



Inspecting policing
in the **public interest**

A review of national police units which provide intelligence on criminality associated with protest

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Preface

Protecting undercover officers and the security of police tactics

Undercover police tactics, by their very nature, include techniques and controls that will be of great interest to criminals who are trying to develop measures to counter them. HMIC has therefore considered it in the public interest to exclude from this report details which might put the safety of individual officers or the effectiveness and efficiency of police operations at risk.

A note on the use of Mark Kennedy's real name

It is normal practice for the police to neither confirm nor deny the true identity of undercover officers. This is to protect both the officers themselves, and the effectiveness of the tactic. However, the case of Mark Kennedy is one of exceptional circumstances, including his own public revelations, the media interest in him, and the fact that the Court of Appeal named him on 19 July 2011. Because of this, HMIC has chosen on this occasion to use his real name.

Other reviews

We recognise that other reviews and investigations associated with the events that are the subject of this report are concurrently underway (e.g. by the IPCC). Their findings and conclusions may in due course impact on the recommendations we have made; if this is the case, our conclusions will need to be revisited.

Complaints about the police

A number of individuals have made complaints about police undercover operations during the course of this review. When these fell within the scope of the review, HMIC has sought further details. Because HMIC's role is to inspect the efficiency and effectiveness of police (rather than to investigate specific complaints), we have, where appropriate, referred these individuals to the relevant authorities. HMIC has written to relevant members of the media, and others, seeking further information on alleged undercover practice. Some chose to express opinions and others not.

1. Summary and conclusions

Introduction

In 2010, revelations about the activities of Mark Kennedy, a police officer working undercover for the National Public Order Intelligence Unit (NPOIU), led to the collapse of the trial of six people accused of planning to shut down a large power station in Ratcliffe-on-Soar, Nottinghamshire. Later that month, Her Majesty's Inspectorate of Constabulary (HMIC) announced a review of the systems used by the NPOIU to authorise and control the development of intelligence.¹ This report outlines our findings and recommendations.

The NPOIU was created in 1999 as part of the Police Service's² response to campaigns and public protest that generate violence and disruption. Located within the Metropolitan Police Service (MPS), it was funded by the Home Office to reduce criminality and disorder from domestic extremism and to support forces managing strategic public order issues.³ The unit gathered and coordinated intelligence that enabled the police to protect the public by preventing crime and disruption.

HMIC has reviewed:

- the supervision of undercover officers deployed by the NPOIU;
- the activities and supervision of Mark Kennedy specifically;
- the issues of management and supervision that arise from the case of Mark Kennedy, and how these might be strengthened;
- the ACPO definition of 'domestic extremism';⁴
- the history, remit and governance of the NPOIU; and
- links between the NPOIU and the MPS Special Demonstration Squad (SDS).

This report considers undercover police tactics when used to develop intelligence, rather than to obtain material specifically for a criminal prosecution. Conclusions and recommendations are made with regard to the level of intrusion into people's lives; the use of these tactics to tackle domestic extremism as well as to inform public order policing; and the extent to which the risks inherent to undercover deployments are justified and controlled.

¹ Terms of reference are at Annex A, and review methodology at Annex B.

² The NPOIU's remit covered England and Wales. They also worked with forces in Scotland and Northern Ireland.

³ Grant Agreement, Secretary of State for the Home Department and Metropolitan Police Service for the provision of the National Domestic Extremism Unit, for the 2010/11 financial year.

⁴ See p.11.

This review focuses on Mark Kennedy and the NPOIU. The findings however are applicable to any police unit that has, is, or may be considering deployment of undercover officers for intelligence development operations.

In January 2011 the NPOIU was subsumed with other units under the National Domestic Extremism Unit (NDEU) within the MPS. Consequently HMIC recommendations relating to the NPOIU are for the NDEU and the MPS to take forward.

Preventative intelligence work by the police

Some serious criminal activities have been associated with public protest. The right to protest is acknowledged in law: but it is not unconditional.⁵ In particular, the public right to peaceful protest does not provide a defence for protesters who commit serious crime or disorder in pursuit of their objectives. Police face the challenge of identifying those individuals who are intent on causing crime and disruption, while simultaneously protecting the rights of those who wish to protest peacefully. Key to being able to differentiate between the two is reliable intelligence.

Intelligence helps those responsible for protecting communities from serious crime and disruption to make better decisions (and therefore to prevent crime) by improving their knowledge about the level and type of threat the public might face. The starting point for gathering such intelligence is prior reasonable suspicion that serious criminal acts may be in preparation.

The undercover tactic

The police must be able to use tactics that allow them to prevent and detect those who engage in criminal acts which endanger the public, unduly disrupt people's lives or businesses, or interfere with the critical national infrastructure. There is a long history of using undercover officers as part of law enforcement. Applied correctly, it is a lawful and ethical tactic, as well as being a productive – and at times vital – means of obtaining much-needed intelligence and evidence.

However, the deployment of undercover officers is inherently risky. They can intrude into the lives not just of criminals, but of their associates and other members of the public. There are also various threats to the welfare of the officers, including violence and the psychological impacts that may arise from, for example, maintaining a different persona. As will be discussed, the risks are particularly acute for the kind of work undertaken by the NPOIU.

⁵ Taken together, articles 9, 10 & 11 of the European Convention on Human Rights (freedom of religion, expression and assembly respectively) provide a right of protest. Article 11, however, is a *qualified* right, which means that the police may impose lawful restrictions on the exercise of the right to freedom of assembly provided such restrictions are prescribed by law, pursue one or more legitimate aims and are necessary in a democratic society (i.e. fulfil a pressing social need and are proportionate). See HMIC (2009) *Adapting to Protest* (available from www.hmic.gov.uk).

To help control these risks, police deploying undercover officers are obliged to follow a system (comprising organisational arrangements, accountabilities, checks and governance). This 'system of control' arises from the combined application of various statutes, case law and guidance.⁶ Its success relies in both its design and its implementation. However, such a system can only reduce the risks, not eradicate them completely.

In applying these controls, police are required to consider in the first instance whether it is **necessary** to use an undercover officer or if the intelligence can instead be secured through some other means where the risks are lower. If it is necessary to use an undercover officer, the police must then determine whether the deployment is **proportionate**: that is, if the seriousness of the crime justifies the level of intrusion into people's lives. They are also required to assess and manage the potential threats to officers.⁷

The sample of NPOIU records examined by HMIC contained insufficient detail to provide assurance that the intelligence requirement could not have been fulfilled through less intrusive means (i.e. that the use of an undercover officer was necessary). The proportionality of NPOIU operations is discussed in more detail on the next page.

Intelligence development

The Office of Surveillance Commissioners (OSC) provides a measure of oversight of compliance by monitoring the use of powers granted by Parliament.⁸ However, for most undercover deployments the most intense scrutiny occurs when the evidence they have collected is presented at court. Accountability to the court therefore provides an incentive for police to implement the system of control rigorously: but in HMIC's view, this incentive did not exist for the NPOIU. This is because NPOIU undercover officers were deployed to develop general intelligence for the purpose of preventing crime and disorder or directing subsequent criminal investigations, rather than gathering material for the purpose of criminal prosecutions.

When HMIC compared the controls applied by the NPOIU with organisations that deploy undercover officers in other areas of serious crime, we found that they fell short of the standards demonstrated by the other units. This was particularly evident in the case of Mark Kennedy. In relation to Ratcliffe-on-Soar, failures by the NPOIU (and others) to provide relevant information to key individuals involved in investigating and prosecuting the case led to the

⁶ See Annex C for a discussion on the law and guidance on undercover policing.

⁷ The requirement is set out in the Code of Practice issued by the Home Office under section 71 of the Regulation of Investigatory Powers Act.

⁸ See <http://surveillancecommissioners.independent.gov.uk/>. Currently the Office of Surveillance Commissioners dip samples authorisations from all the RIPA applications that the force has made over the preceding year. This may include a sample of undercover work but does not necessarily include all cases, and will not ensure that all domestic extremism deployments are included.

CPS dropping charges against six defendants and the Court of Appeal quashing the convictions of 20 more.⁹

Proportionality and intrusion

Undercover operations always carry the risk of intrusion into the lives of members of the public. This risk is much higher for the type of operations the NPOIU carried out, as officers were undercover for comparatively long periods (sometimes lasting several years – see p.19).

In reviewing whether the NPOIU undercover operations were proportionate, HMIC considered the seriousness of the crimes they tackled and the extent to which they controlled the risk of intrusion.

Seriousness of crimes tackled

The NPOIU was involved in the successful collection of intelligence on violent individuals, whose criminal intentions or acts were subsequently disrupted, and who were in some cases brought to justice. These were not individuals engaging in peaceful protest, or even people who were found to be guilty of lesser public order offences. They were individuals intent on perpetrating acts of a serious and violent nature against citizens going about their everyday lives.

Recent national police activity supported by the NDEU includes preventing and / or bringing to justice a number of serious crimes. These include threats to life and harm to individuals, serious damage to property, and the acquisition of weapons (including firearms and homemade bombs).

The NPOIU gathered both intelligence on serious criminality, and intelligence that enabled forces to police protests effectively. While the former might well justify some intrusion into people's lives, the latter would be much more arguable. Conflating these two objectives into one unit makes it difficult to assess objectively whether undercover deployments were proportionate.

The extent to which intrusion was controlled

The sample of NPOIU records examined by HMIC should have contained much more detail on how the risks of **intrusion** were assessed and managed. For example, Mark Kennedy, by his own admission, had intimate relationships with a number of people while undercover, and in doing so encroached very significantly into their lives. NPOIU documentation did not provide assurance that such risks of intrusion were being systematically considered and well managed across the organisation.

The system of control should reduce (but can never eradicate) the risk of undercover officers intruding disproportionately into people's lives. There is always the possibility that an undercover officer will not act as instructed: in

⁹ *Ratcliffe-on-Soar Power Station Protest Inquiry into Disclosure*, December 06 2011, available from www.cps.gov.uk; R v. Barkshire [2011] EWCA Crim 1885, 20 July 2011.

the case of Mark Kennedy, for example, he defied his manager's instructions on two occasions (by continuing to work following his arrest and by taking an activist with him abroad). A more systematic implementation of controls in the NPOIU might have identified more quickly the true extent to which he was intruding into people's lives. In future, where the risk of intrusion is significant, secure intelligence from other sources (such as another undercover officer) may corroborate what is being reported by their undercover officers.

