

Email dated 14/9/17

[redacted]

Your e-mail to [redacted] found its way to me.

Firstly I just wanted to flag up that my team has a policy lead on public inquiries so please keep us copied if you get to the stage of drafting advice to Ministers on holding a PI.

Secondly you might find the attached of use, which builds upon the document that [redacted] sent you. It's for internal use only and still in draft.

[redacted] is right to highlight cost - there has been no recent inquiry that has cost less than several million.

Happy to discuss.

Regards

[redacted]

GUIDANCE FOR MINISTERS AND SUBJECT MATTER OFFICIALS ON WHETHER A PUBLIC INQUIRY SHOULD BE ESTABLISHED

Introduction

Inquiries continue to operate on a statutory and non-statutory basis. The majority of statutory inquiries will be held under the Inquiries Act 2005. The Inquiries Act 2005 covers the setting up of inquiries, appointments to them, their procedures and powers, the submission of evidence and the publication of reports.

It was suggested by the chair of the Fingerprint Inquiry that a successful public inquiry would have the following features:

- Interested parties would believe that a thorough inquiry into the issue which had caused public concern had been conducted, with obvious fairness, and that the final report was not over-written or under-researched;
- Interested parties would feel that they have been given an opportunity to present their views;
- The inquiry reaches conclusions that are justified by the evidence in a way that is cost effective; and
- The inquiry produces a report that people understand.

Advice to Ministers will need to consider the public interest to be served by holding an inquiry and the most appropriate form for any such inquiry. Directorates will need to be able to put forward robust reasoning to support any decision.

Inquiries may be necessary to:

- establish the facts leading up to a matter of concern;
- determine the explanations for, and causes of, things which have gone wrong;
- identify those responsible for deficiencies or performance failures;
- establish the lessons to be learned from what has happened;
- making recommendations intended to correct the deficiencies for the future.

The form of an inquiry - and whether it is statutory or otherwise - will be affected by:

- the likely duration and cost;
- whether there will need to be the power to compel witnesses and the release of documents;
- whether witnesses will need to give evidence on oath;
- whether Ministers will need to exclude documents or hold sessions in private (for example for national security reasons);
- the level of formality that is needed;
- whether a particular option is likely to satisfy those affected by the issues in question.

The following matters are issues and questions which should be considered by **Ministers and the officials advising them** before coming to a decision to hold a public inquiry in Scotland which would achieve these goals.

Do Ministers have a duty to establish an inquiry?

- No – but they may have a duty to ensure that the right to life has been respected and upheld by the state, which will include the actions or absence of actions by relevant public authorities. This duty may in turn mean that an inquiry compliant with Article 2 of the European Convention on Human Rights must be held (see separate guidance on Article 2 of ECHR).

Questions Ministers should consider before deciding to hold a public inquiry

Appropriate form of investigation

- Are the events of the case in question giving rise to serious and widespread public concern? Is that concern justified?

The legislative requirement in section 1(1) of the Inquiries Act 2005 ("the 2005 Act") is just "public concern". This is a matter on which the Directorate which deals with the subject matter of the incident which is causing public concern will provide advice, taking into account public, media and political reaction.

- Will a public inquiry satisfy that public concern?
- Are the final report and any recommendations of a public inquiry likely to address the public concerns which cause its initial establishment?

In this regard, it should be borne in mind that it is not the purpose of a public inquiry to determine civil or criminal liability. The inquiry will not "hold to account" any party

as the media sometimes suggest will, or should, be the case, though the conclusions of the inquiry may permit certain inferences to be drawn.

It is possible that any civil action for damages might be brought and concluded, possibly by settlement, before a public inquiry might report. This is particularly the case because personal injury actions must be raised within three years.

- Are there any other forms of inquiry or investigation under way, or expected, the reports or findings of which are likely to address the same public concerns?

Cost

- Do the circumstances of the matter in question justify the expense of a public inquiry? (see "Cost and length of a public inquiry" below)
- are there sufficient resources available to fund it?

Length

- Given that most public inquiries take some years to report, is there a need for an investigation which will report more quickly?
- Will the likely lapse of time lessen the impact of any conclusions drawn by an inquiry?

Powers required by inquiry

- Are the particular strengths of a statutory public inquiry likely to be required in order to establish the facts of the case in question?
- Are there likely to be any uncooperative witnesses or documents and evidence withheld from another sort of inquiry?

Chair of inquiry

The decision on who should chair an inquiry may be taken after the initial decision has been taken to hold that inquiry.

- Is there an impartial inquiry chair available – and willing to be appointed – who can command sufficient public confidence in determining the facts and making associated recommendations?
- If the inquiry chair is to be a serving judge, sheriff principal or sheriff, has the Lord President been consulted on his or her appointment?
- Is the inquiry chair competent and sufficiently skilled to ensure the efficient conduct of the inquiry?

Remit

The chair of the inquiry must be given an opportunity to discuss the proposed remit of the inquiry with Ministers before that is finalised and published (see "Terms of reference" below).

Timing

- Is a passage of time required before the public can make an objective, dispassionate public assessment of the events in question, and is the holding of a public inquiry likely to provide the passage of such time?

Cost and length of public inquiries

Cost

Although there is a duty on the chair of a public inquiry under section 17(3) of the 2005 Act to act with regard to the need to avoid any unnecessary cost, there are many unavoidable costs incurred at any public inquiry:

- the salary of the chair (unless the chair is a serving judge who remains on salary) and other members of the panel (if any);
- the salaries of counsel, the solicitor and secretary to the inquiry;
- the salaries of other inquiry support staff, either employed by the inquiry or services bought in;
- fees for subject experts;
- expenses of core participants and witnesses, etc attending the inquiry;
- the cost of accommodation both for the inquiry team and for the public hearings (which may have to be held in separate and larger premises);
- IT equipment (including document management and reporting on hearings) and other support services;
- Website, communications and PR; and, above all,
- the legal costs of the core participants at the inquiry which are always met by the Government unless the core participant is a corporate body.

All of these costs fall on the sponsoring Directorate within whose areas of responsibility the subject matter of the inquiry lies and who will provide advice to Ministers on the holding of a public inquiry.

In relation to awards made by the inquiry chair to core participants, witnesses, etc attending the inquiry, Ministers may, under section 40(4) of the 2005 Act, determine qualifications and conditions to which awards to be made in respect of the legal representation of core participants and witnesses at the inquiry. Core participants are those who have played a significant role in matters to which the inquiry relates or have a significant interest in an important aspect of those matters.

An example of a determination by Ministers under section 40(4) is attached in the Annex below. Its terms and the level of hourly rates paid are typical.

Length

The other major factor in the cost of a public inquiry is its length – the longer the inquiry, the more it is going to cost.

The "lessons learned" report from the Fingerprint Inquiry noted that: "it is neither realistic nor fair to expect any particular inquiry to replicate the kind of timescales achieved by other inquiries. The time taken will reflect many things – including the nature of the subject matter, the methodology adopted by the chair (once appointed),

the availability of key players (both among the inquiry team and core participant teams), the demands of the evidence (gathering, collating and assessing) and the practicalities of compiling a report".

With the possible exception of the ICL Stockline inquiry, there have in the past been unrealistic Scottish Government expectations about how long recent inquiries were going to take. For example, it was suggested that the Fingerprint Inquiry would cost around £1.5 million and would be carried out within a year. It finally cost around three times that figure and took nearly four years.

Neither the Edinburgh trams nor the Child Abuse inquiries have set timescales.

The Fingerprint Inquiry operated on the basis of a zero based budget (ie one that is based on prospective actual costs, rather than a budget being assigned to the inquiry. It is therefore essential that the team within the Scottish Government which sponsors the inquiry meets the secretary to the inquiry on a regular basis to monitor the progress of the inquiry and its budget which will largely be determined by how long the inquiry will take.

Recent public inquiries in Scotland

ICL Stockline

Set up February 2008, reported July 2009 (one year, five months).

Cost **£1.91 million**.

Fingerprint (Shirley McKie)

Set up March 2008, reported December 2011 (three years, nine months).

Cost **£4.75 million**.

Vale of Leven (C Difficile)

Set up January 2007, reported November 2014 (seven years, ten months).

Cost **£10.77 million**.

Penrose (Hepatitis C)

Set up April 2008, reported March 2015 (six years, eleven months).

Cost **£12.1 million**.

By way of comparison, the estimated cost to the Crown Office and Procurator Fiscal Service (COPFS) and the Scottish Courts and Tribunals Service (SCTS) of preparing and conducting a fatal accident inquiry (FAI) is shown below. These figures were prepared for the Financial Memorandum for the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016.

	1 day FAI	1 week FAI	Lengthy FAI
COPFS ¹	£9,494	£13,122	£94,701
SCTS ²	£2,000	£10,000	£90,000
Total	£11,494	£23,122	£184,701

The one-day FAI is based on a straightforward mandatory FAI heard over one day or less. The one week FAI is based on a week-long mandatory FAI. The lengthy FAI is based on an FAI involving complex medical evidence (the length of 45 days has been used for the SCTS cost as an example). A public inquiry is likely to last for considerably longer.

The impact on SCTS relates to the accommodation, services, staff and judiciary it provides for the purposes of FAIs.

What is an inquiry under the Inquiries Act 2005?

A public inquiry held under section 1(1) of the 2005 Act is a specific form of public inquiry, which Ministers may cause to be held into any events which have caused or may cause public concern. Scottish Ministers may only hold an inquiry into Scottish matters, meaning matters which relate to Scotland and are not reserved under the Scotland Act 1998. Inquiries may be held jointly with the UK Government – the ICL Stockline inquiry is an example.

The House of Lords Select Committee which carried out post-legislative scrutiny of the 2005 Act recommended in 2014 that public inquiries into issues of public concern should normally be held under the 2005 Act. They pointed out that this is essential where Article 2 of the ECHR is engaged (right to life). They also suggested that no inquiry should be set up without the power to compel the attendance of witnesses unless Ministers are confident that all potential witnesses will attend.

The Select Committee did, however, recommend that the possibility of a public inquiry being held otherwise than under the Act should not be removed, for example where security issues are involved, or other sensitive issues which required evidence to be heard in secret. They suggested that Ministers should give reasons for any decision to hold an inquiry otherwise than under the Act.

The UK Government, in its response to the Select Committee, noted that:

- The fact that section 1(1) of the 2005 Act gives Ministers discretion whether or not to use the Act indicated that Parliament was mindful of the potential suitability of other approaches; and
- There is the option of converting a non-statutory inquiry, investigation or review into a 2005 Act inquiry in the event that powers such as those to compel witnesses or the production of evidence are required.

¹ Includes administrative, precognition, Victim Information & Advice (VIA), legal, pathology and witness costs.

² Based on the basic approximate cost of an FAI sitting in a sheriff court, which includes judicial and staff costs as well as running costs.

