

REVIEW OF POSSIBLE MISCARRIAGES OF JUSTICE

**Impact of Undisclosed Undercover Police
Activity on the Safety of Convictions**

Report to the Attorney General

Authors: Mark Ellison QC & Alison Morgan

*Return to an Address of the Honourable the House of Commons
dated 16 July 2015
for the*

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Covering Letter

QEB
HOLLIS
WHITEMAN

The Attorney General
20 Victoria Street,
London
SW1H 0NF

23rd March 2015

Dear Attorney General,

Review of Possible Miscarriages of Justice - Impact of Undisclosed Undercover Police Activity on the Safety of Convictions

I have the pleasure of enclosing our interim report in this matter.

We have invited comment upon it from all the members of the working group engaged in this Review, which include: Operation Herne, the Criminal Cases Review Commission and the Crown Prosecution Service, and where there is between us a difference of perspective (or substance) we have endeavoured to reflect that within the Report.

As previously, I have been greatly assisted by Alison Morgan, hence the reference to 'our' view in the Report.

I take personal responsibility for the content.

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I. Terms of Reference

On Thursday 26 June 2014, the Home Secretary made the following statement, explaining the Terms of Reference of this Review:

“When I made my statement to the House on 6 March 2014, announcing the findings of the Stephen Lawrence Independent Review by Mark Ellison QC, I said that:

“In identifying the possibility that SDS [‘Special Demonstration Squad’] secrecy may have caused miscarriages of justice, Mark Ellison recommends a further review to identify the specific cases affected. I have accepted that recommendation and Mark Ellison will lead the work, working with the CPS and reporting to the Attorney-General. That will mean that proper consideration can be given to those cases and to any implications that may arise. In doing that work, Mark Ellison and the CPS will be provided with whatever access they judge necessary to relevant documentary evidence.”

[Hansard, 6 March 2014, Column 1063]

Mr. Ellison, the Attorney General and I have now agreed his Terms of Reference. Mr. Ellison will continue to be supported by Alison Morgan, who was Mr. Ellison’s junior counsel during the Stephen Lawrence Independent Review.

The Terms of Reference are:

‘Mark Ellison QC will co-ordinate a multi-agency Review, reporting to the Attorney General, to assess the possible impact upon the safety of convictions in England and Wales where relevant undercover police activity was not properly revealed to the prosecutor and considered at the time of trial. Nothing in these terms of reference affects the statutory responsibilities of the various agencies and office-holders working with the Review.

The Review will initially focus on the undercover police activity of the MPS’s Special Demonstration Squad and the National Public Order Intelligence Unit (NPOIU) which, whilst not an MPS resource, worked to similar objectives. The Review will then assess whether its scope may need to be broadened to cover other undercover police activity.

The Review will seek to ensure, by working co-operatively with the Home Office, Operation Herne (on behalf of the Metropolitan Police Service (MPS)), other police forces, CPS, Criminal Cases Review Commission (CCRC) and any other relevant agencies, that the following tasks are carried out:

1. Establish the relevant document retention and destruction policies adopted within the relevant organisations;
2. Identify the extent of surviving police, prosecution and court case files;
3. Establish the nature of undercover policing undertaken and the potential for undercover police activity to have been relevant to a prosecution but unrevealed to the appropriate authority;
4. Identify, using both available records and other reasonable means, any convictions where it appears there was relevant undisclosed and unrevealed undercover police activity capable of impacting adversely on the safety of the conviction;

5. Ensure that any cases falling in 4 above, where it appears the safety of a conviction may have been adversely affected, are referred to the appropriate authority for evaluation and appropriate action;
6. Ensure that any cases falling in 4 above are reviewed to establish the rationale for non revelation and to establish the extent to which the MPS and the Home Office were aware and identify the action taken as a result; and
7. Agree a protocol with the MPS (and all other police forces subsequently identified), the CPS, the CCRC and any other relevant agencies regarding the tasks that each will undertake; the availability and handling of material; and other issues as necessary.

Mark Ellison QC will aim to report the Review's findings in writing on the above to the Attorney-General by 31st March 2015.'

The Review has already begun its preliminary work. Where the Review identifies a potential miscarriage of justice, the case will be referred to the Criminal Cases Review Commission for its consideration of whether the case should be referred to the appellate courts. At the conclusion of the process, the Review will produce a report to the Attorney General, which he will publish. That report will not include the details of the individuals whose cases have been examined, as to do so could prejudice any subsequent appeal proceedings or retrials.

I am grateful to the Director of Public Prosecutions, the Metropolitan Police Commissioner and to Chief Constable Creedon for the support they have offered to the review. I know that the Metropolitan Police Service will cooperate fully with the Review team.'

2. Findings in the Stephen Lawrence Independent Review [HC 1094. HC 1038 I and II March 2014]

In mid-2013, some way into our review of possible corruption in the Stephen Lawrence case, our Terms of Reference were extended to include:

- an examination of the role of undercover policing in the Stephen Lawrence case;
- whether such information had been withheld from the Stephen Lawrence Inquiry; and
- if it was withheld, what impact knowledge of it might have had on the Inquiry.

We set out our findings on this matter in Chapter 6 of the main Report [pp 180-274], and in section 4 of the Summary of Findings accompanying the Report [pp 20-34].

These included:

- (i) An acknowledgement that for decades the Special Demonstration Squad [‘SDS’] provided effective warning to enable the parts of the MPS dealing with the policing of public disorder to plan and allocate appropriate resources to meet the risks. It also provided valuable intelligence to the Security Service. There were many examples of SDS undercover officers running great personal risks in order to gain very valuable intelligence and, with a few exceptions, the vast majority of the officers that undertook this challenging and difficult work, not only did so to the best of their ability, but also bear no responsibility for the problems created by senior MPS management by allowing the Squad to operate as if it was exempt from the normal duties of disclosure in criminal cases.
- (ii) Accordingly there was clear public benefit accruing from the Squad’s undercover work, but the nature of it also created a level of risk for the MPS on a number of fronts. To maintain their cover, an undercover officer had to ‘live the life’ of the activist they were pretending to be, over an extended period of years. They had to adapt and cope with what their activist group decided to do, which often involved criminal activity. It was inevitable that undercover officers would be likely to face difficult choices as to what criminality they did or did not discuss, acquiesce in, or participate in. They sometimes got arrested with other activists, and while ‘maintaining their cover’ had to handle how they interacted with police investigators, the courts, as well as their fellow activists and sometimes their shared lawyers. They had to cope with rising in influence and authority within an activist group (generally regarded as beneficial to the quality of intelligence they could obtain), but also resulting in them being seen as influential and someone to look up to by activists. They also had to manage the proper limitations surrounding personal relationships with activists.

The potential for “collateral damage” to result from their work was obvious. This could be from:

- the deceitful human interaction that the work entailed;
- the commission of, or connivance with crimes by officers sworn to uphold the law;
- the deception of other police officers and the courts; or
- the long-term effects of the work on the officers themselves.

But of central significance to this Review, is the fact that both SDS and senior MPS managers should have recognised that having serving police officers working undercover alongside activists, who by the nature of their activities were prone to get arrested and prosecuted, would inevitably create a situation where the undercover officer's behaviour and observations might generate material of potential relevance to the issues raised in those prosecutions. And if it did, the MPS was obliged to make this known to the prosecutors under the disclosure regime integral to a fair trial.

- (iii) We identified the wider concerns extending beyond the Stephen Lawrence case in a postscript to our section on undercover policing [Summary of Findings 4.6 pp 33-34]:

"In essence, the wider potential problems that appear to us to be likely to exist all flow from the extraordinary level of secrecy observed as to any disclosure that might carry the risk of exposing that an undercover officer was, or had previously been, deployed.

Whilst that level of secrecy was largely enforced within the processes and procedures adopted by the SDS itself, the wider MPS must take responsibility for allowing a situation to develop over the years whereby the SDS operated as if it was exempt from the developing duty of proper disclosure required of the MPS in legal proceedings, and particularly in criminal prosecutions...

The extent of the wider problems flows from identifying the broad range of SDS activity of potential relevance to issues arising in criminal proceedings where there was a duty of proper disclosure.

The SDS had, over many years, placed undercover officers inside a wide range of activist groups... A long-term undercover officer deployed into such a group had, necessarily, to play the convincing role of a genuine activist.

When the group concerned got involved in planning or committing potentially illegal activity, the undercover officer had to maintain cover. The concept of an undercover officer getting involved in criminal activity in one way or another was, it appears, approached 'flexibly' by some SDS officers.

The potential for an undercover officer to have been viewed by another group member as having approved, encouraged or participated in criminal activity is inevitable.

The undercover officer may well have ended up being arrested. The SDS records show that sometimes that was dealt with by the officer going through the investigation and court process in their undercover name. This inevitably entailed deception of the arresting officers and courts, and also the legal advisers who represented a number of activists arrested at the same time, all of which had to be dealt with in a manner consistent with their undercover role.

It is also clear from the material we have seen that sometimes an undercover officer who had been present at a riot or other disorder where arrests had been made and criminal proceedings had been brought knew that aspects of the prosecution case being advanced through police witnesses was false.

In short, it is inevitable that the interaction between an undercover officer and members of an activist group, taken together with the detailed records of intelligence reported back

by them into the MPS system, yielded an obvious potential source of material relevant to criminal proceedings brought. This relevance might be because the undercover officer had encouraged the alleged criminal activity of others, or because the records were capable of supporting a fact relied upon by a defendant or undermining a fact relied upon by the prosecution.

...

We believe that consideration should be given to reviewing criminal prosecutions falling into the categories which we have described above against available SDS records. The purpose of any such review would be to assess if material non-disclosure may have occurred in any case in which there has been a conviction, and to enable appropriate remedial action to be taken."

Inevitably, given our Terms of Reference, this Review focuses on the way in which the MPS allowed the SDS to function for the duration of its existence, and the extent to which this gives rise to concerns as to possible miscarriages of justice having occurred.

By focusing the Review in this way, we do not mean to underplay the significance and value that undercover policing can bring to law enforcement. We acknowledge that SDS officers on occasions used their influence in a group to either prevent the commission of crime or reduce the magnitude of it and its impact on potential victims. We also acknowledge that the regulation of undercover policing has improved significantly.

However, this Review has demonstrated that undercover activity must be managed by the Police on the basis that it firmly acknowledges its obligation to reveal relevant information to enable prosecutors to decide whether a case should be prosecuted, and to assist in a prosecutor's duty of proper disclosure in criminal proceedings.

3. Progress since March 2014

Achieving tangible progress in establishing and putting into effect the multi-agency process necessary for this Review to begin to examine, and take appropriate action, in cases where potential miscarriages of justice have occurred has been disappointingly slow.

We discussed the implications of the Review with Operation Herne shortly after the Stephen Lawrence Independent Review was published in March 2014, and the further Review was announced. Chief Constable Creedon told us then that without significant further resources, Operation Herne would be unable to make any significant progress, as it was already struggling with its existing workload with the resources it had.

Mr Creedon raised the requirement for further resources with the Deputy Commissioner of the MPS in March 2014, and he requested additional office space in early April 2014.

We agreed that some sort of scoping exercise as to the size of the investigative task, and the likely range of behaviour of concern to the safety of convictions, was a necessary first step. Operation Herne then estimated that a scoping exercise would itself take three months, once it received the additional resources requested.

In May 2014, the Home Office agreed to provide an initial three months of funding support for the scoping exercise and Operation Herne began a recruitment initiative.

Finding available and suitably qualified individuals turned out to be a difficult and protracted exercise that involved the exploration of a number of different avenues over the summer of 2014.

It was not until September 2014 that any recruits commenced work with Operation Herne. The expanded premises to accommodate them only became available at the end of October 2014.

