



BRIEFING PAPER

Number 8660, 13 September 2019

Undercover policing in England and Wales

By Joanna Dawson,
Jennifer Brown

Contents:

Summary

1. Regulation of undercover operations
2. Undercover policing scandal
3. Government and parliamentary reviews
4. Litigation
5. The Mitting Inquiry



Contents

Summary	3
Undercover policing scandal	3
1. Regulation of undercover operations	5
1.1 Legislation	5
Regulation of Investigatory Powers Act 2000	5
1.2 Oversight	8
1.3 Current police practice	10
Undercover policing units	11
2. Undercover policing scandal	13
2.1 Special Demonstration Squad	13
2.2 National Public Order Intelligence Unit	14
Ratcliffe-on-Soar Power Station 'protest'	15
3. Government and parliamentary reviews	17
3.1 Senior officers sanctioned intimate relationships between officers and those they were investigating	17
3.2 The use of the identities of deceased children to build back stories for undercover officers	18
Home Affairs Select Committee findings	18
Operation Herne findings	18
3.3 Use of undercover police in the aftermath of the Stephen Lawrence case	19
Operation Herne findings	20
Ellison Review findings	20
3.4 Officers appearing in court in their undercover identities	22
3.5 Relationship between SDS and the Home Office	22
4. Litigation	24
4.1 Human rights claims	24
4.2 Criminal prosecutions	25
Judicial Review of CPS decision	27
4.3 Children of undercover officers	29
5. The Mitting Inquiry	30
5.1 Scope of the Inquiry	30
5.2 Preliminary issues	32
5.3 Controversy	36
5.4 Next steps	38

Summary

Police forces use undercover police officers in a variety of operational deployments. The use of undercover police officers is governed by [Part II Regulation of Investigatory Powers Act 2000](#) (RIPA). RIPA sets out the legal framework for the use of 'covert human intelligence sources' by public authorities, including the police, the security and intelligence services, and customs officials.

The [Investigatory Powers Act 2016](#) created a new single oversight body for all investigatory powers, the [Investigatory Powers Commissioners Office](#) (IPCO). IPCO regularly inspects and monitors the use of undercover policing and has raised several concerns about the authorisation and oversight of undercover policing. In its [first annual report](#) (published January 2019) IPCO acknowledged that there had been "significant public disquiet" about the actions of undercover police officers.

Undercover policing scandal

In the early 2010s a series of revelations about the practices of undercover officers came to light in what was to become known as the 'undercover policing scandal'.

The scandal raised serious concerns about the conduct of individual officers and the culture of undercover policing units. Several undercover officers were found to have had multiple intimate relationships with those they were investigating. Some of these officers fathered children in these relationships. Historic undercover policing units were found to have routinely used the identities of dead children to construct undercover personas for officers.

There have also been questions about the effectiveness of undercover policing and the appropriateness of its use against certain protest movements. A major trial against climate protestors who attempted to occupy a Ratcliff power station collapsed when evidence collected by an undercover officer was mishandled. There have been serious concerns about the use of undercover officers to monitor those associated with the campaign for justice for Stephen Lawrence.

Proceedings against the police

Two high profile officers, Mark Kennedy (who was the officer involved in the collapse of the Ratcliff power station trial) and Jim Boyling (an officer who had several intimate relationships with those he was tasked to investigate) have been dismissed from the police for 'Gross Misconduct'. The police have also come to financial settlements with several women who had intimate sexual relationships with undercover officers. The police have issued a public apology to these women in which they described the intimate sexual relationships as "abusive, deceitful, manipulative and wrong" and "a gross violation" of personal privacy.

However, attempts to bring criminal charges against individual officers have failed. The CPS have decided not to prosecute officers for sexual offences and this decision was upheld after judicial review.

4 Undercover policing in England and Wales

One of the women who had a relationship with Mark Kennedy has bought a human rights claim against the police. The police have admitted that her human rights were violated, but the legal proceedings are ongoing.

The Mitting Inquiry

Former Home Secretary Theresa May [announced](#) a public inquiry into undercover policing on 12 March 2015. This followed several other independent reviews into aspects of the undercover policing scandal. The Mitting Inquiry (so named after its current chair Sir John Mitting) has been surrounded by controversy since it was announced and has yet to begin taking oral evidence.

New guidance to undercover police officers?

As a result of the scandal the Inspectorate of Constabulary was asked to review undercover policing. The review was critical of guidance to undercover police officers and recommended that new guidance be drafted. A new [draft guidance document](#) was published in 2016. However, the [formal guidance](#) to undercover police officers remains “under development”. A date for finalising the draft guidance has not been set.

1. Regulation of undercover operations

1.1 Legislation

Regulation of Investigatory Powers Act 2000

Under Part II of the [Regulation of Investigatory Powers Act 2000](#), individuals act as covert human intelligence sources (CHIS) if they: establish or maintain a relationship with another person to obtain information covertly;

- give access to information on another person; or
- disclose information covertly which they have obtained using the relationship or they have obtained because the relationship exists

A relationship is established or maintained for a covert purpose if it is conducted in a manner that is calculated to ensure that one of the parties to the relationship is unaware of the purpose.¹

This includes, but is not limited to, undercover work carried out by law enforcement officers. If a law enforcement agency uses a CHIS they are called a 'relevant source' and additional regulations apply.

The [Regulation of Investigatory Powers \(Covert Human Intelligence Sources: Relevant Sources\) Order 2013](#) defines a relevant source as a source holding an office, rank or position within certain specified public authorities.²

Any police officer deployed as a 'relevant source' in England and Wales would also be required to comply with and uphold the principles and standards of professional behaviour set out in the College of Policing Ethics Code.

Public authorities that are entitled to authorise CHIS include police forces and law enforcement agencies such as the National Crime Agency (NCA) and Her Majesty's Revenue and Customs (HMRC). Authorisations may be given where necessary on the following grounds:

- in the interests of national security;
- for the purposes of preventing or detecting crime;
- in the interests of the economic well-being of the UK;
- in the interests of public safety;
- for the purpose of protecting public health;
- for the purpose of assessing or collecting any tax, duty, levy or other imposition, contribution or charge payable to a government department

¹ For further detail see the [Covert Human Intelligence Sources: Revised Code of Practice](#), Home Office, 2018

² See *ibid*, Annex B

Authorisation are normally given by a superintendent (except in urgent cases) and last for 12 months.

Within the public authority there will be a ‘handler’ who has day to day responsibility for dealing with the CHIS and a ‘controller’ who has general oversight of the use made of the CHIS.

Statistics on the use of these powers

Since April 2017, statistics on the use of CHIS have been collected by the Investigatory Powers Commissioner’s Office (IPCO).³

Figure 1 compares the number of CHIS authorisations for law enforcement agencies (LEAs) and non-LEAs, other than undercover police and those granted to the intelligence agencies. The number of authorisations has fallen over the past 10 years, although there has been a slight increase since 2015.⁴

Fig. 1 CHIS Authorisations over the last 10 years (excluding UKIC and relevant sources)

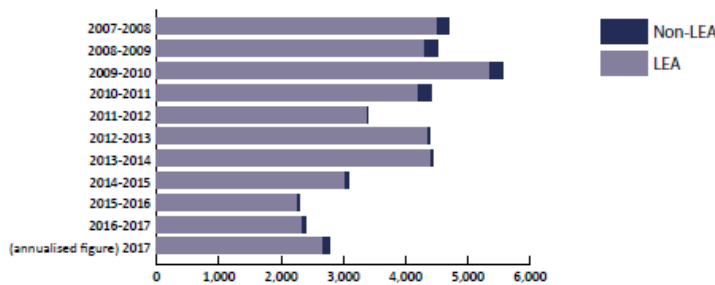
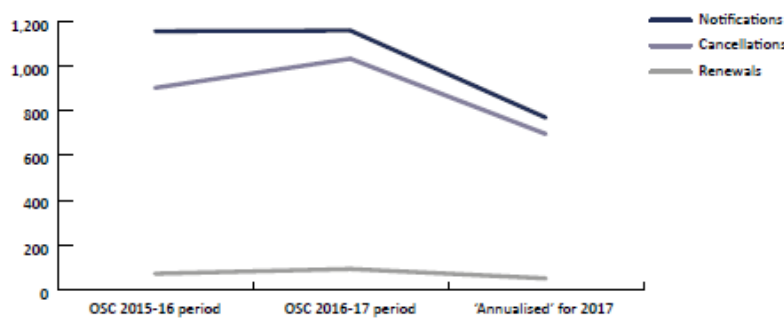


Figure 2 shows a marked decline in the number of authorisations and renewals for the deployment of undercover police officers in 2017, however the IPCO report notes that it is too early to comment as to whether this indicates a trend.⁵

Fig. 2 Relevant Source notifications, renewals and cancellations



The use of children as CHIS

The *Regulation of Investigatory Powers (Juveniles) Order 2000* and CHIS code of practice recognise that juveniles are more vulnerable than adults, and make special provision for those under 18:

³ Pre-2017 statistics were reported by the Office of Surveillance Commissioners – see section below 1.2 for further detail.

⁴ [Annual Report 2017](#), Investigatory Powers Commissioner’s Office, HC 1780, 2019

⁵ Ibid, para 3.13

- For CHIS under the age of 16:
 - No authorisation can be given where the target relationship would be with a parent or someone with parental authority;
 - An appropriate adult (such as a parent) must be present at meetings between the CHIS and their contact at the 'investigating authority' (eg the relevant police force);
- For CHIS under the age of 18:
 - a risk assessment must be conducted into the nature and magnitude of any risk of physical injury or psychological distress, and any identified risk is justified and explained to the CHIS;
 - the maximum duration of an authorisation is four months (instead of 12 for an adult)

Authorisations for the use of CHIS under RIPA are given by an officer of requisite seniority within the investigative authority. Enhanced authorisation levels are stipulated when the authorisation relates to a juvenile CHIS.