Powers of an Inquiries Act 2005 inquiry

A public inquiry is conducted by its chair, who may be assisted by an inquiry panel (though the appointment of other panel members is relatively rare). The chair will usually be assisted by counsel to the inquiry who will cross-examine witnesses on behalf of the inquiry.

There will usually be a secretary to the inquiry, who will administer the inquiry, managing its budget and progress, and a solicitor to the inquiry, who will provide legal advice on its procedures.

The inquiry will investigate the events causing public concern which has caused the inquiry to be held, consider the evidence and determine the facts. They may also make recommendations in connection with that case. An inquiry may not, however, establish the criminal or civil liabilities of any persons.

A public inquiry under the 2005 Act is granted powers that are not available to other forms of public or private inquiry. The chair may require the attendance at the inquiry hearing of witnesses and may also require the production of documents and evidence for examination to the same extent as would be the case in the Court of Session. The inquiry may also require evidence to be taken under oath. Persons who do not comply with a direction of an inquiry are guilty of committing an offence.

It is possible for a non-statutory inquiry (see below) to be converted to an inquiry under the 2005 Act in order that the chair may have power to require that witnesses or evidence are brought forward at the inquiry. This was done at the Edinburgh Trams Inquiry due to lack of co-operation by certain core participants.

Subject only to certain specified restrictions, a public inquiry must ensure that members of the public (including reporters) are either able to attend the inquiry in person or to hear a simultaneous transmission of the proceedings, and are also able to obtain or view a record of the evidence presented.

What are Ministers' powers under the Inquiries Act?

Terms of reference

Ministers are empowered to establish the inquiry itself (section 1), including the date on which it will be set up, as well as establishing the inquiry's terms of reference (section 5).

In establishing the terms of reference of an inquiry, Ministers may set out particular matters which require to be determined, and whether or not recommendations require to be made. Under section 5 of the Act, Ministers must set out the terms of reference of the inquiry before the date that is to be specified as the setting up date for the purposes of the Act.

Ministers must consult the chair or proposed chair (and are required to do so in

respect of an Inquiries Act 2005 inquiry).

Legal advice should always be sought before the terms of reference are announced. The terms of reference should always make clear:

- To whom the inquiry should report;
- The purpose of the inquiry; and,
- Whether the inquiry is being invited to review policy in a given area, consider the facts of a particular case, and/or make recommendations.

Terms of Reference may include an estimated timeline to help maintain focus and speed.

Ministers may, however, at any time change the terms of reference of the inquiry, but must consult the chair of the inquiry before doing so (section 5(3) and (4)).

Appointment of chair and other members of the inquiry panel

Ministers will select and appoint an impartial person as the chair of the inquiry under section 4 and, after consulting the chair, may appoint any other members of the inquiry panel and any expert assessors appointed to assist the inquiry in advance of its being set up. After an inquiry has been established, it is for the chair to appoint any further assessors.

The House of Lords Select Committee recommended that the inquiry panel should consist of a single member unless there are strong arguments to the contrary and it has been rare for more than one member to be appointed to the inquiry panel.

Although Ministers may terminate the appointment of an inquiry panel member under section 12, they may only do so on certain limited grounds including:

- Physical or mental illness;
- Failure to comply with duties imposed by the Act;
- Lack of impartiality due to a direct interest in the subject matter of the inquiry or a close association with an interested party;
- Any misconduct.

Fees and expenses

Ministers may determine the fees and expenses to be paid to the inquiry team, including its chair (section 39). They will also determine conditions or limits on the expenses to be paid to core participants and witnesses which will otherwise be paid at the discretion of the chair (section 40). An example is shown in the attached Annex. Such expenses paid to witnesses may include expenses actually incurred, compensation for loss of time and legal representation.

Independence of the inquiry

After an inquiry has been established, Ministers may not direct the inquiry as a whole, or the chair in particular, or the conduct of Inquiry proceedings. Under

section 17 of the 2005 Act, the procedure and conduct of the inquiry are for the chair to direct.

Restrictions on public access

Under section 19, Ministers may impose restriction notices in relation to the disclosure or publication of any evidence or documents given, produced or provided to an inquiry. Ministers must consider the harm or damage that could be avoided or reduced by such restriction, including:

- death or injury;
- damage to national security or international relations;
- damage to the economic interests of the UK or any part of the UK; and
- damage caused by disclosure of commercially sensitive information.

Ministers may vary or revoke a restriction notice by giving further notice to the chair at any time before the end of the inquiry.

Suspension or ending of terms of reference

Ministers may suspend an inquiry to allow for the completion of any other investigation or the determination of civil or criminal proceedings, but must consult the chair of the inquiry before doing so.

Ministers may also, or for any reason, end the inquiry entirely, but must first consult the chair. In cases of a change to the inquiry's terms of reference, or its suspension or its being brought to an end by Ministers, a notice or a statement is required to be provided to the Parliament. To adopt such a course could clearly be politically controversial.

Ministers may certify matters to the Court of Session in relation to any persons failing to comply with the requirements of an Inquiry, including refusal to attend hearings or produce evidence in their possession.

Rules

Ministers may by statutory instrument make the rules of public inquiries dealing with matters of evidence and procedure, the return or keeping of inquiry documents and the award of expenses to witnesses.

What other kinds of inquiry are available?

Fatal Accident and Sudden Death Inquiries

A fatal accident inquiry (FAI) is conducted by a sheriff. Its purpose is to establish the circumstances of a specific death or deaths. FAIs are not intended to consider wider issues of public concern, only the circumstances of the deaths in question which have led to the holding of the FAI. Like public inquiries, it is not the purpose of an FAI to establish civil or criminal liability.

At the conclusion of the FAI, the sheriff may make recommendations in his or her final determination based on the circumstances of the fatal incident with the intention that deaths in similar circumstances may be avoided in the future. Such recommendations are not legally binding and they may, for example, relate to reserved matters.

Under the provisions of the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016, parties to whom sheriffs direct their recommendations are obliged to respond to the Scottish Courts and Tribunals Service to indicate whether and to what extent they intend to implement the recommendations – if they do not intend to implement the recommendations, then they are obliged to explain why not. Sheriffs. Recommendations will otherwise usually be considered by the relevant regulatory bodies, whether devolved or reserved.

It is not within the gift of Scottish Ministers to establish an FAI, because the investigation of sudden, suspicious or unexplained deaths in Scotland is a discrete and long-standing responsibility of procurators fiscal under the direction of the Lord Advocate. Further, an FAI may only be held in circumstances where there has been a sudden or unexplained death, possibly as the result of an accident, and FAIs will be an unsuitable alternative to a public inquiry in cases where public concern is unrelated to the occurrence of deaths.

Inquiries under other legislation

In a very limited number of cases, an inquiry may be established under other legislation, such as the Financial Services Act 2012 or the Merchant Shipping Act 1995.

Non-statutory inquiries

Because of national security or other reasons of sensitivity, a public inquiry may be held on an *ad hoc*, non-statutory basis. Such inquiries will lack the powers to subpoena witnesses or material.

Examples of such *ad hoc* inquiries are those into the construction of the Scottish Parliament building and the Iraq Inquiry (Chilcot). Ahead of its first hearings, the Chilcot Inquiry published three protocols that set out processes for the inquiry's interaction with witnesses, hearing of evidence and the identification and handling of sensitive information. The inquiry also agreed with Government a protocol setting out the steps that would be followed when seeking to reach agreement on the use of sensitive written and electronic information.

Non-Statutory Committees

A Commission or Committee may be established to act independently of Ministers to investigate a set of circumstances and if properly appointed can carry as much public confidence as can a public inquiry into the quality of its recommendations, but the statutory protections of the independence from Ministerial interference provided to such bodies are limited and there could be concerns that Ministers will exert improper influence over the committee or commission, including in the provision of

resources and funds. Further, such bodies will have no powers to compel the appearance of unwilling witnesses or the production of documents or other evidence, and are not required to be conducted in public.

Royal Commissions or an inquiry of Privy Councillors

Royal Commissions tend to be held into constitutional matters (for example the 1973 Kilbrandon Report on the constitution of the UK) or public policy rather than issues of immediate public concern.

Inquiries of Privy Councillors may also consider matters relating to Government such as the 1957 Report on the interception of communications.

A Royal Commission or an inquiry of Privy Councillors may be established to act independently of Ministers to investigate a set of circumstances and if properly appointed can carry as much public confidence as can a public inquiry into the quality of its recommendations, but the statutory protections of the independence from Ministerial interference provided to such bodies are limited and there could be concerns that Ministers will exert improper influence over the Commission, including in the provision of resources and funds. Further, such bodies may have no powers to compel the appearance of unwilling witnesses or the production of documents or other evidence, and are not required to be conducted in public.

Investigation with a public hearings element overseen by a judge or a QC

Independent Review with a public hearings element

Regulatory Investigations

Some areas of public service are overseen by regulatory authorities who are granted powers of investigation. The Scottish Public Services Ombudsman and various Accident Investigation authorities, for example, have substantial powers to compel documents and evidence from the relevant authorities within their respective remits, while planning inquiries have all the powers of a tribunal and are usually required to be held in public.

Internal Investigations

Any public authority may establish an internal inquiry to determine the facts of a case and learn lessons from the experience to improve their future performance. Such inquiries are entirely reliant on a commitment to good practise and transparency. Such forms of self-regulation are normally able to establish all the necessary facts and make relevant recommendations, because all the necessary evidence and witnesses are already at the disposal of the public authority. However, they are rarely held in public and the authorities are not immune from suits of action arising from the conduct of an investigation, as Public Inquiries are. The potential for conflict of public authority interest is evident and so self-regulated internal investigations may be subject to criticism for their lack of independence. They may not assuage public concerns, especially if the commissioning authority is itself found (or, perhaps more pertinently) not found to have been at fault.

Independent Investigation

Ministers may commission an independent investigation into events without establishing a Public inquiry in order to minimise the elements of conflicted interests described in internal investigations but it would be difficult to entirely remove the potential conflict if Ministers themselves were accountable for the actions giving rise to the events under investigation.

Police Investigations and Criminal Prosecutions

It would be inappropriate for Ministers to direct police investigations or decide on public prosecutions - these decisions that will be taken independently by Police Scotland and by procurators fiscal under the overall direction of the Lord Advocate.

Police Scotland and the Crown Office and Procurator Fiscal Service have sufficient powers to investigate any criminal matters and if they have taken the decision to do so it is unlikely that a public inquiry could determine the facts of a case any more efficiently – or quicker. A public inquiry is unlikely to serve a useful purpose until criminal proceedings have concluded, and indeed the holding of a public inquiry may even hamper the efficient conduct of criminal proceedings since the disclosure of evidence at a public inquiry may prejudice the rights of the accused at criminal proceedings.