Operation Herne has recently indicated that it is currently operating across the various aspects of its investigation into the SDS with 63 staff. A recent staffing review identified that 85 officers were necessary. The number of staff able to carry out work for this Review continues at a level significantly less than identified as necessary. 30 staff were identified as necessary to complete the three month scoping exercise, and the highest number of staff working on this Review at any given time has been 21.

While the task of resourcing Operation Herne to permit the investigation of SDS and NPOIU records for the purposes of this Review was in progress, we endeavoured to establish Terms of Reference, and a working protocol, commensurate with the statutory duties of the Crown Prosecution Service [‘the CPS’] and the Criminal Cases Review Commission [‘the CCRC’]. This was in order to identify the process by which cases would be reviewed by both bodies, and if necessary, referred back to the courts.

This also became a somewhat protracted process. There was an initial difference of opinion as to our role. The CPS, in particular, wanted to ensure that our role would not involve any direction over the CPS, potentially undermining its statutory independence. This was clarified through the Terms of Reference [Annex 1], which were not agreed until June 2014. It took until later in October 2014 to agree a Protocol, as required under our Terms of Reference.

We formed a 'Working Group', including representatives of Operation Herne, the CPS, the CCRC and the Home Office. A 'Steering Group' involving other interested agencies also met once a month. The purpose of the Working Group was to bring the CCRC, CPS, and Operation Herne together to liaise over the assessment of the initial case files that were presented by Operation Herne as samples of the sort of issues which might impact upon the safety of convictions.

By the end of October 2014, however, given the slow progress and the delay over resourcing Operation Herne, it became clear that no more than a 'scoping report' was going to be achieved by March 2015, and so efforts re-focused on achieving as much work as possible in order to inform that report.

We wrote to the Attorney General and the Home Secretary in late October 2014 to explain that due to the time it had taken for Operation Herne to gain some of the further resources it needed to begin work for this Review, and the enormity of the investigation required, there was no realistic possibility of the Review achieving more than a scoping exercise by March 2015. We indicated that we would do all we could to ensure that the report identified the range of behaviour that was being discovered of concern to the safety of convictions, and also the size of the task ahead.

On 16 January 2015, in response to a question in Parliament as to what progress Mark Ellison Q.C. had made in his Review, the Rt Hon Mike Penning, Minister of Justice for Policing, Criminal Justice and Victims replied that the Review was reviewing cases in line with the Terms of Reference of the Review, and was intending to provide a progress report to the Attorney General by the end of March 2015.

By the time of writing, Operation Herne has submitted files to the Working Group relating to the convictions of a total of 83 activists. Many of the cases have been identified by the Group as requiring some further investigative work. As yet, in respect of those 83 cases, no decisions have been made by the CCRC or the CPS as to whether they should be referred to the courts. Nevertheless, the cases provide some further insight as to the types of issues being raised, and the spectrum of behaviour of concern to the safety of convictions.

It is not appropriate or possible to go into the detail of those cases prior to final decisions being made, but we will refer to a general description of the sorts of concerns that they raise.

4. The history and culture surrounding SDS and NPOIU revelation of undercover activity to investigators and prosecutors

The SDS

The MPS Special Branch formed the Special Operations Squad ['SOS'] in 1968 with direct support from the Home Office, in response to the violent anti-Vietnam War demonstrations that took place in Grosvenor Square in London on 18 March 1968.

The MPS was, at that time, required by the Home Office to cover the operation of the SOS with the strictest of secrecy, so as not to compromise the Government or its sensitive operations. Significant dedicated funding was provided by the Home Office to the MPS.

The first detailed 'Statement of Purpose' for the SOS dated 26 November 1968 said:

"The primary object is to provide information in relation to public order problems, the secondary by-product is that our knowledge of extremist organisations and individuals active in them is considerably enhanced."

The Squad operated as the 'Special Operations Squad' between 1968 and 1972/3, when it was renamed the 'Special Demonstration Squad' ['SDS'].

Until 1989 the Home Office received succinct, annual summaries of the work of the SDS and continued to fund the Squad. Thereafter the MPS exercised all financial as well as managerial control.

By 1992, some 24 years after the Squad's inception, the SDS's statement of purpose as recorded in its 1992/93 Annual Report still reflected the reasons for which it was formed back in 1968:

"... To provide a quality service in the gathering and dissemination of relevant information and intelligence regarding matters affecting public order and the intentions of extremists who engage in politically motivated crime..."

At that time, and until around 1995, specific operational tasking within the Squad was typically communicated orally by the undercover officer's Detective Inspector:

Undercover officers would meet, usually with a Sergeant from the Unit, at least weekly, to provide a handwritten or typed report of anything they thought might be of interest to those collating intelligence back at the Unit. Sometimes they would also telephone in a report if it was urgent.

The raw intelligence would then be reviewed back at the SDS office, alongside other intelligence from other officers. It was then "sanitised", so as to remove all references which might identify that it had emanated from an undercover deployment, before it was disseminated out of the Unit to "specialist desks" within Special Branch. They would pass it on to the units that had to plan for and deal with public disorder, typically describing the intelligence as "from a secret and reliable source".

Initially, the SOS remit was to gather intelligence on demonstrations by left-wing extremists, and to identify the organisers and participants promoting disorder or violence. In later eras, political events led the SDS to infiltrate extreme right-wing groups and 'Animal Rights' groups.

Whilst the targets changed, the practice of the SDS remained consistent over its 40 year period of operation. The SDS Annual Report for 1996/1997 refers to similar objectives to those articulated at the Squad's inception, namely:

- To supply information about the intentions of militant political extremists in relation to public order events
- To identify those who engage in preliminary planning or who take part in such demonstrations
- To identify suspects involved in breaches of the law before, during and after demonstrations
- To gather and record information about the formation and development of target organisations for long-term intelligence purposes
- To provide intelligence on the criminal activities of individuals or groups involved in support of terrorism and animal rights extremism

The potential for the MPS officers carrying out these objectives to collect information of potential relevance to criminal investigations and prosecutions initiated against activists in the groups they infiltrated, or at events they attended, is obvious and should have been recognised then by senior management in the MPS.

The policy of almost absolute secrecy, leading to no revelation of the fact or nature of SDS undercover activity to investigators and prosecutors, was such that very few people outside of Special Branch even knew of the Squad's existence until its last few years.

A Detective Inspector in the Squad during the 1990s put it thus:

“... We were part of a “black operation” that absolutely no one knew about and only the police had actually agreed that this was all okay.”

In 1997 the Squad was again renamed as the ‘Special Duties Section’ [‘SDS’], as it remained until it was closed down in 2008.

Over one hundred police officers are believed to have served undercover in the Squad over the 40 years that it operated, almost all of whom were recruited from within Special Branch.

There was no formal selection or training process and little guidance was given to its operatives. Practices evolved over time as a result of officers reporting their activities and their personal initiatives and sharing these with colleagues. There was, accordingly, a variety of approaches taken by different officers as to what they did or did not consider to be the appropriate limit on how they went about their work.

Over its lifetime, undercover officers working in the Squad infiltrated several hundred activist groups, including almost every activist group assessed to be capable of causing potential public order issues, as well as a number of terrorist groups.

Special Branch promised that the identity of the officers who served undercover in the SDS would never be disclosed.

An SDS office memo of May 1997 indicated that the operational focus of some of its work had begun to shift. This was after there had been a movement away from mass demonstrations and public disorder as a means of mainstream political protest:

“... If large-scale public order events of one kind or another once provided a common focus for our endeavours, it is now overwhelmingly the case that we serve independent groups of customers with entirely distinct requirements. Very often these requirements entail the long-term targeting of key individuals who have little or no interest in demonstrations...”

An MPS SO15 report into the SDS in 2009 recognised how this shift away from the clarity of the original public order remit took the SDS into what appeared to be a far more questionable area of covert surveillance:

“Over time the main objective of the SDS operation changed. It became focused on obtaining strategic intelligence on the direction of subversive, extremist and other target groups for the purpose of informing decision making within the Police Service and Government. The objective was to know where a target organisation would be in five years and who would be leading or directing them. In this regard the SDS were successful and managed on many occasions to engineer their field officers into key positions within target groups. Tactical intelligence became a by-product of the operation and secondary to their long-term aim. Although, when it suited the SDS management, they would offer the by-product of tactical intelligence as a key indicator of their success.”

The same MPS report in 2009 said of the SDS management:

“... Many files would not have been subject to referral to senior management within Special Branch outside of the SDS and correspondingly had no senior responsible owner or corporate sponsor. The papers contained within the files varied considerably in style and substance and some, as is often the case in reality, appear driven by necessity or misfortune...”

With the introduction of a new code of practice for Special Branch undercover operations in 1998 the deployments were subject to annual review. I have read the annual authorisations for all SDS officers from 1999 that were signed by the A/Commander Special Branch. None of the authorisations extended beyond one side of an A4 sheet and were obviously completed by the SDS prior to presentation for “rubber stamping” without any further articulation of management consideration. Clearly the SDS preferred the less bureaucratic approach and directed their operational activity without intrusive senior supervision and management at that time... The SDS directed their own operations with significant tactical latitude with minimal organisational constraints... Inappropriate targeting occasions and reporting upon peripheral subjects whom, on the face of it, were not worthy of mention is further evidence of this... There appears to be no value to the policing of London derived by recording and retaining such information. It neither prevents or assists in the detection of crime or helps secure the economic well-being of the UK or protect National Security.”

In addressing the MPS's duty of disclosure to prosecutors of any material of potential relevance to a prosecution brought against activists who had been the subject of reporting by SDS officers, or with whom SDS officers had interacted, the 2009 MPS Review stated that the SDS:

“...relied on their “intelligence only” doctrine of never giving evidence in order to suggest that their activity did not impact upon the criminal proceedings, no matter how accurate that was.”

As part of the Stephen Lawrence Independent Review we commented [Vol I p 200]:

“We have found no material to indicate that the SDS, or those in the line of seniority over it, ever revealed to a court that there had been an undercover deployment of relevance to a case before the court, other than in order to protect an undercover officer who was charged with an offence.

The default position, as indicated by the above 2009 reference, seems to have been that the SDS regarded its activity as outside of any of the prosecution disclosure obligations. This was the case even when a prosecution was being pursued in circumstances in which an SDS undercover officer had interacted with the alleged offenders in a manner capable of being relevant to trial issues, or where an SDS undercover officer had reported back intelligence capable of undermining the prosecution case or assisting a defendant. As a result, it appears to us that many such prosecutions simply proceeded with no revelation to the prosecutor or court of the SDS role.”

With the benefit of further investigation of surviving SDS records carried out since March 2014, Operation Herne recently encapsulated the position as being that the SDS generally operated secretly, with little or no revelation of undercover activity to public order commanders, senior investigating officers or to the judicial body.

Some examples of revelation of undercover involvement to the courts or investigators are documented, but this was primarily because the SDS was seeking to extract or protect an undercover officer who had been arrested, and not to enable a prosecutor to comply with the disclosure requirements for a fair trial.

Beyond these examples, we have been made aware of one occasion in which Special Branch records suggest that there was revelation of the role of an SDS officer to a prosecutor, but it has not been possible to confirm this by reference to case papers, and the extent and adequacy of the disclosure that was made is not yet known.

It follows that the material currently available confirms an almost universal practice of SDS secrecy. That is, withholding undercover intelligence, reporting and activity from investigating officers and prosecutors, even when (as it must have sometimes done) it touched on the activists who were arrested and prosecuted, and even when an undercover officer had also been involved in the events that were the subject of the prosecution, and/or had been arrested and prosecuted alongside the activists. The consequences of this are considered in our examination of the legal framework set out below.

The NPOIU

The National Public Order Intelligence Unit (NPOIU) operated from 1999 to 2011. Operation Herne has been tasked to investigate its practices. It was created following an agreement between the Home Office and the MPS, as part of a response to campaigns and public protests that generated violence and disruption. It was funded by the Home Office to reduce criminality and disorder arising from domestic extremism, and to support forces nationwide managing strategic public order issues. Nationwide animal rights activity was within its remit.