In June 2018 the House of Lords Secondary Legislation Scrutiny Committee drew the attention of the House to the [Regulation of Investigatory Powers \(Juveniles\) \(Amendment\) Order 2018](#).⁶ This Order extended the period for which authorisation could be given for the use of a juvenile CHIS from one month to four months.

The Committee expressed concern that enabling a young person to participate in covert activity for an extended period might increase the risks to their mental and physical welfare, and that the [Explanatory Memorandum](#) failed to explain how authorisation decisions should weigh intelligence benefits against potential negative impacts on the CHIS.

In a subsequent debate in the House of Lords, the Minister explained that the extended time limit was intended to reduce pressure to obtain immediate results from authorisations, and that authorisations would still be reviewed on a monthly basis.⁷

Following this, Harriet Harman wrote as chair of the Joint Committee on Human Rights (JCHR) to the then Security Minister, Ben Wallace, requesting further explanations about the use of juvenile CHIS. The letter highlighted the obligation under Article 3 of the UN Convention on the Rights of the Child (UNCRC) that the best interests of the child be a primary consideration in all actions concerning children. It asked how this obligation is adhered to in practice.⁸

⁶ Secondary Legislation Scrutiny Committee, [35th Report – Draft Investigatory Powers \(Codes of Practice and Miscellaneous Amendments\) Order 2019, Regulation of Investigatory Powers \(Juveniles\) \(Amendment\) Order 2018](#), HL Paper 168, 28 July 2018

⁷ [HL Deb 18 July 2018, cc114-132GC](#)

⁸ [Letter from Chair of the JCHR to Minister of State for Security and Economic Crime](#), 16 August 2018

In October 2018 the House of Lords debated the issue again after Lord Paddick tabled a regret motion about the failure to consult human rights and children's welfare organisations concerning the decision to extend the authorisation period.⁹ Lord Paddick outlined the three main areas of concern:

- A child of 16 or 17 can be recruited as a police informant without a parent, guardian or appropriate adult being present, even though it is illegal to interview a child of that age under caution without an appropriate adult;
- It is unclear what the practical difference would be between the new position, whereby an authorisation can be given for four months but reviewed every month, and the previous position whereby a month long authorisation could be renewed monthly; and
- The obligation under Article 3 of the UNCRC that the best interests of the child be a primary consideration.

In response to the concerns raised by the JCHR and others in 2018, the IPC committed to report on the issue in more detail.¹⁰ He wrote to Harriet Harman in March 2019 providing figures on the use of juvenile CHIS, and stated that future annual reports would provide more detail on how the matter was being kept under review.¹¹

Children's rights charity *Just for Kids Law* brought a judicial review concerning the use of juvenile CHIS. The charity argued <https://justforkidslaw.org/news/just-for-kids-law-takes-home-office-to-court-over-use-of-children-as-spies/> that the practice puts children at risk of severe physical and emotional harm, and that the lack of safeguards contravenes domestic and international human rights law. However, the High Court decided that despite the "self-evident" dangers to children, the current policy was not unlawful.¹²

1.2 Oversight

The *Investigatory Powers Act 2016* (IPA) created a new single oversight body – IPCO - with responsibility for oversight of surveillance powers, as well as interception and other investigatory powers.¹³ This includes oversight of the use of CHIS as provided for by RIPA.

IPCO's first annual report, covering 2017, was published in January 2019.¹⁴ The report acknowledged that there had been "significant public disquiet" about the allegations of impropriety on the part of undercover police officers and committed to providing all possible

⁹ [HL Deb 16 October 2018](#), cc435-450

¹⁰ [Letter from Sir Adrian Fulford to Harriet Harman, 24 August 2018](#)

¹¹ [Letter from Sir Adrian Fulford to Harriet Harman, 8 March 2019](#)

¹² [Just for Kids Law v Home Secretary](#) [2019] EWHV 1772 (Admin)

¹³ Prior to the enactment of the IPA, oversight of covert policing was conducted by the Office of Surveillance Commissioners (OSC). OSC annual reports from previous years are available on [Gov.uk](#) [accessed 26 June 2019]

¹⁴ Annual Report of the Investigatory Powers Commissioner 2017, HC1780, 31 January 2019

assistance to the forthcoming inquiry, to be chaired by Sir John Mitting (see part 5 below for further detail).¹⁵

The report also noted that in order to be effective sources of intelligence and to protect their identity, CHIS may need to participate in criminality. It acknowledged that this may be seen as controversial. The extent of such activity and justifications advanced for it will therefore be a particular focus of attention in the next annual report.¹⁶

The report explained that IPCO's general approach to oversight of CHIS is to inspect CHIS and surveillance activity at a single inspection, during which inspectors would attend for up to a week. 59 inspections of LEAs were carried out during 2017.

During the inspection IPCO scrutinises CHIS documentation in order to assess all relevant aspects of the process of authorising and running a representative sample of CHIS.

Inspections also consider how an LEA has applied its own guidelines on the participation of CHIS in criminality.

The 2017 report found a high degree of compliance with the statutory framework. Any failures to follow processes and procedures were not found to be systemic.

In relation to LEAs specifically, the report found that there had been an improvement in recent years in how CHIS are managed and authorised. However it also identified an "evident gap in the knowledge of various senior officers and officials, as well as on the part of some of those involved in day-to-day operations, as to the minimum requirements to manage and safeguard CHIS".

It also identified shortcomings in the way that LEAs take account of collateral intrusion, that is, intrusion with respect to individuals with whom CHIS may have contact. The report suggested that assessment of the sources of the CHIS, together with the locations and context in which he or she works, would be of particular relevance.

The report identified three areas of particular concern:

- The Senior Investigating Officer should not unduly or improperly influence the routine management of undercover officers;
- Forces failed to notify IPCO that there had been a new authorisation for an undercover officer on an excessively frequent basis;
- Scrutiny is required as to when repeated engagement with the same or similarly-minded criminals is deemed to be a new operation or part of the same operation for the purposes of determining whether to apply for a renewal or a new authorisation.

IPCO considers juvenile CHIS cases individually. This includes looking at the details of the recruitment and whether the CHIS has previously been involved in criminality; the risk assessment and welfare of the CHIS; any

¹⁵ Para 3.6

¹⁶ Para 3.8

particular danger that they might be exposed to; and, whether their parents have been informed.

1.3 Current police practice

Police forces may use undercover police officers as an investigatory technique in a variety of operations. Not all undercover operations take the form of a long-term deployment, some may include one instance of contact with a suspect.

Police forces must work within the regulatory framework for the use of undercover officers as set out above.

All police staff, including undercover officers, should follow the College of Policing (the policing professional body) [Code of Ethics](#). The Code sets out ten standards of professional behaviour. These standards include “to behave in a way that does not bring discredit to the police service”.¹⁷ Police officers found to have broken The Code will be subject to formal misconduct hearing and can be disciplined or dismissed from their force.

The College of Policing have issued Authorised Professional Practice (APP)¹⁸ on [Undercover policing](#). This document provides official guidance to undercover police officers.

Her Majesty’s Inspectorate of Constabulary recommended that the APP for undercover policing be reviewed. The College of Policing is currently analysing the feedback they received on a [draft update](#) to the document. The consultation closed in August of 2016. The College have not indicated when their analysis of the results of this update will be concluded.

Police must also act in accordance with the [Code of Practice for the use of Covert Human Intelligence Sources](#).

The National Undercover Working Group, which is based in the National Police Chiefs Council, aims to ensure that there is a consistent approach to undercover policing across England and Wales.¹⁹ This includes promoting the implementation of the College of Policing APP across police forces.

¹⁷ [Code of Ethics](#), College of Policing, 2014, college.police.uk

¹⁸ APP is official police guidance. Police officers are expected to have regard to APP when on duty. However, there may be circumstances in which it would be legitimate for them to deviate from it. Further information about APP can be found in section 1.2 of the Library’s Briefing [Introduction to police powers](#).

¹⁹ NPCC, [National Undercover Working Group: terms of reference](#), dated 1 July 2016

2014 inspection

Following the undercover policing scandal, the Home Secretary asked Her Majesty's Inspectorate of Constabulary (HMIC- now HMICFRS) to inspect the effectiveness of contemporary arrangements for undercover policing in England and Wales.¹

HMIC's inspection looked at all use of undercover police officers by forces across the country. They found:

In general, undercover police officers ... carry out their roles professionally and with great courage. We found them to be dedicated to their task. We were impressed by their keen awareness of the vital role which they play in protecting our communities, and the legal, practical and ethical environment in which they operate.¹

However, HMIC had concerns with the governance of undercover policing. They found that undercover officers had little awareness of the appropriate guidance. The guidance itself was found to lack detail and was not comprehensive. HMIC recommended that the guidance should be reviewed and shared widely among practitioners and (where appropriate) the public.¹

HMIC found that coordination of undercover policing across forces was weak. They said that senior police officers lacked expertise of undercover policing which they said, "was a barrier against the continuous improvement of the tactic".¹ HMIC were particularly critical of the National Undercover Working Group (the coordinating body for undercover policing across England and Wales). They concluded that "root and branch reform of the way the working group operates is needed" and recommended that its membership should be reconstituted and its terms of reference and objectives be reset.¹

Response from police forces

HMIC made 49 recommendations to police forces on undercover policing. The National Police Chiefs Council (NPCC) and the College of Policing accepted all 49 (four of which they accepted with amendments). They created an 'action plan' to implement the recommendations. As of August 2016, the NPCC and College of Policing had implemented 42 of the 49 recommendations. The remaining 7 recommendations were in progress.¹

Undercover policing units

Police units which use undercover police officers must be accredited to do so.²⁰ Each use of undercover police officers must be authorised by a senior officer.²¹ Some forces may have specific units which specialise in undercover operations, other forces may use undercover officers as part of teams undertaking a variety of investigatory techniques.