Although Mark Kennedy worked for a national unit, his undercover activities were **authorised** by senior officers from the police force that covered the particular local area in which he was working. The authorising officer¹⁰ of an undercover deployment must take into account the risk of intrusion into the privacy of persons other than those directly implicated in the operation or investigation. However, the NPOIU did not provide authorising officers with potentially relevant information on the overall background to his deployment, or on some of his activities while deployed. This made it difficult for them to be fully aware of the overall intelligence picture, to fully assess whether alternative means for securing the intelligence might be available, or to consider the overall level of intrusion.

By law, the arrangements for authorisation of an undercover deployment only require the authority of a police superintendent (although in practice it is done by Assistant Chief Constables). This contrasts with both the interception of telephone conversations (which must be approved by the Home Secretary), and the planting of listening devices on residential premises or in a private vehicle (which requires the approval of a Chief Constable, with the pre-authority of the OSC).

Some have argued that, in principle, the undercover deployments that present the most significant risks of intrusion should not be left to the police to regulate; the ACPO President, for instance, suggested that this 'must take the form of some independent pre-authority that is already a common feature in other areas of policing in this country'¹¹ (such as for 'intrusive surveillance' which includes the deployment of listening devices in homes and cars). This might provide a greater degree of accountability and we believe that there is real value in the discipline associated with the process of attaining independent prior authorisation. However, it would have some very practical consequences for those charged with providing prior authority: for instance, if this was done by courts, it could create issues for judicial independence. The effectiveness of any authorisation process, whether conducted from inside or outside policing, will always be reliant on the adequacy of the information provided to the authorising officer and the degree to which the authorising officer critically challenges what he or she is given.

¹⁰ Undercover operations are authorised by Chief Officers (not by statute but by police practice). An application must be made to them which describes the necessity and proportionality of the deployment.

¹¹ Sir Hugh Orde, ACPO President, speaking about the small number of cases where there may be issues of public confidence (not low-level examples such as test purchases from street corner drug dealers). Speech to seminar 'Undercover Policing and Public Trust', 07 February 2011.

Since 2009 the MPS has raised awareness of the role of the authorising officer through an input into the Senior Command Course, and this has been improved further by ACPO in the past year: but it is still insufficient. There is no formal training provision for authorising officers. Knowledge of RIPA authorities¹² and covert tactics is usually based on experience gained in more junior ranks before becoming a chief officer; but not all those who go on to be chief officers necessarily have had such experience.

Recommendation 1 – Home Office (HO), ACPO and OSC

The arrangements for authorising those police undercover operations that present the most significant risks of intrusion¹³ within domestic extremism and public order policing should be improved as follows:

- (a) ACPO should give serious consideration to establishing a system of prior approval for pre-planned, long-term intelligence development operations subject to the agreement of the OSC.*
- (b) The level of authorisation for long-term deployments of undercover police officers should be aligned with other highly intrusive tactics such as Property Interference, as defined by s93 Police Act 1997 (subject to the legal requirements and the agreement of the OSC).¹⁴*

In the interim:

- (c) Either a collaborative agreement should be entered into between police forces and the MPS which allows one authorising officer within NDEU to own undercover operations from start to finish, or these operations should be managed in police forces by authorising officers that are:
 - a. Properly trained and accredited. In particular this training should cover the concepts of necessity, intrusion, proportionality, disclosure and risk management.*
 - b. Fully briefed with all the relevant information.**

In making these changes, consideration will need to be given to ensuring the police have some flexibility to deploy covert resources at short notice where operationally necessary, and to minimising potential impacts on Covert Human Intelligence Source (CHIS) work and police collaboration with partners.

¹² Regulation of Investigatory Powers Act 2000 – see Annex C for a summary of the legal framework.

¹³ Some undercover activities (such as test purchase operations) have a lower level of intrusion.

¹⁴ Currently the Office of Surveillance Commissioners dip samples authorisations from all the RIPA applications that the force has made over the preceding year. This may include a sample of undercover work but does not necessarily include all cases, and will not ensure that all domestic extremism deployments are included.

HMIC makes a number of further recommendations around improving the NPOIU's management of the risk associated with intrusion (see Recommendations 3 and 4 below).

Domestic extremism vs public order policing

The NPOIU is funded by the Home Office to reduce criminality and disorder from domestic extremism and to support forces managing strategic public order issues.¹⁵ However, domestic extremism and public order policing are two different police functions.

Domestic extremism

The ACPO definition of domestic extremism is as follows:

*Domestic extremism and extremists are the terms used for activity, individuals or campaign groups that carry out criminal acts of direct action in furtherance of what is typically a single issue campaign. They usually seek to prevent something from happening or to change legislation or domestic policy, but attempt to do so outside of the normal democratic process.*¹⁶

This definition could incorporate a very wide range of protest activity and its breadth means that it affords limited guidance to authorising officers applying RIPA (whatever its merits for other purposes).

It is HMIC's view that the term 'domestic extremism' should be limited to threats of harm from serious crime and serious disruption to the life of the community arising from criminal activity. The deployment of undercover officers in response to a threat of serious disruption from criminal activity will always require both a very careful assessment of the proportionality of the proposed deployment and close control of the undercover officer when it is underway. Deployments in this category should occur only in exceptional circumstances in which the level of disruption anticipated is very high, and the level of intrusion carefully calibrated to the threat.

An alternative would be to adopt the definition of extremism in the Government's *PREVENT* strategy for counter terrorism:

*Extremism is defined as the vocal or active opposition to fundamental British values, including democracy, the rule of law, individual liberty and mutual respect and tolerance of different faiths and beliefs. We also include in our definition of extremism calls for the death of members of our armed forces, whether in this country or overseas.*¹⁷

¹⁵ Grant Agreement, Secretary of State for the Home Department and Metropolitan Police Service for the provision of the National Domestic Extremism Unit, for the 2010/11 financial year.

¹⁶ ACPO (2006).

¹⁷ Secretary of State for the Home Department (2011) *PREVENT Strategy* (Cm 8092, 2011).

However, this definition may not be suitable for the police as it is not limited to criminality or police work.

Recommendation 2 – ACPO and Home Office

In the absence of a tighter definition, ACPO and the Home Office should agree a definition of domestic extremism that reflects the severity of crimes that might warrant this title, and that includes serious disruption to the life of the community arising from criminal activity. This definition should give sufficient clarity to inform judgements relating to the appropriate use of covert techniques, while continuing to enable intelligence development work by police even where there is no imminent prospect of a prosecution. This should be included in the updated ACPO 2003 guidance.

Public order policing

Domestic extremism is (in accordance with ACPO's current definition) unlawful and potentially serious. Therefore methods to deal with it need to involve consideration of intrusive, covert tactics. The capabilities, controls and security of units that deal with covert policing should be designed to manage the high risk that such deployments incur.

By way of contrast, protest is a democratic right (whilst not unconditional, see p.6 above), and the role of the police is to work with communities to facilitate safe and peaceful protests.¹⁸ Whilst effective planning depends on accurate intelligence, much public order policing capability relies on less intrusive tactics. The preparation and policing of such events is carried out by mainstream officers using everyday policing tactics, such as 'open-source' and other intelligence gathering processes.

On occasions, serious crime is committed during protests, and this must be tackled. However, the deployment of undercover officers to tackle serious criminality associated with domestic extremism should not be conflated with policing protests generally, as it is unlikely that the tests of proportionality and necessity would be readily satisfied in the latter case.

Recommendation 3 – ACPO, MPS and Home Office

The positioning of both public order intelligence and domestic extremism intelligence within the NDEU needs to be reconsidered. There will need to be an incremental transfer to any newly created hub for public order intelligence.¹⁹

¹⁸ HMIC has reported previously on overt tactics used in policing protest, in *Adapting to Protest* (2009), *Nurturing the British Model of Policing* (2009) and *Policing Public Order* (2011), which are all available from www.hmic.gov.uk. We view this report as complementary to that work.

¹⁹ HMIC's 2011 report, *The Rules of Engagement: A review of the August 2011 disorders* (available from www.hmic.gov.uk) recommends the creation of a central information 'all source hub', which would help police in anticipating and dealing with disorder.

Controls

As discussed above, all undercover operations are inherently risky. This is particularly the case with NPOIU deployments (when compared with, for example, deployment of an undercover officer to purchase drugs from a dealer on the street), because they tend to last longer (often for years), and have the objective of intelligence development (and so do not have accountability to a court as the incentive to implement the system of control rigorously). They therefore need to be strongly controlled.

The system of controls applied by the NPOIU was strengthened to a degree in 2009, although further improvements are still needed.

In the course of reviewing the controls, HMIC looked at the intelligence gathered by the NPOIU, which is held on a database. We found that the rationale for recording pictures of people taken at protest events was well documented. However, the rationale for recording other material, such as the description of an event, was not sufficient to provide assurance that its continued retention was necessary or justified, given the level of intrusion into people's privacy. **HMIC will revisit this database to check that improvements have been made.**

Recommendation 4

In recognition that undercover operations aimed at developing intelligence around serious criminality associated with domestic extremism and public order are inherently more risky, additional controls should be implemented as follows:

- (a) MPS and ACPO leads should adopt a practical framework for reviewing the value of proposed operations or their continuation.²⁰*
- (b) Authorising officers should conduct a thorough review of all undercover operations that last longer than six months. This review will be in addition to an independent review by the Surveillance Commissioners.*
- (c) Subject to reconsideration of the public order component (see Recommendation 3), domestic extremism operations should continue to be managed within the existing regional Counter Terrorism Unit structure, and there should be oversight by an operational steering group representing a range of interests and agencies. External governance could be provided using arrangements similar to those employed by the counter terrorism network.*
- (d) The rationale for recording public order intelligence material on NDEU's database should be sufficient to provide assurance that its continued retention is necessary and justified given the level of intrusion into people's privacy.*

(contd)

²⁰ An example of such a framework is reproduced in Chapter 4 (p.36).