In January 2011, following the revelations of Mark Kennedy’s involvement in activist groups, the NPOIU was subsumed with other units under the National Domestic Extremism Unit (NDEU) within the MPS.

Operation Herne has identified fewer than 20 NPOIU undercover officers who were deployed over that period.

Although created under an agreement with the MPS, the NPOIU carried out undercover work outside the MPS area, across the UK and overseas.

The limited investigation (since June 2014) that has so far been possible by Operation Herne into the NPOIU indicates that the NPOIU officers were reporting on individuals who affiliated themselves to a range of protest groups, and under this guise committed offences at a low level of criminality, such as criminal damage, assault on police officers, aggravated trespass, breach of the peace and offences against civil injunctions.

The undercover officers appear to have been well positioned within the groups, enabling them to report on individuals who were intent on taking direct action. This was achieved by being present at meetings, and on occasions, once trusted, providing transport to and from events.

We consider the role of Mark Kennedy, in particular, below. To what extent his methods were also adopted by other NPOIU officers remains to be determined, but it is right to say that NPOIU officers have told Operation Herne that they were not. The decision to close down the NPOIU was taken after the Kennedy cases.

Operation Herne's work to investigate the nature and extent of the undercover work of the NPOIU was only able to begin properly in November 2014 and has barely been able to 'scrape the surface' so far.

The initial investigation of the NPOIU does however suggest that there was far more frequent engagement with investigators and prosecutors than ever occurred in the SDS. As yet there is no clear picture as to the adequacy of that engagement, other than that emerging from the few cases that been considered by the courts and very few NPOIU cases passed to the Working Group by Operation Herne.

5. A Fair Trial

The prosecutor's duty of disclosure in a criminal trial

Put in its simplest terms, the Prosecution is obliged to disclose to the defence any material which might reasonably be considered capable of undermining the case for the Prosecution or assisting the case for the accused.

This principle is set out in section 3 of the Criminal Procedure and Investigations Act 1996 [‘the CPIA’], which came into force on 1 April 1997 and provides a statutory scheme designed to ensure that the principle is achieved in practice, which includes an obligation on the investigator to obtain any material of potential relevance to the case. The principle is a fundamental element in achieving a fair criminal trial.

Although much of the SDS activity pre-dates this legislation coming into force, the obligations on the Prosecution were recognised by the common law for a long time before that [see for example: *Marks v Beyfus* (1890) 25 Q.B.D. 494 which recognised that even sensitive material had to be disclosed if it might help the defendant show their innocence].

At or about the time of the inception of the SDS, the duty of the Prosecution had been articulated in *Dallison v. Caffery* [1965] 1 Q.B. 348, 369, in the following way by Lord Denning M.R.:

“The duty of a prosecuting counsel or solicitor, as I have always understood it, is this: if he knows of a credible witness who can speak to material facts which tend to show the prisoner to be innocent, he must either call that witness himself or make his statement available to the defence. It would be highly reprehensible to conceal from the court the evidence which such a witness can give. If the prosecuting counsel or solicitor knows, not of a credible witness, but a witness whom he does not accept as credible, he should tell the defence about him so that they can call him if they wish.”

From 1981 onwards, the duties of disclosure were encapsulated in Guidelines issued by the Attorney General [*Guidelines for the disclosure of unused material to the defence in cases to be tried on indictment* (1982) 74 Cr.App.R. 302]. The test for disclosure at that time was arguably wider than is now set out in statutory form in the CPIA, as it provided that everything gathered, created or generated by the police was potentially disclosable. However, the discretion was to whether or not to disclose material was at that time left with the prosecutor.

These Guidelines were superseded by the common law, by the late 1980s in a number of cases in which the Court of Appeal highlighted its concerns as to application of the Guidelines in practice. The principal, guiding decision was *R v Ward* [1993] 2 All ER 577. In endorsing the paramount importance of disclosure to a fair trial process, the Court of Appeal [Glidewell LJ] expressed the following concerns about the ability to conduct an ex post facto assessment as to the relevance of disclosure in a case, where proper disclosure had not been conducted at the time of the trial:

“The obligation to disclose only arises in relation to evidence which is or may be material in relation to the issues which are expected to arise, or which unexpectedly do arise, in the course of the trial. If the evidence is or may be material in this sense, then its non-disclosure is likely to constitute a material irregularity. The proviso makes it plain that “material” means something less than “crucial,” because it contemplates that although there may have been a material irregularity, yet a verdict of “guilty” can be upheld on the ground that it involves no miscarriage of justice.

Mr. Langdale conceded that there were a number of items of evidence in the present case which should have been disclosed but were not. In relation to most of them, however, he argued that the failure to disclose did not bring section 2(1)(c) into operation: the undisclosed evidence, may have been material to issues in the case, but it was relatively insignificant in the context of the case viewed as a whole, and therefore the failure to disclose it did not amount to a material irregularity. This is a perfectly valid proposition and one which appears to have been adopted in relation to some of the undisclosed evidence in *Reg. v. Maguire*, as to which the court said, at p. 958, that it “was of such insignificance in regard to any real issue that we cannot describe its non-disclosure as a ‘material irregularity.’” We would emphasise, however, that the scope for the application of Mr. Langdale’s proposition is limited to matters which, at the end of the day, can be seen to have been of no real significance. The possibility that this view will ultimately be taken of any particular piece of disclosable evidence should be wholly excluded from the minds of the prosecution when the question of disclosure is being considered. Non-disclosure is a potent source of injustice and even with the benefit of hindsight, it will often be difficult to say whether or not an undisclosed item of evidence might have shifted the balance or opened up a new line of defence.”

Alongside the statutory test for disclosure now encapsulated in the CPIA, the Prosecution must also have regard to the Code for Crown Prosecutors. This provides a framework as to how disclosure should be conducted. It provides the following specific guidance [at paragraph 3.5]:

“Prosecutors must make sure that they do not allow a prosecution to start or continue where to do so would be seen by the court as oppressive or unfair so as to amount to an abuse of the process of the court”.

This is important when we come on to the issues of ‘entrapment’ that are set out below.

The Crown Prosecution Service’s Disclosure Manual sets out the disclosure obligations in the following way:

“[Chapter 1]

The obligations in relation to unused material and disclosure are determined by the date on which the investigation began...where the investigation began before 1 April 1997, the common law disclosure rules will apply. Investigators and prosecutors should refer to the 2000 Guidelines, the 1997 Code and the 2002 JOPI. Where the investigation began on or after 1 April 1997 but before 4 April 2005, then the unamended Act will apply.

...

[Chapter 2]

The duties of revelation and disclosure do not only arise under the CPIA 1996. Further legal obligations arise which assist:

- the prosecutor in determining whether a person should be charged with an offence (revelation by the police)
- the accused by providing certain material during the early stages of a prosecution (common law disclosure to the accused).

...

The investigator must inform the prosecutor as early as possible whether any material weakens the case against the accused.

...

From the start of any prosecution, the prosecutor should consider what (if any) immediate disclosure should be made in the interests of justice and fairness in the particular circumstances of the case. Examples of what should be disclosed are:

...

- material which might enable an accused to make a pre-committal application to stay the proceedings as an abuse of process
- material which might enable an accused to submit that a committal should only take place on a lesser charge or that committal should not take place at all, and/or
- material which would enable an accused to prepare for trial which may be significantly less effective if disclosure is delayed (e.g. names of eye witnesses whom the prosecution do not intend to use).

...

The investigator or disclosure officer must reveal to the prosecutor any material that is relevant to sentence (for example, information which might mitigate the seriousness of the offence or assist the accused in laying some blame upon a co-accused or another).

...

The duty of disclosure continues as long as proceedings remain, whether at first instance or on appeal (*R v Makin* [2004] EWCA CRIM 1607). While the Court of Appeal in *Makin* did not purport to lay down any general test to be applied for disclosure on appeal, prosecutors should apply disclosure test in the interests of justice. It is suggested that those interests do not require disclosure beyond that which is obtainable under the CPIA 1996.

...

The interests of justice will mean that where material comes to light after the conclusion of the proceedings that might cast doubt upon the safety of the conviction, there is a duty to consider disclosure. Any such material should be brought immediately to the attention of line management."

It is undoubtedly the case that over the decades that the SDS operated, there was a gradual improvement in the practical recognition of the duties of disclosure. Over time, there was some acknowledgement that the Prosecution had to take all reasonable steps to obtain and review for potential disclosure material that might undermine its case or assist that of the Defence. It was also acknowledged that if the Prosecution wished to withhold sensitive information, such as the deployment of an undercover officer, which met the threshold for disclosure, then it would need to assert public interest immunity (PII) in relation to that material and seek a ruling from the court as to whether a fair trial could be preserved in light of the non-disclosure [see *R v H & C* [2004] 2 W.L.R. 335 and the Criminal Procedure Rules for the detailed description of the PII process].

But that evolution of understanding and practice does not provide an answer to a prosecutor responding to an appeal heard in the present day, faced with having to concede deficiencies in disclosure many years ago, as the court will apply modern standards of fairness.

This can be demonstrated by the judgment of the Court of Appeal in *R v Bentley* [2001] 1 Cr.App.R. 21, which considered the safety of Bentley's conviction for murder 46 years before, when Lord Bingham LCJ said:

"The Court must judge the safety of the conviction according to the standards which would now apply in any other appeal under section 1 of the 1968 Act. Further, where between conviction and appeal there have been significant changes in the common law (as opposed to changes effected by statute) or in standards of fairness, the approach indicated requires the Court to apply legal rules and procedural criteria which were not and could not reasonably have been applied at the time."

It follows that, whatever may have been the practice and approach towards disclosure at the time of trial, an assessment of how effectively the principles of proper disclosure of material capable of undermining the prosecution or assisting the defence can be applied, must be judged against the standards of a fair trial today.

Material (which includes information) which might reasonably be considered capable of undermining the case for the prosecution in a historic case involving undercover police activity would include:

- a) Any material capable of undermining any factual basis advanced by the Prosecution, or assisting any factual basis advanced by the Defence.
- b) Any material capable of being deployed by the Defence to argue that the trial should be stayed by the court as an abuse of process, because of the manner in which an undercover police officer had behaved.

It is the duty of the police investigation's disclosure officer and the prosecutor to seek out and assess all potentially disclosable material, applying their knowledge of the Prosecution and Defence cases and the issues that they raise.

It is the obligation of those managing a police force to ensure that all units capable of generating such material are aware of the need to assist, not frustrate, this process.

Agent Provocateur and Entrapment issues

SDS officers were law enforcement officers, conducting long-term infiltration activity. The public interest driving the activity (which had significant 'collateral damage' potential) was identified as the need to manage potentially dangerous public order issues.

The legal framework as to the relevance of interaction between a law enforcement officer and an accused prior to the commission of crime evolved over the period that the SDS operated. However, the core issue throughout has been assessing where the balance of public interest lies in the state prosecuting the commission of a crime following the prior involvement of a law enforcement officer with the suspect.