Staffing structure

Units which use undercovering policing should be led by an officer of at least the rank of Chief Inspector.²² Undercover operations should be led by an officer of the rank of Inspector. This officer will report to their head of unit on the progress of their operation.²³

The Chief Inspector and Inspector must seek authorisation from a more senior officer each time they use an undercover officer in an operation. Normally, this authorisation will be secured from an officer of the rank of Assistant Chief Constable, or equivalent (i.e. an officer one rank below the most senior officer in the force). Assistant Chief Constables

²⁰ College of Policing, [Draft Authorised Professional Practice. Undercover policing](#), p3

²¹ College of Policing, [Authorised Professional Practice Covert policing: undercover policing](#) [last accessed]

²² Ibid, p22

²³ Ibid, p23

12 Undercover policing in England and Wales

must also notify the Investigatory Powers Commissioner when they authorise the use of undercover policing.²⁴

There are two exceptions where an Assistant Chief Constable will not authorise the use of an undercover officer:

- In urgent cases, a Superintendent (the rank below Assistant Chief Constable) can authorise a request.
- In cases where the use of undercover policing is likely to be required for more than a year the police force's most senior officer (normally the Chief Constable) must obtain the approval of the Investigatory Powers Commissioner before they can authorise the operation.²⁵

Undercover officers

All officers who take part in undercover operations should have been selected and trained appropriately. Whilst working on an undercover operation officers should work closely with the CPS to ensure that they are gathering the best evidence for a prospective court case.²⁶

There are three types of undercover officer:

Foundation officers have passed the College of Policing's Foundation Undercover Training and Assessment Course (an entry level course). This means they can be deployed in specific operations. Foundation officers are deployed in undercover operations involving low-level contact with an individual or a criminal gang. They are not deployed for sustained periods of time.

Advanced officers have passed the relevant training to become a foundation officer and has then been assessed for suitability and completed the National Undercover Training and Assessment Course. Advanced officers can undertake more complex operations and undertake long term infiltration of serious or organised crime groups. When deployed in long term infiltrations these officers will assume undercover identities which require 'legend building'.

Undercover online officers have passed the relevant training to become a foundation officer. Undercover online officers are then 'appropriately trained' so they can establish and maintain relationships through the internet to obtain information or evidence against an individual or criminal group.²⁷

²⁴ College of Policing, [Authorised Professional Practice Covert policing: undercover policing](#) [last accessed]

²⁵ College of Policing, [Authorised Professional Practice Covert policing: undercover policing](#) [last accessed]

²⁶ NPCC, [CPS, ACPO, SOCA and HMRC sign memorandum of understanding on undercover officers](#), July 2012

²⁷ HMIC, [An inspection of undercover policing in England and Wales, 2014, paragraphs 4.1 to 4.5](#)

2. Undercover policing scandal

In the late 2000s and early 2010s a series of problematic practices of undercover police officers were revealed in what was to become known as the 'undercover policing scandal'. The scandal was wide ranging and raised questions about the oversight and governance of undercover policing in the UK generally. However, the practices of two particular units came under greatest criticism: The Special Demonstration Squad and the National Public Order Intelligence Unit.

2.1 Special Demonstration Squad

The Special Demonstration Squad (SDS) was a highly secretive unit of the Metropolitan Police's (MPS) *Special Branch*.

The SDS operated between 1968 and 2008.²⁸ Between 1968 and 1988 the SDS received funding from the Home Office. During this period, it provided Home Office officials with annual reports on its activities.²⁹ In 1989 the MPS assumed the cost of running the SDS and the SDS ceased providing the Home Office with annual reports.³⁰

The SDS was originally set up under the name 'Special Operations Squad' to provide intelligence on the anti-Vietnam war protest movement. The establishment of the SDS was a direct response to violent protests by anti-war demonstrators that took place on the 17th March 1968 near the US Embassy in London.³¹

During the first year of operations covert police officers in the SDS successfully infiltrated the anti-war movement and provided intelligence on planned demonstrations. Officials in the Home Office authorised the expansion of the SDS' operations. In the subsequent 40 years, until it was disbanded in 2008, the SDS carried out a number of long-term covert deployments and reported on radical political and Irish terrorist groups.³² In total 147 named individuals are believed to have served as police officers in the SDS.³³

The operations, tactics and oversight of the SDS has come under significant criticism since its existence was revealed in the late 2000s. In particular there have been concerns that:

- SDS officers had inappropriate sexual relationships with those they were investigating.
- SDS officers used the identities of dead children to form their undercover identities.
- SDS officers gave evidence in court in their undercover identities.

²⁸ Mick Creedon (Chief Constable Derbyshire Constabulary), [Operation Herne Report 1: Use of covert identities](#), July 2013, see paragraphs 1.1 to 1.7

²⁹ Report from Stephen Taylor's independent review, [Investigation into links between Special Demonstration Squad and Home Office](#), January 2015, p4

³⁰ Ibid

³¹ Mick Creedon (Chief Constable Derbyshire Constabulary), [Operation Herne Report 1: Use of covert identities](#), July 2013, paragraph 1.1

³² Ibid, paragraph 1.4

³³ Ibid, page 2

- SDS officers conducted inappropriate surveillance of a number of groups, including those connected with the campaign for justice for Stephen Lawrence in the aftermath of his murder.

Peter Francis

Peter Francis was a former undercover police officer in the SDS. In 2010 the *Guardian* and the *Observer* began publishing a series of interviews with Francis in which he made a claim about the operations of the SDS. Partly as a result of Peter Francis' whistleblowing, the then Home Secretary Theresa May requested Mark Ellison QC investigate the SDS actions during the Macpherson Inquiry into the death of Stephen Lawrence.

Jim Boyling

Jim Boyling was another undercover officer in the SDS. He infiltrated an anti-roads campaign group 'reclaim the streets'.³⁴ Three women came forward accusing Jim Boyling of having inappropriate sexual relationships with them in his undercover identity 'Jim Stutton'.³⁵ A 2018 MPS disciplinary hearing found that Boyling had inappropriate relationships with women he was tasked to gather information on and that he had attempted to conceal these relationships from internal police investigations.³⁶ Boyling was dismissed from the MPS for 'gross misconduct'.³⁷ The women who had relationships with Boyling are amongst a number who have sought legal action against undercover officers. This litigation is discussed in [section 4](#) of this briefing.

2.2 National Public Order Intelligence Unit

The National Public Order Intelligence Unit (NPOUI) was a national police unit that existed between 1999 and 2011. The unit was formed as part of the police's response to radical political protest involving criminality. The unit focused on crime associated with environmental activism, animal rights and far right politics. The unit had a specific remit to provide intelligence on these protest groups, so they could disrupt their plans.³⁸

Between 1999 and 2006 the NPOUI was part of the MPS. In 2006 the unit was moved from the MPS to be under the control of the Association of Chief Police Officers (ACPO). At ACPO the NPOUI worked with two 'sister units' the National Extremism Tactical Co-ordination Unit and the National Domestic Extremism Team.³⁹

In the early years of the NPOUI the unit had strong links with the SDS. A number of staff moved between the SDS and the NPOUI. These links weakened when the NPOUI moved from the MPS to ACPO.⁴⁰

Though there are some similarities between the SDS and the NPOUI, Her Majesty's Inspectorate of Constabulary found "distinct differences between SDS and NPOUI training, tactics, review and integration" which they summarised in the table below.⁴¹

³⁴ *BBC News*, [Undercover Met Police officer sacked over relationship](#), 3 May 2018

³⁵ *Ibid*

³⁶ Metropolitan Police Service, Officer dismissed following misconduct hearing, 3 May 2018

³⁷ *Ibid*

³⁸ HMIC, [A review of national police units which provide intelligence on criminality associated with protest](#), p18

³⁹ *Ibid*

⁴⁰ *Ibid*, p37

⁴¹ *Ibid*, p38

SDS	NPOIU
Trained its officers in-house	Used accredited national police training courses
Developed its tactics in-house	Engaged with police professional development bodies
Reviewed its operations once per year	Reviewed its operations four times per year
Appeared to be wholly isolated from the MPS and the police service	Integrated with forces and provided a national service

Ratcliffe-on-Soar Power Station 'protest'

In April of 2009 114 people were arrested at a school in Nottinghamshire whilst they were allegedly preparing to occupy and close nearby Ratcliffe-on-Soar power station. Among the 114 people arrested was NPOIU officer Mark Kennedy. Kennedy was undercover as 'Mark Stone' and had been investigating the Ratcliffe protestors as part of 'Operation Aeroscope'.⁴²

The identity of Kennedy was revealed when the resulting criminal trial of several of the protestors collapsed. The trial had collapsed due to a failure by prosecution lawyers to disclose sensitive material collected by Kennedy to the defence

Following the exposure of Kennedy's identity, the *Guardian*, the BBC and other news outlets began sustained reporting into undercover policing in England and Wales. This reporting raised a number of questions about the practice of undercover policing. It led to a series of independent investigations discussed in part 4 of this paper and the public inquiry discussed in part 5.

Kennedy's policing connected with the Ratcliffe protest was the subject of an Independent Police Complaints investigation completed in 2011. The IPCC investigation found that there was a "collective failing by a number of parties" but that individual actions "do not amount to misconduct".⁴³

Sir Christopher Rose conducted an inquiry into the Crown Prosecution Service's role in the collapse of the Ratcliffe legal case. He found that the failure to disclose evidence by CPS lawyers did have a bearing on the case. He concluded that had information been properly shared charges may have never been brought against the accused.⁴⁴

⁴² IPCC, [Ratcliffe-on-Soar Power Station \(Operation Aeroscope\) Disclosure Nottinghamshire Police](#), 2011

⁴³ IPCC, [Ratcliffe-on-Soar Power Station \(Operation Aeroscope\) Disclosure Nottinghamshire Police](#), 2011, paragraph 125

⁴⁴ [DEP2011-1982: Ratcliffe-on-Soar Power Station Protest: Inquiry into Disclosure](#), December 2011. Mark Kennedy has also been involved in the controversy over intimate relationships with targets. See Part 4 below for further detail.