Under section 3(2) of the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016, the Lord Advocate may decide that the circumstances of a death have been sufficiently established by other proceedings, such as a criminal trial or an inquiry under the 2005 Act, and that it is unnecessary to hold an FAI which would otherwise be mandatory under section 2 of the 2016 Act.

Truth and Reconciliation Commission

No such commission has ever been held in Scotland. The aim is to establish the facts of a case and to reconcile the parties involved, such as the commission established to investigate the apartheid regime in South Africa. Such a forum is a legal minefield, with questions arising around the incrimination of witnesses and the defamation of the deceased.

ANNEX

DETERMINATION BY MINISTERS UNDER SECTION 40(4) OF THE INQUIRIES ACT 2005

Public Inquiry into C Difficile infection and mortality at the Vale of Leven Hospital

NOTICE TO THE CHAIRMAN OF A DETERMINATION BY THE SCOTTISH MINISTERS UNDER SECTION 40(4) OF THE INQUIRIES ACT 2005

The Scottish Ministers have determined, under section 40(4) of the Inquiries Act 2005 ("the 2005 Act"), that as regards the Inquiry into c difficile infection and

mortality at the Vale of Leven Hospital, the power of the Chairman of the Inquiry to award amounts in respect of legal representation under section 40(1) and (2) of that Act shall be subject to the qualifications and conditions set out below.

The qualifications and conditions are:

1. Awards in respect of legal representation may be made only in circumstances in which the Chairman considers it is necessary, fair, reasonable and proportionate for such an award to be made.
2. Any award must be subject to the condition that payment will be made only for work that is evidenced and can be identified as having been done in an effective and efficient manner, avoiding unnecessary duplication and making best use of public funds.
3. Awards may be made only in respect of legal representation provided by one or more named legal representatives whose involvement has been approved in advance by the Chairman. The Chairman must approve the size and composition of any legal team to be engaged, including the seniority and number of any counsel. Costs associated with work carried out by legal representatives who are not approved in advance of the work being carried out shall not be met from public funds.
4. Any award must specify the nature and scope of the work that is to be publicly funded. Legal representatives must not be publicly funded for work that does not fall within the agreed scope. An inquiry under the 2005 Act is inquisitorial in nature and legal representatives will not be paid for investigative work or for work in relation to obtaining expert reports, unless the Chairman gives express permission in advance for this work to be carried out.
5. The legal representatives will agree in advance, with the Solicitor to the Inquiry, hourly rates for counsel and solicitors, subject to the following maximum hourly rates:

Senior Counsel – £200

Junior Counsel – £100

Solicitors – £150.
6. The maximum number of hours that can be charged by a legal representative in receipt of an award made by the Chairman shall be 40 hours per week, save that exceptionally the Solicitor to the Inquiry may authorise an increase in the weekly cap up to 60 hours for counsel or a solicitor during the oral hearings and for a two month period before they commence where the Solicitor to the Inquiry is satisfied that such action is justified in all the circumstances (e.g. when the work involved in any week clearly needs to exceed 40 hours).
7. In respect of paragraph 6 of this notice:

(a) No unused hours in any week may be set off against any other week;

(b) A week shall be taken as commencing on Sunday and ending on Saturday;

8. Expenditure incurred before notification of the Chairman's award, or expenditure in excess of the terms upon which approval is granted, will not be recoverable. In exceptional circumstances, and after obtaining the Scottish Ministers agreement, the Chairman may make an award in respect of expenditure incurred before notification of the Chairman's award.

9. Travel and subsistence rates as they apply to Scottish Government employees would apply for witnesses and legal representatives within the United Kingdom. Rail travel would be reimbursed at standard class rate and air travel at economy class rate. Awards for travel expenses or compensation for loss of time shall only be made for witnesses from outside the UK where the Chairman is satisfied that their travel is necessary to the fulfilment of the Inquiry's terms of reference.

Email dated 5/10/17

[redacted]

Attached is a first go at a submission and public inquiries annex (there are a number of other annexes, but they'll be largely cut and pastes). I would welcome your initial views on how this is looking.

[redacted]

Email dated 6/11/17

[redacted]

Thank you for this submission which is spot-on. [redacted]

We have discussed a couple of things that we need to plan for:

- The option of the Cabinet Secretary for Justice writing to the Home Secretary 48 hours in advance of statement/publication with an embargoed copy.
- Including in that letter a restatement of SG's preferred option i.e. extending the UCPI terms of reference.
- The Cabinet Secretary for Justice meeting with HMICS in early course to be briefed orally by Derek Penman.

- Co-ordinating a handling plan with Police Scotland, HMICS and SG Comms.
- The terms of any Parliamentary statement – if we don't offer one, MSPs will demand one.

Was there anything from our conversation with the Cabinet Secretary for Justice last Wednesday?

[redacted]

Email dated 7/11/17

Interesting comments from [redacted]. Do you want to go through them now or when [redacted] responds?

[redacted]

Email dated 7/11/17

[redacted]

copy as above

It is up to the Cabinet Secretary to determine when to lay the report in Parliament. Publication by HMICS would follow but Parliament needs to get it first, and we will be suggesting a Parliamentary statement on the same day.

I don't think the Cabinet Secretary should decide on a date until he has seen advice from us, [redacted], and has had the discussion with Derek Penman.

I know HMICS are keen to nail down a date but we can't do that yet.

[redacted]

Email date 17/11/17

Folks

With apologies for sending yet another email on this, I've attached a re-structured version of the submission. As well as the restructuring, please note that there is now an undertaking to take the views of [redacted].

[redacted]

Email date 17/11/17

I had suggested including extracts as an annex. Pages 1-2 are the helpful stuff; pages 3-4 are the unhelpful.

What do you think?

[redacted]

EXTRACTS

...the use of undercover policing in Scotland cannot be considered to be widespread. (p.4)

The use of undercover officers is a legitimate policing tactic and has been used effectively in Scotland. (p.8)

...all the authorisations we examined complied fully with the requirements of RIP(S)A and the associated codes of practice. (p.8)

There was no evidence that undercover advanced officers from Police Scotland had infiltrated social justice campaigns or that officers had operated outwith the parameters of the authorisation. (p.8)

Police Scotland has adopted the College of Policing, Authorised Professional Practice for undercover policing. (p.9)

The use of covert investigatory measures including the authorised use and conduct of an undercover officer is legitimate in tackling serious organised crime and keeping people safe, provided such activity is proportionate, necessary, lawful and appropriately authorised. (p.13)

... we are reassured that the current internal supervision and oversight measures in place by Police Scotland reduce this risk and are likely to identify unacceptable behaviour. These measures are further strengthened by external scrutiny arrangements. (p.15)

We consider that the continued development by Police Scotland of the use and conduct of undercover policing, in conjunction with other investigatory measures, and in a manner that is necessary, proportionate and in compliance with the law and codes of practice is an essential element in tackling serious and organised crime and keeping communities across Scotland safe. (p.16)

... we found evidence that undercover foundation officers were closely monitored, supported and supervised by cover officers. (p.21)

The authorising officer made it clear that it is never acceptable for an undercover officer to form an intimate sexual relationship with the subject(s) of an operation and that such conduct would not be authorised as an operational tactic. (p.23)

We found that the internal process for the authorisation of an undercover officer was well established and understood by those responsible and, in our view, complied with the requirements of RIP(S)A and the codes of practice. (p.23)

We found that a code of conduct for undercover officers is signed by each officer on an annual basis confirming that the officer is personally responsible for his or her own actions and will adhere to the law, rules and regulations. (p.24)

When we engaged with all undercover officers, they displayed a good understanding of ethical standards and were conversant with the organisation's values and the code of ethics for policing. Officers had strong views that there were a number of safeguards in place to ensure that ethical standards were maintained when they were deployed. This was evidenced by the dynamic process of risk assessment, the role of the cover officer, the COM-UC and the intrusive level of supervision and support provided. (p.25)

... Operations Herne and Elter who have cooperated fully with our review and enabled us to establish the extent and scale of SDS and the NPOIU undercover deployments in Scotland. (p.47)

Apart from the G8 Summit, which was the main focus of his activity, we consider that there was no routine engagement with Scottish police forces and that the service would have been unsighted on his [Mark Kennedy] visits. (p.48)

Outwith the G8 policing operation all other undercover operations conducted by the SDS and NPOIU in Scotland was the responsibility of the SDS and NPOIU. (p.49)

We are satisfied that the deployment of undercover officers to support the police security operation at the G8 Summit was undertaken with the full knowledge, co-operation and the authorisation of Tayside Police. (p.5)

It is our assessment that the information provided in this report, in respect of the NPOIU deployments in Scotland, should be considered as provisional and not conclusive. (p.5)

Two of the key elements within the Policing 2026 strategy relate to online safety and the response to serious organised crime. The capacity and capability within Police Scotland to conduct undercover policing in support of these is currently limited and needs to be further developed. (p.8)

We consider that financial management of undercover operations required more analysis and oversight. (p.9)

There is no recognised cross border provision for advising Police Scotland when undercover officers from England and Wales are deployed to Scotland. There are also no reciprocal arrangements for advising when Police Scotland officers are deployed in England and Wales. (p.9)

Police Scotland should introduce a welfare-based policy for substance misuse testing of active undercover officers. (p.12)

HMICS considers it essential that the service should take the opportunity to review the organisational structure and operational benefits provided by SCD. (p.17)

There was limited resilience within the management and supervision of undercover policing, with the COM-UC managing two separate roles and relatively few cover officers providing welfare, support and overseeing the day to day management of undercover operations. (p.19)

...there was insufficient capacity to support effectively multiple undercover operations across Scotland. (p.20)

Although an experienced police manager, the detective chief inspector had not received training in the regulation of investigatory powers legislation and had limited experience of undercover policing. (p.20)

...there is an element of risk when managers are asked to carry out leadership roles that include the provision of scrutiny and oversight of specialist areas of policing but may lack the necessary expertise and experience to examine the operational detail. (p.20)

This professional awareness of the limited capacity within the SOU has undoubtedly resulted in the number of undercover authorisations remaining relatively low when compared with elsewhere in the UK. (p.21)

Compliance with the principles and standards set out in Police Scotland's code of ethics is a requirement of the statutory code of practice for covert human intelligence sources. To ensure that undercover officers observe these principles Police Scotland should develop a process that demonstrates effective governance and oversight of compliance with the code. (p.25)

...reluctance to release trained undercover officers to support an authorised operation has a detrimental impact on the SOU's capability to operate effectively. (p.27)

We established that about 50% of trained officers had not been operationally deployed in 2016... (p.33)

We also found there is currently limited capacity and capability within Police Scotland for undercover advanced and online operations. (p.35)

We found that there was a lack of awareness amongst divisional commanders and senior managers about operational benefits of using undercover officers. (p.36)