The law evolved in the following way:

- By 1980 it had been established that there was no legal 'defence' of entrapment [*R v Sang* [1980] A.C. 402]. In other words, an accused was not able to justify his or her behaviour by reference to the conduct of a law enforcement official. The fact that the accused had acted in the way he did because of his interaction with a law enforcement official might be relevant in providing 'mitigation' for the accused's conduct, but it did not provide him with a legal defence to the crime.
- In later cases, the Court of Appeal examined whether or not a judge should have excluded evidence from a trial, or should have stayed the proceedings as an 'abuse of process' where the activities of a law enforcement officer had played some part in the commission of an offence by an accused. The 'abuse of process' regime allows a court to determine whether it is necessary to stop the proceedings in order to preserve the integrity of the criminal justice system.
- The questions which were often considered by the courts were as follows:
 - Was the officer acting as an agent provocateur in the sense that he was enticing the defendant to commit an offence he would not otherwise have committed?
 - How active or passive was the role of the undercover officer?
 - Was the defendant predisposed to commit such an offence? [*R v Smurthwaite and Gill* (1994) 98 Cr.App.R. 437]
- In 2000, the House of Lords provided guidance in the conjoined appeals of *Loosley and Attorney General's Reference* (No. 3 of 2000) [2001] 1 W.L.R. 2060. This clarified the underlying principles and indicated that an 'abuse of process' would usually be the appropriate remedy. Lord Nicholls identified the key principle as follows:

"It is simply not acceptable that the state through its agents should lure its citizens into committing acts forbidden by the law and then seek to prosecute them for doing so. That would be entrapment. That would be a misuse of state power, and an abuse of the process of the courts. The unattractive consequences, frightening and sinister in extreme cases, which state conduct of this kind could have are obvious. The role of the courts is to stand between the state and its citizens and make sure this does not happen...."
- The House of Lords approved Lord Bingham CJ's statement in *Nottingham City Council v Amin* [2000] 1 Cr.App.R., as follows:

"...it has been recognised as deeply offensive to ordinary notions of fairness if a defendant were to be convicted and punished for committing a crime which he only committed because he had been incited, instigated, persuaded, pressurised or wheedled into committing it by a law enforcement officer. On the other hand, it has been recognised that that law enforcement agencies have a general duty to the public to enforce the law and it has been regarded as unobjectionable if a law enforcement officer gives a defendant an opportunity to break the law, of which the defendant freely takes advantage, in circumstances where it appears that the defendant would have behaved in the same way if the opportunity had been offered by anyone else."

- These cases marked an abandonment of defining 'entrapment' by reference to whether the officer was active or passive, and led to the introduction of the concept of whether the police activity merely provided "an unexceptional opportunity" for an accused to commit the offence. Lord Nicholls described the test thus:

"whether the police conduct preceding the commission of the offence was no more than might be expected from others in the circumstances."

The modern approach to entrapment therefore requires an examination of the following questions:

- (i) Were there reasonable grounds to suspect the commission of offences of the kind that the police provided an opportunity to be committed?
- (ii) Was the police activity properly authorised and supervised?
- (iii) Was the police activity preceding the commission of the offence by the accused no more than the provision of an unexceptional opportunity to commit the offence, or was it more than that, such that it would bring the system of justice into disrepute to allow the prosecution to continue?

The impact of a policy to withhold material of potential relevance to a prosecutor's duty of disclosure in a criminal trial

The long-term deployments of the SDS (and NPOIU) undercover officers, involving living amongst the activists within the groups they infiltrated and rising to positions of influence so as to gain the most valuable intelligence, inevitably meant that on occasions officers would either behave in a manner, or collect information, passing the threshold of necessary disclosure in criminal proceedings brought against activists.

If an investigating officer or a prosecutor is made aware of undercover police infiltration of a group whose members have been arrested, or that an undercover officer may have witnessed events relevant to a prosecution or participated in the planning of it, it would be their duty to find out exactly what that the nature of the deployment had been, how they had behaved and what they had witnessed of relevance to the issues in the case. They would be obliged to consider whether the behaviour of the undercover officer might reasonably be used by the Defence to mount an argument of 'abuse of process', or whether the undercover officer had information that was capable of undermining the prosecution case against the activists, or assisting the case of the activists. This duty of disclosure would also extend to any information which might assist the Defence in advancing mitigation to reduce the sentence imposed.

It is important to understand that such an investigation by the investigator or prosecutor might well include asking the undercover officer what they witnessed or gleaned from their interaction with the activists. This is particularly significant if written records were compiled for intelligence purposes rather than evidential issues in a trial, or suggested that the undercover officer had been in close proximity to those arrested before or during the events leading to arrest.

If the deployment of an undercover officer who has interacted in some way with activists, or may have witnessed relevant events, is revealed to an investigator and prosecutor, then this provides the proper opportunity to the prosecutor to comply with their duties of disclosure.

Once the behaviour of and information obtained by the undercover officer is established, and assuming that it is of relevance to the case, it may be possible for the prosecutor to steer around some of the difficulties, for example by altering the way in which the Prosecution case is advanced, or by making concessions regarding the Defence case. Although this is unlikely to avoid disclosure relevant to a potential 'abuse of process' argument on the basis of entrapment issues, it may justify non-disclosure of reporting on factual issues. Certainly it will enable the prosecutor to ensure the court is not misled by the way in which the case is presented. The court can also be engaged to rule on the necessary level of disclosure to ensure a fair trial is achieved, if the material remains sensitive. If the court determines that a fair trial cannot be had without disclosure of sensitive material then the prosecution will take the appropriate course.

The policy of secrecy under which the SDS (under the ultimate management of the MPS) operated must inevitably (on occasions) have deprived the trial process of any opportunity to properly assess how and whether a fair trial might, or might not be had in cases where relevant and potentially disclosable undercover activity had taken place.

Being completely unsuspected as to an undercover deployment, the prosecutor may well have pursued a case that was factually incorrect, or a case they would not have advanced if the deployment of the undercover officer had been known. The prosecutor may unwittingly have misled the court as to the activists' motives, or their relative roles. The Defence may have been deprived of an opportunity to use the factual information generated by the undercover officer to assist its case, or undermine the Prosecution case, or to use the officer's behaviour to seek a stay on the grounds of 'abuse of process'.

Having a deliberate policy of absolute secrecy and non-disclosure within the SDS, that had the consequence of depriving the trial process of the proper opportunity to consider the importance of an undercover deployment connected to activists who were arrested and prosecuted, is therefore a serious procedural irregularity in the process designed to ensure a fair trial.

Such a policy can be compared against the standard now identified. In October 2014, Her Majesty's Inspectorate of Constabulary ['HMIC'] published its inspection of undercover policing. In its report it expressed the following concern [at paragraphs 117-118]:

"The generally poor level of knowledge and lack of expertise of senior leaders combine to form a powerful barrier against the continuous improvement of the tactic and, most importantly, its openness to scrutiny and challenge.

This is unacceptable, especially in light of today's widely-held understanding of just how important sound oversight of this essential yet intrusive police tactic is".

In addition, it emphasised the continuing need for reinforcement of the principle that every undercover officer deployed, in every circumstance, may be required to give evidence in court about their conduct and the evidence that they obtained during their deployment [at paragraph 7.101].

A court examining the impact of the irregularity of non-disclosure upon the safety of a conviction will, of course, want to try to examine the extent to which it is possible now to establish whether the details of the undercover deployment might, if known about at the time, have made a difference to the trial. Such a reconstruction, years after the event, presents obvious difficulties.

In the process of this Review, the Crown Prosecution Service has emphasised that the proper disclosure regime, enshrined in the Attorney General's Guidelines on Disclosure and the Judicial

Protocol on Disclosure, requires a 'thinking approach towards disclosure', in which the Defence must play its part in helping to identify the relevant trial issues.

Whilst this is plainly correct in most cases, it assumes two matters:

1. That disclosure has been handled correctly by the Prosecution at the time of the trial. Where this is not the case, and significant procedural irregularity is known to have occurred, the task faced by the Prosecution is in establishing that the non-disclosure was immaterial to the case.
2. That the Defence is capable of adding value to this process by identifying the issues. In cases involving the deployment of an undercover officer, the extent to which the Defence can engage meaningfully is bound to be limited.

In a case in which the court accepts and concludes that the manner in which an undercover police Squad generally operated was highly likely to have generated material (albeit not in every case) that was potentially relevant and disclosable in a case, it is not likely to be impressed by being asked to assume a conviction is safe simply because there are insufficient surviving records now to determine the matter one way or the other.

This is particularly the case if the material that does survive paints a picture that, in general terms, indicates that the Squad as a whole generally operated a 'flexible' approach to:

- undercover officers engaging in crime;
- officers frequently holding influential positions in groups;
- officers being encouraged to 'go along' with the activists so as 'maintain cover';
- officers getting arrested and sometimes going to trial in their pseudonyms;
- officers being frequently involved in planning meetings for action and the action itself; and
- officer being present and witnesses when events took place.

The Crown Prosecution Service has observed that simply because the manner in which the SDS operated may have created a risk that the fairness of a trial was undermined, it does not automatically mean that a miscarriage of justice always occurred.

We have concerns nevertheless, as to how the safety of a conviction can be demonstrated where it is known that the manner in which the Squad was run must, in some cases, have led to unfairness, but there are simply no surviving records that allow the safety (or unsafety) of a specific conviction to be demonstrated.

Recent appellate decisions relating to undercover police activity

In *R v Barkshire and Others* [2011] EWCA Crim 1885, the activities of Mark Kennedy, an undercover officer who had worked in the NPOIU from 2003 to 2010, came under scrutiny in relation to events relevant to the convictions of a number of environmental activists, prosecuted in connection with the invasion and occupation of Ratcliffe-on-Soar Power Station in 2009.

Kennedy's activities were first identified by activists and he then made public assertions as to his undercover role. He had been deployed into an environmental activist group. The Court of Appeal concluded, on the material provided to it, that Kennedy had played "a significant role in assisting, advising and supporting..." the activities of the group.

In 2009, there was a developed plan to invade and occupy Ratcliffe-on-Soar Power Station. 114 people from various parts of the country were ultimately arrested. Of those, 26 were charged with conspiracy to commit aggravated trespass. From those 26, 20 people eventually admitted participation in the offence, but advanced a defence of 'necessity'. They were convicted. The other 6 denied participation and were due to face a separate trial, but the Prosecution offered no evidence following revelation of previously undisclosed material relating to Kennedy's actions and filed intelligence. The 20 that had been convicted then appealed on the basis of material non-disclosure by the Prosecution at their trial.

Material disclosed for the purpose of appeal proceedings indicated that Kennedy had participated in the reconnaissance of the power station on several occasions and had given activists every impression of enthusiastic support for their objectives. He participated in the briefings of those going to take part; he was responsible for checking for local police activity; he agreed to act as one of the team of climbers; and he was regarded as an '*eminence grise*' by some of the younger activists. It follows that possible issues of 'entrapment' were raised.

Examination of the intelligence that he filed before, during and after the protest, had the potential to undermine aspects of the factual basis upon which the Prosecution case was advanced at trial. Importantly, it tended to show that some of the activists who arrived at the site did not know what action was going to be taken, and it supported claims that the purpose of the protest had been to reduce pollution rather than the 'publicity stunt' asserted by the Prosecution. Clearly, this reporting triggered a duty of disclosure as it had the potential to undermine the Prosecution case.

In addition, as Kennedy remained in contact with some of the activists post-arrest, there was a fear that he had come into possession of legally privileged material, and may have passed some of this material back to his handler.

The Court of Appeal concluded that Kennedy had acted beyond the terms of his authorisation and focused on the non-disclosure of material that had occurred, in the following terms:

"...elementary principles that underpin the fairness of our trial process were ignored...as a result justice miscarried...the golden rule is that full disclosure of material capable of undermining or assisting should be made."

The Court of Appeal concluded:

"...these convictions were quashed 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, as well as of materials which had the potential to provide support for the defence case or to undermine the case for the prosecution. These materials were pertinent to a potential submission of abuse of process by way of entrapment and in any event they had the capacity to support the defence of necessity and justification."

Following the judgment of the Court of Appeal in the Kennedy case, the Crown Prosecution Service asked Sir Christopher Rose to conduct a review of its conduct in the case. His report was published

in December 2011. In its conclusions the report observed that given the terms of Kennedy's authorisations and his activities:

“there could be no clearer case of the need to disclose his role as a participating informant to the court.”

Sir Christopher also concluded:

- (i) There had been a failure by the NPOIU to reveal detail about Kennedy's deployment and the material he had collected to the CPS before charging decisions were made. Had that happened, it is highly unlikely that anyone would have thought it in the public interest for charges to be brought;
- (ii) Proper disclosure was not then made to the Defence and no public interest immunity application was made or considered, because of failures over many months, and at more than one level, by the Police and the CPS;
- (iii) The CPS were told pre-charge that an undercover officer had been involved, but it did not see, or ask to see, as it should have done, all the relevant sensitive material;
- (iv) Existing relevant guidance was simply not followed.