- (e) *Exit plans should be an addendum to the risk assessment and should be reviewed by the Authorising Officer, and they should be considered by appropriately trained police Cover Officers²¹ and police-employed psychologists collectively, alongside risks to the operational strategy and welfare of undercover officers.*
- (f) *In order for safeguards to operate effectively consideration should be given to undercover officers waiving their right to confidentiality allowing the psychologist to brief managers of any concerns.*
- (g) *The 2003 ACPO Guidance needs urgent revision taking account of the findings of this and other reviews.*

Special Demonstration Squad

Following media reports²² about the behaviour of officers in the MPS Special Demonstration Squad (SDS), HMIC reviewed whether there was any overlap of people or processes with the NPOIU.

The SDS was formed following the anti-Vietnam riots in London in 1968, and closed in 2008. The work of the Squad had similarities to the NPOIU's in that they were both located in the MPS and deployed undercover officers for long periods to gather intelligence (rather than evidence) with the aim of preventing serious crimes associated with protest. However, there were also significant differences: the SDS operated in London, whereas the NPOIU operated nationally; and they worked independently, both sometimes sending officers to the same event, for example.²³

HMIC found that a small number of staff and managers had worked for both the SDS and the NPOIU. The work that they had undertaken included training, providing guidance, recruiting staff and authorising undercover operations.

The MPS has already referred matters relating to the court appearances of an SDS officer to the IPCC. HMIC has communicated additional matters to the IPCC for their consideration.

In light of the lessons learned from this review, it would be prudent for there to be a separate, external and independent review of all the other MPS units which carry out undercover work, but were outside the scope of this report.

The MPS has agreed to undertake such a review of their relevant units, in order to assure the MPS Commissioner that current best practice is being applied.

²¹ A Cover Officer acts as a link between the undercover officer and their unit and managers.

²² These media reports included allegations that officers from the unit had intimate relationships while working undercover, and that they gave evidence in court under their assumed identity inappropriately. E.g. 'Police accused of allowing undercover officers to lie in court', *Guardian*, 20 October 2011; 'Second undercover officer accused of misleading court', *Guardian*, 22 October 2011.

²³ See Table 2 on p.38 for more differences between the units.

2. Background and context

Serious criminality and serious disruption

Over the last decade, some members of society have chosen to pursue a belief or cause through serious criminality or by serious disruption of the community arising from criminal activities, rather than through the democratic process. The police are tasked by society to protect the public by preventing these crimes and, if they do happen, by bringing the perpetrators to justice. For example:

- *Environmental activists* have been convicted of a range of offences over the last 10 years, associated with protests against (for instance) genetically modified crops; the burning of coal; and the expansion of aviation. Notable incidents have included the hijacking of a coal train in 2009, and conspiracies to disrupt power supplies.
- *Animal rights extremist* tactics have included violent criminality, such as arson and planting improvised explosive devices.²⁴ Their tactics also included intimidation and harassment, which reached a peak in 2004 when an average of 40–50 company directors and scientists a month received home visits, during which cars and property were vandalised. There have also been many incidents of threatening letters, hoax letter bombs, and public disorder.²⁵
- Elements of the *extreme right wing*, such as Combat 18, have actively pursued violent tactics. The nail bombing campaign by David Copeland in 1999, and the conviction in 2010 of Terence Gavan (who had assembled a large cache of firearms and homemade bombs)²⁶ highlight the threat that can be posed by right wing extremists who are prepared to resort to serious violence.

The difficulty for the police is identifying those individuals who are intent on serious criminal activity, while protecting the rights of those who wish to protest peacefully. Key to differentiating between the two is reliable intelligence;²⁷ and one tactic used by the NPOIU to gather this intelligence was the deployment of undercover officers.

²⁴ There were convictions in 2007 for arson, attempted arson, and possessing explosives with the intent of carrying out explosions; and in 2009 for conspiracy to commit arson.

²⁵ Setchell, Anton, the National Coordinator for Domestic Extremism (2007) [communication – letter] 14 January 2007. Restricted.

²⁶ Referenced in Secretary of State for the Home Department (2011) *PREVENT Strategy* (Cm 8092, 2011).

²⁷ Intelligence is defined by the NPIA (in their *Guidance on the National Intelligence Model*) as information that has been subject to a defined evaluation and risk assessment process in order to assist with police decision making.

Code of Conduct for Undercover Officers

The current ACPO Manual of Guidance²⁸ sets out a National Code of Conduct for Undercover Officers. The Guidance states that, in addition to the oversight function of the Surveillance Commissioners (see p.7), an ACPO officer will be appointed in each force to oversee adherence to the Code. It also states that all undercover officers will comply with the Code.

The Code sets out 17 statements covering the professional and personal standards expected of the undercover officer, and a number of process issues around the voluntary nature of the work and the deployment of officers.

The Code:

- Clearly states that undercover officers remain bound by the laws, rules and regulations governing the conduct of law enforcement agencies, and that an undercover officer remains bound by their respective discipline codes whilst in role. Whilst it is recognised that behaviour in role will of necessity reflect the requirements of an operation, conduct must still be consistent with the spirit of the regulations and with the fundamental aims of the respective organisation.
- Places responsibility on undercover officers not to undertake, or to remain committed to an operation to which they feel unfit; not to embark upon a course of action which unnecessarily risks their physical or mental well-being; and to agree to attend psychologist appointments *as required* (emphasis added).
- Explicitly states that undercover officers, as well as being bound by the Official Secrets Act, have an ongoing duty to maintain the confidentiality of undercover operations, investigations, methodology and capability.
- Requires undercover officers to have completed the National Undercover Training and Assessment Course and signed the Code.

The behaviour of Mark Kennedy and the media allegations about other suspected undercover officers have arisen partly because officers have not behaved as one would expect a police officer to behave whilst deployed on duty. The Code is a clear statement of expectations and standards. Undercover officers have a responsibility to behave in accordance with those standards, while their cover officers and managers have also both to reinforce the standards and to seek to monitor compliance where practicable.

The ACPO Manual of Guidance is currently being updated, and learning from this review should be incorporated in the revised version.²⁹

²⁸ ACPO (2003) Manual of Guidance. Restricted.

²⁹ See Recommendation 4.

This review

The terms of reference for this review (attached at Annex A) have taken account of the other reviews into undercover operations in Nottinghamshire that are taking place concurrently.³⁰ HMIC has focused on how intelligence is authorised and controlled to support the policing of protest involving criminal activity.

HMIC has not reviewed specific undercover work carried out by other units in relation to the policing of protest. However, following media reports³¹ about the behaviour of officers in the MPS Special Demonstration Squad (SDS), we have undertaken an examination of the level of interchange of personnel, systems and practices between the SDS and the NPOIU.

Methodology

HMIC gathered evidence for this report through interviews and a review of available documentation. The full methodology is set out at Annex B.

We have also consulted widely – not simply with police stakeholders and other members of the law enforcement community, but with representatives of protest groups, advocates of civil liberties, and the Office of Surveillance Commissioners, as well as representatives of businesses and industries which have found themselves the target of protests in the past. We also invited Mark Kennedy to take part in this review, and to read this report before publication; he chose to decline both offers.

HMIC has had access to the case files of undercover operations, but we are not publishing the details, in order to protect both the identity of the officers involved and the details of the techniques that they use. This information has, however, been used to inform the recommendations (where appropriate).

HMIC's review has been subject to independent oversight in the form of an External Reference Group. This group comprised members of the House of Lords, the judiciary, civil liberty groups, academia, the Serious and Organised Crime Agency (SOCA) and elected representatives. We have also taken legal advice on the issues raised by this report.

³⁰ Including those by SOCA, the Crown Prosecution Service (CPS), and Independent Police Complaints Commission (IPCC).

³¹ E.g. 'Police accused of allowing undercover officers to lie in court', *Guardian*, 20 October 2011; 'Second undercover officer accused of misleading court', *Guardian*, 22 October 2011.

3. National Public Order Intelligence Unit undercover operations

The National Public Order Intelligence Unit (NPOIU) was created in 1999 as part of the Police Service's response to campaigns and public protest which generate violence and disruption (particularly those focused on animal rights, some environmental issues and extreme political activism). Its purpose was to gather and co-ordinate intelligence. In January 2011, the NPOIU was subsumed with other units under the National Domestic Extremism Unit (NDEU) within the MPS (discussed further below, p.30).

The NPOIU was involved in the successful collection of intelligence on violent individuals, whose criminal intentions or acts were subsequently disrupted, and who were in some cases brought to justice. These were not individuals engaging in peaceful protest, or even people who were found to be guilty of lesser public order offences. These were individuals intent on perpetrating acts of a serious and violent nature against citizens going about their everyday lives.

The NPOIU used a variety of intelligence gathering techniques to build knowledge about groups, campaigns and individuals, including the deployment of undercover police officers. Such intrusive tactics could and can only be authorised by senior police officers.

System of control of undercover officers

Authorities for NPOIU undercover deployments were managed within the MPS until 2006, when a decision was taken that the forces where the majority of activity was taking place should be responsible for authorising future deployments. The new process therefore involved officers from the NPOIU approaching force authorising officers and presenting them with the case for an undercover deployment.

The ACPO Guidance³² prescribes the system by which undercover officers are controlled and supported, so that the risks associated with the tactic can be minimised. The key elements are:

- **Selection & training** – designed to prevent inappropriate candidates being appointed, harm to the public and the police, and exposure of the tactic.
- **Authorisation, review and oversight** – designed to prevent ethical and legal mistakes, breaches of human rights, and wasted cost.
- **Operational supervision** – designed to support the officer but also to prevent inappropriate conduct by the officer, targeting of the wrong people, and harm to the public and the police.

³² ACPO (2003) Manual of Guidance. Restricted.

- **Psychological reviews** – designed to prevent problems going unseen, management being unaware of the welfare of officers, and the prospect of the officer taking control.
- **International rules** – designed to prevent ethical and legal mistakes, harm to the public and the police, and reputational damage to the UK.
- **Exit strategies** – designed to protect the officer and to prevent the inappropriate end to an operation, enabling the safe removal of an officer, and minimising the prospect of the officer taking control.

HMIC benchmarked the use of these controls with practice found in police forces, SOCA, HM Revenue & Customs (HMRC), the Security Service and other agencies (such as the US Federal Bureau of Investigation). Levels of compliance and robust control were generally found to be consistently strong in these organisations. HMIC accepts both that undercover work is a high-risk tactic, and that one of these associated risks is that undercover officers might (from time to time) work outside their remit. No absolute guarantees can be made: only assurance given, through tight controls.