There is a requirement for the SOU to operate in compliance with the APP and the standards set by the College of Policing. This includes sufficient backroom support which at the time of the review was absent. (p.36)

We found that there is a need to develop a policy that covers professional practice for undercover online activity. (p.38)

We also found that there was no recognised procedure for notifying Police Scotland where undercover officers from England and Wales were deployed to Scotland either as part of an authorised operation under RIPA or legend building. (p.39)

We reviewed each of the 27 undercover advanced operations and in 24 cases the authorisation for the use and conduct was undertaken by a chief officer. In three of the cases (circa 2000 and 2003) the paper documentation of the authorisations are no longer available... (p.44)

Whilst there is expertise in the management of undercover foundation deployments, there is limited experience of the management of undercover advanced operations. (p.46)

...it is not possible to establish if the material obtained by Operation Herne is entirely accurate or comprehensive and it is probable that, given the passage of time and the likelihood of human error, that some records are missing or inaccurate. (p.47)

HMICS believe that in a ten year period between 1997 and 2007 the SDS deployed 11 undercover officers to Scotland. Deployments were aligned to a range of groups including terrorist, anarchist and anti-capitalist activity and were time limited to a few days as opposed to long-term community infiltration. (p.67)

Excluding G8 we established that in a ten year period between 1997 and 2007, there were six SDS officers who visited Scotland on 11 occasions comprising a total of 28 days. From the records held by Operation Herne it does not appear that Scottish police forces were sighted on these deployments. (p.47)

In our fieldwork, we established that a small number of Scottish police officers were seconded to the NPOIU carrying out a variety of different functions including the cover officer role. (p.48)

Two emails dated 22/11/17

Linda

I've had another go at this. I've added in some further information around the level of concern area.

It still requires some work, and we need [redacted] to confirm my understanding of RIPA authorisations.

[redacted]

[redacted]

Is this the most recent version of this submission? Is there a version post [redacted] comments? Apologies if there is, I cant find it!

L

Email dated 22/11/17

I have reviewed and re-structured. Please read with tracked changes switched off.

The main substantive addition is this rationale/summary:

"While there is some legitimate public concern around the activities of Metropolitan Police units in Scotland, I consider that establishing such a Scottish public inquiry into undercover policing is not justified by the evidence in the HMICS review; would not be a proportionate response in light of the limited scale of the activities of SDS and NPOIU police officers in Scotland, and the lack of any evidence of any systemic failings within undercover policing in Scotland; would inevitably create a measure of duplication with UCPI by involving many of the same core participants, law enforcement officers and potential overlap in conclusions and remedies; could, because of the scale and duration of the UCPI, be subject to potential delay in obtaining Metropolitan Police Service participation and documentation; and would not represent value for money for the Scottish tax-payer."

"I have weighed up the case for and against a separate inquiry in Scotland and I do not consider that establishing a public inquiry would serve the public interest. The HMICS review provides reassurance to the public and the Parliament around Scottish policing's use of undercover police officers since 2000, identifies room for improvement and makes a number of recommendations that Police Scotland will implement in full.

"Ultimate responsibility for the actions of English and Welsh police units lies with the UK Government and the Mayor of London and the Scottish Government position continues to be that that the most effective way of addressing 'Scottish' concerns is for the terms of reference of the UCPI to be amended to allow it to look at the activity of English and Welsh police operations which took place in Scotland."

[redacted] - We spoke. Does this rationale fly for you?

[redacted]

Email dated 23/11/17

Thanks [redacted].

Broadly convinced me, but I'm biased by my position (*and by my experience around the lengthy internal/external debates to resist, then establish the child abuse inquiry!*)

Lengthwise, the text could be tightened for media comment, but is fine for parly statement/correspondence.

Due to other pressures today, I've had to ask [redacted] to look at this with a bit more focus, and suggested he test it with a comms peer who's not on the justice desk and can consider it from position of no knowledge.

The one quick thing that leapt out was the use of the word "Scottish" concerns, even in inverted commas, runs against our general theme that these are concerns about what happened in "Scotland" rather than what was sanctioned by "Scottish" authorities.

Would suggest amend this:

Ultimate responsibility for the actions of English and Welsh police units lies with the UK Government and the Mayor of London and the Scottish Government position continues to be that that the most effective way of addressing 'Scottish' concerns is for the terms of reference of the UCPI to be amended to allow it to look at the activity of English and Welsh police operations which took place in Scotland."

To read something like this:

Responsibility for the actions of English and Welsh police units sits with the UK Government and the Mayor of London and the Scottish Government position remains that the clearest and most effective way of addressing those concerns about what (may have) happened in Scotland is for the terms of

reference of the UCPI to be amended to allow it to look at the activity of English and Welsh police operations which took place across Great Britain."

[redacted]

Email dated 26/11/17

[redacted]

Thanks for looking over this again, I have made some changes/comments in the attached and am happy to discuss.

[redacted]

Timing on all of this will be crucial, now that there is so much else going on with Police Scotland – we will need to speak to Communications colleagues and those in Police division to come up with a recommended point of release for this.

Can this be read with fresh eyes to make sure references to paragraphs and Annexes are correct? I wonder about some of the Annexes and whether they are logical, but I have marked that in the body of the text.

Finally, I mentioned this to Gillian as a complex and difficult piece of work that you and [redacted] were taking forward - she offered to have a look as she has significant experience of inquiries (she set up Penrose). So, if there is a slot for her to look at the final draft (with Annexes attached and post [redacted] once over, if possible), then I think that would be helpful. I also think your helpful rationale and final submission should also be run past [redacted] too, as I suspect [redacted] might ask for a meeting to discuss and he will ask [redacted] to attend, so it is as well ensuring we have all bases covered.

Thanks – I think we are getting there!
Linda

Email dated 27/11/17

[redacted]

This is a new version of the submission. I've moved some stuff around and clarified some of the points that Linda had raised. I'm also suggesting taking out the historical documents from annexes and instead sticking them as separate docs on the covering email (that way they can be printed off if MM requires to see them again). Subject to any further views you have, I'll send this version onto [redacted], Gillian and [redacted] (for [redacted]).

[redacted]

From:

Cabinet Secretary for Justice
[redacted]

HMICS STRATEGIC REVIEW OF UNDERCOVER POLICING IN SCOTLAND

Purpose

1. To provide you with advice following receipt of HMICS's report, "*A strategic review of undercover policing in Scotland*". This advice covers 1) the findings and proposed handling of the review, 2) the related issue of the ongoing judicial review in the Court of Session and 3) the question of a public inquiry into undercover policing in Scotland.
2. [redacted] on the issues raised in this submission, in particular the ECHR considerations and the interaction with the judicial review.

Priority - Routine.

Background

3. You directed HMICS to undertake this review on 22 September 2016 and the terms of reference were published on 11 January 2017. The decision to direct HMICS was taken following consideration of a number of options around holding some form of inquiry into undercover policing in Scotland. Copies of these documents are attached separately for information.

Findings of the Report

4. The HMICS strategic review provides public reassurance around undercover policing in Scotland since 2000. The report puts undercover policing in the context of Policing 2026, assesses capacity, reports scale as being at a low level, states that the tactic it is underutilised, that procedures for authorisation have been tightened up, identifies room for improvement and recommends that Police Scotland should always be notified of any activity by others in Scotland. A fuller analysis of key findings is included at Annex A and HMICS Derek Penman has offered to meet with you to discuss this report in more detail.

Scottish Public Inquiry

5. We have considered the options around some form of inquiry again, following receipt of this report and have concluded that there is nothing in the report to suggest that a Scottish inquiry under the Inquiries Act 2005 is necessary, desirable or appropriate, nor do we believe that there are grounds for an alternative form of inquiry for the same reasons. Our view remains that the most effective way of addressing 'Scottish' concerns is for the terms of reference of the UCPI to be amended to allow it to look at the activity of English and Welsh police operations which took place in

Scotland. The publication of the report presents an opportunity to restate that case to the Home Secretary and a draft letter for you to consider is attached at Annex F.

6. Annex C sets out the arguments and detailed advice as to why there should not be an inquiry in Scotland and our proposed rationale is provided at Annex D.

Next Steps

7. Once you have indicated that you are content, we will make arrangements to lay the report in the Scottish Parliament. After the report has been laid, HMICS will publish the report on their website. Preparatory arrangements have been taken forward with the SSI Clerk.

8. You may wish to consider making a Ministerial Statement in relation to the findings of the HMICS strategic review and your decision on whether an inquiry into undercover policing in Scotland is necessary, desirable or appropriate. SGLD has confirmed that there is no difficulty in making a Ministerial Statement provided there is no mention of the specifics of the ongoing litigation raised by [redacted]. You will also wish to be aware that the Justice Sub-Committee on Policing has pencilled in a slot to take evidence from HMICS about his report on Thursday 18 January, which could have a bearing on the timing of a Statement.

Background material

9. The following annexes are attached:

- Annex A - Report Summary
- Annex B - Interaction with Judicial Review and ECHR considerations
- Annex C - Advice on whether or not to hold a Public Inquiry into undercover policing in Scotland
- Annex D – Rationale for not setting up a public inquiry in Scotland
- Annex E - Draft media holding line
- Annex F - Draft letter to Home Secretary
- Annex G - HMICS recommendations

10. In addition, the following documents have been attached separately for reference and information:

- Advice on different forms of inquiry
- Announcement of HMICS review – PQ 55W-03046
- HMICS Terms of reference
- HMICS report – ‘A strategic review of undercover policing in Scotland’

11. It would be helpful to meet with you to discuss this advice, the handling of the report and our recommendations below.

Recommendations

12. It is recommended that you:

- 12.1 note the above and the detailed annexes;
- 12.2 agree the media holding line at Annex D;
- 12.3 meet with HMICS Derek Penman to be briefed on his report;

- 12.4** agree to lay the report in the Scottish Parliament;
- 12.5** consider writing to the Home Secretary re-stating our position (draft at Annex F)
- 12.6** consider making a Ministerial Statement outlining the Scottish Government's position on the same day; and
- 12.7** in a Ministerial Statement, provide a decision and rationale for not setting up a public inquiry in Scotland.

[redacted]
Safer Communities – Defence, Security and Cyber Resilience Division
[redacted]
November 2017

Copy List:	For Action	For Comments	For Information		
			Portfolio Interest	Constituents Interest	General Awareness
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«Officials Only»	«text»
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ANNEX A

HMICS STRATEGIC REVIEW OF UNDERCOVER POLICING IN SCOTLAND

REPORT SUMMARY

Background

13. You directed HMICS to undertake this review on 22 September 2016. The decision to direct HMICS was taken following consideration of a number of options around holding some form of inquiry into undercover policing in Scotland. HMICS published its terms of reference on 11 January 2017.