The judgment clearly caused concern within the Police and the Crown Prosecution Service as to whether Kennedy's conduct might have had an impact on other cases.

Following further representations on behalf of other convicted activists, independent counsel was instructed by the CPS to review the cases of 29 individuals who had been convicted of offences relating to them having stopped and occupied a train taking coal to Drax Power Station to protest against climate change.

In April 2012, the Director of Public Prosecutions requested that the MPS conduct a comprehensive review of the conduct of Kennedy in other cases.

While that MPS review was underway, on 3 July 2012, the DPP invited the 29 individuals who had been convicted of offences relating to the Drax train protests to appeal against their convictions, issuing a statement in the following terms:

“As a result of concerns raised with me about the convictions of 29 individuals for offences committed during a protest near Drax Power Station in North Yorkshire in 2008, I ordered a review of the case by a senior CPS lawyer with no prior involvement in the case and asked Brian Altman QC, First Senior Treasury Counsel, to advise on the safety of the convictions...

Having considered the conclusion of that review carefully, I have decided that the safety of the convictions should be considered by the Court of Appeal. That is because it appears to me that a senior CPS lawyer, who has since left the organisation, may not have complied fully with disclosure obligations in this case...

Because I have real concerns about any prosecutions involving Mark Kennedy, in April I asked the Metropolitan Police Service to examine their records relating to Mr Kennedy's deployment to confirm that the Criminal Procedure and Investigations Act 1996, which sets out disclosure obligations, was adhered to.

The MPS has agreed to that request and is currently engaged in that exercise. This is a task that can only be carried out by the police because they hold the relevant records, but should any issues arise in cases prosecuted by the CPS, I will ensure those cases are reviewed by a senior CPS lawyer.

More generally, I have asked Sue Hemming, the head of the CPS Special Crime and Counter Terrorism Division, to work with our Complex Casework Unit Heads to identify, from our available records, whether there are any further cases involving undercover officers that might need to be examined...”

On 16 November 2012, the result of the MPS review into Mark Kennedy's deployments was communicated to the DPP by letter and was to the effect:

- a) That a comprehensive review of prosecutions resulting from the deployments of Mark Kennedy had been conducted.
- b) That it had considered all of Kennedy's deployments.
- c) That there was 'nothing' to suggest that there had been any breach of the disclosure obligations under the Criminal Procedure and Investigations Act 1996, or grounds to suspect that any miscarriage of justice had occurred.

Following the invitation of the DPP that those convicted appeal, the Drax power station case was considered by the Court of Appeal, and became known as *R v Bard and Others* [2014] EWCA Crim 463.

The Court concluded that there had been a clear failure to disclose the fact of Kennedy's involvement and the notes and reports that he made during his deployment.

Kennedy had agreed to participate in the action and became responsible for transportation. Although he was not the only driver, it was conceded on appeal that it could not categorically be stated that the event would, or would not have taken place without Kennedy's involvement.

Kennedy had been authorised to act as he did, and his detailed reporting of the events had been supplied to the Assistant Chief Constable of the local force. None of it had been disclosed at the trial, as the Court of Appeal ruled it clearly should have been. Inconsistent accounts between the Police, CPS and prosecuting counsel made it impossible to resolve exactly why that was the case.

The Court observed:

“Had it been disclosed, no doubt issues would have been raised prior to the trial as to whether there had been an abuse of process or whether Mr Kennedy had acted as agent provocateur.”

On that basis all the convictions were quashed.

In 2013, following representations on behalf the convicted person and an investigation by the Criminal Cases Review Commission, the CCRC referred the conviction of John Jordan back to the Crown Court, his original appeal having been dismissed.

In August 1996, Mr Jordan was arrested with other campaigners for public order offences arising from their occupation of a government office. One of those also arrested was an SDS officer who had maintained his false 'cover' identity through the investigation and court process. Legal proceedings in

relation to this case are on-going at the time of writing. The Crown Prosecution Service did not seek to maintain the conviction on appeal as:

“They were unaware there was an undercover officer involved in the case and had they known ‘Jim Sutton’s’ true identity, it would have been highly unlikely that it would have commenced a prosecution for two relatively minor offences, and thus have risked compromising a police undercover operation.”

As a result of the CCRC’s involvement in the Jordan case, it identified a need for there to be a wider investigation into the activities of the SDS. It initiated contact with Operation Herne in 2012 to consider how this would proceed. This initiative was superseded by this Review.

In so far as we are aware, all the cases that have reached the courts to date have been the result of those convicted having raised concerns, prompting reactive investigations by the Police and the Crown Prosecution Service.

The Crown Prosecution Service has emphasised that in light of the general lack of revelation to prosecutors set out above, there are now inevitable barriers to finding cases of concern through examining CPS files, as it is entirely dependent upon what it is told by the Police.

Whilst steps have been taken to respond to cases that have been drawn to its attention, such as the Kennedy cases, the CPS does not have a mechanism by which it is able to provide a comprehensive check of cases of potential relevance because it cannot identify cases where the Police did not reveal potentially relevant undercover activity.

6. Surviving Records

SDS Records

The 2009 MPS Review of the SDS said the following regarding SDS record keeping:

“A lack of cradle to the grave lifetime files relating to the officers and their deployments leaves the MPS vulnerable to litigation as there is no record to rebut accusations levelled against the organisation, unless they have been stored ‘securely’ elsewhere. This issue will become more acute when supervisors, who could assist by providing evidence of their action, policy and procedure retire.”

One ex-SDS Detective Inspector interviewed by Operation Herne in 2013 stated:

“Your [referring to Herne’s] job is difficult, because we did our best to make it difficult for anyone to understand /reveal our work...When I originally checked records...in 2000 ‘very little’ was held...Until the advent of the computer system the SDS would retain very little that would betray it, that’s why its difficult for you...the unit would not engage with SO10 to keep a firewall from other units/operations...the computer made things more vulnerable.”

We reported in the Stephen Lawrence Independent Review Report [Vol 1 p201] that Operation Herne had informed us that it had not been able to locate any of the original intelligence reported in by any SDS operative before 1997. This remains the position and presents a major difficulty to any attempt to re-construct how an undercover officer deployed before 1997 behaved in any specific situation, let alone what they may have witnessed of relevance to events related to prosecutions faced by activists that resulted in convictions.

For pre-1997 SDS deployments, Operation Herne has accordingly faced the very difficult task of trying to identify from out-going ‘sanitised’ intelligence who may have been the undercover officer concerned and to then try to establish how they generally operated, and any other sources of material that may shed light on what they did, or witnessed, in relation to events relevant to convictions. As we address in more detail below, the task of even identifying convictions that may be connected to SDS activity has itself also been extremely difficult.

Operation Herne currently has 37 various data storage devices that were seized by it from the offices of the SDS in November 2011. It holds files relating to the SDS for the period from 1998 until its closure in 2008, estimated to contain in excess of 50,000 documents. All of the material has been examined, but only on a limited basis against specific search terms. Operation Herne has already seen that when the full details of some of these files have been read, further concerns as to criminality or misconduct may emerge.

It therefore recognises the need to look at the very large quantity of surviving SDS material (mostly from the post 1997 era) in detail. However, it estimates that to complete this detailed exercise would take in excess of 27 years to complete. Once the data is in a fully searchable form, it is clear that Operation Herne will need to find a more manageable solution and agree a more focused approach.

NPOIU records

Surviving NPOIU records include the undercover officers’ pocket notebooks and the authorities granted for their activities, but Operation Herne has still found it difficult to ascertain how the officers actually behaved due to the lack of detail as to their conduct within the records. The records having

been made primarily to deliver on the public order remit behind the activity, and not with a view to keeping a record of how the undercover officer behaved, or what he witnessed, that might be of relevance to the criminal prosecutions of activists.

Despite extensive research, and in contrast to the position with the SDS, Operation Herne has, as yet, been unable to recover the sanitised intelligence associated with the pocket notebooks and RIPA authorities.

The recovery of intelligence and subsequent operational activity, investigation and prosecution files, and conviction details, has also been problematic because of the national responsibility of the NPOIU.

A Review by Her Majesty's Inspectorate of Constabulary ['HMIC'] in 2012 commented on the fact that a sample of NPOIU records examined contained insufficient detail to provide assurance and justification that the intelligence requirement could not have been fulfilled through less intrusive means than the use of an undercover officer.

The HMIC also found that because NPOIU undercover officers were deployed to develop general intelligence, rather than gather evidence for the purpose of prosecutions (which would involve the most intense scrutiny of its methods), the controls applied by the NPOIU fell short of the required standard.

MPS records

Prior to 1998, MPS policy dictated that documents relating to minor offences were retained for 7 years and then destroyed, although the mandatory requirement was less than that. Serious offences (apart from murder) were reviewed after 10 years, with the option to retain or destroy. Retained records and murder files were reviewed at 25 years, with a view to selection for permanent preservation under the Public Records Act 1958.

In 1998, the mandatory period for preservation was increased for minor offences to 7 years, and for serious offences, including murder, to 25 years, to then be reviewed for permanent preservation.

In 2006 Codes of Practice were introduced, increasing the retention periods further. However, the MPS was not at that time in a position to comply and it was agreed that the MPS would work towards compliance by 2018.

Although the types of criminality infiltrated by the SDS evolved over the years, the majority of crime was low level and therefore retention of investigation records beyond 7 years was unlikely.

Potentially as a result of the MPS destruction and retention policies, Operation Herne has so far been unable to trace and locate any police crime files in respect of the low level criminality that would have been dealt with at the Magistrates' Courts.

CPS records

The CPS was created in 1986. It follows that this is the earliest date from which files would be retained.

Case files of 'long term interest' [listed very serious offences, or cases where life or indeterminate sentences are imposed, or other cases of special significance] are required to be preserved indefinitely.

Other case files in double jeopardy cases, or cases where indeterminate sentences are passed are required to be kept for 25 years and then reviewed.

All other case files are required to be kept for 5 years or the length of the sentence (whichever is longer).

HM Court Service records

Magistrates' Courts

HM Courts and Tribunal Service currently require the permanent preservation of Magistrates' Court Registers, and their transfer to local record offices, no later than 30 years after their creation, under s 3(4) of the Public Records Act 1958. Once microfilmed, original records can be destroyed two years after the date of the last entry, and once transferred to the record office the records remain closed to the public until 100 years old. Notes of evidence and case papers can be destroyed after 3 years, subject to the local records office not seeking to retain them. Crown Court appeal papers held by the Magistrates' Court may be destroyed after 3 years from the date the appeal.

In so far as Operation Herne has identified relevant convictions and sought out the Magistrates' Court records, it has met with mixed results, usually after a time-consuming search of locally held records.

Crown Courts

Crown Court records are generally required to be kept for 7 years before being moved to a centrally managed storage facility or before being destroyed.

Records required to be preserved permanently in trials include indictments, the court record. The result of any appeal to the Court of Appeal must be preserved for 20 years.

In committals from the Magistrates' Court, the memorandum or notice of conviction and court record should be preserved for 20 years.

In appeals, the notices of conviction, appeal and court record should be preserved for 10 years.

Otherwise trial files, including guilty pleas, should be destroyed after 7 years unless:

- they concern homicide;
- a life or other indeterminate sentence, restriction order, or sentence of more than 7 years was imposed;
- they involve acts of terrorism or official secrets; or
- they are considered to relate to matters of wide public concern.

Committal files should be destroyed after 5 years, and appeal files after 3 years from date of result.

Judges and other notebooks should be destroyed after 5 years.

It follows from the above, as Operation Herne has confirmed, that after 7 years only the indictment and court record may still exist from a trial in the Crown Court.