HMIC has examined all undercover operations conducted by the NPOIU since its creation. The number is small, particularly in comparison with organised crime operations. We found examples of insufficient case management, inadequate application of control mechanisms (e.g. around corroboration of intelligence) and insufficient high-level operational oversight. Overall control of undercover operations by the NPOIU was not as strong as it should have been.

Selection and training

HMIC found that the selection process for undercover work appears robust. Candidates can (and do) fail the process. Nationally, between 2006 and 2011, 26% of officers seeking selection for advanced undercover roles failed their initial assessment. Likewise, Mark Kennedy was unsuccessful at his first attempt.

Length of NPOIU deployments

Most undercover deployments against organised crime are for short periods of time: enough for a transaction (such as a drug deal) to take place, or for there to be sufficient evidence of a criminal conspiracy. This would involve an officer infiltrating the criminal group, gathering evidence of what they heard being planned or what they saw being exchanged, and passing this evidence on to investigators so arrests and prosecutions could take place. This might take a number of months.

In contrast, NPOIU undercover operations have a significantly longer lifespan (with many lasting years rather than months). There appears to be four main reasons for this:

- The groups they target are structured and operate differently to many organised crime groups. Generally, no commodity is traded; therefore the crimes can be more difficult to define. Also, those intent on serious criminality mix with others who are in contrast pursuing the same or a related cause in lawful ways. Consequently, intelligence development is considered necessary in order to gain clarity about criminal intentions.
- Planning of criminal activity relating to protest and extremism may take place in a 'closed atmosphere', and as such access is restricted and based on trust. It therefore takes time to place undercover officers in a position where they will become privy to significant intelligence.
- Criminal infiltration tactics allow undercover officers to portray their criminal credentials and gain acceptance in a much shorter timeframe than it may take an activist to demonstrate their commitment to a cause in order to gain credibility and trust.
- Although the dangers and challenges of all undercover work should not be underestimated, there is arguably greater risk of harm to an undercover officer in an organised crime group than in a group of activists. This greater risk might, to some extent, be mitigated by shorter deployment.

Intelligence and evidence

The main objective of the NPOIU has been gathering intelligence. This involved building knowledge about the protest groups infiltrated, their aims and links with other groups, their plans and methods, and the people involved in suspected serious crime.

In most undercover organised crime operations, the question of the lawfulness of the deployments rests first with the authorising officers, and then with the courts. But because the product of NPOIU undercover operations was intelligence as opposed to evidence, the judiciary has not had the opportunity to test the authorising officers' decision-making in respect of these deployments.

This lack of exposure to due process in a criminal trial does nothing to strengthen public confidence in the NPOIU, and whilst the OSC inspects force authorisations, the depth and frequency of sampling that they can reasonably conduct is no substitute for independent judicial examination of all the evidence.

Proportionality and necessity

In assessing the proportionality of the deployment of an undercover officer, police have to balance the impact of intrusion against the benefit of preventing some of the most serious crimes. This judgement should also include consideration of why it is necessary to use an undercover officer, i.e. whether the intelligence required can be obtained by less intrusive means.

The authorising officer³³ of an undercover deployment must take into account the risk of intrusion into the privacy of persons other than those directly implicated in the operation or investigation. Such 'collateral intrusion' must be reasonable and justified in the specific circumstances; and the mitigation of all forms of collateral intrusion should be planned for and considered.

There are three main categories:

- inevitable intrusion (such as into the privacy of intimate associates of the subject);
- foreseeable intrusion (such as into the privacy of known associates); and
- general intrusion (such as into the privacy of other members of the public who come into contact with the subject).

HMIC is of the view that authorisation may be proportionate if either there is an actual criminal investigation ongoing, or there is a realistic and imminent prospect of one being started. The best approach is to have a criminal investigation ongoing or in sight; if this is not the case, the police need to take additional measures to satisfy and manage the requirements of necessity and proportionality.

The ACPO Guidance states that undercover officers should only be deployed against 'serious crime': but there is no corresponding statement to qualify the level of public disorder they may be used against. It may be sensible to establish a similar criterion: namely **serious disruption to the life of the community** (derived from section 12 of the Public Order Act 1986) arising from criminality.

The sample of records of all NPOIU undercover operations examined by HMIC should have been much more detailed in relation both to the necessity of using the undercover tactic, and to how the risks of collateral intrusion were considered and managed. These records do not provide assurance that necessity and intrusion were being considered and managed.

HMIC is therefore recommending stronger controls for the use of undercover officers by NDEU. Whether that responsibility remains there or moves elsewhere, a new framework should be agreed, against which these deployments will be tested and periodically reviewed. A practical framework for these purposes is set out in the next chapter (p.36).

Outcomes achieved by NDEU

Recent national police activity supported by the NDEU includes preventing and / or bringing to justice a number of serious crimes, involving threats to life and harm to individuals, serious damage to property, and the acquisition of weapons such as firearms and homemade bombs. (Intelligence attributable specifically to Mark Kennedy is discussed in more detail later.)

³³ Undercover operations are authorised by Chief Officers (not by statute but by police practice). An application must be made to them that describes the necessity and proportionality of the deployment.

Comparative level of authorisations

It appears surprising to HMIC that prior authority from the OSC is required for the deployment of a listening device in the car of a suspected drug dealer, but not for the deployment of an undercover officer. This is a consequence of Regulation of Investigatory Powers Act (RIPA) treating undercover officers in the same way as ordinary Covert Human Intelligence Sources (CHIS).³⁴

The test for authorisation for an undercover officer, who may overhear a conversation because they have formed a relationship with the speaker and is participating in the conversation, is lower than would apply if the same officer had concealed themselves in premises and overheard the conversation because their presence was unknown. Placing a hidden listening device or human listener in premises or a vehicle is 'intrusive surveillance'; placing an undercover officer in the same location by false pretences is not (even if they have recording equipment on them). The practical consequences for this are:

- The test for the deployment is lower, in that intrusive surveillance requires the authorising officer to find that the deployment was necessary for the prevention or detection of serious crime, while for the deployment of a undercover officer the crime at which the deployment is aimed does not have to be serious. This is to comply with the law. (In practice, ACPO placed a restriction on the use of undercover officers to serious crime in 2003. See Annex C.)
- Intrusive surveillance requires the prior approval (in all but the most urgent cases) of a Surveillance Commissioner, without which the authorisation will not take effect. The deployment of an undercover officer does not require prior approval and will be subject only to the random sampling of cases by the Surveillance Commissioners.

Tactic	Authority Level
Interception of communication (wire tap)	Home Secretary
Property interference (i.e. entering a car to fit a listening device)	Chief Constable with the pre-authority of the OSC
Intrusive surveillance (i.e. activating and recording the listening device)	Chief Constable with the pre-authority of the OSC
Undercover officer & CHIS deployments	Superintendent ³⁵
Acquisition of telecoms data (billing & subscriber)	Superintendent
Directed surveillance (i.e. planned observations to prevent local crime)	Superintendent

Table 1: Illustration of authority levels for surveillance

³⁴ See Annex C for an explanation of CHIS.

³⁵ In practice, undercover operations are authorised by Chief Officers (not by statute but by police practice).

Ratcliffe-on-Soar

On 20 July 2011, the Court of Appeal quashed the convictions of the 20 defendants who had been found guilty of conspiring to disrupt the power generation at Ratcliffe-on-Soar 'because of the failure of the Crown to make proper disclosure of material relating to the role and activities of the undercover police officer Mark Kennedy (who had worked for the NPIOU for seven years), as well as materials which had the potential to provide support for the defence case or to undermine the case for the prosecution.'³⁶

The judgement ruled that: 'the material that the Crown failed to disclose was pertinent to a potential submission of abuse of process by way of entrapment.' It also highlighted some of the boundaries set by Mark Kennedy's handler within which he was expected to operate.

The law *does* allow for an undercover officer to participate in criminal activity, but this must be authorised, and the limits of the authorised conduct made clear. In addition, specific restrictions must be placed on the behaviour of the undercover officer, such that:

- they must not actively engage in planning and committing the crime;
- they are intended to play only a minor role; and
- their participation is essential to enable the police to frustrate the crime and to make arrests.

Examination of the authorisations and risk assessments by the authorising officer indicated that specific parameters for Mark Kennedy's deployment were set. These included outlining how far he was authorised to partake in criminal activities.

However, the Court of Appeal ruled that 'Kennedy was involved in activities which went much further than the authorisation he was given'. Examples of this included attending an activist briefing, checking an area for police activity and joining the team that planned to climb the power station structures. The judgement continues that this 'appeared to show him as an enthusiastic supporter of the proposed occupation of the power station and, arguably, an agent provocateur'.³⁷

In an earlier judgement, Lord Hoffman stated that undercover officers could hardly remain concealed unless they showed some enthusiasm for the enterprise. He also said that: 'A good deal of active behaviour in the course of

³⁶ *R v. Barkshire* [2011] EWCA Crim 1885, 20 July 2011.

³⁷ An agent provocateur is someone employed by the state, acting undercover, who incites others to commit a crime. Home Office guidance is explicit: 'No member of a public authority or source (informant) should counsel, incite or procure the commission of a crime' (Home Office Circular 97/69). This is slightly different from the term 'entrapment', which means that the offence alleged was committed only because of the incitement of the undercover officer, who has therefore committed an unlawful act (*R v. Loosely*, Attorney General's Reference (No 3 of 2000) [2001] 1 WLR 2060). Case law exists to guide the police and the courts in what amounts to acting as an agent provocateur. The test to be applied is whether the police merely provided the defendant with an unexceptional opportunity to commit a crime which he or she was already predisposed to commit, or whether they have truly created a crime which would otherwise not have occurred.

an authorised operation may therefore be acceptable without crossing the boundary between causing the offence to be committed and providing and opportunity for the defendant to commit it.³⁸

However, in this case (and because of the failure by the prosecution to disclose information) the defence 'were not in a position to advance submissions based on potential entrapment by a participating informer, or to address these issues'.

Mark Kennedy

Mark Kennedy was deployed undercover by the NPOIU for a total of nearly seven years. During that time he was tasked to gather intelligence on individuals, groups and campaigns about a variety of issues, mainly linked to environmental concerns. He worked on operations throughout the United Kingdom and on deployments to 11 other countries. However, HMIC found that Mark Kennedy operated outside the Code of Conduct for Undercover Officers (see p.16). This suggests that NPOIU operational supervision, review and oversight were insufficient to identify that his behaviour had led to disproportionate intrusion.