Mark Kennedy

Mark Kennedy was an undercover police officer with the NPOIU. He infiltrated the environmental protest movement in the mid to late 2000s. His deployment included various trips undercover to foreign countries. He provided intelligence on large scale and high profile planned demonstrations across Europe. His identity was revealed by the *Guardian* when the Ratcliffe protester trial collapsed.

In 2013 Her Majesty's Inspectorate of Constabulary (HMIC) found that, throughout his seven-year deployment, Kennedy "operated outside the Code of Conduct for Undercover Officers". HMIC concluded that Kennedy "should have been withdrawn by his managers in 2009" when it became clear that he was defying instructions.⁴⁵

⁴⁵ HMIC, [A review of national police units which provide intelligence on criminality associated with protest](#), July 2012, p24

3. Government and parliamentary reviews

Between 2010 and 2013 the then Home Secretary Theresa May announced a series of investigations, inspections and reviews into undercover policing. Theresa May asked:

- Senior police officers to investigate the practices of the SDS. This investigation is known as Operation Herne.⁴⁶
- The Inspectorate of Constabulary to review national police units which provide intelligence on criminality associated with protest.⁴⁷
- Mark Ellison QC to look at the possible corruption and the role of undercover policing in the Stephen Lawrence case.⁴⁸
- Stephen Taylor (a former senior civil servant) to establish the full extent of the Home Office's knowledge of the SDS.⁴⁹

In addition to these reviews, the Home Affairs Select Committee conducted an inquiry into undercover policing.⁵⁰

These reports considered different, and overlapping, aspects of the undercover policing scandal. A summary of their findings, arranged by subject matter, has been outlined in the remainder of this section.

3.1 Senior officers sanctioned intimate relationships between officers and those they were investigating

In news reports and evidence given by officers to the Home Affairs Select Committee, Operation Herne, and in legal proceedings, it was evident that undercover officers had intimate relationships with those they were tasked to investigate. What is not as clear, is to what extent senior police officers were aware of and sanctioned relationships between undercover officers and those they were investigating.⁵¹

Operation Herne found evidence that an SDS 'trade craft' document contained (as Operation Herne describes it) 'tacit consent' of sexual relationships.⁵² The 'trade craft' document is said to advise that

"if there is no other option operatives should try to have fleeting and disastrous relationships with individuals who are not important to your sources of information."⁵³

⁴⁶ HCDeb, [Undercover Policing](#), 24 June 2013, c25

⁴⁷ HMICFRS, [A review of national police units which provide intelligence on criminality associated with protest](#), February 2012

⁴⁸ HCDeb, [Undercover Policing](#), 24 June 2013, c26

⁴⁹ Home Office, [Independent report: Investigation into links between Special Demonstration Squad and Home Office](#), March 2015

⁵⁰ Commons Select Committee, [Undercover policing: follow-up](#) [last accessed...]

⁵¹ See part 4 below regarding disclosures in legal proceedings on this issue

⁵² Mick Creedon (Chief Constable Derbyshire Constabulary), [Operation Herne Report 2: Allegations of Peter Francis](#), March 2014, p72

⁵³ Ibid

However, Operation Herne concluded that there was no evidence that sexual relationships were explicitly authorised by senior officers.⁵⁴

3.2 The use of the identities of deceased children to build back stories for undercover officers

On 3 February 2013 *The Guardian* published an article in which it was alleged that the MPS had sanctioned undercover officers to use the identities of deceased children to build a back story for their undercover identities.⁵⁵

Following the revelations, Theresa May and then Commissioner of the MPS Sir Bernard Hogan-Howe agreed that it would be “appropriate for a senior figure from outside the MPS to take over leadership” of Operation Herne.⁵⁶

Home Affairs Select Committee findings

The use of the identities of deceased children by undercover officers became a central focus of the Home Affairs Select Committee inquiry into undercover policing that was ongoing at the time of the Guardian revelations. On the 5 February 2013 the Committee took evidence from Patricia Gallan (then Deputy Assistant Commissioner of the MPS) who confirmed that the identities of dead children were used by undercover officers.⁵⁷

In their report, published on 26 February 2013, the Committee concluded that:

The practice of “resurrecting” dead children as cover identities for undercover police officers was not only ghoulish and disrespectful, it could potentially have placed bereaved families in real danger of retaliation. The families who have been affected by this deserve an explanation and a full and unambiguous apology from the forces concerned. We would also welcome a clear statement from the Home Secretary that this practice will never be followed in future.

The Committee called for a formal investigation to be launched by the Independent Police Complaints Commission regarding the conduct of the officers who authorised the technique.⁵⁸

Operation Herne findings

The first report of Operation Herne looked specifically at the use of the identities of deceased children to construct their undercover identities. It was published after Patricia Gallan had already confirmed to the Home Affairs Select Committee that undercover officers used this technique.

⁵⁴ Ibid

⁵⁵ *The Guardian*, [Police spies stole identities of dead children](#), 3 February 2013

⁵⁶ [HCDeb, topical question 1 \[142200\]](#), 11 February 2013, c564

⁵⁷ HC837, [Undercover Policing: Interim Report, Thirteenth Report of Session 2012–13](#), page Ev18, Q115

⁵⁸ HC837, [Undercover Policing: Interim Report, Thirteenth Report of Session 2012–13](#), paragraph 22 and 28

Operation Herne found that at least 42 covert identities constructed by the SDS used the names and information of deceased children.⁵⁹ It concluded that it is “highly possible” that the practice was used by other undercover policing units.⁶⁰

The report references an SDS manual which described the ‘benefits’ of using the technique. The manual suggests that, as undercover officers could use the identity of a deceased child to generate a birth certificate, they could easily obtain a range of documentation to support their identities. The report quotes the manual as saying the practice is “unsafe” but that there are “no other alternatives”.⁶¹

Operation Herne concluded that the practice of using the identity of deceased children ended sometime around the mid-1990s.⁶² The report stated that:

There is understandable public, political and media concern about the use of the identities of deceased children, irrespective of the context, of the operational rationale, or any perceived necessity and of any legal considerations. It is right that the public is now properly reassured that the tactic no longer takes place.⁶³

3.3 Use of undercover police in the aftermath of the Stephen Lawrence case

Between March 2010 and June 2013, the *Observer* and the *Guardian* published a series of interviews with Peter Francis, a former undercover officer with the SDS. In the interviews, and in subsequent television programmes and books, Francis made a series of allegations relating to undercover policing.⁶⁴ Among these allegations was that the SDS deliberately disrupted public investigations into the police handling of the Stephen Lawrence case and attempted to smear the families of Lawrence and Duwayne Brooks (an eye witness to Lawrence’s murder).

In June 2013 Theresa May asked Mark Ellison to investigate the allegations as part of his ongoing review into corruption in the MPS during the initial Stephen Lawrence murder investigation and the subsequent Machpherson Inquiry into that investigation.⁶⁵ Mrs May asked Operation Herne to provide Ellison with all the information he needed to conduct his inquiries.⁶⁶

In March 2014 both Operation Herne and Mark Ellison published their findings.

⁵⁹ Mick Creedon (Chief Constable Derbyshire Constabulary), [Operation Herne Report 1: Use of covert identities](#), July 2013, p2

⁶⁰ Ibid, paragraph 11.7

⁶¹ Ibid, paragraph 3.2

⁶² Ibid, paragraph 3.3

⁶³ Ibid, paragraph 11.8

⁶⁴ Mick Creedon (Chief Constable Derbyshire Constabulary), [Operation Herne Report 2: Allegations of Peter Francis](#), March 2014, p1

⁶⁵ HCDeb, [Undercover Policing](#), 24 June 2013, c25

⁶⁶ Ibid.

Operation Herne findings

Operation Herne found:

No evidence has been discovered to confirm that:

- Peter Francis was tasked to smear the Lawrence family or their campaign
- He was tasked to smear or investigate Duwayne Brooks
- He was tasked to provide information on Black Justice Campaigns'
- Managers within Special branch prevented Peter Francis from making disclosures to the Macpherson Inquiry
- Family Liaison Officer's attached to the Lawrence family shared information with Special Branch.⁶⁷

Operation Herne did find that there was an undercover officer (known as N81) deployed into a protest group closely associated with the Lawrence family. They found that this officer:

- attended the public gallery at the Macpherson Inquiry in his undercover persona,
- had reported personal information about Stephen Lawrence's parents to a Senior Investigating Officer involved in the case; and,
- that the existence of this officer was never revealed to the Macpherson inquiry.⁶⁸

N81 stressed to Operation Herne that the intentions of their actions were to "support the Lawrence family".⁶⁹

Ellison Review findings

The meeting between N81 and a senior officer was discussed in greater detail, and highly criticised, by Mark Ellison in his review:

In mid-August 1998 the SDS arranged for an undercover officer, N81 (who was deployed into one of the groups seeking to influence, and to some extent succeeding in influencing, the Lawrence family campaign), to meet an ex-Special Branch officer, acting Detective Inspector Richard Walton, who had been seconded to the [Metropolitan Police Service] MPS Lawrence Review Team. This was the MPS team that was involved in drafting the final written submissions to be made on behalf of the Commissioner of the MPS to the Stephen Lawrence Inquiry.

- We find the opening of such a channel of communication at that time to have been 'wrongheaded' and inappropriate.
- The reality was that N81 was, at the time, an MPS spy in the Lawrence family camp during the course of judicial proceedings in which the family was the primary party in opposition to the MPS.
- The mere presence of an undercover MPS officer in the wider Lawrence family camp in such circumstances is highly

⁶⁷ Mick Creedon (Chief Constable Derbyshire Constabulary), [Operation Herne Report 2: Allegations of Peter Francis](#), March 2014, paragraph 27.1 to 27.3

⁶⁸ Ibid, p8

⁶⁹ Ibid

questionable in terms of the appearance it creates of the MPS having a spy in the family's camp.