7. The difficulties faced by Operation Herne

Operation Herne has summarised the position thus:

“...the intelligence only remit of both the SDS and NPOIU, the lack of original case files and associated documentation and the geographic spread of SDS and NPOIU activity, added to the legitimate destruction of Police, CPS, and court records is severely hampering the decision making of both the CPS and the CCRC...”

...current guidance for the investigation within Op Herne to identify intelligence where the covert work of the undercover officer specifically directed, influenced or facilitated the offending which led to conviction ...is complicated given the nature of the covert work and the long term infiltration of hundreds of groups with a disparate and changing membership who were involved in a wide range of protest activity - and at times criminal activity - across England, Wales and beyond.

The work is potentially far wider as the review also requires the identification of cases where there was a procedural irregularity in intelligence supplied by an undercover officer or material not being revealed to the prosecutor. In these cases the undercover officer may not have 'directed, influenced or infiltrated' the offending but their presence, distant involvement or mere submission of intelligence not revealed to the CPS may still be deemed to be a procedural irregularity.

Given there is not a definitive court judgment on this matter of non-revelation, Op Herne and the partner agencies still have the widest consideration of the potential scale.”

From the work that Operation Herne had already done before this Review was requested in March 2014, it was apparent that a number of SDS officers had been arrested in their undercover identity, often along with other activists. Using the SDS Annual Reports it has now been possible to identify 26 SDS officers who were arrested on a total of 53 occasions. Nine of those occasions were when they were 'in role' and in the company of other co-defendants. The Annual Reports made reference to these occasions due to their potential to compromise the integrity of the Squad's work.

Operation Herne has also been able to identify activists who were arrested on the same occasions that undercover officers were arrested, if they were then convicted of offences. It has provided the Working Group with such records as it could find to shed light on the events, and the officer's role and reporting.

As these files were considered, it became apparent that it was necessary to read more widely into the undercover officer's reporting to gain an understanding of how they generally behaved when undercover. This was of potential relevance in assessing the likelihood that the way they generally conducted themselves gave rise to disclosure issues in the cases of activists who they had been proximate to, and who had been arrested and prosecuted to conviction.

Accordingly Operation Herne endeavoured to provide a more complete picture of each of the relevant officers, to accompany the files, by way of 'pen portraits'. These were necessarily based on an understanding of the officer's role from the information which has been assessed. Given the scale of the task involved in reviewing all of the reporting and activities of any officer, the 'pen portraits' remain a work in progress.

By way simply of example, over 240 files were found relating to a single undercover officer who had been arrested at some point in his undercover role. Those enquiries generated another 51 files relating to their reporting. These files mention 642 individuals who need to be checked to identify any undercover policing related convictions. 628 of the 642 individuals have their own intelligence files which include their date of birth to enable Police National Computer ['PNC'] checks to be conducted. A review of their files has led to a further 84 organisations being identified, linked to the groups that the undercover officer reported on. The files on these groups will also need to be checked.

To fully investigate the extent to which the behaviour and reporting of all the other SDS officers (i.e. those who were not at some time arrested) also causes concern around the safety of the convictions recorded against activists they interacted with or reported on, Operation Herne would need to apply the same investigative treatment to all of the files recording or based on their undercover activity.

For all of the pre-1998 era (before records began to be stored electronically) only summary documents, such as the Annual Reports, authorities bearing scant detail, and the outgoing sanitised intelligence have survived.

The picture that these surviving records create is therefore only a general one, not only lacking the kind of specific detail that may well have been within the incoming raw intelligence reports provided to the SDS office by the undercover officers, but also making it very difficult to determine which undercover officer even provided the intelligence on which it is based.

This undoubtedly presents a real disability to the task of probing whether the detail of what an undercover officer did, or reported back to the Unit would, or would not have presented a disclosure 'problem' at trial.

Operation Herne has suggested, and the Working Group is considering, asking the officers if they can assist at all. Almost all of these officers have now retired. The CPS has highlighted this as being of some relevance before the final outcome of any case is determined.

It is likely that issues relating to the accuracy and credibility of some of these officers may arise given the content of surviving material. These officers may also face scrutiny in relation to other issues, such as potential misconduct, inappropriate sexual relationships during the course of their deployments, and the use of dead children's identities. The extent to which the input of individual officers can be obtained, given the sensitivities around their exposure, and the weight that can be attached to it if it is, therefore remains unclear.

In the post-1998 era more records survive within the electronic storage used by the SDS. Some searchable records have been collated around individual undercover officer's deployments and geographical areas, as well as links to the intelligence they provided. Operation Herne has embarked on reviewing the detailed records to identify occasions where individuals referred to therein have been arrested, then to establish what investigation, prosecution and court records still exist.

Operation Herne has also tried to approach the task by identifying key events that were likely to have resulted in arrests and convictions and where SDS undercover involvement was also likely. This has proved impossible as a result of the way records were stored and compiled.

There is another significant problem for Operation Herne in terms of identifying relevant convictions. Whilst the available records do refer to names of individuals reported upon by the undercover officers, almost invariably the reporting does not contain a date of birth. Without a date of birth, searching for relevant convictions or caution on the PNC system returns huge numbers of result

under just a name. PNC checks are also unreliable beyond a period of 10 years, as minor offences were 'weeded' from the PNC at that time. Indeed Operation Herne has discovered from SDS records that there were relevant convictions more than 10 years ago, only to discover that no record of it exists on the PNC system. This has then required enquiries to be made directly with the Magistrates' Courts and local registries to see if a memorandum of conviction can be obtained.

Examining the NPOIU records to identify convictions that may be unsafe has proved no easier because of the need to resort to a national search, involving multiple physical record examination as well as database searches. In addition, although the NPOIU undercover officers' notebooks survive, these focus upon the intentions of the activists being reported on rather than describing the behaviour of the undercover officer. Again, the option of asking the officers themselves to assist arises.

It is worth emphasising again that even if complete records that describe the undercover officer's behaviour had existed and had survived, the passage of time since the events would still make any reliable 're-construction' of how this might have impacted on the fairness of a trial difficult.

The proper opportunity for disclosure was at the time of trial, when it would have been possible to carry out an investigation into the extent and impact of the activity. There may well now be no satisfactory way in which a court, examining the issue many years later, could be assured that a failure of due process and disclosure, integral to a fair trial, had NOT rendered a conviction unsafe.

Additional options to aid the investigation

As the Review continues, consideration will have to be given not only to seeking information from the undercover officers but also from activists. During the course of this Review, it has been suggested to us that it is of some significance that despite the widespread media publicity of the issues surrounding undercover policing to date, very few activists have come forward to suggest that their convictions amounted to a miscarriage of justice. For the reasons that we have explored in detail above, we believe that this is of limited relevance, given the fact that most activists would be entirely unaware of the deployment of an undercover officer, and that it does not displace the obligations on the CPS and the CCRC to review relevant convictions in any event.

An additional and significant complicating factor, is the unconditional reassurance provided to all undercover officers by the MPS at the time of their agreeing to carry out what was at times dangerous work, that they would never identify them.

Civil proceedings brought against the MPS, particularly those by women who allege they were deceived by undercover officers when entering into personal relationships, resulted in a public ruling by Bean J [*Dil and others v The Commissioner of the Metropolis* [2014] EWHC 2184 (QB)]. This affirmed the very strong public interest in protecting the anonymity of undercover officers, so as to permit them and their superiors to neither confirm or deny ('NCND') their status. However, this does not extend to circumstances of a criminal trial in which revealing the presence of an undercover officer is necessary to avoid a miscarriage of justice.

Even where an officer has self-disclosed, the Police may be permitted to rely on NCND. However, the Court held there was no legitimate public interest which entitled the Commissioner to use 'NCND' to avoid answering the general allegations relating to SDS officers forming long-term sexual relationships with activists.

In so far as the individual officers who allegedly had these relationships were concerned, the Court ruled that two officers, one of whom had been confirmed to have been an undercover officer by the Commissioner, and the other having self-declared and been publicly named by the IPCC as a former MPS officer, could no longer rely on NCND. Others who had been named in the media as having been undercover officers, but who had not self-disclosed or been officially named as undercover officers, were able to remain subject to NCND.

The absolute and forever assurance given to the SDS officers at the time of their deployments is not therefore as absolute under the law.

Nevertheless, the position of individual undercover officers remains a matter of great concern and sensitivity to the officers themselves, their families and to the organisation that offered them an absolute promise that in certain circumstances, it may not be able to keep.

8. The emerging picture as to the nature and level of concern capable of impacting on the safety of convictions

Operation Herne recently described:

“From 1968 until their closure, the SDS provided intelligence on groups and people who committed, in the main, public order offences. However there is no doubt the some groups targeted did participate in significant criminality ranging from offences of criminal damage to the planting of incendiary devices and a range of terrorist activity.

The conduct of the undercover officers ranged from being completely passive to them adopting legitimate tactics of supporting infiltrated groups such as actively supporting the criminal behaviour and even driving others to a demonstration. There is evidence that some officers held positions of trust, seniority and responsibility within targeted organisations. There is also evidence that they were authorised to participate in crime...”

Although the review exercise is still in its early stages, and there is only limited material which describes the behaviour of the undercover officers, the case files which Operation Herne has referred to the Working Group have nevertheless included some helpful pointers of the nature of the concerns arising as to possible miscarriages of justice.

So far as the SDS era is concerned, a general policy of non-revelation of the existence or detail of the undercover activity and reporting to police investigators or prosecutors has been confirmed.

Operation Herne has identified only a very small number of cases where there was revelation of the involvement of an undercover officer:

- In one example, revelation was made to a prosecutor. However, in that example, the undercover officer had been arrested for a driving offence unrelated to his deployment.
- On another occasion, revelation was made to an investigative officer, but not to the prosecutor.
- On a further occasion, revelation was made to the court and the prosecutor, although it was suggested that the individual in question was an ‘informant’ rather than an undercover officer.
- We have already referred to the single occasion when the SDS recorded that there had been engagement with a prosecutor that entailed some degree of revelation, which has yet to be confirmed and the nature of it clarified.

This principal purpose of making any form of revelation was though in order to protect the position of the undercover officer, rather than as part of any attempt to assist in the compliance with the correct level of disclosure required to ensure a fair trial.

In the NPOIU era, it appears there was revelation to senior investigators and to the CPS – the Kennedy cases being examples. However, the current lack of CPS and court records, together with the limited work that Operation Herne has been able to conduct in this area means that it has not been possible to establish the extent and completeness of such revelations or disclosure. Very few of the case files submitted to the Working Group concern NPOIU undercover activity.

The following types of conduct are revealed in the files referred to the Working Group and present clear cause for concern as to the potential for a miscarriage of justice to have occurred:

- A case in which a number of activists and an undercover officer were arrested during a protest and subsequently convicted. The undercover officer was apparently present at planning meetings and attended the protest with some of the activists who were convicted. The officer was instructed not to appear at court on the bail date.
- A case in which an undercover officer was arrested, together with an activist, and may have contributed to the planning of the offence and/or provided encouragement. The undercover officer was then told not to appear at court and the activist was convicted.
- A case in which an undercover officer was described as an active and trusted member of the group they infiltrated. The group was involved in numerous violent clashes with other groups and the police. The undercover officer was arrested and prosecuted. The circumstances of the case suggested that the undercover officer might have been able to give evidence that directly contradicted the evidence of other police officers relied upon by the Prosecution. On one occasion the officer went to trial in his pseudonym and was acquitted after an approach was made to the court clerk.
- A case in which an undercover officer infiltrated a group to a senior level and participated in crime. The information available suggests that the undercover officer may have had an active role preparing for the criminality, attended a meeting where the event was planned and roles were allocated, attended meetings where tactics regarding the proceedings were discussed. A number of members of the group, including the officer, were arrested, prosecuted and convicted after trial. The officer reported upon some of those convicted.