Length of deployment

Mark Kennedy has not been found to have entrapped others; but clearly there is a danger that undercover officers in situ for long periods may be given greater responsibilities by those they are deployed amongst, as the group's trust in them grows. This could signal a shift towards a more leading role, which increases the risk that they will be drawn into acting as an agent provocateur.

Mark Kennedy was in the field for long periods: on one occasion for around six weeks without a break or return to his family. This increased risk that might have been avoided by better planning for shorter periods in the field.

Authorisation, review and oversight

Chief officer authorisations, regular reviews and the routine checks of undercover officers' continuing deployment should have provided some assurance (albeit no guarantee) of behaviour in the field. Risks and signals associated with undercover officers need to be clearly understood by all those in a management role. There must be comprehensive control, with some 'triangulation' or corroboration of the undercover officer's actions and of the accuracy of the information they pass to their controllers (for example, from another undercover officer).

No single authorising officer appears to have been fully aware either of the complete intelligence picture in relation to Mark Kennedy or the NPOIU's activities overall, or of the other intelligence opportunities available to negate

³⁸ *R v. Loosely*, Attorney General's Reference (No 3 of 2000) [2001] 1 WLR 2060.

the need for an undercover officer. Additionally, it was not evident that the authorising officers were cognisant of the extent and nature of the intrusion that occurred; nor is it clear that the type and level of intrusion was completely explained to them by the NPOIU. This would have made it difficult for them to assess accurately whether deployments were proportionate.

There were two instances during Mark Kennedy's deployment when the authorisation for his use and conduct under the Regulation of Investigatory Powers Act 2000 (RIPA – see Annex C for a summary of the legal framework) had lapsed:

- for three days in 2005, due to poor administrative processes; and
- for five days in 2008, while responsibility for the authorisation moved from the Metropolitan Police Service (MPS) to Nottinghamshire Police.

These instances are, in HMIC's view, more indicative of poor supervision and administration than of the more substantive issues of control described elsewhere in this report.

In terms of oversight, authorities for Mark Kennedy were selected at random on two occasions for review by the OSC in the course of his deployments. This selection was in no way associated with risk and consisted of a compliance check of whether policies and guidance were being adhered to, rather than an examination of whether the deployment was proportionate or necessary.

Operational supervision

There were indications that Mark Kennedy was becoming resistant to management intervention. He seems to have believed that he was best placed to make decisions about how his deployment and the operation should progress:

- his managers reported that he defied instructions and worked outside the parameters set by his supervisors by accompanying a protestor abroad in 2009;
- in 2006 he carried on working despite his arrest and contrary to his instructions; and
- he has claimed that he had at least two intimate relationships with female protestors (although he did not make these claims to the NPOIU during the seven years of his deployment).

These are the incidents that have come to light. The full extent of his activity remains unknown. HMIC is of the view that Mark Kennedy should have been withdrawn by his managers in 2009, when it was discovered that he had defied his instructions.

Day-to-day supervision and support was provided by a dedicated sergeant (a Cover Officer),³⁹ who worked closely with Mark Kennedy for the entire period

³⁹ See footnote 21 above.

of his deployment. This supervisor was responsible for Mark Kennedy's welfare, as well as for providing advice about his deployment and reviewing the intelligence produced. A close relationship had built up over nearly seven years, and the degree of challenge and intrusiveness into Mark Kennedy's activity proved insufficient. Conflating the roles of a welfare officer and an intrusive supervisor needs to be reviewed by the relevant ACPO working group. In addition, appropriate training for Cover Officers in dealing with people who are in extremely testing operational conditions needs to be considered.

The dangers of insufficient supervision, long deployments and resistance to management intervention are clear:

- the risks to undercover officers, both physical and psychological, may increase;
- police operations may be frustrated;
- police officers may find themselves in unnecessarily difficult situations; and
- if acting outside the authority, the undercover officer may be acting inappropriately or even illegally.

Whilst the NPOIU had some senior and experienced officers, HMIC found there were insufficient checks and balances to evaluate and manage Mark Kennedy's deployment. The measures in place (such as monitoring intelligence reporting on Mark Kennedy's activities whilst deployed) proved ineffective. Later, stricter supervision did identify problems and firm management action led to the withdrawal of Mark Kennedy from his deployment.

Whatever Mark Kennedy's rationale for his actions in the field, the absence of robust controls and systems can (and in Mark Kennedy's situation did) give rise to the kinds of difficulties that were exposed by the Ratcliffe-on-Soar case.

Intelligence provided

Nevertheless, Mark Kennedy did help to uncover serious criminality, although the lack of specific outcomes makes an objective assessment of success extremely difficult.

Examples of operations where his intelligence appears to have assisted include:

- A European-wide protest group whose aim was to unite the most violent of European protesters in order to take part in combined protests in cities which they perceived to be subject to political unrest. This group had the capability to create and use improvised explosive devices (homemade bombs).
- An anti-fascist group whose main objective was to disrupt the activities of the extreme far right wing groups and political parties. They planned and carried out physical attacks on members of such groups.

- A network of anarchist groups set up to disrupt the 2005 G8 summit in Gleneagles. The associations and relationships made were utilised to continue the campaign against further G8 gatherings throughout Europe.

Psychological reviews

All undercover officers must undertake regular psychological assessments.⁴⁰ These assessments are a welfare provision for the officers and as such the psychologists undertaking them are bound by client / patient confidentiality. However, if psychologists suspect the health of an officer is being damaged through their work, they have a responsibility to ensure that this is communicated to the officer's employer. In the case of Mark Kennedy, the psychologist did not raise any such concerns.

Exit plans

Psychological reviews should not be the only way of mitigating the risks to the psychological health of an officer. Supervisors should also design exit plans (with input from psychologists) which, for example, consider the duration of deployments and the intensity of the work.

The long-term aspects of Mark Kennedy's welfare and personal development were not well provided for. Little consideration was given to an exit strategy to allow either for short-term extraction during the deployment or for his withdrawal and potential replacement. Authorising officers appear not to have considered such a strategy until the end of his deployment.

Training courses to support Mark Kennedy's long-term development as a police officer and to enable reintegration were identified. These were not progressed until the latter part of his service (between 2009 and 2010). This was due to a lack of commitment to this on the part of both Mark Kennedy and the NPOIU.

International rules

Mark Kennedy was used in or visited 11 countries on more than 40 occasions, including 14 visits to Scotland. There is evidence that the NPOIU were securing agreements with the destination countries for Mark Kennedy's overseas deployments; but they were not (on occasions) informing the authorising officer that he was going overseas, nor providing them with relevant information about what happened while he was overseas.

⁴⁰ Up to four times a year, according to deployment status.

Disclosure⁴¹

The issue of disclosure was outside the terms of reference of this review. However, in July 2011, the Director of Public Prosecutions, Keir Starmer QC, asked the retired Court of Appeal Judge and Chief Surveillance Commissioner, Sir Christopher Rose, to conduct an independent inquiry into the CPS's handling of the Ratcliffe-on-Soar power station protest cases. Sir Christopher Rose published his report on 06 December 2011.⁴²

⁴¹ 'Disclosure' is a component of a fair justice system in which the prosecution reveals all material held that weakens its case or strengthens that of the defence. Attorney General's Guidelines on Disclosure, www.cps.gov.uk, accessed January 2011.

⁴² Available from www.cps.gov.uk.

4. The NPOIU and its governance

Given the concerns that the Mark Kennedy case has raised around the implementation of the system of control within the NPOIU, HMIC has considered the work of its two sister units,⁴³ as well as the governance arrangements for all three.

In 2006, the NPOIU became a part of the National Domestic Extremism Unit (NDEU). The NDEU works on both domestic extremism and public order.

The NPOIU's two objectives: Domestic extremism and public order

The term 'domestic extremism' was coined at some point shortly after 2001, but is not legally defined. It is not unique in this regard: there are many colloquial terms in policing (such as domestic abuse and organised crime) which assist with identifying the nature of the work, but have no legal definitions. However, ACPO uses the following definition:

*Domestic extremism and extremists are the terms used for activity, individuals or campaign groups that carry out criminal acts of direct action in furtherance of what is typically a single issue campaign. They usually seek to prevent something from happening or to change legislation or domestic policy, but attempt to do so outside of the normal democratic process.*⁴⁴

This definition includes all forms of criminality, no matter how serious. It could lead to a wide range of protestors and protest groups being considered domestic extremists by the police. HMIC questions whether this is appropriate, and if the police should instead reserve this potentially emotive term for serious criminality. It was suggested earlier (p.21) that a cut-off for the proportionality test might be 'serious disruption to the life of the community arising from criminal activity'; perhaps there would be some merit in developing this as a working reference point for what constitutes domestic extremism. Consideration might also be given to the definition of extremism starting with that contained within the Government's *PREVENT*⁴⁵ strategy, which although not necessarily defining extremism as criminal or for the police to deal with, does contain a sense of severity:

⁴³ The National Extremism Tactical Co-ordination Unit and the National Domestic Extremism Team (see p.31).

⁴⁴ ACPO (2006).

⁴⁵ The *PREVENT* Strategy, launched in 2007, seeks to stop people becoming terrorists or supporting terrorism. It is the preventative strand of the Government's counter-terrorism strategy, *CONTEST*.

*Extremism is defined as the vocal or active opposition to fundamental British values, including democracy, the rule of law, individual liberty and mutual respect and tolerance of different faiths and beliefs. We also include in our definition of extremism calls for the death of members of our armed forces, whether in this country or overseas.*⁴⁶

Protest differs from domestic extremism in that it is part of the democratic process, providing a legitimate means for citizens to express their views, promote their cause and inform others (including those in Government). On occasions serious crime is committed during protests. However, the deployment of undercover officers to tackle serious criminality associated with domestic extremism should not be conflated with policing protests generally, as it is unlikely that the tests of proportionality and necessity would be readily satisfied in the latter case.

The NPOIU and the National Domestic Extremism Unit (NDEU)

The NPOIU was formed within the MPS in 1999 to gather and co-ordinate intelligence. In 2006 the NPOIU was moved to ACPO, along with two sister units:

- The National Extremism Tactical Co-ordination Unit.⁴⁷ This unit was established by the Chief Constable of Cambridgeshire in 2004 to provide advice to the police and to the industries and victims affected by national extremism.
- The National Domestic Extremism Team.⁴⁸ This was created a year later by the newly appointed National Coordinator for Domestic Extremism (NCDE).