Key Findings

14. HMICS's report is largely procedural in nature and makes 19 recommendations (see Annex G), all of which are for Police Scotland to take forward. Police Scotland has told us that they accept all of the recommendations. The report notes that:

'The use of undercover officers is a legitimate policing tactic and has been used effectively in Scotland. Operational activity has primarily focused on drug related offences, child sexual abuse and exploitation, human trafficking and exploitation and serious organised crime.'

15. It also notes:

'There was no evidence that undercover advanced officers³ from Police Scotland had infiltrated social justice campaigns or that officers had operated outwith the parameters of the authorisation.'

16. Paragraph 158 makes clear that the use of the undercover policing tactic has not been widespread in Scotland from 2000:

'In a sixteen year period (2000-2016) an assessment of the number of undercover deployments by Scottish policing lead us to the conclusion that the use of undercover policing in Scotland cannot be considered to be widespread. Indeed, we believe that undercover advanced officers and undercover online officers has been underutilised. This is a position that has been accepted by Police Scotland.'

17. The report confirms that appropriate safeguards are in place. These include a number of internal mechanisms – internal governance arrangements are structured and team meetings are conducted professionally; all undercover foundation officers⁴ are closely monitored, supported and supervised on a daily basis; and Police Scotland has adopted the College of Policing Authorised Professional Practice for undercover policing. There is also compliance with statutory measures: full compliance with section 7(6) of RIP(S)A, full compliance with the Regulation of Investigatory Powers (Covert Human Intelligence Sources) (Scotland) Order 2014 (which further regulates

³ Undercover advanced officers are able to undertake more complex and long-term undercover deployments including the investigation of major crime, organised crime and counter terrorism – see Appendix 2 of HMICS report

⁴ Undercover foundation officers operate at the 'entry point' in undercover policing and will undertake activities such as test purchasing of drugs – see Appendix 2 of the HMICS report.

undercover officers) and full engagement with the Office of Surveillance Commissioners (now the Investigatory Powers Commissioner's Office).

18. With regard to the deployment of Special Demonstration Squad (SDS) and National Public Order Intelligence Unit (NPOIU) from the Metropolitan Police Service and ACPO, the report records the following:

- *'We believe that between 1997 and 2007 the SDS deployed eleven (11) undercover officers to Scotland.'*
- *'We believe that between 2003 and 2010 the NPOIU deployed nine (9) undercover officers to Scotland.'*
- *'Mark Kennedy accounts for the majority of NPOIU deployments in Scotland and between 2004 and 2010 visited Scotland on at least seventeen (17) occasions with multiple activities during each visit.'*

19. The report notes, however, that the material made available in relation to the SDS may not be entirely accurate or comprehensive. Paragraph 167 states that the SDS deployments were concerned with terrorist, anarchist and anti-capitalist activity and were limited to a *'few days as opposed to long-term community infiltration'*. The same paragraph also states that *'the purpose of these visits was connected with activities elsewhere in the UK...'*

20. The majority of NPOIU deployments are attributed to Mark Kennedy. It is assessed that Kennedy visited Scotland on at least 17 occasions with those visits being recorded as legend building (*'legend building'* is the activity undertaken to develop and maintain the officer's *'story'*). Information about Mark Kennedy's visits is already in the public domain through the 2014 HMIC report although it reported 14 occasions rather than 17.

**Defence, Security and Cyber Resilience Division – Organised Crime Unit
November 2017**

ANNEX B

HMICS STRATEGIC REVIEW OF UNDERCOVER POLICING IN SCOTLAND

INTERACTION WITH JUDICIAL REVIEW AND ECHR CONSIDERATIONS

21. You are aware of the on-going Judicial Review by [redacted] which challenges both the UK Government's decision not to extend the Undercover Policing Inquiry (UCPI, formerly referred to as the Pitchford Inquiry) to Scotland, and the Scottish Government's 'failure' to commission a Scottish Public Inquiry.

22. The petition from [redacted] seeks judicial review on two fronts, namely:

- the decision of the UK Government to refuse to extend the terms of reference of the Pitchford Inquiry into undercover policing to cover Scotland; and
- the decision of the Scottish Ministers to refuse to set up a Scottish Inquiry under and in terms of the Inquiries Act 2005 with terms of reference equivalent to those of the Pitchford Inquiry but covering Scotland.

23. The Scottish Government's position on the UCPI is that it supports the inquiry's terms of reference being extended to allow it to take evidence on SDS and NPOIU operations which crossed the border into Scotland. The UK Government has refused such an extension.

24. It is anticipated that the full hearing of those matters will not take place until early in 2018. A Ministerial decision made on whether or not to hold a public inquiry in Scotland before that hearing should render the challenge to the Scottish Government element of that case academic, although such a decision might simply prompt a different challenge. Any "new" decision based on your consideration of HMICS's report could give rise to a separate petition for judicial review of that decision either by [redacted] or someone else claiming to be affected by the decision.

Do ECHR Considerations point to a public inquiry?

25. Where an individual claims that their human rights under the ECHR have been breached there may be a duty on the state to ensure an effective official investigation into the circumstances in which that breach occurred. Failure to provide for that investigation can itself amount to a separate breach of the rights in question.

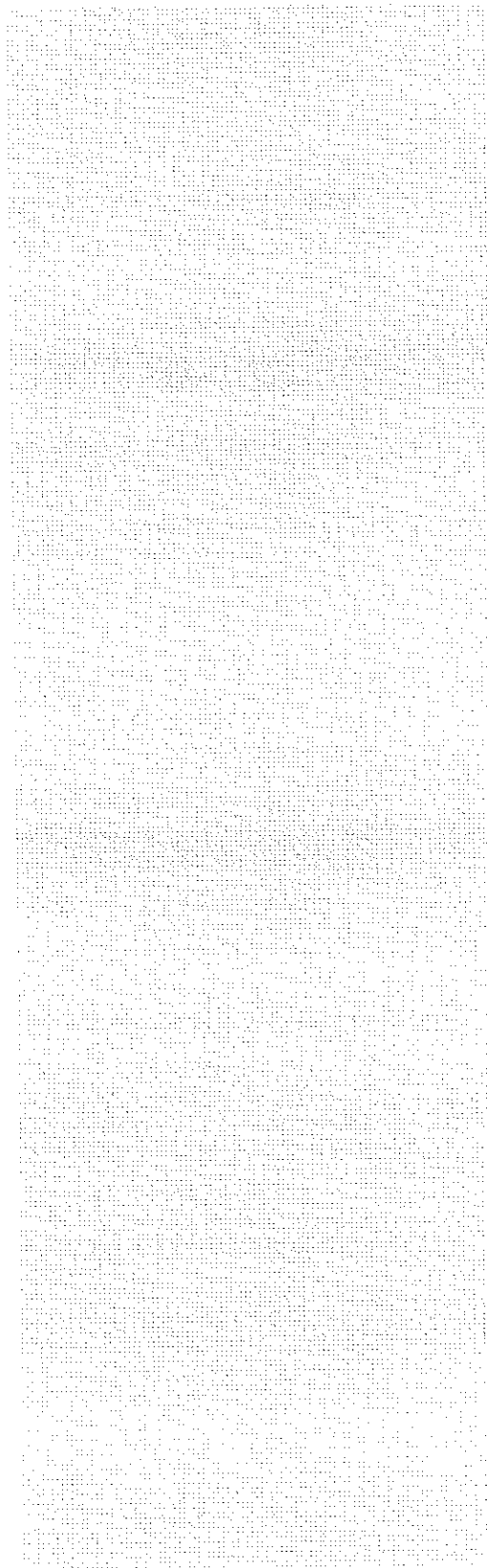
26. This duty to ensure an official investigation does not apply to all rights protected by the ECHR. It is accepted to apply to breaches of article 2 (right to life) and article 3 (prohibition against torture, inhuman and degrading treatment or punishment). It may also arise in relation to article 5 (prohibition against arbitrary detention). There is nothing in the HMICS report to suggest that undercover policing in Scotland has compromised anyone's rights under these articles and [redacted] does not allege any breach of these articles in her judicial review.

27. [redacted] does argue that the obligation to ensure an effective investigation extends to article 8 (private and family life) and that there should be a 2005 Act inquiry because her privacy was interfered with by covert policing activity.

28. There are a few cases in which it has been suggested that the duty to ensure an official investigation does apply to article 8 but those are extreme cases (e.g. detention, torture or extraordinary rendition) in which there were very serious breaches of other rights. In addition, even where there is a duty to ensure an official investigation, that duty does not automatically require a public inquiry under the Act.

29. In summary, [redacted].

**Defence, Security and Cyber Resilience Division – Organised Crime Unit
November 2017**



ANNEX C

HMICS STRATEGIC REVIEW OF UNDERCOVER POLICING IN SCOTLAND

ADVICE ON WHETHER OR NOT TO HOLD A PUBLIC INQUIRY INTO UNDERCOVER POLICING IN SCOTLAND

The Inquiries Act 2005

30. The Inquiries Act 2005 covers the setting up of inquiries, appointments to them, their procedures and powers, the submission of evidence and the publication of reports. Inquiries may be necessary to:

- establish the facts leading up to a matter of concern;
- determine the explanations for, and causes of, things which have gone wrong;
- identify those responsible for deficiencies or performance failures;
- establish the lessons to be learned from what has happened;
- make recommendations intended to correct the deficiencies for the future;
- fulfil the state's responsibility under ECHR to investigate the circumstances leading to a breach of Convention rights (see Annex B).

Commented [u1]: Most of these 6 purposes will be achieved by UCPI. [redacted]

31. A public inquiry held under section 1(1) of the 2005 Act is a specific form of public inquiry which Ministers may cause to be held into any events which have caused or may cause public concern. Scottish Ministers may only hold an inquiry into Scottish matters, meaning matters which relate to Scotland and are not reserved under the Scotland Act 1998.

Appropriate form of inquiry

32. The legislative requirement in section 1(1) of the Inquiries Act 2005 is 'public concern'. In order to address this aspect, we have considered the following questions:

- Are the events of the case in question giving rise to serious and widespread public concern?
- Is that concern justified?
- Do ECHR Considerations point to a public inquiry? (This question has been addressed at Annex B.)

Statutory position and devolved matters

33. Undercover policing in Scotland is regulated by the Regulation of Investigatory Powers (Scotland) Act 2000 (RIP(S)A) and by The Regulation of Investigatory Powers (Authorisation of Covert Human Intelligence Sources) (Scotland) Order 2014 (which came into force on 2 February 2015).

34. The Regulation of Investigatory Powers Act 2000 (RIPA) is the relevant legislation for the rest of the UK. Both Acts allow for a degree of cross-border operation, with RIPA being less restrictive in this regard than RIP(S)A.