- However, for a meeting to then be arranged to enable an in-depth discussion to take place about the Lawrences' relationship with groups seeking to support their campaign, in order to help inform the MPS submissions to the Public Inquiry, was, in our assessment, a completely improper use of the knowledge the MPS had gained by the deployment of this officer.
- The meeting was apparently sanctioned at a high level of SDS management. Mr Lambert has claimed that he was asked to arrange it by senior management within the SDS. We also note that the file note he made was sent to the Detective Chief Inspector acting at the time. From a later file note that he made in September 1998, it would also appear that Special Branch Operations Commander Colin Black was aware of the meeting.
- In so far as we can discern, it appears therefore that the SDS management thought that it was a good idea to have the meeting because it might be useful to the MPS in dealing with the Inquiry, and because it might fulfil part of the 'wider remit' that the SDS was seeking to serve at this time.
- Nobody seems to have considered how opening such a channel of communication would be viewed by the Inquiry or the public, if it became known, in the context of the MPS's opposition to the Lawrence family's case at the Public Inquiry.⁷⁰

Ellison also responded to the claim that Francis himself was tasked to smear the Lawrence family and Duwayne Brooks. Whilst Ellison (like Operation Herne) could not find evidence that Francis, or any other officer, was deployed explicitly to smear the family of Lawrence, he did find that "the potential for such activity... exists."⁷¹ Ellison concluded that a public inquiry might be better placed to make definitive findings on the issue.⁷²

IPCC investigation

Following the publication of the Ellison Review the meeting between N81 and Richard Walton was referred to the Independent Police Complaints Commission (IPCC, now the Independent Office of Police Complaints). The IPCC investigated several senior officers involved in the meeting. The IPCC concluded that Richard Walton and Robert Lambert (an ex detective inspector in the SDS) had a case to answer for misconduct in respect of 'Discreditable Conduct'.⁷³ However, both

⁷⁰ Mark Ellison QC, [THE STEPHEN LAWRENCE INDEPENDENT REVIEW: Possible corruption and the role of undercover policing in the Stephen Lawrence case: Summary of Findings](#), p23-24

⁷¹ Ibid, p29

⁷² Ibid, p30

⁷³ IPCC, [Ellison Review – Walton, Lambert and Black: An investigation into the circumstances surrounding a meeting between Detective Inspector Richard Walton and an undercover officer on 14 August 1998](#), January 2016, paragraph 359 and 368

Walton and Lambert retired from the MPS before formal misconduct hearings could be initiated.⁷⁴

3.4 Officers appearing in court in their undercover identities

News reports have suggested that undercover officers were sanctioned to take part in criminality in their undercover identities. It has been claimed that officers stayed undercover throughout legal proceedings which included appearing in court in their personas.

Operation Herne found that 24 SDS officers are known to have been arrested in their undercover identities. 10 SDS officers are known to have given evidence in court proceedings in their undercover identities, two of whom gave evidence for the defence. Operation Herne found that SDS officers were authorised to engage in minor criminality to maintain their cover. Operation Herne noted that, according to advice, so long as the identity of the officer was “not subject to the charge” and officers “did not lie under oath, no offences had been committed” by officers giving evidence in their undercover identity.⁷⁵

HMIC acknowledged that media stories have claimed that NPOUI officers also gave evidence in court in their undercover identities. HMIC concluded:

Media stories have raised questions as to whether it is acceptable for undercover officers to give evidence under their assumed identities. We have not looked into the particular cases raised in these stories, as this is outside HMIC’s remit. However, there are circumstances in which it is possible for the prosecutor to apply to the judge for permission not to reveal the true identity of a witness giving evidence.⁷⁶

3.5 Relationship between SDS and the Home Office

Following the publication of Mark Ellison’s review the Home Secretary announced that her Permanent Secretary had asked Stephen Taylor (a former Auditor General) to assess the full extent of Home Office involvement in the operations of SDS.

Taylor’s subsequent review found that the Home Office was:

...supportive of the SDS being created in 1968 and funded certain operational costs until 1989. Metropolitan Police Special Branch provided a level of accountability through an annual summary in this period. When funding ceased in 1989, no accountability was required until the SDS closed in 2008 and no significant evidence was identified of any links to the Home Office throughout this period. Outside of the annual reviews there is very little evidence

⁷⁴ *The Times*, [Former Met boss retired days after report found he had case to answer in Stephen Lawrence probe](#), 2 March 2016

⁷⁵ Mick Creedon (Chief Constable Derbyshire Constabulary), [Operation Herne Report 2: Allegations of Peter Francis](#), March 2014, p49

⁷⁶ HMIC, [A review of national police units which provide intelligence on criminality associated with protest](#), 2012, p38 and 39

to support any Home Office knowledge of the SDS and in particular no evidence was identified of any influence in operational activities.⁷⁷

Though Taylor found limited evidence that officials in the Home Office were aware of the practices of the SDS, he concluded:

I cannot rule out the possibility that, at some point, an individual or individuals within the Home Office may have: a) been aware of the tactic to use the identity of a dead child; b) acknowledged that the squad it was funding included inherent risks of:

- inappropriate relationships forming with individuals within groups;
- criminality; and
- court appearances using a false identity.⁷⁸

⁷⁷ Report from Stephen Taylor's independent review, [Investigation into links between Special Demonstration Squad and Home Office](#), January 2015, p2

⁷⁸ Ibid, p4

4. Litigation

In November 2015 the MPS reached financial settlements with seven women who had brought legal claims relating to their relationships with undercover officers. Assistant Commissioner Martin Hewitt made a public apology to the women, in which he described the intimate sexual relationships as “abusive, deceitful, manipulative and wrong” and “a gross violation” of personal privacy. He also acknowledged that the relationships may have reflected problematic attitudes towards women in police culture, and that there had been no proper management of the deployments. He claimed that relationships of this nature would never be authorised in advance, nor used as a tactic in a deployment. He suggested that if such a relationship did occur, for example where it was a matter of life and death, the officer concerned would be required to report it, so that it could be investigated for any potential criminal offence or misconduct.⁷⁹

4.1 Human rights claims

In 2011 Kate Wilson brought a claim in the High Court with respect to her relationship with Mark Kennedy. She claimed that the actions of Mr Kennedy violated her human rights. The High Court declined jurisdiction to hear the case on the basis that the claim should have been brought before the Investigatory Powers Tribunal (IPT). A separate common law claim for damages was successful and in 2017 Ms Wilson received an apology from the MPS and significant damages in compensation.

A new claim was brought before the IPT in 2017, on the basis that the relationship had breached Ms Wilson’s human rights under the European Convention on Human Rights (ECHR). Specifically, Ms Wilson argued that the relationship breached Article 3 (prohibition against torture and inhuman or degrading treatment), Article 8 (right to family and private life), Article 10 (right freedom of expression), Article 11 (right freedom of assembly and association), and Article 14 (right to non-discrimination in the enjoyment of Convention rights).

As a result of the initial disclosure of evidence, it became clear that Mr Kennedy’s handlers and line manager knew about the relationship, contrary to previous assertions. The defendants, the MPS and the National Police Chief’s Council, also admitted that the relationship constituted a violation of Ms Wilson’s rights under Articles 3, 8, 10 and 11 of the Convention.⁸⁰

At a hearing at the IPT in October 2018, the defendants sought to avoid further disclosure of evidence, arguing that the associated costs were disproportionate. They argued that the core factual and legal issues had already been admitted, and that the forthcoming public inquiry into undercover policing (see part 5 below for further detail) could

The Investigatory Powers Tribunal is a special tribunal established by RIPA to hear complaints about the use of covert powers, such as surveillance and interception, by MI5, MI6, GCHQ and the police

⁷⁹ [Police ‘Knew Undercover Officer Was in a Relationship](https://www.rightsinfo.co.uk/2018/09/21/police-knew-undercover-officer-was-in-a-relationship/), rightsinfo.co.uk, 21 September 2018

⁸⁰ Kate Wilson, “[I was abused by an undercover policeman. But how far up did the deceit go?](https://www.theguardian.com/uk-news/2018/sep/21/kate-wilson-i-was-abused-by-an-undercover-policeman-but-how-far-up-did-the-deceit-go)”, *The Guardian*, 21 September 2018

investigate any wider issues of law, practice and policy. Therefore, they proposed that the IPT should consider the question of a remedy for the claimant (such as damages) on the basis of a set of agreed facts, avoiding the need for further disclosure of evidence. The IPT rejected these arguments and gave the defendants three months to file a defence to the claim.⁸¹

At a hearing in November 2018 Ms Wilson applied to the IPT for an order that the defendants should pay her costs arising from earlier hearings at which they had sought to bring an end to the proceedings. This was on the basis that it was unreasonable and unfair for a public authority to be able to raise such issues to obstruct the progress of a claim, even where they were unsuccessful or without merit.

The IPT concluded that it would only be able to award costs in very unusual cases, because the rules governing its procedures were designed to ensure that in general an unsuccessful party did not have to pay the other party's costs (as would normally be the case in litigation). The case was not unusual enough to justify deviating from this approach.⁸²

Ms Wilson has since said that she is reliant on crowd funding to continue with the case, and that it may become impossible to continue.⁸³

There was a further hearing on 16 May 2019 at which the parties disagreed as to whether the defendants had now disclosed sufficient evidence for the case to proceed to a full hearing. The IPT concluded that further evidence concerning RIPA authorisations for Mark Kennedy should be disclosed to the Tribunal for consideration. However it did not order that the evidence should be disclosed to Ms Wilson, as she had argued.⁸⁴

4.2 Criminal prosecutions

In 2014 the CPS announced that it would not be seeking to prosecute any officer who had formed an intimate relationship in the course of an undercover policing relationship. One of the women, known as DIL, who had settled a claim with respect to her relationship with Mr Boyling, exercised her Victim's Right to Review. However, in 2016 the CPS stated that it would not reconsider its decision in relation to charging Mr Boyling.