All three units were brought together to form the NDEU, under the command of the NCDE.

Initial governance arrangements for the NPOIU included the creation of a Steering Group (established in 1999 and comprising chief officers, Home Office representatives and other stakeholders). This stopped meeting in 2007. In 2004 the NCDE was appointed, but the role has not been filled by an individual with the seniority of a chief officer since 2009.

Wherever the units have been located, they appear to have operated in isolation from the host organisation, and to have lacked effective governance. Consequently, they took responsibility for operations when no other organisation was prepared to take the lead. The NPOIU remained primarily an intelligence-gathering body, with no investigative responsibility.

⁴⁶ Secretary of State for the Home Department (2011), *PREVENT Strategy* (Cm 8092, 2011).

⁴⁷ NETCU provided advice and guidance to forces tackling domestic extremism, and acted as a crime prevention unit supporting industry, academia and other organisations that have been or could be targeted by extremists.

⁴⁸ NCDE provided strategic support and direction to police forces dealing with domestic extremism investigations.

Following reviews within ACPO TAM,⁴⁹ and HMIC's *Counter Terrorism Value for Money* inspection in 2010 (unpublished, restricted), it was recognised that there was a need to redistribute aspects of ACPO TAM's work into more appropriate lead force arrangements (in a similar way to those which helped to establish the national counter terrorism network). The primary concern was that operational units should be under the governance of a lead force and not run by ACPO, a company limited by guarantee and set up for the purpose of providing a strategic view on policing matters. Additionally, it was considered that the lead force principles enhance effectiveness and efficiency by putting in place a single legal/contracting entity capable of recruiting, employing and administering staff, without excessive accommodation, travel and central service allowances.

The ACPO TAM Board thus agreed that the funding streams of the units should be merged to create a single national function under the lead force principles, with the MPS invited to provide that lead. The three units moved to the MPS in January 2011.

The NDEU retains the functions of its precursor units, and in particular its role regarding intelligence collection, investigation support and raising awareness of the issues more broadly. HMIC recognises the continuing need for a function that can fulfil those responsibilities across a range of criminality.

Staff and training

Historically, one of the features inherent in this kind of arrangement (i.e. 'lead force principles') was that all staff were employed by the lead force. However, the ACPO TAM Board considered that there should continue to be an opportunity for police officers from around the UK to be seconded to the NDEU, to ensure that the unit maintains a level of national representation. The number of such secondees should reflect the operational requirement or necessity.

There is formal training for senior staff, which covers some of the issues on decision-making (such as critical incident training) and debriefing. However, there is no formal training provision for authorising officers. Since 2009 the MPS has raised awareness of some of the key issues (around the tactics, the role of the authorising officer, and necessity and proportionality) through an input to the Senior Command Course; this input has been further improved by ACPO in the past year, but is still insufficient. Knowledge of RIPA authorities and covert tactics is usually based on experience gained in more junior ranks before becoming a chief officer; however, not all those who go on to be chief officers necessarily have had such experience.

⁴⁹ The Association of Chief Police Officers (Terrorism and Allied Matters) (ACPO TAM) is the business area of ACPO which deals with terrorism, extremism and associated issues.

Current threats being managed by NDEU

The focus for the work of the precursor units and for NDEU today concerns protest associated with extreme methods used in environmental protest, animal rights and violent political extremism. Other activity is also considered where emerging threats are identified, and where significant events create a unique opportunity for activists.

The NDEU's role covers both domestic extremism and public order policing. By way of example, the NDEU were involved in efforts to obtain and co-ordinate intelligence during the August 2011 public disorder, which originated in Tottenham and spread beyond London.⁵⁰ NDEU's role in this has been described more fully by HMIC in our 2011 report, *The Rules of Engagement*.⁵¹

Intelligence systems

As NDEU is the sole national body for the collation and analysis of domestic extremism intelligence, it receives intelligence from police forces, counter terrorism units (CTUs), industry and open sources on the full range of protest activity. To manage the threats described in the previous section, the NDEU also submits bespoke intelligence requirements to law enforcement partners on particular groups and planned events of interest.

When intelligence is received by the NDEU it is recorded on a computer database. Not all intelligence received is recorded, but rather a subjective decision is made about the relevance and value of what has been submitted. In some cases additional checks are made to ensure the correct information is being stored – but this is not common. If intelligence is not recorded, contact is made with the force or unit that provided it, to clarify if the intelligence is complete or to advise the force that the intelligence fails to meet the requirements of NDEU.

During the early part of the 2000s, a weeding policy was developed which meant a record would be removed from the database if there had been no new intelligence for six months. However, this never formed a definitive policy; and in practice, by 2006 weeding was not robust. The current database has an automatic weeding process, although it still requires human confirmation. Since 2008 more than 2,900 expired entries and documents have been removed from the database.

HMIC has examined the NDEU database and found that in a number of cases the rationale for recording and retaining the intelligence was not strong enough (in terms of the 'necessity and proportionality' tests). This makes it difficult for NDEU to provide assurance that these tests are satisfied. In order to meet the Management of Police Information⁵² requirements, NDEU must

⁵⁰ Although some commentators have noted that not all the disorder was attributable to the protest.

⁵¹ Available from www.hmic.gov.uk.

⁵² MoPI is the standard set by the Bichard Review following the murders of Holly Wells and Jessica Chapman.

document the 'objective facts' used to justify retaining intelligence. **HMIC will revisit this issue separately.**

HMIC examined the database used to store images of individuals taken at protest events. Given that there are many hundreds of protest events nationally every year, some attracting tens or hundreds of thousands of people, the database contains a relatively small number of images: fewer than 2,000. The database is continually reviewed and weeded and, since June 2005, a total of 2,063 images have been deleted. HMIC also dip sampled the image database and found a set of controls that was much stronger than those in place for the intelligence database; consequently, the storage of virtually all images examined appeared justified.

Relationship risks

A close relationship was built up over a number of years between the NDEU and those industries which found themselves the target of protests, to raise awareness of threats and risk so that damage and injury could be prevented. A number of police officers have retired from NDEU's precursor units and continued their careers in the security industry, using their skills and experience for commercial purposes. Whilst this is perhaps no different from any other retired officer finding similar employment, HMIC acknowledges NDEU's concerns about attempts by retired officers to then contact and work with NDEU as this, on occasions, led to potential conflict of interests. Given this, HMIC welcomes NDEU's policy that it will have no contact with private security companies which operate in the same type of business.⁵³

A proposed new focus and location for the NDEU

We found that NPOIU undercover operations were technically authorised correctly (with two minor exceptions in the case of Mark Kennedy, see p.25). The authorisations indicate to HMIC that these operations were aimed at serious criminality and not at protest more generally. HMIC's assessment of this is qualified since, as discussed earlier, NPOIU justifications for proportionality and necessity were not well documented. Furthermore, there is evidence of NPOIU undercover officers providing intelligence on protest generally as a by-product of their primary aim of gaining intelligence on serious criminality. If the public are to have confidence in the future operations of the NPOIU (or any similar units), there may be a case for separating out the direction and control of operations that seek to gain intelligence on serious criminality from those that seek to gain intelligence on public order (as well as making improvements in the documentation of authorisations, as discussed above, p.21).

Despite the changes to the organisation in which the NDEU is located, their current mix of responsibilities and remit does not easily fit within any existing policing structure, nor is it fully in line with the remit of any pre-existing

⁵³ HMIC considers the issue of post service employment in its 2011 report, *Without Fear or Favour: A review of police relationships*. Available from www.hmic.gov.uk.

agency. This has been a recurring structural problem throughout the existence of the precursor units,⁵⁴ and is characterised by the poor case management and control described earlier in this report.

The emergence of the National Crime Agency (NCA) might present a suitable location. Its precise remit has not yet been defined, although it is known that it will focus primarily on serious crime. As a national agency, with a large intelligence capability, the NCA would have the requisite capacity and capability to facilitate authorisation of the NDEU's covert intelligence gathering tactics. Its national reach would also allow for strategic oversight and coordination of the NDEU's activities, as well as provide an opportunity to separate its work on domestic extremism and public order. However, this model might increase pressure on the NCA to dramatically extend its remit by taking on counter terrorism as well.

It is essential that a long-term home be found for the NDEU, where robust governance, leadership and support can be provided. There may be other options in the future, but for now a lead force connected to the counter terrorism network offers the best prospect.

The lead force arrangements (see p.31) that currently exist within the MPS around counter terrorism could meet these requirements, subject to reconsideration of the public order intelligence component. Currently, there is clear operational oversight of extremism under the Senior National Coordinator for counter terrorism, and there is a plan to appoint a dedicated chief officer coordinator. An operational steering group, representing a range of interests and agencies, could strengthen the consideration of taskings, priorities, trends and the standing of this work within the wider context of risk and the *CONTEST* strategy.⁵⁵ External governance could be provided using arrangements similar to those employed by the counter terrorism network.

Presently, the work of the NDEU amounts to an amalgam of public order/crime and extremism intelligence development work. The work of units developing intelligence on sensitive issues must be carefully focused. The essence of intelligence is 'fore knowledge' of threats and sources. The further 'upstream' intelligence gathering goes, the more intrusive the methods required; this brings major challenges for the police.⁵⁶

HMIC discussed the potential remit of the NDEU with practitioners, policy makers and others. It was acknowledged that the current ACPO definition of domestic extremism is too widely drawn; but it proved difficult to secure consensus on a more precise mission for police purposes. Considering the nature of the work, this is understandable. Precise definitions can also be counter-productive, as the nature of extremist activity morphs in the way it operates and draws in others.

⁵⁴ The NPOIU, National Extremism Tactical Co-ordination Unit, and the National Domestic Extremism Team: see p.30.

⁵⁵ *CONTEST*, the UK's counter terrorism strategy, aims to reduce the risk from terrorism to the United Kingdom and its interests overseas.

⁵⁶ The definition of domestic extremism, and how this is distinct from public order, is discussed further above (p.29).

An alternative approach is to recognise the broad definition of the Government's *PREVENT* strategy as a starting point, and have guidelines or a framework designed to enable criminal extremism to be addressed in a proportionate way. We have therefore looked at critical ingredients or principles that could act as a reference point when deciding on requests for the unit to develop intelligence, and so ensure their operation remains within appropriate boundaries. Again, this has been discussed with practitioners, who (it emerged) use a variety of reference points, including (but not limited to) a consideration of the seriousness of the harm caused.