35. It appears from paragraph 177 of HMICS's report that the authorisations made by the SDS and NPOIU were for 'the purpose of preventing and detecting crime or of preventing disorder' and were made under RIPA. A number of authorisations made in relation to the G8 Summit at Gleneagles were authorised both under RIPA by the relevant Metropolitan Police unit and under RIP(S)A by Tayside Police i.e. they were

dual authorised. In terms of authorisations made by the Metropolitan Police units, RIPA would be the appropriate legislation only so long as not all of the activity took place in Scotland (in which case RIP(S)A would have been the relevant legislation). The assumption can therefore be made that the authorised activity by the Metropolitan Police units was not restricted to Scotland. Further consideration of this matter is provided in paragraphs 45-46 below.

36. This statutory purpose of preventing and detecting crime or of preventing disorder is included in both RIPA and RIP(S)A. It is considered that holding a 2005 Act inquiry in Scotland on the matter of undercover policing where authorisations have not been made for a reserved purpose would fall within Scottish Ministerial competence, i.e. it would be possible to hold an inquiry in Scotland which could take evidence from individuals employed by law enforcement agencies elsewhere in the UK.

37. While Scottish Ministers could set up a Scottish Inquiry to look at undercover policing authorised for the purpose of preventing and detecting 'non-reserved' crime, there is a risk that officers acting under a RIPA authorisation may seek to challenge the remit of the inquiry, or refuse to co-operate/answer specific questions if they can make an argument that the purpose of the Operation/authorisation was for 'reserved' crime or national security. The information provided at paragraphs 45-46 below requires the 'prevention and detection of crime' undercover authorisations to have been made on the basis that not all the activity took place in Scotland.

Are the events of the case in question giving rise to serious and widespread public concern?

38. The criticism from those who want the UCPI extended to Scotland, or for an equivalent Scottish inquiry to be established, is that undercover officers had infiltrated campaign groups and were active in Scotland. So far as we have been able to establish, those claims refer to officers working for either the SDS or the NPOIU. The concern expressed has come largely from individuals who have been named as core participants to the UCPI. Their cause has been championed politically by Neil Findlay MSP.

39. A group of 14 concerned individuals who claimed to have been spied upon in Scotland as well as in England wrote to you in January 2017. All 14 individuals have been given Core Participant status in the UCPI.

40. You met with a group of five individuals in May 2017. Of those, three are Core Participants, one was representing her sister (who is a Core Participant), and the fifth was [redacted], who is judicially reviewing the Scottish and UK Governments.

41. There is a single piece of correspondence on file from an individual (who claims to have come into contact with Mark Kennedy in Scotland) whose name (as provided in her correspondence) does not appear on the list of UCPI Core Participants. On the basis of this information, there does not appear to be serious and widespread public concern in Scotland.

Is that concern justified?

Commented [u2]: [redacted] – Para 177 is less than clear. My understanding, though, is that if all the activity authorised began and took place in Scotland, it would not have been capable of having been authorised under RIPA.

42. While there is evidence in HMICS's report that both units were operative in Scotland, this is not new information; there is nothing to suggest that either SDS or the NPOIU were routinely active in Scotland. The English and Welsh elements of both units' operations will be covered by the UCPI. Although this is not ideal – as the Scottish Government's position on the matter attests – a Scottish inquiry would, to some extent, involve the same group of core participants, the same law enforcement officers and potentially the same remedies.

43. The HMICS report has uncovered none of the sorts of issues in Scotland being committed by Scottish police force officers which led to the UK Government establishing the UCPI. As matters stand, this is the best evidence that the Scottish Government has on which to base a decision.

44. On the face of there being no known issues of a uniquely Scottish nature, any inquiry in Scotland could only reasonably be undertaken on the basis of the activity undertaken by the SDS and NPOIU – this, however, could be subject to the risks identified at paragraph 37 above. It is possible that there will be individuals who were affected by the SDS and NPOIU deployments in Scotland but who were not involved in activity in England and Wales and who would not, therefore, have the opportunity to provide evidence to the UCPI (one of these is mentioned in paragraph 41, above).

45. The SDS and NPOIU activity, however, was presumably part of wider operational activity extending beyond Scotland; had it been contained solely within Scotland, it would not have been capable of having been authorised under RIPA. Section 46 of RIPA provides for 'Restrictions on authorisations extending to Scotland'. It states that no person shall grant or renew an authorisation under this Part [of RIPA] unless: a) the authorisation is in relation to a body named in subsection 46(3) or in an Order made under subsection 46(4); or b) not all the conduct authorised, or renewed, is likely to take place in Scotland. In relation to a), neither the Metropolitan Police Service nor ACPO is named in subsection 46(3) or included in an order under subsection 46(4)⁵. In relation to b), therefore, for either the Metropolitan Police Service or a Unit under either its or ACPO's control, to authorise activity in Scotland, they could only do so as long as not all the activity were to take place in Scotland – in other words, the activity in Scotland was part of UK-wide operations.

46. It can be argued therefore, that the activity in Scotland that has led to public concern is the activity of the SDS and NPOIU, and that this activity was not confined to Scotland. Our reading of the evidence in the HMICS report supports this as there is no suggestion of unethical activity by legacy forces. An inquiry in Scotland would be likely to concentrate on the activity of the SDS and NPOIU and largely involve the same parties on both sides of the matter under consideration by the UCPI.

Cost

47. Cost is a legitimate consideration in determining whether or not to hold an inquiry. In considering this, the matters described above need to be borne in mind. Consideration has also been given to the following questions:

⁵ The relevant Orders are The Regulation of Investigatory Powers (Authorisations Extending to Scotland) Order 2007 and The Regulation of Investigatory Powers (Authorisations Extending to Scotland) (Amendment) Order 2009

- Do the circumstances of the matter in question justify the expense of a public inquiry?
- Are there sufficient resources available to fund it?

48. On a purely Scottish basis it is unlikely that setting up a parallel inquiry in Scotland could justify the expense it would likely incur. The following table provides details of expenses incurred by recent public inquiries in Scotland.

<i>Inquiry</i>	<i>Cost</i>	<i>Duration</i>
ICL Stockline	£1.91 million	One year, five months
Fingerprint (Shirley McKie)	£4.75 million	Three years, nine months
Vale of Leven (C Difficile)	£10.77 million	Seven years, ten months
Penrose (Hepatitis C)	£12.1 million	Six years, eleven months

The estimated cost of the review (which will not be a 2005 Act inquiry) in relation to the miners' strike in Scotland is estimated at £285,000. The latest cost for the UCPI to the end of June 2017 stood at £6.7 million, with at least another 2 years to go.

49. While it could be argued that an inquiry in Scotland could be a much shorter affair than the UCPI due to the apparently lesser scale of activity, it would in effect amount to committing to public expenditure in relation to the same sorts of issues already under consideration by the UCPI. As noted above, it is possible that there will be individuals who were affected by the SDS and NPOIU deployments in Scotland but who were not involved in activity in England and Wales and who will not, therefore, have the opportunity to provide evidence to the UCPI. It is considered that the cost for a Scottish inquiry to consider what may well be a small subset of individuals would be entirely disproportionate and would be better and more effectively achieved by a change to the terms of reference to the UCPI.

Length

50. Another major factor in the cost of a public inquiry is its length.

51. The 'lessons learned' report from the Fingerprint Inquiry noted that: "it is neither realistic nor fair to expect any particular inquiry to replicate the kind of timescales achieved by other inquiries. The time taken will reflect many things – including the nature of the subject matter, the methodology adopted by the chair (once appointed), the availability of key players (both among the inquiry team and core participant teams), the demands of the evidence (gathering, collating and assessing) and the practicalities of compiling a report".

52. There are anecdotal reports that the Metropolitan Police Service is struggling to cope with the demands being placed upon it by the UCPI. A Scottish Inquiry would add to these demands and could potentially run the risk of having to take a back seat until such times as the UCPI has reported. The latest update by the UCPI, issued in July 2017, states:

"Meanwhile the Inquiry team continues to grow as we collect and consider relevant documentation, including witness statements, ahead of public hearings which are currently expected to begin in 2019."

53. While a Scottish inquiry might be much shorter and sharper than the UCPI, it is feasible that it could be delayed significantly by UCPI events. It is entirely possible that many of the parties involved in the UCPI would also be called to a Scottish inquiry – this is likely to be problematic in terms of availability, particularly for those on the law enforcement side of the UCPI, while the UCPI is ongoing. Alternatively, a view could be taken that it would be impracticable to launch a Scottish inquiry, were it considered necessary to do so, until such times as the UCPI had reported.

**Defence, Security and Cyber Resilience Division – Organised Crime Unit
November 2017**

ANNEX D

HMICS STRATEGIC REVIEW OF UNDERCOVER POLICING IN SCOTLAND

PUBLIC INQUIRY - RATIONALE FOR NOT SETTING UP A PUBLIC INQUIRY IN SCOTLAND

54. This submission recommends not establishing a public inquiry under the Inquiries Act 2005, nor any of the forms of inquiry listed in the submission of August 2016 (attached separately).

55. **There is nothing in the HMICS report to suggest that a Scottish inquiry under the Inquiries Act 2005 is necessary, desirable or appropriate.** It is our view that an inquiry under the 2005 Act:

- would be **disproportionate** in terms of cost;
- would likely involve a significant number of **the same parties** who are participating in the UCPI and could lead to duplication of evidence, conclusions and remedies;
- could run the risk of individuals in law enforcement **refusing to participate**, or to participate fully, on reserved competence or accountability grounds;
- would likely be subject to significant **delay**; and
- the **scale** and **extent** of undercover policing in Scotland identified in the report is small and does not justify a separate inquiry.

56. As set out in Annex C, there is no evidence of unethical practices having been committed by either Police Scotland or legacy Scottish police force undercover deployments. It is possible that there will be individuals who were affected by the SDS and NPOIU deployments in Scotland but who were not involved in activity in England and Wales and who will not, therefore, have the opportunity to provide evidence to the UCPI.

57. The HMICS strategic review will provide some measure of public reassurance around Scottish policing's use of undercover police since 2000. Our view remains that the most effective way of addressing 'Scottish' concerns is for the terms of reference of the UCPI to be amended to allow it to look at the activity of English and Welsh police operations which took place in Scotland. The publication of the report presents an opportunity to restate that case to the Home Secretary and a draft letter for you to consider is attached at Annex F.

Rationale for not setting up a public inquiry in Scotland

58. We recommend that the rationale for not setting up a public inquiry in Scotland should be summarised and couched in these terms:

"While there is some legitimate public concern around the activities of Metropolitan Police units in Scotland, I consider that establishing such a Scottish public inquiry into undercover policing is not justified by the evidence in the HMICS review; would not be a proportionate response in light of the limited scale of the activities of SDS and NPOIU police officers in Scotland, and the lack of any evidence of any systemic failings within undercover policing in Scotland; would inevitably create a measure of duplication with UCPI by involving many of the same core participants, law enforcement officers and potential overlap in conclusions and remedies; could, because of the scale and duration of the UCPI, be subject to potential delay in obtaining Metropolitan Police Service participation and documentation; and would not represent value for money for the Scottish tax-payer."