In 2017 another claimant asked the CPS to consider a complaint, and the CPS declined to prosecute. That claimant sought a review of the decision, which concluded that the decision not to prosecute was correct.

⁸¹ *Wilson v Commissioner of Police for the Metropolis* [2018] UKIP Trib IPT 167 H

⁸² *Wilson v Commissioner of Police for the Metropolis* [2018] UKIP Trib IPT 11 167 H2

⁸³ Kate Wilson, '[I was lied to by a police spy. The inquiry promised the truth but we're far from it](#)', *The Guardian*, 29 April 2019

⁸⁴ [\[2019\] UKIPTrib IPT 11 167 H](#)

This decision was made on the basis that the case failed the evidential stage of the CPS's Code for Prosecutors, in that the evidence did not provide a realistic prospect of conviction. According to the CPS Code, a realistic prospect "means that an objective, impartial and reasonable jury ... properly directed and acting in accordance with the law, is more likely than not to convict the defendant of the charge alleged".⁸⁵

The three offences under consideration were: rape, procurement of unlawful sexual intercourse by false pretences or representations; and misconduct in public office.

In March 2019 the BBC reported that two women who had had relationships with undercover police had given interviews. One of them described herself as a victim of a "conspiracy to rape" by a team of officers, who knew there was "no informed consent". Another agreed with this characterisation, suggesting that the feeling of violation was exacerbated by the fact that the "abuse" was perpetrated not by one person but by a whole police department.⁸⁶

Rape

The CPS lawyer who reviewed the decision not to prosecute concluded that there was sufficient evidence from which a jury would be likely to conclude that there was a sexual relationship, and that the claimant would not have entered into it had she known that My Boyling was a police officer. However, when considering the law on rape as it stood at the relevant time⁸⁷ she concluded that there were only two sets of circumstances in which deception could undermine consent. These were deception as to the nature of the sexual act, and deception as to the identity of the perpetrator. The deception underlying the relationship in this case did not fit into either category.

Procurement of unlawful sexual intercourse

The [Sexual Offences Act 1956](#) provided for an offence of procurement of unlawful sexual intercourse by false pretences or false representations.⁸⁸ The CPS lawyer found that there was very strong evidence against the proposition that field officers were expressly directed to procure women to have sexual intercourse in order to obtain evidence. She concluded that the relationship was based on mutual attraction, and that Mr Boyling's false pretence of being an environmental activist provided nothing more than context for them to meet on sufficient occasions to develop a relationship.

⁸⁵ Para 4.7

⁸⁶ [Undercover police: Women were 'victims of co-ordinated rape'](#), 4 March 2019, bbc.co.uk [accessed 6 March 2019]

⁸⁷ The law was then governed by section 1 of the Sexual Offences Act 1956. The Sexual Offences Act 2003 gave statutory effect to the previous common law position regarding consent and deception. Section 76 provides that it should be conclusively presumed that the complainant did not consent if the defendant intentionally deceived the complainant as to the nature or purpose of the act in question, or obtained consent by impersonating someone known personally to the complainant.

⁸⁸ This was subsequently repealed by the Sexual Offences Act 2003 but the offence would have been in force at the relevant time the relevant acts took place.

Misconduct in public office

Finally, the CPS lawyer analysed whether the conduct in question amounted to an abuse of the public's trust in the office holder. She suggested that there was a likelihood of sexual relationships in circumstances where officers were undercover for years, and that it was difficult to identify the sort of behaviour that would go so far beyond acceptable conduct as to amount to an abuse of office. She did not discount the possibility that conduct of this kind could amount to a misconduct offence, but concluded that in the circumstances a jury would find that it did not.

Judicial Review of CPS decision

Following this internal review, the claimant brought a judicial review of the CPS decision not to prosecute. The decision was challenged on two grounds:

- That the CPS was wrong to conclude that Mr Boyling's deception did not undermine her consent (relevant to the offence of rape); and
- That the CPS had failed to take account of certain relevant considerations, including that Mr Boyling had conducted relationships with several women connected with Reclaim the Streets (relevant to the procurement offence); and that the MPS Police said that undercover officers were prohibited from having sexual relationships with subjects of surveillance (relevant to misconduct in public office).

On the issue of consent, the claimant's lawyers argued that deception was capable of undermining consent if it related to a matter sufficiently serious to be relevant to a woman's decision-making, and where it related to a matter that the woman regarded as fundamental to her autonomous decision-making.

On the issue of misconduct in public office, the claimant's lawyers argued that the apology given by AC Hewitt and the internal guidance warning against sexual relationships⁸⁹ were clear evidence that the conduct was prohibited.

The High Court noted in its judgment that the circumstances in which it would intervene in relation to a prosecutorial decision are very rare, given that responsibility for such decisions had been entrusted to the Director of Public Prosecutions by Parliament.

The Court gave detailed consideration to the case law on the circumstances in which deception can undermine consent, both prior to and since the [Sexual Offences Act 2003](#) came into force. Two scenarios are now expressly provided for by the 2003 Act: cases in which the defendant deceived the victim as to the nature or purpose of the act, or where the defendant impersonated someone known to the victim. This reflects the common law position prior to 2003.

⁸⁹ The SDS Tradecraft Manual (1995) cited in *R(Monica) v DPP & Andrew James Boyling* [2018] EWHC 3469 (QB) [8]

The High Court agreed with the CPS lawyer's analysis of recent case law, which identified two further categories of case where deception could be capable of undermining consent. These were:

- cases where the deception relates directly to the sexual act and where the victim's sexual health could be put at risk (such as where the deception concerned the use of contraception); and,
- those that "strike at the heart of the complainant's sexuality". This latter category – exemplified by a case in which the victim was deceived about the perpetrator's gender - involve a deception about a fundamental aspect of the identity of the perpetrator.

According to the High Court, in these cases the victim is deprived of their freedom of choice to consent by the perpetrator's deception.

However, the Court concluded that the deception in the case in question did not fit in to either of these categories. It would be a matter for Parliament rather than the courts to decide to extend the existing concept of consent to cover this kind of situation.

With respect to the procurement and misconduct offences, the Court concluded that the CPS lawyer had been entitled to reach the conclusions that she had on the basis of the available evidence. The application for judicial review was therefore dismissed.

Responding to the judgment the complainant's lawyer, Harriet Wistrich, said that the law needed to be clarified on deception and consent, and suggested that at present it left women open to "frightening abuses of power".⁹⁰

⁹⁰ [Undercover officer won't face prosecution over relationship](#), bbc.co.uk, 14 December 2018

4.3 Children of undercover officers

A case has also been brought against the MPS Police by the child of an undercover officer, Bob Lambert. The claimant was born as a result of a relationship between Mr Lambert and his mother, who settled her case for £425,000 in 2014.⁹¹

The claimant, known as “TBS” brought the claim on the basis that his abandonment by his father, and the discovery that he was an undercover officer, resulted in mental health problems. It was brought against the Metropolitan Police Commissioner, as the employer of Lambert and the officers who were supervising him.

The claim was brought for misfeasance in public office and negligence. The claimant alleged that Mr Lambert’s actions amounted to a knowing or reckless abuse of the power entrusted to him as a public officer, which he knew was likely to cause psychiatric injury to the claimant, or he was recklessly indifferent to this outcome. Further, in so far as any of Mr Lambert’s supervisors knew of the relationship with his mother and allowed it to continue, they were deliberately or recklessly abusing their powers.

The negligence claim alleged that the MPS knew or ought to have known that there was an obvious risk of a child being conceived and suffering harm in these circumstances, and owed a duty of care to prevent this from happening.

The MPS failed in an initial attempt to have the claim struck out on the basis that there were no reasonable grounds for bringing it.

It has been reported that the MPS is seeking to make Mr Lambert a joint defendant to the claim. If successful, this could mean that Mr Lambert would be liable to pay a proportion of any compensation awarded to his son.⁹²

“Misfeasance in public office” may form the basis for a civil claim against a public officer who is exercising powers in that capacity. The conduct that the claim concerns must have been intended to injure the claimant, or the officer must have known or been reckless about the fact that they had no power to engage in the conduct in question.

⁹¹ [TBS v Metropolitan Police Commissioner](#) [2017] EWHC 3094 (QB)

⁹² ‘[Police take legal action against former officer who had child with activist](#)’, *The Guardian*, 14 May 2019

5. The Mitting Inquiry

5.1 Scope of the Inquiry

As Home Secretary in 2015, Theresa May announced her intention to establish an Inquiry into undercover policing under the [Inquiries Act 2005](#) ("the 2005 Act").⁹³

The Inquiry was announced before the conclusion of criminal investigations into SDS officers and a review into potential miscarriages of justice involving undercover police officers. The timing was attributed to the public interest in having a statutory inquiry start as soon as possible.

The Inquiry is chaired by Sir John Mitting,⁹⁴ a former High Court judge. The terms of reference are to inquire and report on undercover police operations conducted by English and Welsh police forces in England and Wales since 1968. In particular it will:

- investigate the role and the contribution made by undercover policing towards the prevention and detection of crime;
- examine the motivation for, and the scope of, undercover police operations in practice and their effect upon individuals in particular and the public in general;
- ascertain the state of awareness of undercover police operations of Her Majesty's Government;
- identify and assess the adequacy of the:
 1. justification, authorisation, operational governance and oversight of undercover policing;
 2. selection, training, management and care of undercover police officers;
- identify and assess the adequacy of the statutory, policy and judicial regulation of undercover policing.⁹⁵

The inquiry will investigate whether and to what purpose, extent and effect undercover police operations, including the SDS and the NPOIU, have targeted political and social justice campaigners.

The terms of reference state that the Inquiry will report to the Home Secretary as soon as practical and will make recommendations as to the future deployment of undercover police officers. It was initially anticipated that the inquiry report would take up to three years, a deadline which has now passed.