To illustrate what is possible in guiding decision-making, HMIC has blended together practical principles (as referenced by practitioners) with a set of ethical principles for intelligence and the legal requirements. The result is set out on the next page.

This approach is helpful in setting boundaries, but will not necessarily deal with all the intelligence, all the vulnerabilities to the public or all the medium-term threats. It may also not provide sufficient information on trends to meet the needs of policy advisers and politicians. Those responsible for policing will need to consider this carefully.

Separating out public order from domestic extremism will in the future require a clear practical framework in terms of the focus and threshold for activity to be dealt with. Whilst (as we discuss above), the opportunity for overlap needs to be considered, ideally some clear space should be seen between these two functions to ensure operational focus and public confidence.

A practical framework to review proposed undercover operations or their continuation⁵⁷

1. **There must be *sufficient cause for police action*.** Police should only become involved if there are reasonable grounds for suspecting that the activity in question is likely to lead to serious criminal acts or to the planning or committing of serious disruption to the public. Professional judgments about this need to be framed in reference points such as 'criminal intent', 'motivation', 'impact on the community', and 'the type of activity anticipated' – but they also need to be tempered against equally important judgements about freedom of speech and rights to protest. Actions intended to undermine parliamentary democracy, where criminality is not clear, should remain the remit of the other agencies.
2. **There must be *integrity of motive*.** The police must make their own independent operational judgement of sufficient cause and not be swayed by public opinion or other domestic or international pressure. It is a police decision, case by case, whether investigations are best carried out by the relevant local force or nationally.
3. **There must be *proportionality*.** The degree of intrusion must be proportionate to the harm to the public that the actions are intended to forestall. The more serious the potential harm, the more intrusion into the rights of the individuals would be justified.
4. **There must be *proper authority*.** This must be via a clear chain of command from senior police officers, including appropriate legal approvals and warranty, with full oversight of activity and proper records of operational activity. (We suggest some additional considerations on authorities granted below.)
5. **There must be a *reasonable prospect of success*.** Even if there is sufficient cause and the methods used are proportionate, there needs to be a comprehensive assessment of risk to the police, their sources and to the public (particularly in terms of collateral intrusion).
6. **There needs to be *necessity*.** Can the purpose be achieved through non-intrusive means, or can it be resolved by other non-law enforcement agencies?

⁵⁷ Adapted with the assistance of Sir David Omand. See (2010) *Securing the State*. Hurst & Co.

5. Other units conducting similar work to the NPOIU

MPS Special Demonstration Squad (SDS)

This review has focused on Mark Kennedy, the NPOIU and its sister units. The learning contained within this report is applicable to any other police unit that has, is, or may be considering deployment of undercover officers.

However, following allegations published in the media⁵⁸ about the behaviour of officers from the MPS's Special Demonstration Squad (SDS), HMIC has reviewed whether their people or processes overlapped with those of the NPOIU. These media reports included allegations that officers from this unit had intimate relationships while working undercover, and that they gave evidence in court under their assumed identity inappropriately.

HMIC has compared SDS people, policy and practices with those of the NPOIU. In the time available, this exercise could be no more than limited, using available documents. The SDS was closed down by the MPS in 2008.

The SDS was formed following the 1968 anti-Vietnam war riots in Grosvenor Square to gather information about public order problems and to build knowledge of extremist organisations and individuals. The SDS focused on 'anti-war', 'anti-nuclear' and 'Irish terrorism'. The Government provided direct funding for the SDS, and was provided with an annual update on activity from 1968 to 1989.

The SDS worked on themes similar to the domestic extremism work of the NPOIU. Like the NPOIU, SDS officers were used to gather intelligence rather than evidence, and their deployments, in the main, lasted for years rather than months. However, there were differences. The SDS operated largely within London for the MPS, whilst the NPOIU operated mainly outside the capital for all other police forces. Furthermore, although they targeted similar groups, they worked independently, sometimes both sending officers to the same events (such as G8 and G20).

HMIC found that a small number of staff and managers had worked for both the SDS and the NPOIU. The work that they undertook included training, providing guidance, recruiting staff and authorising undercover operations. Mark Kennedy knew some SDS officers and, for a period of time, he was authorised by the same officers that oversaw SDS deployments. Links of practice, focus and people fade around 2005/06.

⁵⁸ E.g. 'Police accused of allowing undercover officers to lie in court', *Guardian*, 20 October 2011; 'Second undercover officer accused of misleading court', *Guardian*, 22 October 2011.

Differences between SDS and NPOIU deployments

Before 2000, there was no specific legislation defining the rules of undercover policing, only case law and police guidance. Home Officer Circular 97/1969 provided advice on 'informants participating in crime', and in 1999 ACPO and HM Revenue and Customs published a public statement on standards in covert law enforcement techniques.

A 1995 SDS manual describes how their undercover 'Field Officers' should operate.

HMIC found distinct differences between SDS and NPOIU training, tactics, review and integration, as the following table shows.

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

Table 2: Differences between SDS and NPOIU deployments

The MPS has already referred matters relating to the court appearances of an SDS officer to the IPCC. HMIC has communicated additional matters to the IPCC for their consideration.

Other units conducting similar work – beyond the SDS

In light of the lessons learned from this review, it would be prudent for there to be a separate, external and independent review of all the other MPS units which carry out undercover work, but were outside the scope of this report.

The MPS has agreed to undertake such a review of their relevant units, in order to assure the MPS Commissioner that current best practice is being applied.

Giving evidence in court

Media stories⁵⁹ 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

⁵⁹ See for instance footnote 22 above.

HMIC's remit.⁶⁰ 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.⁶¹

⁶⁰ HMIC's role is to inspect the efficiency and effectiveness of police. HMIC does not investigate complaints as this is the role of other authorities such as the IPCC.

⁶¹ Under the Coroners and Justice Act 2009. See also Annex C.

6. Recommendations

Recommendation 1 – Home Office (HO), ACPO and OSC

The arrangements for authorising those police undercover operations that present the most significant risks of intrusion⁶² within domestic extremism and public order policing should be improved as follows:

- (a) ACPO should give serious consideration to establishing a system of prior approval for pre-planned, long-term intelligence development operations subject to the agreement of the OSC.*
- (b) The level of authorisation for long-term deployments of undercover police officers should be aligned with other highly intrusive tactics such as Property Interference, as defined by s93 Police Act 1997 (subject to the legal requirements and the agreement of the OSC).⁶³*

In the interim:

- (c) Either a collaborative agreement should be entered into between police forces and the MPS which allows one authorising officer within NDEU to own undercover operations from start to finish, or these operations should be managed in police forces by authorising officers that are:
 - a. Properly trained and accredited. In particular this training should cover the concepts of necessity, intrusion, proportionality, disclosure and risk management.*
 - b. Fully briefed with all the relevant information.**

In making these changes, consideration will need to be given to ensuring the police have some flexibility to deploy covert resources at short notice where operationally necessary, and to minimising potential impacts on Covert Human Intelligence Source (CHIS) work and police collaboration with partners.

Recommendation 2 – ACPO and Home Office

In the absence of a tighter definition, ACPO and the Home Office should agree a definition of domestic extremism that reflects the severity of crimes that might warrant this title, and that includes serious disruption to the life of the community arising from criminal activity. This definition should give sufficient clarity to inform judgements relating to the appropriate use of covert techniques, while continuing to enable intelligence development work by police even where there is no imminent prospect of a prosecution. This should be included in the updated ACPO 2003 guidance.

⁶² Some undercover activities (such as test purchase operations) have a lower level of intrusion.

⁶³ Currently the Office of Surveillance Commissioners dip samples authorisations from all the RIPA applications that the force has made over the preceding year. This may include a sample of undercover work but does not necessarily include all cases, and will not ensure that all domestic extremism deployments are included.

Recommendation 3 – ACPO, MPS and Home Office

The positioning of both public order intelligence and domestic extremism intelligence within the NDEU needs to be reconsidered. There will need to be an incremental transfer to any newly created hub for public order intelligence.⁶⁴

Recommendation 4

In recognition that undercover operations aimed at developing intelligence around serious criminality associated with domestic extremism and public order are inherently more risky, additional controls should be implemented as follows:

- (a) MPS and ACPO leads should adopt a practical framework for reviewing the value of proposed operations or their continuation.⁶⁵*
- (b) Authorising officers should conduct a thorough review of all undercover operations that last longer than six months. This review will be in addition to an independent review by the Surveillance Commissioners.*
- (c) Subject to reconsideration of the public order component (see Recommendation 3), domestic extremism operations should continue to be managed within the existing regional Counter Terrorism Unit structure, and there should be oversight by an operational steering group representing a range of interests and agencies. External governance could be provided using arrangements similar to those employed by the counter terrorism network.*
- (d) The rationale for recording public order intelligence material on NDEU's database should be sufficient to provide assurance that its continued retention is necessary and justified given the level of intrusion into people's privacy.*
- (e) Exit plans should be an addendum to the risk assessment and should be reviewed by the Authorising Officer, and they should be considered by appropriately trained police Cover Officers⁶⁶ and police-employed psychologists collectively, alongside risks to the operational strategy and welfare of undercover officers.*
- (f) In order for safeguards to operate effectively consideration should be given to undercover officers waiving their right to confidentiality allowing the psychologist to brief managers of any concerns.*
- (g) The 2003 ACPO Guidance needs urgent revision taking account of the findings of this and other reviews.*

⁶⁴ HMIC's 2011 report, *The Rules of Engagement: A review of the August 2011 disorders* (available from www.hmic.gov.uk) recommends the creation of a central information 'all source hub', which would help police in anticipating and dealing with disorder.

⁶⁵ An example of such a framework is reproduced in Chapter 4 (p.36).

⁶⁶ A Cover Officer acts as a link between the undercover officer and their unit and managers.

Annex A: Review terms of reference

The original terms of reference as published at the start of this project are set out below. These have been developed during the course of the review by, for example, including an examination of whether the people and processes of the Special Demonstration Squad (SDS) overlapped with those of the NPOIU.