"I have weighed up the case for and against a separate inquiry in Scotland and I do not consider that establishing a public inquiry would serve the public interest. The HMICS review provides reassurance to the public and the Parliament around Scottish policing's use of undercover police officers since 2000, identifies room for improvement and makes a number of recommendations that Police Scotland will implement in full."

"Ultimate responsibility for the actions of English and Welsh police units lies with the UK Government and the Mayor of London and the Scottish Government position continues to be that that the most effective way of addressing 'Scottish' concerns is for the terms of reference of the UCPI to be amended to allow it to look at the activity of English and Welsh police operations which took place in Scotland."

59. Subject to your views, this summary could be used as a basis for a Ministerial statement, media lines or correspondence, such as to the Home Secretary or MSPs.

ANNEX E

HMICS STRATEGIC REVIEW OF UNDERCOVER POLICING IN SCOTLAND

MEDIA - HOLDING LINES

1. You are aware of the interest likely to be shown by the media, parliamentarians and members of the public who have an interest in the Undercover Policing Inquiry (UCPI, also referred to as the 'Pitchford Inquiry') in England and Wales.
2. The report is likely to attract media, parliamentary and public interest. It is highly possible that it will be viewed in some quarters as a foregone conclusion as it contains evidence of none of the types of unethical behaviour which led to the UCPI being established and no substantive criticism of policing in Scotland.
3. You met with a number UCPI core participants (or representatives thereof) on 10 May 2017 ([redacted], not a UCPI Core Participant, was also present). At that meeting, you were informed that the core participants who believed they had been victims of unethical treatment by undercover officers would refuse to participate in any way with HMICS's review. That has proven to be the case.
4. Subject to your views on making a Ministerial Statement (see paragraph 14), press lines to be held against enquiries have been drafted following consultation with Comms Justice and Special Advisers:
"I received HMICS's report, "A strategic review of undercover policing in Scotland" on 2 November. Once I have fully considered the report's findings, I will make a Ministerial Statement outlining the Scottish Government's position. Arrangements will be made to lay the report in the Scottish Parliament, following which HMICS will publish the full report on its website."

Defence, Security and Cyber Resilience Division – Organised Crime Unit
November 2017

97
Email dated 15/12/17

Submission attached. Annex E suggests:

"I received HMICS's report, "A strategic review of undercover policing in Scotland" on 2 November. Once I have fully considered the report's findings, I will make a Ministerial Statement outlining the Scottish Government's position. Arrangements will be made to lay the report

in the Scottish Parliament, following which HMICS will publish the full report on its website.”

The Cabinet Secretary for Justice might want to take out the bit in square brackets.

Please include [redacted] in the copy list.

IAN

Three emails dated 14-15/12/17

And this is the latest PQ from Neil Findlay on this subject and the proposed response which is with Private Office.

IAN

SpAds

To see the query below from [redacted] at the Sunday Mail. [redacted] has helpfully advised that a submission went to Cab Sec a couple of days ago on this with a suggested media line. In the submission it was suggested that Mr Matheson may wish to make a statement to parliament. You'll see that there is mention of this in the suggested line in square brackets. This could either be left in / deleted in line with the Cabinet Secretary's thoughts on making a statement.

Are you content that I put to the Cabinet Secretary for clearance?

Justice Secretary Michael Matheson said:

“I received HMICS's report, 'A strategic review of undercover policing in Scotland' on 2 November. Once I have fully considered the report's findings, I will make a Ministerial Statement outlining the Scottish Government's position. Arrangements will be made to lay the report in the Scottish Parliament, following which HMICS will publish the full report on its website.”

Thanks
[redacted]

Hi [redacted] – could you take on please?

He wants to know what the report says, and why there has been a delay.

Thanks,

[redacted]

[redacted]

* * *

Hi [redacted]

PQ as discussed:

Index Heading: Education, Communities and Justice

Neil Findlay (Lothian) (Scottish Labour): To ask the Scottish Government when it will publish the finding of Her Majesty's Inspectorate of Constabulary's review into undercover policing in Scotland.

S5W-13147

Michael Matheson: I received HMICS's report, "A strategic review of undercover policing in Scotland" on 2 November. Once I have fully considered the report's findings, arrangements will be made to lay the report in the Scottish Parliament, following which HMICS will publish the full report on its website.

99

Three emails all dated 15/12/17

Thanks, [redacted].

I will issue now.

[redacted]

* * *

[redacted]

Mr Matheson has seen and is content to clear.

Thanks,
[redacted]

* * *

Private Office

We have received a query from the Sunday Mail on the back of the following PQ from Neil Findlay.

Neil Findlay (Lothian) (Scottish Labour): To ask the Scottish Government when it will publish the finding of Her Majesty's Inspectorate of Constabulary's review into undercover policing in Scotland.

Michael Matheson: I received HMICS's report, "A strategic review of undercover policing in Scotland" on 2 November. Once I have fully considered the report's findings, arrangements will be made to lay the report in the Scottish Parliament, following which HMICS will publish the full report on its website.

The Sunday Mail wish to know what's in the report and why there's been a delay. I've agreed the following short response with policy colleagues and SpAds and am looking for confirmation that the Cabinet Secretary was content.

A Scottish Government spokesperson said:

"The Justice Secretary received HMICS's report, 'A strategic review of undercover policing in Scotland' on 2 November. Once the report's findings have been fully considered, arrangements will be made to lay the report in the Scottish Parliament, following which HMICS will publish the full report on its website."

Thanks
[redacted]

Emails dated 9/1/18

[Redacted]

The Cabinet Secretary has now considered your submission and the recommendations within it. See his responses in bold below:

- note the above and the detailed annexes – **noted**
- agree the media holding line at Annex E – **agreed**
- meet with HMICS Derek Penman to be briefed on his report – **CSJ would like to meet. Private Office will arrange with Mr Penman and will confirm proposed dates with officials**
- agree to lay the report in the Scottish Parliament – **agreed. CSJ would like this to take place in the next two weeks if possible.**
- consider making a Ministerial Statement outlining the Scottish Government's position on the same day – **agreed, date to be agreed. Private Office will liaise with Parliamentary Business on this and keep officials updated.**
- in a Ministerial Statement, provide a decision and rationale for not setting up a public inquiry in Scotland – **agree**
- consider writing to the Home Secretary re-stating our position - **agreed**

I will go back to the committee to advise them of our intention to publish shortly once a date has been agreed but that they should postpone their proposed session on the 18th January until a date is known.

Regards,
[Redacted]

Email dated 9/1/18

[Redacted]

Thanks for this. I've been in touch with the SSI unit and have obtained a 2018 laying number. I've passed that onto HMICS admin team so that they can produce a 'new' report which will include that number (the report we have at the moment has a 2017 laying number which is now out of date).

There's obviously a bit of choreography to take place which, I think, kicks off once you have a date agreed with Parliamentary Business. I think we'll also want to write to the Home Sec no sooner than the day of the Statement – probably on the same day?

We'll begin to draft a statement and will aim to let you have sight of that fairly quickly.

I mentioned earlier that we'd been asked for an FMQ on the back of the article in the Herald yesterday. I'm attaching that just so that you're sighted on that, too, and I'm assuming that we won't be making any statement before FMQs on Thursday!

- Following calls for the Scottish Government to establish an inquiry equivalent to the Undercover Policing Inquiry (UCPI, also known as 'Pitchford' Inquiry) to cover Scotland, the Cabinet Secretary for Justice directed HMICS to undertake a strategic review of undercover policing on 22/9/16.
- HMICS presented his report on 2/11/17. It examines the extent of undercover policing operations carried out in Scotland since 2000, including operations in Scotland by the Metropolitan Police, namely the National Public Order Intelligence Unit and the Special Demonstration Squad.
- Advice on HMICS's report went to the Cabinet Secretary and the Lord Advocate on 6/12/17. The crux of the advice is that an Inquiries Act 2005 inquiry would be disproportionate in terms of cost; would likely involve a significant number of the same parties who are participating in the UCPI and could lead to duplication of evidence, conclusions and remedies; could run the risk of individuals in law enforcement refusing to participate, or to participate fully, on reserved competence or accountability grounds; would likely be subject to significant delay; and that the scale and extent of undercover policing in Scotland identified in the report is small and does not justify a separate inquiry.
- NOTE – The advice is under consideration by the Cabinet Secretary.
- The Herald of 8/1/18 reported that the Cabinet Secretary received the report in November 2017. Neil Findlay is quoted as saying, "Michael Matheson has been sitting on this report for over two months and all the while victims of unethical undercover policing are denied justice or even an understanding of how the police operated in relation to their case. He should publish this report now".
- UKG and SG are being judicially reviewed by [Redacted] regarding 1) the UK Government decision not to extend the UCPI to cover Scotland, and 2) Scottish Ministers' decision not to establish an Inquiry with terms of reference equivalent to those of UCPI. Permission to proceed was granted by the Court of Session on 14/9/17. Legal aid has been refused and the petition is currently sisted to allow an appeal to be made against that decision.

Top Lines

- Once the findings of HMICS's strategic review have been fully considered, arrangements will be made to lay the report in Parliament.
- The Scottish Government is currently subject to a Judicial Review on the matter of holding an inquiry into undercover policing in Scotland. This obviously impacts on our consideration of the report's findings.
- We will, however, endeavour to have the report laid as soon as practicable.
- Where the evidence shows that undercover officers in Metropolitan Police units were active in Scotland, then the Undercover Policing Inquiry in England and Wales should be able to follow that line of investigation in order for the full picture to be revealed.

- As the UK Government refused our request to extend the terms of reference of the Undercover Policing Inquiry the Cabinet Secretary for Justice directed HMICS to undertake a review of undercover policing in Scotland.

The Undercover Policing Inquiry (UCPI - the 'Pitchford' Inquiry)

- Scottish Government understands that some operations undertaken by Metropolitan Police units were multi-jurisdictional and not limited to England and Wales.
- Therefore a single inquiry across the UK is the best option for a comprehensive and coherent investigation into these matters.

HMICS's Strategic Review of Undercover Policing in Scotland

- This review is essential in gathering facts about existing and historical undercover policing activities over the period the Scottish Parliament has had responsibility in this area, and will inform any future decision we make.
- It provides an independent view of the operation, procedures and safeguards in place by Police Scotland in relation to undercover policing, with the objective of providing assurance to Ministers, the Parliament and the public.
- It examines the extent and scale of undercover policing carried out in Scotland by Scottish policing since the relevant legislation came into force in 2000.
- It also examines the extent and scale of undercover police operations carried out in Scotland by the National Public Order Intelligence Unit and the Special Demonstration Squad in the same period.