As a statutory Inquiry it is subject to the principle of openness except where it is appropriate to restrict any information from disclosure by making a restriction order under section 19 of the 2005 Act.

⁹³ [HC WS381, 12 March 2015](#)

⁹⁴ Sir Christopher Pitchford was originally appointed as Chair but had to stand down in 2017 due to ill health. The inquiry was thus referred to initially as the Pitchford Inquiry

⁹⁵ [Undercover Policing Inquiry: Terms of Reference](#)

In a preliminary ruling in 2016, the then Chairman Sir Christopher Pitchford identified areas of alleged wrongdoing that had emerged from Operation Herne and the Ellison review:

- (i) Widespread and authorised use by undercover officers of the names of real children, since deceased, without the permission of their next of kin, to create undercover identities;
- (ii) With tacit managerial approval undercover officers entered into deceitful and therefore abusive long term intimate relationships;
- (iii) Undercover officers infiltrated “black justice campaigns”;
- (iv) Officers gave evidence in criminal proceedings in an undercover identity not disclosed to the court;
- (v) Undercover officers provided information for inclusion in an employers’ blacklist;
- (vi) Undercover officers provided personal information about the family of Stephen Lawrence, deceased;
- (vii) An undercover officer gave a secret and undisclosed briefing to the Metropolitan Police Lawrence Review Team;
- (viii) The Metropolitan Police Service deployed an undercover officer to report on the activities of the parents of Stephen Lawrence;
- (ix) The Metropolitan Police Service used an undercover operation to acquire personal and confidential information about Duwayne Brooks OBE;
- (x) The Metropolitan Police Service failed, in the due administration of justice, to make disclosure of undercover activities to Crown prosecutors;
- (xi) Undercover officers reported on the activities of elected politicians;
- (xii) Undercover officers reported on the activities of trades unions.

He concluded that the Inquiry would have to reach conclusions about whether these allegations about the SDS and the NPOIU were true; whether such practices were also true of other police forces; and, how such practices developed and why they ceased.

However, the scope of the Inquiry is not limited to these allegations, and will also need to consider the context of undercover policing during this period:

There is a broader public concern about the targeting of groups active in social, political, justice and environmental causes. The ostensible justification for targeting these groups was the need to obtain intelligence about planned public disorder and crime. The Inquiry will need to examine the information gathered in the course of these operations; it will wish to discover how and for what purposes this information was processed and distributed in

order to test whether the original authorisation for targeting was justified by previous and subsequent events.⁹⁶

The Inquiry will consider evidence in three modules:

- In the first module the facts of undercover policing and undercover police operations will be examined;
- In the second module the Inquiry will examine systematic issues, including policy, authorisation, justification, management, supervision, training and welfare;
- The third module will examine lessons learned and look to the future of undercover policing⁹⁷

5.2 Preliminary issues

The Inquiry has yet to begin taking evidence as a result of the need to resolve preliminary issues, including applications for restriction orders, which would prevent the publication of certain information.

The procedure for determining applications for restriction orders is set out in sections 18 and 19 of the 2005 Act. These require the Inquiry to take reasonable steps to ensure that the public are able to access evidence and documents. Under section 19, any restrictions on this general approach to disclosure must be: required by statute or a rule of law; conducive to the Inquiry fulfilling its terms of reference; or, necessary in the public interest.

When deciding whether a restriction would be conducive to fulfilling the terms of the Inquiry or necessary in the public interest, the Chairman must take account of various considerations, including:

- The extent to which any restriction might inhibit the allaying of public concern;
- Any risk of harm or damage that could be avoided or reduced by any restriction;
- The extent to which not imposing a restriction might cause delay or impair the efficiency of the inquiry.

In considering the Inquiry's approach to disclosure, Sir Christopher Pitchford concluded that each application for a restriction order would need to be considered according to the specific facts.

Core participants

The designation of particular individuals as 'core participants' is determined by the [Inquiry Rules 2006](#).

Individuals are able to make an application to the Inquiry for core participant status.

The Chairman considers whether the person played, or may have played, a direct and significant role in relation to the matters to which

⁹⁶ [Applications by the Metropolitan Police service for an extension of time for the making of restriction order applications and for a change by the Inquiry to its approach to investigation – Ruling](#), 2 May 2017, Para 103

⁹⁷ *Ibid*, para 107

the Inquiry relates, or whether they have a significant interest in an important aspect of the matters to which the Inquiry relates.

The question of whether the person will be subject to significant or explicit criticism is also relevant.

Core participants can have access to all of the public evidence relevant to their particular interest in the case, and in some cases may have legal costs paid.

As of July 2019, the number of core participants was 228, of which 211 were receiving funding for legal costs.⁹⁸ A full list of core participants is available on the Inquiry website.⁹⁹

Core participants include the following:

- Women who were deceived into relationships with undercover officers
- Social and environmental campaigners
- Family justice campaigners
- Relatives of deceased individuals whose identities were used
- Families of former undercover officers
- Former undercover officers

Anonymity

Many of the undercover officers involved in the inquiry have applied for, and been granted, anonymity, on the basis that public disclosure of their real names would breach their Article 8 rights to private and family life.

In May 2017, having failed to make expected progress in applying for restriction orders, the MPS submitted an application for an extension of time for making applications, and for a change by the Inquiry to its approach to making orders. The MPS suggested that the Inquiry should be more selective in its approach to requesting applications from former members of the Special Demonstration Squad, arguing that the approach taken was disproportionate and wasteful of resources. This was because the Inquiry intended to make contact with all surviving former members of the SDS to seek witness statements. For each individual concerned the MPS had to undertake a considerable amount of work in order to reconstruct their undercover careers and conduct a risk assessment in order to determine whether or not to make an application for a restriction order.

The Chairman rejected this argument. Instead he concluded that it was unlikely that the Inquiry would achieve the necessary level of understanding of the situation without seeking to obtain written statements from all the field and cover officers, managers, back room

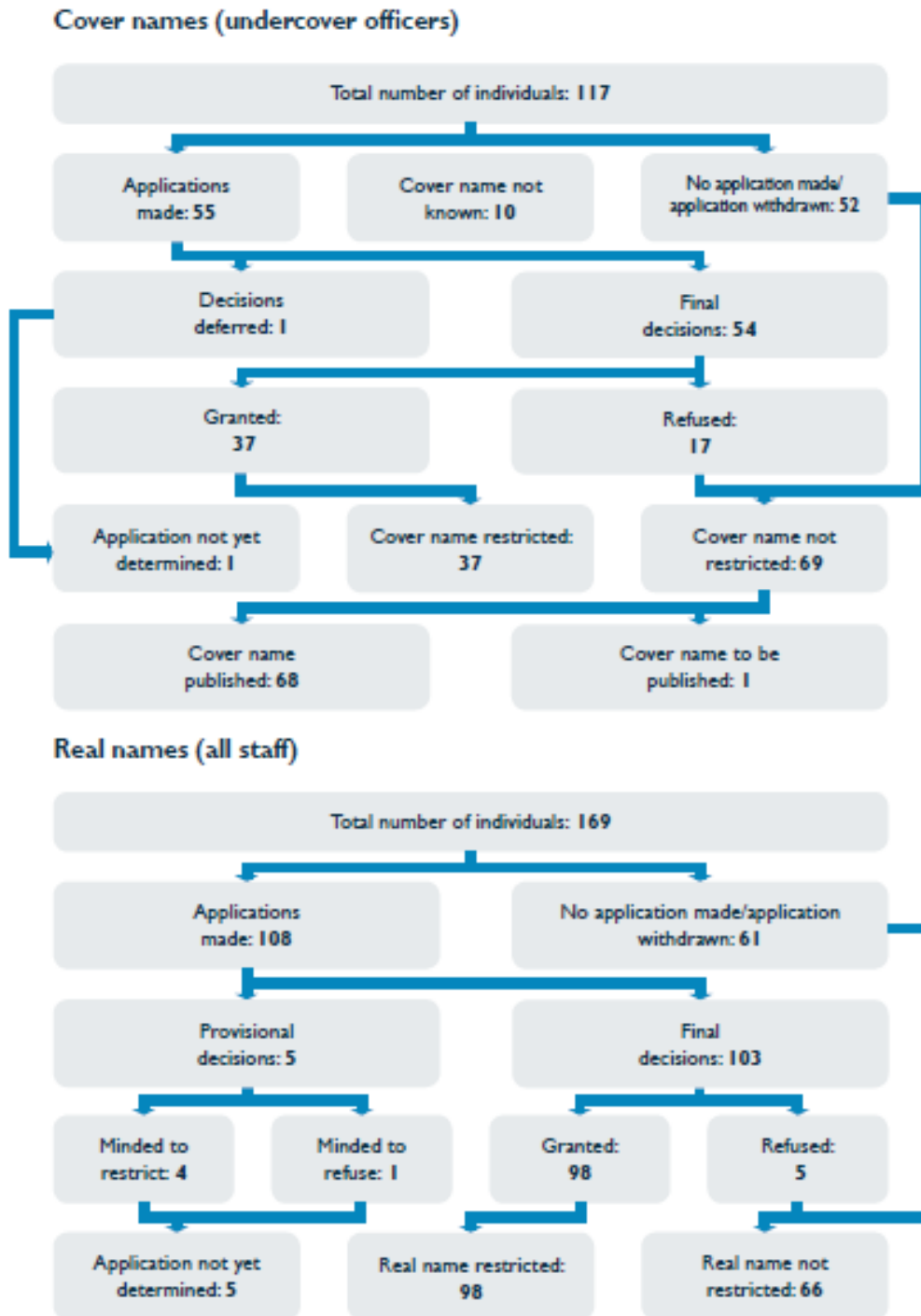
⁹⁸ [Update Note, July 2019, ucpi.org.uk](#)

⁹⁹ <https://www.ucpi.org.uk/core-participants/list-of-core-participants/>

staff, senior officers and commanders who were responsible for undercover operations.¹⁰⁰

An Update Note published in July 2019 shows the number of restriction orders sought, granted and outstanding with respect to the identity of state core participants. See Figure 3 below.¹⁰¹

Figure 3



¹⁰⁰ Ibid, para 165

¹⁰¹ [Update Note, July 2019, ucpi.org.uk](#). Applications from NPOIU participants is ongoing

Anonymity has also been granted to 30 non-state core participants and witnesses.¹⁰²

Use of deceased children's identities

Under its terms of reference the Inquiry will need to investigate how wide the practice of using names of deceased children was, whether it is still used, and if not, when it ceased.