To review how intelligence that supports the policing of protest involving criminal activity is prioritised, gathered, assessed and managed by the National Public Order Intelligence Unit, the National Domestic Extremism Team and the National Extremism Tactical Coordination Unit by considering:

1. the existing remit of these units and whether they are appropriate for the future;
2. the effectiveness of operational oversight and governance arrangements for these units;
3. the adequacy and resilience of structures, funding, staffing and resourcing of these units and the future requirements;
4. how intelligence activity associated with these units is authorised in accordance with the law, including
 - a) consideration of how the 'proportionality' of covert tactics is determined, in particular the use of undercover officers for collecting intelligence;
 - b) the process by which covert methods to collect intelligence are tasked and coordinated;
 - c) the process by which covert intelligence is translated into operational activity and, where appropriate, tested through a judicial process; and
 - d) the training, experience and accreditation of all staff involved in the process;
5. how covert intelligence gathering associated with these units is managed, including the use of undercover police officers;
6. whether existing legislation, and the guidance provided by ACPO, is sufficient to maintain public confidence in managing intelligence about protest activity.

Annex B: Review methodology

The review methodology comprised five stages:

- Stage 1: Consultation and document review;
- Stage 2: Scoping, assessment and evaluation;
- Stage 3: Benchmarking;
- Stage 4: User perceptions; and
- Stage 5: Future concept consultation.

The report is based on views and comments obtained from a variety of stakeholders throughout England, Wales, Northern Ireland and Scotland. These include representatives of business and industry, as well as from a broad range of interested parties such as protest groups and advocates of civil liberties. We also used feedback from SOCA, ACPO, the Home Office, police forces, HM Revenue and Customs, the National Policing Improvement Agency (NPIA), the Office of Surveillance Commissioners, the ACPO National Undercover Working Group, and the Security Service, as well as representatives of overseas law enforcement agencies based in the UK.

In addition, the report draws on the results of a questionnaire (which was completed by all police forces), a document review and observations by HMIC staff.

The review was subject to independent oversight in the form of an External Reference Group. This group comprised members of the House of Lords, the judiciary, civil liberty groups, academia, the Serious and Organised Crime Agency (SOCA) and elected representatives.

More information on the External Reference Group and some of the consultation work that took place is available on the HMIC website (www.hmic.gov.uk, search for NPOIU).

Annex C: Law and guidance on undercover policing

An undercover police officer is, for the purposes of UK law, an informant or Covert Human Intelligence Source (CHIS). This is a statutory term used in the Regulation of Investigatory Powers Act 2000 (RIPA) and defined in section 26(8):-

“For the purposes of this Part a person is a covert human intelligence source if:

- (a) he establishes or maintains a personal or other relationship with a person for the covert purpose of facilitating the doing of anything falling within paragraph (b) or (c);*
- (b) he covertly uses such a relationship to obtain information or to provide access to any information to another person; or*
- (c) he covertly discloses information obtained by the use of such a relationship, or as a consequence of the existence of such a relationship.”*

The lack of delineation between an undercover officer and CHIS in RIPA is not ideal, as there are clear differences between how these tactics have to be managed.

The Regulation of Investigatory Powers (Source Records) Regulations 2000 defines an undercover officer as a *“source who holds an office, rank or position with a relevant investigating authority.”*⁶⁷ Undercover police officers are therefore servants of the crown and different considerations apply to them from those which apply to CHIS.

Clearly also, different management techniques are required for undercover police officers from those which may apply to other types of CHIS. To this end, HM Revenue & Customs (HMRC) and the Association of Chief Police Officers (ACPO) National Undercover Working Group (NUWG) developed guidance that set out the necessary control measures by which managers assure themselves and the courts that the undercover officer has conducted themselves correctly. This guidance also provides a definition of undercover officers:

*“**Undercover Officer** is a specifically trained law enforcement officer working under direction in an authorised operation or investigation in which the officer’s identity is concealed from third parties. The officer*

⁶⁷ Regulation of Investigatory Powers (Source Records) Regulations (2000). No. 2725.

may be concealing his or her identity or otherwise acting covertly be deployed

(a) in the interests of National security

(b) for the purpose of preventing and detecting crime or of preventing disorder

(c) in the interests of the economic well-being of the UK

(d) in the interests of public safety

(e) for the purpose of protecting public health

(f) for the purpose of assessing or collating any tax, duty, levy or other imposition, contribution or charge payable to a government department; or

(g) for any other purpose prescribed in an order made by the Secretary of State”⁶⁸

Within the Police Service there are also other non-uniformed officers that perform a covert role, but are not defined as undercover officers. Plain clothes CID and surveillance officers have been used to monitor activity covertly at public protests, similar to the role police spotters have at football matches. These officers neither take on another identity, nor undertake any of the functions of an undercover officer.

Legal Basis for Undercover Tactics

The deployment of undercover officers is a legitimate policing tactic, as described in the Judgment of the European Court of Human Rights in *Teixeira de Castro v. Portugal* (1998) 28 E.H.R.R. 101. However, it is one of the most intrusive tactics available to the police and involves a high level of risk to the officers involved. It should therefore be used only when appropriate and in accordance with law.

There are several sources of law affecting the use of undercover officers:

- The **Police & Criminal Evidence Act 1984** (PACE) created clear legal rules regarding the searching, detention, identification and interviewing of suspects. This involved the keeping of proper records and the creation of robust ‘audit trails’ from arrest through to prosecution. Should an undercover officer be arrested whilst on deployment they would be subject to all these rules, meaning managers of undercover officers needed to carefully consider the behaviour and conduct of their officers.
- The **Prosecution of Offenders Act 1985** moved the responsibility for the prosecution of offences from the police to the newly formed and independent Crown Prosecution Service. This meant that managers now needed to reveal the identity of the officer to an external and independent organisation, outside of the police service.

⁶⁸ ACPO (2003) Manual of Guidance. Restricted.

- The **Criminal Procedure and Investigations Act 1996** (CPIA) set standards for the conduct of investigations, as well as the handling of material found or generated in the course of an investigation, and its 'disclosure' to the Crown Prosecution Service and the defence. This meant that managers needed to ensure that undercover deployments were to an evidential standard and that the proper disclosure of material was assured.
- The **Regulation of Investigatory Powers Act 2000** (RIPA) was introduced to govern the way police and other public bodies carry out surveillance, investigation, and the interception of communications. Grounds for invoking powers under the Act include national security, the detection of crime, preventing disorder, public safety, protecting public health, and in the interests of the economic well-being of the United Kingdom.

The introduction of RIPA meant that for the first time clear legal rules existed regarding the role and conduct of undercover officers, albeit they were covered by the provisions for a 'Covert Human Intelligence Sources'. The Act details how such officers must be authorised and deployed, and it outlined who can authorise such operations, and who has oversight.

The Police and Criminal Evidence Act 1984 section 78 provides the power to exclude prosecution evidence if its admission would have such an adverse effect upon the fairness of the proceedings that it ought to be excluded. The court is empowered to consider all of the circumstances including the circumstances in which the relevant evidence was obtained.

The Code of Practice dated August 2010 issued by the Home Office under section 71 of the Act "Covert Human Intelligence Sources" ("the Code").

- **The European Convention on Human Rights**, Articles 2, 6 and 8. These are relevant because Article 6 concerns the right to a fair trial of any person prosecuted after an investigation involving undercover officers; Article 8 concerns the right to respect for private or family life of any person, whether prosecuted or not, and whether a person under investigation or not; Article 2 concerns the right to life of the undercover officers and of other persons who may be exposed to risk if available and useful methods of investigation are not deployed. The jurisdiction of the criminal courts at common law to stay proceedings as an abuse of the process of the court if the defendant cannot receive a fair trial or if it would undermine the criminal justice system to try him because of some misconduct by the police connected with the prosecution.
- **The criminal law**, which may criminalise activities of police officers, committed in their undercover roles. The police discipline code also applies to varieties of misconduct short of crime.
- **The Coroners and Justice Act 2009** provides for witness anonymity allowing the court to consent to an undercover officer to give evidence in their assumed identity.

Guidance and control

As mentioned above, the main source of operational advice on the use of the undercover tactic is the ACPO guidance. These guidelines set out mandatory control measures for all UK law enforcement bodies that deploy undercover officers. The procedures were written in June 2003 and require updating in order to reflect changes in the past eight years and to provide clearer guidance in relation to specific issues. HMIC is aware that the National Undercover Working Group (NUWG) – a group established in the 1990s, chaired by an Assistant Chief Constable and comprising the Heads of Units accredited to run undercover officers – is currently working on producing updated guidance. This needs to be published urgently.

There are two other sources of guidance for the tactic, namely:

- The Code of Practice published under section 71 of RIPA is an authoritative source of guidance, being admissible in civil and criminal proceedings.
- Office of Surveillance Commissioners' Procedures and Guidance document, 2011, which is designed to indicate the way in which the Commissioners are minded to construe particular statutory provisions. This is circulated to those who may have to exercise powers granted by RIPA, including local authorities and other agencies and the circulation is therefore likely to be quite wide.

The use of undercover officers by the police is one of the most intrusive police tactics and is regulated by law in the Regulation of Investigatory Powers Act (RIPA) 2000. **In practice the tactic is directed against serious crime, because in 2003 ACPO restricted the deployment of such officers to serious crime (and then *only* on the authorisation of an officer of at least Assistant Chief Constable rank).**

Perhaps the most significant guidance can be found in the original **Home Office Circular 97/1969 – *Informants who take part in crime*** – officers are informed at paragraph 3(c).

The police must never commit themselves to a course which, whether to protect an informant or otherwise, will constrain them to mislead a court in subsequent proceedings. This must always be regarded as a prime consideration when deciding whether, and in what manner, an informant may be used and how far, if at all, he is allowed to take part in an offence. If his use in the way envisaged will, or is likely to result in its being impossible to protect him without subsequently misleading the court, that must be regarded as a decisive reason for his not being so used or not being protected.

RIPA however does provide a very broad provision, at s27, whereby any authorised activity is “lawful for all purposes”. This contention is, obliquely, supported by the wording of the original CHIS Code of Practice (Third Impression – 2002) which, at paragraph 2.10 stated that:

In a very limited range of circumstances an authorisation under Part II may, by virtue of section 26(7) and 27 of the 2000 Act, render lawful conduct which would otherwise be criminal, if it is incidental to any conduct falling within section 26(8) of the 2000 Act which the source is authorised to take.