We should add that we have also seen case files in which it appears, from the surviving records, that there was no relevant undercover activity which was directly linked to the circumstances of a conviction.

CCRC and CPS current approach to the issues arising from this Review

Although many of the case files presented to the Working Group require further investigative work, and no decisions have been made in any particular case yet, we have nevertheless asked both the CCRC and the CPS to encapsulate their views as to the issues that are emerging. They are the statutory bodies that have a duty to review such cases. Their roles in any appeal process are different.

If it is considered appropriate, and if the convicted person has never pursued an appeal, then the CPS can notify the convicted person that they might want to seek leave to appeal out of time.

The CCRC has the power to refer cases to an appellate court in accordance with the Criminal Appeal Act 1995. It applies a test of whether there is a 'real possibility' that the conviction would not be upheld.

The Criminal Cases Review Commission

The CCRC's view of the circumstances and situations indicated or suggested by the case files submitted to the Working Group has been expressed as follows:

"The work done, so far, has revealed cases where it appears that the use of a UCO [undercover officer] was lawful and led to information which assisted the police to prepare for potential public order issues on future occasions. There are also, however, situations which are a cause for real concern:

1. Cases where a UCO was deployed, sometimes over a lengthy period, in circumstances that appear to show that he might have become influential in the target group and arguably an agent provocateur.
2. Cases where there is evidence of activity by the UCO at the point when offences are alleged to have been committed. This activity led to arrest, and, in two cases, prosecution of the UCO under a pseudonym, together with the other co-defendants. Prosecutions appear to have proceeded without information on the involvement of a UCO being revealed to the CPS/prosecutor and with the court being misled. Such circumstances would compromise the capacity of the prosecutor to decide whether to prosecute and how to proceed fairly. The possibility that a UCO acquired information that was inconsistent with the prosecution or which might have assisted the defence (and which would therefore need to be disclosed) would not have been addressed. Overall, the failure to reveal the involvement of a UCO could lead the prosecutor inadvertently to mislead the Court in circumstances where co-defendants with a tenable argument of entrapment had their opportunity for a fair trial compromised. This would have resulted in the trial judge remaining ignorant of information needed to ensure that the co-defendants had a fair trial.
3. There are also concerns where a UCO has attended privileged meetings between co-defendants and their defence solicitors.

The Commission considers that a court on appeal would consider that all of these circumstances are improper, undermine confidence in the criminal justice system and amount to an affront to justice. It is arguable that a stay would be required in order to safeguard the integrity of the criminal justice system.

As yet we do not know how many cases will emerge where co-defendants were tried alongside a hidden UCO, or where the UCO has otherwise been charged. So far the scoping exercise has revealed cases in this category between 1977 and 2001.

Another aspect that remains unclear to date is whether the activities of individual UCO's, over time and across a number of target groups, has become of such concern that an argument could be based on the allegation that they are tainted. A wider argument that some of the activities of the SDS were such that the Squad's actions tainted the safety of convictions may also need to be addressed in due course as more information becomes available through the work that Operation Herne, in particular, is engaged with."

The Crown Prosecution Service

The CPS has summarised its position thus:

“There has been clear and consistent agreement that where the features set out in [the CCRC letter], numbered 1; 2 and 3 exist in cases they give rise to the need to make further enquiries and for consideration to be given as to whether that particular case should be placed before a court. The integrity of the Criminal Justice System is of paramount importance in maintaining public confidence. However, the apparent existence of those features does not immediately render a conviction unsafe and does not mean that cases should automatically be referred to a court.

In assessing cases, the Crown Prosecution Service will apply the test set out in *Nunn v Suffolk* [2012] EWHC 1186 at paragraph 33, namely, “it is necessary to show something that materially may cast doubt upon the safety of the conviction before the duty of the Police and the CPS as set out in the Attorney General’s Guidelines and the CPS Guidance arises.” Each case must be judged on its own merits.

It is apparent that in many of the cases reviewed there was material evidence that was no longer available simply due to the passage of time and the fact that paper documents are subject to a, quite proper, destruction process. That is particularly pertinent when considering summary offences. Where material was unavailable there was a natural tendency to speculate about what might have existed. The Crown Prosecution Service views speculation as undesirable when applying the test in, ‘*Nunn*’. For example, the deployment of an undercover officers for lengthy period of time so that they could build the level of trust that infiltrated groups placed in them should not lead to the conclusion that they ‘might’ have played a significant role in organising the activities undertaken by the group. There must be material in existence that casts, ‘...doubt on the safety of the conviction...’, before action is required. The long term infiltration of groups by UCOs was and is a necessary and justifiable part of the important and difficult role that they fulfil.

The Crown Prosecution Service will consider referring cases to a court where the UCO can be shown to have engaged in the same conduct as, and alongside a defendant who was convicted of that offence, where there is evidence that the court and prosecutor was misled about the true identity of the UCO or where there is a real possibility that the fairness of the trial process was undermined by the failure to reveal the status of the UCO to the prosecutor. The consideration of each case is likely to involve further enquiries having to be made to confirm or refute the material that casts doubt on the safety of the conviction. These further enquiries may include a request for the Police to interview the UCO and alerting the relevant defendant to the circumstances prevailing in the case of that defendant. No distinction will be drawn between cases based on the seriousness of the offences for which the defendant was convicted. The Crown Prosecution Service will seek to preserve the integrity of the court process.”

We have confirmed that it follows from the above that there is a difference between the CCRC and the CPS as to the criteria that each believes merits a referral to a court. Essentially, the CPS has indicated that it will not consider inviting a convicted person to appeal against conviction simply because there is no remaining paperwork, unless there is material that positively demonstrates that in the case under consideration:

“...the UCO can be shown to have engaged in the same conduct as, and alongside a defendant who was convicted of that offence... there is evidence that the court and prosecutor was misled

about the true identity of the UCO or... there is a real possibility that the fairness of the trial process was undermined by the failure to reveal the status of the UCO to the prosecutor.’

The CPS has clarified the meaning of this paragraph to the effect that it will not engage in what it describes as ‘speculation’ about what might exist, and will only invite a convicted person to appeal against conviction ‘where the available material provides a proper basis for forming the view that a miscarriage of justice may have occurred’. Whilst this material may include the way in which the Squad operated, this would have to be of specific relevance to a case.

Whereas the CCRC has indicated that an appellate court’s concerns as to the safety of a conviction may arise from a wider consideration of the activities of the SDS, potentially tainting the safety of convictions generally. Further, an individual officer’s behaviour may be tainted beyond the circumstances of a specific case, giving rise to concerns as to the safety of a conviction. Clearly these broader concerns extend beyond the criteria that the CPS considers would merit referring a case to an appellate court.

For what it is worth, we endorse the approach taken by the CCRC. In our opinion, this accords with the legal framework that we have considered above. In adopting the position that it does, the CPS places reliance on the case of *Nunn*. In our view, that case is clearly distinguishable from the issues under consideration in this Review. The case of *Nunn* concerned a ‘fishing expedition’, in which disclosure was sought on a speculative basis. Our Review is considering a context of known serious irregularity on the part of an undercover squad. The Squad operated a deliberate policy of non-disclosure of material that it must, on occasions, have known to include material that was disclosable in criminal cases.

Having expressed that view, we immediately acknowledge that it is the responsibility of the Crown Prosecution Service and the Criminal Review Cases Commission to arrive at their own independent assessment of whether any particular conviction case does, or does not, merit an invitation to appeal against conviction, or a referral to an appellate court as a possible miscarriage of justice.

The CPS has indicated to the Working Group that it will review all of the cases that Operation Herne has referred to the Group, and will make decisions in those specific cases. This may include requesting that further enquiries are conducted. The CPS will make decisions once it is satisfied that ‘all lines of enquiry have been completed’.

In the event that the CPS decides not to invite a convicted person to appeal against conviction, the CCRC will then consider a case independently, against its own criteria, and will decide whether it should refer it to an appellate court. This is consistent with the Protocol set out in Annex I.

9. Recognition of the potential miscarriage problem and action taken

We have not been able to embark on an examination of this issue in any detail yet. However, we can indicate:

- i) We have seen nothing to indicate that during the era of 1968 to 1989, when the Home Office funded the SDS and received brief annual summaries of its work, that the potential impact that the policy of total secrecy might have on criminal prosecutions of activists was ever considered. After 1989, the MPS took control of both the funding and management of the SDS.
- ii) Operation Herne has confirmed that, to date, it has not identified any material that indicates that the MPS identified the potential problem that the policy of total secrecy observed by the SDS might have had on the safety of historic convictions of activists. This includes before, during and after the reviews of the SDS carried out internally in the MPS in 2008-2009.
- iii) Operation Herne was initially formed by the MPS in October 2011 in response to allegations made in the media about misconduct and criminality committed by members of the SDS. These allegations focused on sexual relationships and undercover officers being arrested and giving evidence in their undercover identity. Operation Herne's remit extended to carrying out a full review of the SDS. Chief Constable Creedon was appointed as an independent lead for Operation Herne in February 2013, due to rising public interest following the allegations regarding the use of dead children's identities, which was reported on by Operation Herne in July 2013. We understand from Operation Herne that in October 2011 it notified the MPS of practices adopted by the SDS that may have affected the safety of historic convictions.
- iv) As set out above, after the Kennedy case, in April 2012, the DPP asked the MPS to review all prosecutions arising out of, or connected to, Mark Kennedy's undercover activity. In November 2012, the MPS indicated that it had reviewed all of Kennedy's deployments and stated that there was nothing to suggest that there had been any breach of the Police and Prosecution's disclosure obligations, or other grounds to suspect a miscarriage of justice had occurred. In the meantime, having received representations on behalf of convicted activists, the DPP invited the individuals convicted in the Bard case to appeal.
- v) During 2012 and 2013, further representations were received by the CPS from other individuals convicted of offences connected to protest activities. We have looked at the CPS case notes regarding these cases. These indicate that enquiries were being made of the Police and the relevant CPS areas. The CPS has informed us that it has reviewed those cases and is satisfied that there is currently no basis to refer any of them to a court.
- vi) Operation Herne has yet to investigate most of the NPOIU cases. It has not yet investigated the Kennedy cases. As indicated above, in July 2012 the DPP announced:

"More generally, I have asked Sue Hemming, the head of the CPS Special Crime and Counter Terrorism Division, to work with our Complex Casework Unit Heads to identify, from our available records, whether there are any further cases involving undercover officers that might need to be examined..."

On 27 June 2012, Sue Hemming contacted the CPS Areas 'to seek an assurance that there were no other cases involving the deployment of undercover officers that raised concerns, or alternatively, to identify any areas of concern'. This request was focused on cases that had been handled by the CPS over the preceding five years. The context of the request was that the CPS had no computerised system in place which was capable of identifying the involvement of an undercover officer in a case. The methods available to identify relevant cases included reliance on the recollections of CPS staff, and the use of the CPS case management system to research cases in which the deployment of undercover officers was considered to have been more likely to have occurred, based on the type of criminality involved.

The CPS has indicated that the CPS London Report received in response to Sue Hemming's request identified two cases of concern: *R v Jordan and R v Clarke and Sheppard*, in which there had been no revelation or disclosure. Both of these cases had already been identified as potential miscarriages of justice before the CPS review. Those acting for Mr Jordan applied to the CCRC in September 2011. The CCRC subsequently identified the conviction of a co-defendant of Mr Jordan as being a cause for concern and it traced him, and his solicitor and invited them to make an application to the CCRC to consider his case.

Operation Herne had identified concerns in the case of *R v Clarke and Sheppard* by early 2012, primarily as a result of allegations made in the media, and the case was raised specifically by Caroline Lucas M.P. in Parliament in June 2012.

The CPS has indicated that in response to her letter, another area notified Sue Hemming of a case in which short-term undercover policing had resulted in an abuse of process application being upheld by a court in 2012. The deployment was in the context of offences of attempting to handle stolen goods, and consequently it was not linked to the SDS or the NPOIU. Following the court's ruling, other linked cases were discontinued by the CPS, and the CPS invited convicted individuals to take appropriate action. The CPS alerted the Police to the issue so that they could decide what appropriate action was necessary in relation to cautions that had been administered.