A preliminary issue arose as a result of relatives of deceased children applying for disclosure of information about the use of their identities by undercover police.

Sir Christopher Pitchford was therefore required to consider whether the State's obligations under Article 8 of the ECHR required the disclosure of this information to the relatives. He concluded that the answer to this question would depend on striking a fair balance between the interests of the individual and any countervailing interests of the public.

He identified possible factors that would weigh against disclosing the information and exposing the officer's identity, including:

- That it might lead to a risk of death or serious injury to the officer;
- That it might lead to a disproportionate interference with their enjoyment of private or family life;
- That it might create a risk of harm to the officer or their family;

The balance to be struck between these competing interests would have to be decided according to the facts of each individual case.

Families of deceased children have been divided into three categories for the purpose of determining the approach to be taken to disclosure:

- Category 1 families are those parents or close relatives of a child whose identity was used by police officer for covert purposes and a provisional decision has been made not to restrict publication of that information. Counsel to the Inquiry, counsel to the MPS, and counsel to the relatives all agreed that these families should be approached and informed of the position. They will be given the option of applying for an order restricting publication of the information. Otherwise it will be made public;
- Category 2 families are those who have expressed an interest in knowing whether their deceased child's identity has been used, but the Inquiry Chairman has imposed an order restricting publication. These families will not be provided with any information;
- Category 3 families are those who have expressed an interest in knowing whether their deceased child's identity was used and the Inquiry finds no evidence that it was. With respect to these families, the Chairman to the Inquiry concluded that no information should be provided in the short term, because confirming to some families that their child's identity was not

¹⁰² Ibid

used might lead to others inferring that it had been, when a decision had been made to restrict disclosure of this information.

Sir Christopher Pitchford also concluded that the Inquiry has a responsibility to attempt to trace families who may be affected but have not made their wishes known. These families will be issued with an invitation explaining their right to make an approach to the Inquiry.¹⁰³

Data Protection

Another issue that has had to be determined is how ensure the Inquiry is compliant with data protection rules. In order to obtain witness statements from core participants, it will be necessary to share intelligence reports on individuals including sensitive information such as political views and sexual relationships.

The Inquiry has had to consider the extent to which it has an obligation under the General Data Protection Regulations and the [Data Protection Act 2018](#) to provide information to those whose data it is processing.

The Chairman issued a statement on 11 April 2019 setting out the Inquiry's position on the issue. In light of submissions from non-state core participants, he indicated that intelligence reports would be made available to them, subject to a restriction order and/ or undertakings as to their use. Because this would result in the disclosure of sensitive data of other core participants and witnesses, the Inquiry will explore the possibility of redacting references to "intensely personal matters", including sexuality, intimate personal relationships, and relationships with children, before reports are shared with others.¹⁰⁴

5.3 Controversy

Police obstruction

It has been suggested that the police are seeking to deliberately obstruct the Inquiry in order to avoid scrutiny.

When considering an application from the MPS for an extension of time for the making of restriction order applications, Sir John Mitting acknowledged that

For many who have in the intervening years acquired some knowledge, but incomplete knowledge, of their unwitting involvement in undercover policing, the slow progress of the Inquiry towards disclosure and publication is the subject of deep frustration, anger and distress. Their perception is that the Metropolitan Police Service has been making efforts "to stifle the Inquiry's effectiveness and prevent any details of wrongdoing in undercover activities being made public". In the meantime, they note, sources of evidence are being lost through ill health and death. Furthermore, it is suspected that unlawful destruction of

¹⁰³ [Preliminary issue: Disclosure of deceased children's identities – Ruling](#), 14 July 2016, Undercover Policing Inquiry

¹⁰⁴ [Chairman's Statement on Data Protection and Privacy](#), ucpi.org.uk

records may have occurred and this is currently being investigated by the Independent Police Complaints Commission.¹⁰⁵

However he did not accept that the MPS Inquiry team was deliberately obstructive, noting that they were in regular contact.

Criticism of Sir John Mitting

Criticism has also been levelled at Sir John Mitting for the decisions he has taken and comments made during preliminary hearings and elsewhere.

His membership of the Garrick Club (which excludes women from being members), and comments made in a judgment in an unrelated case concerning domestic violence, have been interpreted as indicating a lack of understanding of gendered violence. One of the women who had an intimate relationship with an undercover officer suggested that this is incompatible with responsibility for an inquiry of this nature.¹⁰⁶

In March 2018 Phillipa Kaufmann, counsel to several of the core participants who had relationships with undercover officers, suggested that a panel including individuals with a proper understanding of sexual and racial discrimination should be appointed to sit alongside Sir John Mitting. She, her legal team, and the women then walked out of the inquiry. She was quoted as saying that the women were

... not prepared to actively participate in a process where their presence is mere window dressing lacking all substance and meaning which would achieve nothing other than to lend the process a legitimacy it does not have.¹⁰⁷

Writing in the *Guardian* in April 2019, Kate Wilson expressed dismay at the fact that the Chairman had granted anonymity to two-thirds of the police officers who requested it. She suggested that the decision to keep officers' cover names secret would mean that those who had relationships with them would be unaware and therefore unable to give evidence.¹⁰⁸ She concluded that his 'bias' would undermine the inquiry's conclusions

In allowing officers to maintain their anonymity, Mitting appears to believe that police evidence is more valuable than victims', and his bias when it comes to deciding what the public needs to know puts control of the narrative in the hands of a sexist, racist, politically prejudiced institution that carried out anti-democratic operations without public oversight for decades. He asks us to trust him to make an assessment of that narrative alone. Whatever your political position, that should be cause for concern.

¹⁰⁵ [Applications by the Metropolitan Police Service for an extension of time for the making of restriction order applications and for a change by the Inquiry to its approach to investigation – Ruling](#), 2 May 2017, Undercover Policing Inquiry

¹⁰⁶ 'Alison', [Undercover police conned us into 'relationships'. We need a judge who understands](#), *The Guardian*, 5 April 2019

¹⁰⁷ ['Campaigners stage walk out of 'secretive' police spying inquiry'](#), *The Guardian*, 21 March 2018

¹⁰⁸ Kate Wilson, ['I was lied to by a police spy. The inquiry promised the truth but we're far from it'](#), *The Guardian*, 29 April 2019

Strategic Review

After the victims' 'walk out', Sir John Mitting carried out a Strategic Review.

He noted that it had been reported that non-state core participants were undecided as to whether to continue to participate. He stated that he would not use coercive powers to compel them to do so, and that their absence would not undermine the purpose of the Inquiry. However, their absence would be regrettable and would mean that the foundations for the findings of fact which could be made would be less extensive.

He ruled out appointing a panel for the duration of the Inquiry because of the resource implications. He did however conclude that a diverse panel would be desirable at the third stage of the Inquiry, looking at current undercover policing practices and the future of undercover policing:

Profound and, perhaps, difficult questions exist as to the circumstances, if any, in which undercover police officers should be deployed. There is likely to be widespread agreement that their deployment is justified to prevent and/or investigate very serious crimes, including those which put the lives and safety of the public at risk. There will be many different views on the justification for deployments in other circumstances, such as the prevention or control of public disorder. On these issues, extensive public debate and the opinions of a diverse panel would be welcomed by me and, I anticipate, be required to found recommendations for the future capable of commanding widespread public support.¹⁰⁹

5.4 Next steps

In January 2019 the Sir John Mitting published a statement confirming that hearings would not begin before 2020.¹¹⁰ The reasons given included the time taken to obtain and process intelligence reports filed between 1968 and 1984, and the time required for non-state core participants to consider and respond to requests for witness statements.

An Update Note published in July 2019 stated that hearings were expected to commence in summer 2020.

The obtaining of witness statements from officers and managers is anticipated to be completed by December 2019, and from those affected by deployments by February 2020.¹¹¹

As of 31 March 2019 the Inquiry had spent £17.2m.

¹⁰⁹ [The Inquiry into Undercover Policing: Strategic Review](#), May 2018, Foreword para vi, ucpi.org.uk

¹¹⁰ [Statement from Sir John Mitting](#), Chair of the Undercover Policing Inquiry, 29 January 2019, ucpi.org.uk

¹¹¹ [Update Note, July 2019, ucpi.org.uk](#)

About the Library

The House of Commons Library research service provides MPs and their staff with the impartial briefing and evidence base they need to do their work in scrutinising Government, proposing legislation, and supporting constituents.

As well as providing MPs with a confidential service we publish open briefing papers, which are available on the Parliament website.

Every effort is made to ensure that the information contained in these publicly available research briefings is correct at the time of publication. Readers should be aware however that briefings are not necessarily updated or otherwise amended to reflect subsequent changes.

If you have any comments on our briefings please email papers@parliament.uk. Authors are available to discuss the content of this briefing only with Members and their staff.

If you have any general questions about the work of the House of Commons you can email hcenquiries@parliament.uk.

Disclaimer

This information is provided to Members of Parliament in support of their parliamentary duties. It is a general briefing only and should not be relied on as a substitute for specific advice. The House of Commons or the author(s) shall not be liable for any errors or omissions, or for any loss or damage of any kind arising from its use, and may remove, vary or amend any information at any time without prior notice.

The House of Commons accepts no responsibility for any references or links to, or the content of, information maintained by third parties. This information is provided subject to the [conditions of the Open Parliament Licence](#).