The CPS has confirmed that it has not identified any other conviction cases giving rise to cause for concern. This process was inevitably restricted to cases in which revelation of the existence of an undercover police officer had been made to the CPS.

As to the wider picture, the reports from the CPS Areas were collated and summarised in a report for the Director of Public Prosecutions. That report accepted that it had proved difficult to identify the exact number of test purchase or advanced undercover officer deployments given the limitations of methodology set out above. Following the assessment of the reports from the CPS Areas, Sue Hemming instructed the CPS Areas to meet with their Police counterparts in order to identify any further causes for concern. This liaison led to the implementation of a 'Memorandum of Understanding' between the CPS and the Police as to future handling of cases involving undercover deployments.

- vii) As we have indicated previously, and as is confirmed by (vi) above, the activity by the CPS prior to the commencement of this Review was essentially reactive to concerns initiated by those who had been convicted. Although the CPS invited the convicted individuals in the Bard case to appeal against their convictions, this process was initiated after complaints had been made on behalf of the activists to the Director of Public Prosecutions. The CPS has emphasised that it has been proactive in its current approach towards cases involving undercover officers, including its comprehensive review of the processes involved, and its Memorandum of Understanding with the Police.

10. Looking Ahead

The expectation in March 2014 was that a review of possible miscarriages of justice arising from the non-revelation of undercover police activity, touching on activists who were convicted of offences, should have been able to make considerable progress in a year so as to permit the announced Public Inquiry to commence with the benefit of its findings.

Regrettably, this has not transpired to be the case. What has transpired is that the size and difficulty of the investigative task has become recognised as one that could take many years to complete, if pursued in the level of detail currently seen as necessary.

The Review has already uncovered a number of convictions causing concern that are currently under active consideration by the CPS and CCRC, and we are advised that they should have arrived at some decisions about these cases reasonably soon.

How the Review is now progressed in the light of the difficulties that have now been identified will need to be considered.

What has also become clear is that there are a large number of convictions where the lack of surviving records precludes a detailed analysis of the nature of the deployments such as to identify if there was, or was not, any relevant activity or observation by the undercover officer that might meet the disclosure threshold.

Having ascertained in more general terms how undercover activity at the time of the convictions was managed, as well as how the individual officers generally behaved, it may become necessary in those cases to focus more on the impact that the policy of total secrecy had in preventing the proper level of scrutiny taking place at the time of trial. The inevitable context being that the nature of the undercover deployments was such that on occasions they must have generated material which was disclosable in criminal proceedings but which was not revealed by the SDS to the responsible investigators and prosecutors.

Given that the CPS has indicated that the wider activities of the Squad do not, of themselves, provide criteria for consideration by a court, and that the CCRC may not yet be in a position to whether they would merit referral either, it appears that the Public Inquiry may provide the best opportunity for a public examination of the issues they raise.

Other forces

Operation Herne has established that many forces had covert units working against extreme football hooliganism in the 1980s, which used essentially the same methodology of long-term infiltration as the SDS and NPOIU. In addition, the spread of undercover work against organised crime touches on every police force and every type of criminal activity. Although much of this activity will have been focused on obtaining evidence, there is clearly some potential that adequate disclosure may not have taken place.

As regards the breadth of the Review, Op Herne has suggested:

“The potential of the miscarriage work is compounded by the broader understanding of undercover policing throughout England and Wales, outside the SDS and the NPOIU. The reality is that the issue of non-revelation of undercover officer’s infiltration of all types of criminality

is potentially much wider...in seeking to assess the scale of the potential miscarriage problem, consideration needs to include every police force in England and Wales...”

We agree with that suggestion.

As we have already mentioned, consideration will also need to be given to involving the undercover officers in the fact-finding exercise, and the activists as well.

Many of these issues may be capable of some form of resolution as part of the Public Inquiry, which could also determine the level of detail required on particular topics, and the specific cases that it would seek to examine.

Conclusion

The relative lack of progress of this Review over the last year; the complexity which has been encountered in making progress over any reasonable timescale, and the limitations that may exist as to either the CCRC or the CPS referring cases back to an appellate court, all suggest that it may now be appropriate for the Public Inquiry to become engaged in these issues.

ANNEX I

Review of potential miscarriages of justice (relating to the activities of the Special Demonstration Squad and/or National Public Order Intelligence Unit)

Protocol between Operation Herne, the Metropolitan Police Service (MPS), the Crown Prosecution Service (CPS) and the Criminal Cases Review Commission (CCRC)

Background

Mark Ellison QC has been appointed by the Home Secretary to co-ordinate a multi-agency Review to assess the possible impact upon the safety of convictions in England and Wales where relevant undercover police activity was not properly revealed to the prosecutor, and considered at the time of trial.

The Review will seek to ensure, by working co-operatively with the Home Office, Operation Herne, the MPS, the CPS, the CCRC and any other relevant agencies that the tasks identified at items 1 to 6 in the Terms of Reference for the Review (published by the Home Secretary in a Written Ministerial Statement on 26 June 2014) are carried out, and will aim to report the Review's findings in writing to the Attorney-General by 31st March 2015. As at the time of agreeing this protocol it is apparent that the findings of the Review by 31st March 2015 will be limited to a scoping exercise to describe the nature and extent of the possible miscarriages of justice and a likely timescale for the Review to be completed.

This protocol is agreed pursuant to item 7 of the Terms of Reference, by Operation Herne, the MPS, the CPS and the CCRC regarding the tasks that each will undertake.

As stated in the Terms of Reference, the statutory responsibilities of the various agencies and the office-holders working with the Review remain unaffected.

Purpose

There is a possibility that the activities of the MPS Special Demonstration Squad (SDS) (which operated nationwide) will have resulted in other incidents and arrests which, upon consideration, may be shown to be cases in which the convictions are unsafe. Similar concerns exist in respect of the activities of the National Public Order Intelligence Unit (NPOIU) which, whilst not an MPS resource, worked to similar objectives. Such cases fall within the remit of the CCRC, should the conviction be such that it justifies a referral to the appropriate appellate court.

In such circumstances the relevant agencies are aware of the respective reasonable expectations in order that, should the need arise, the CCRC and/or CPS are able to carry out a review of a conviction with the benefit of as much contemporary (to the conviction) material which remains extant.

Operation Herne

Operation Herne is engaged in a review of all material held on databases, or preserved in documentary form, and which were created as a result of the activities of the SDS. Operation Herne

may also identify relevant material that is held by other agencies. When considering such material, Operation Herne will establish whether, as a result of the operations under review, any persons were arrested and subsequently tried and convicted of criminal offences, whether before a magistrates' court or the Crown Court.

Where convictions have resulted (whether after trial or through a guilty plea) Operation Herne will have regard to the guidance on cases relating to undercover policing agreed between Operation Herne, the CPS and the CCRC, liaising with the CPS and/or CCRC as appropriate.

Where the circumstances set out in the guidance are met, the following action will be taken by **Operation Herne**:

- Inform the CPS of the details of the conviction. This will include:
 - The date of the conviction,
 - The court convicting,
 - The defendant's full details,
 - The details of any known co-defendants,
 - The causal link to the undercover officer.
- Request the CPS to identify and preserve any files arising from the trial and appeal (if any).
- Secure all relevant police documents, paying particular attention to any disclosure material.
- Inform the CCRC that such a referral to the CPS has been made.
- Make a copy of any relevant material available to Mr Ellison if requested.

The CPS and the CCRC

The principles as to division of work between the **CPS** and **CCRC** will be:

- In any case where an appeal has been heard, or leave to appeal has been refused, the
- CCRC will carry out a review of the case, applying its statutory test to the case.
- In all other cases, the CPS will carry out a review of the case, applying its test to the case, and will inform the CCRC of the outcome of that review.
- Where a case has been reviewed by the CPS and the CPS does not consider the conviction to be unsafe, then the CCRC will carry out a further review of that case, applying its statutory test to the case.

The CPS will:

- Liaise generally with the CCRC and Operation Herne.
- Identify and preserve any files arising from the trial and appeal (if any).
- Obtain any additional material necessary to any CPS case review.
- Review cases in accordance with CPS policy and procedure.
- Notify the CCRC of the outcome of any CPS case review.
- Make a copy of any relevant material available to Mr Ellison if requested.

The CCRC will:

- Liaise generally with the CPS and Operation Herne, as above.
- Check the name of the defendant on the CCRC case management system to establish whether an application has been received independently. Where an application has been made in a case that the CPS would otherwise be reviewing, the CCRC will notify the CPS and will 'take over' that review.
- Where appropriate, serve section 17 notices¹ on:
 - HM Courts & Tribunal Service (HMCTS)
 - CPS
 - Police (with assistance from Operation Herne, where appropriate, to identify relevant police material)
 - Any other relevant agencies.
- Review cases in accordance with CCRC policy and procedure.
- Make a copy of any relevant material available to Mr Ellison if requested, subject to the requirements of sections 23 to 25 of the Criminal Appeal Act 1995.

Other relevant issues

Where material is deemed, by the relevant agency, to be sensitive for reasons of national security, access and disclosure restrictions may apply in accordance with usual working practice. No material will be made public without the consent of its originating organisation or, failing that, direct Ministerial authority.

¹ Under section 17 of the Criminal Appeal Act 1995 the CCRC may, where it is reasonable to do so, require any public body to produce any document or other material in its possession or control which may assist the CCRC in the exercise of any of its functions. The CCRC may also direct that any such document or material must not be destroyed, damaged or altered until such time as the direction is withdrawn. The requirement is not limited by any obligation of secrecy.

TERMS OF REFERENCE FOR MARK ELLISON QC'S REVIEW OF POSSIBLE MISCARRIAGES OF JUSTICE IN CASES INVOLVING UNDISCLOSED UNDERCOVER POLICE ACTIVITY

Mark Ellison QC will co-ordinate a multi-agency Review, reporting to the Attorney General, to assess the possible impact upon the safety of convictions in England and Wales where relevant undercover police activity was not properly revealed to the prosecutor and considered at the time of trial. Nothing in these terms of reference affects the statutory responsibilities of the various agencies and office-holders working with the Review.

The Review will initially focus on the undercover police activity of the MPS's Special Demonstration Squad and the National Public Order Intelligence Unit (NPOIU) which, whilst not an MPS resource, worked to similar objectives. The Review will then assess whether its scope may need to be broadened to cover other undercover police activity.

The Review will seek to ensure, by working co-operatively with the Home Office, Operation Herne (on behalf of the Metropolitan Police Service (MPS)), other police forces, CPS, Criminal Cases Review Commission (CCRC) and any other relevant agencies, that the following tasks are carried out:

1. Establish the relevant document retention and destruction policies adopted within the relevant organisations;
2. Identify the extent of surviving police, prosecution and court case files;
3. Establish the nature of undercover policing undertaken and the potential for undercover police activity to have been relevant to a prosecution but unrevealed to the appropriate authority;
4. Identify, using both available records and other reasonable means, any convictions where it appears there was relevant undisclosed and unrevealed undercover police activity capable of impacting adversely on the safety of the conviction;
5. Ensure that any cases falling in 4 above, where it appears the safety of a conviction may have been adversely affected, are referred to the appropriate authority for evaluation and appropriate action;
6. Ensure that any cases falling in 4 above are reviewed to establish the rationale for non revelation and to establish the extent to which the MPS and the Home Office were aware and identify the action taken as a result; and
7. Agree a protocol with the MPS (and all other police forces subsequently identified), the CPS, the CCRC and any other relevant agencies regarding the tasks that each will undertake; the availability and handling of material; and other issues as necessary.

Mark Ellison QC will aim to report the Review's findings in writing on the above to the Attorney-General by 31st March 2015.

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