[Redacted]

Email dated 11/1/18

[Redacted]

First bash at the statement. If we get 10 minutes, it's too long. Cab Sec speaks at 120 words per minute, therefore 10 minutes = 1,200 words.

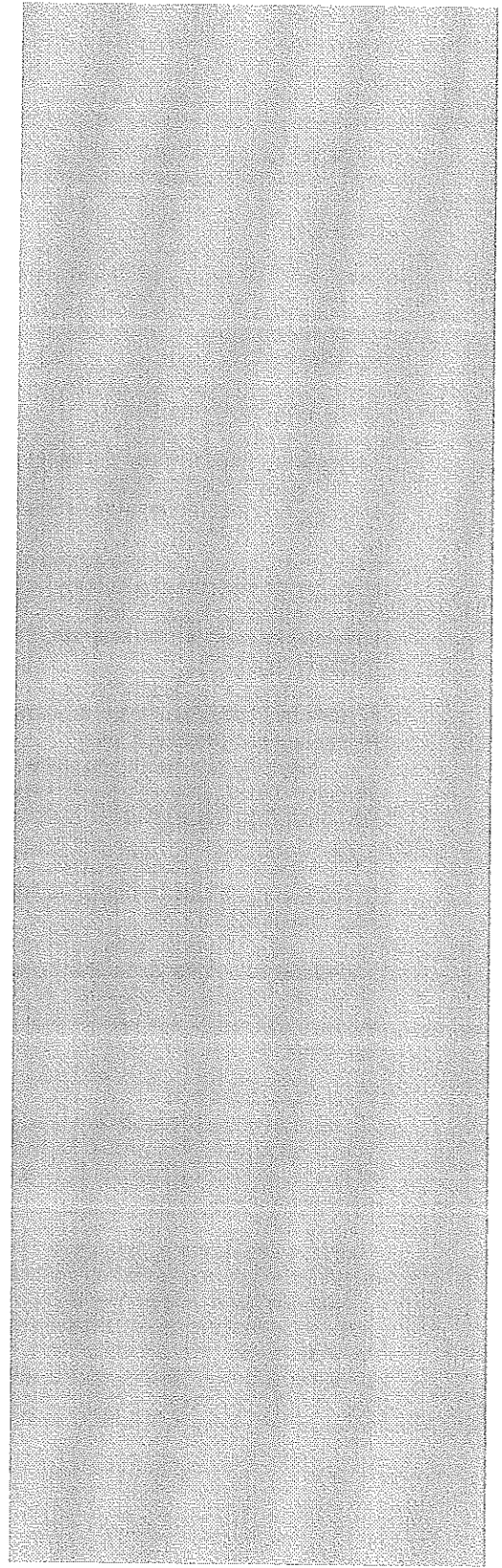
[Redacted]

Email dated 12/1/18

[Redacted]

This is very good. Thank you.

I have made amendments and put it on ERDM. I am afraid it is even longer now but better to have too much at this stage than too little. See what you think.



I think we need to consult Linda, [Redacted], John McFarlane and [Redacted] on the draft. Can you consider the order/groups in which we do them.

[Redacted]

* * *

(Draft statement)
HMICS REVIEW

Thank you Presiding Officer.

Earlier today I laid before Parliament the HMICS report 'A Strategic Review of Undercover Policing in Scotland'. I am grateful for this opportunity to make a statement on that report and to speak about what happens next.

Firstly, I would like to put on record my thanks to HMICS Derek Penman and his team for the work they have done on producing this review.

I directed Mr Penman to undertake this review on 22 September 2016. I asked that the review should:

- provide an independent review of the operation, procedures and safeguards in place by Police Scotland with a view to providing assurance to Ministers, the Parliament and the public; and
- examine the extent and scale of undercover policing in Scotland from 2000, including the undercover policing operations carried out in Scotland by the Special Demonstration Squad and the National Public Order Intelligence Unit.

HMICS makes 19 recommendations, all of which are for Police Scotland to take forward, and the service has undertaken to implement all 19 of the recommendations.

The report puts undercover policing in the context of the Policing 2026 strategy, assesses capacity, reports scale as being at a low level, identifies scope for improvements, and that records that procedures for authorisation have been tightened up.

The report states that:
'The use of undercover officers is a legitimate policing tactic and has been used effectively in Scotland. Operational activity has primarily focused on drug related offences, child sexual abuse and exploitation, human trafficking and exploitation, and serious organised crime.'

HMICS makes clear at paragraph 158 of his report that since 2000 the use of the undercover policing tactic has not been widespread in Scotland :
'... the number of undercover deployments by Scottish policing lead us to the conclusion that the use of undercover policing in Scotland cannot be considered to be widespread. Indeed, we believe that undercover advanced officers and undercover online officers have been underutilised.'

It also notes that:

'There was no evidence that undercover advanced officers from Police Scotland had infiltrated social justice campaigns or that officers had operated outwith the parameters of the authorisation.'

The UCPI

It is worth pausing here to remind Parliament how we reached this point and why I directed this strategic review.

Members will be aware of the Undercover Policing Inquiry – previously known as the Pitchford Inquiry – which is taking place in England and Wales. Its stated purpose is to investigate and report on undercover police operations conducted by English and Welsh police forces in England and Wales since 1968, including the full scope of undercover policing, the work of the Special Demonstration Squad and the National Public Order Intelligence Unit.

There were a number of issues which led to the instigation in 2014 of this inquiry under the Inquiries Act 2005 by the then Home Secretary. These include:

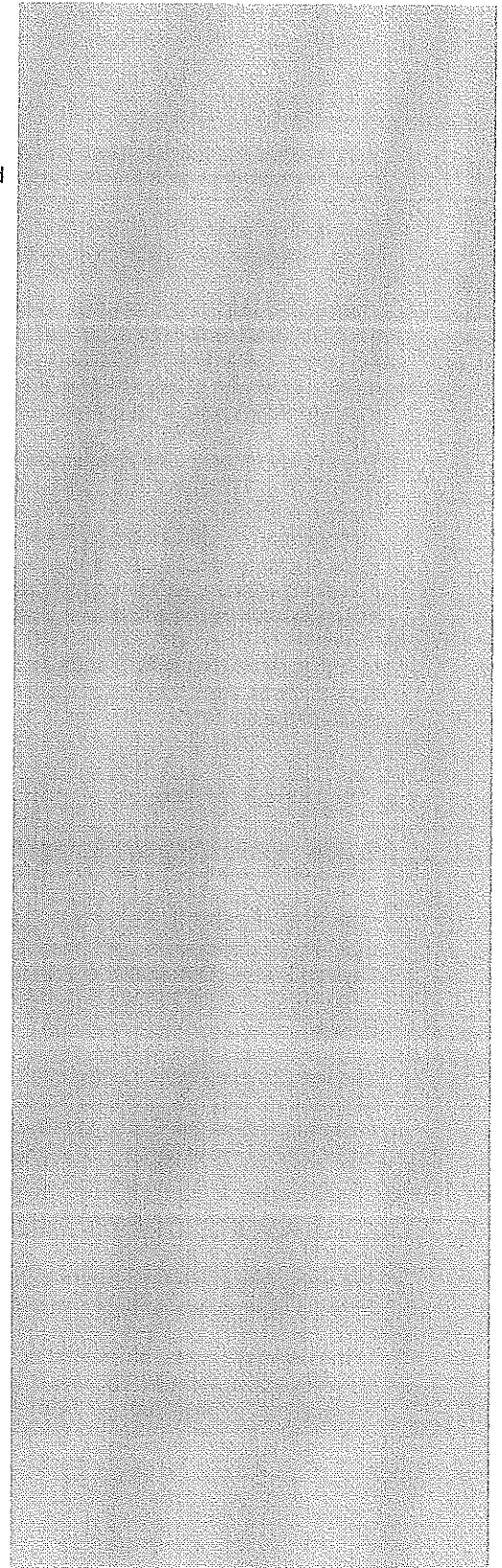
- Mark Kennedy, a former Metropolitan Police officer attached to National Public Order Intelligence Unit had infiltrated many protest groups between 2003 and 2010.
- a Guardian article from 2011 claiming that undercover officers routinely adopted a tactic of promiscuity. We have heard details in previous debates in this chamber about undercover officers entering into long-term relationships with members of the groups they have infiltrated.
- In 2012, Theresa May appointed Mark Ellison QC to carry out a review of the police investigation into the murder of Stephen Lawrence for the purpose of examining allegations reported in the media that the investigation had been tainted by corruption.
- In 2014, Theresa May told the House of Commons that the findings of Mark Ellison and of Operation Herne, a review of the Metropolitan Police's Special Demonstration Squad, had persuaded her of the need for a judge-led public inquiry into undercover policing.

The accumulation of revelations of highly questionable and unethical behaviours eventually led to the establishment of the Undercover Policing Inquiry. They all relate to police forces which fall within the ultimate responsibility of the Home Office.

THE POSITION IN SCOTLAND

Despite the evidence that the Special Demonstration Squad and the National Public Order Intelligence Unit had been active in Scotland, the terms of reference for the Undercover Policing Inquiry did not and do not extend to Scotland.

I wrote on a number of occasions to both Theresa May and Amber Rudd stating that I had no objection to the terms of reference of the Undercover Policing Inquiry being amended to allow it to consider the evidence of these 2 units' activity north of the border. In her letter of January 2016, Theresa May wrote that the Inquiry are



'...interested in the whole story and are bound to encourage those coming forward to provide a complete picture when submitting their evidence.'

Despite that response, neither Mrs May nor her successor saw fit to amend the terms of reference in order to allow that 'whole story' to be considered.

The HMICS report confirms that undercover officers from these 2 units, the SDS and the NPOIU, were active in Scotland. This activity, however, was not standalone and not self-contained within Scotland. Nor did it not have any particularly Scottish focus. There was nothing that set it aside as something distinctive from the units' activities which were being considered by the Undercover Policing Inquiry.

The activity of these units' undercover officers required to be authorised. The HMICS report confirms that it was authorised under the Regulation of Investigatory Powers Act 2000, referred to as RIPA. That is the appropriate statute for the authorisation of such activity by law enforcement bodies in England and Wales. RIPA allows for such authorised activity to cross the border north into Scotland. But it does so with one very important caveat. It can only do so, so long as not all the activity authorised takes place in Scotland.

In simple terms, the activity of these English and Welsh undercover officers in Scotland was authorised as part of an operation that began, or mainly took place, south of the border.

THE 2005 G8 SUMMIT

In 2005 SDS and NPOIU officers were deployed in support of the Scottish policing operation for the G8 Summit at Gleneagles. The HMICS report states:

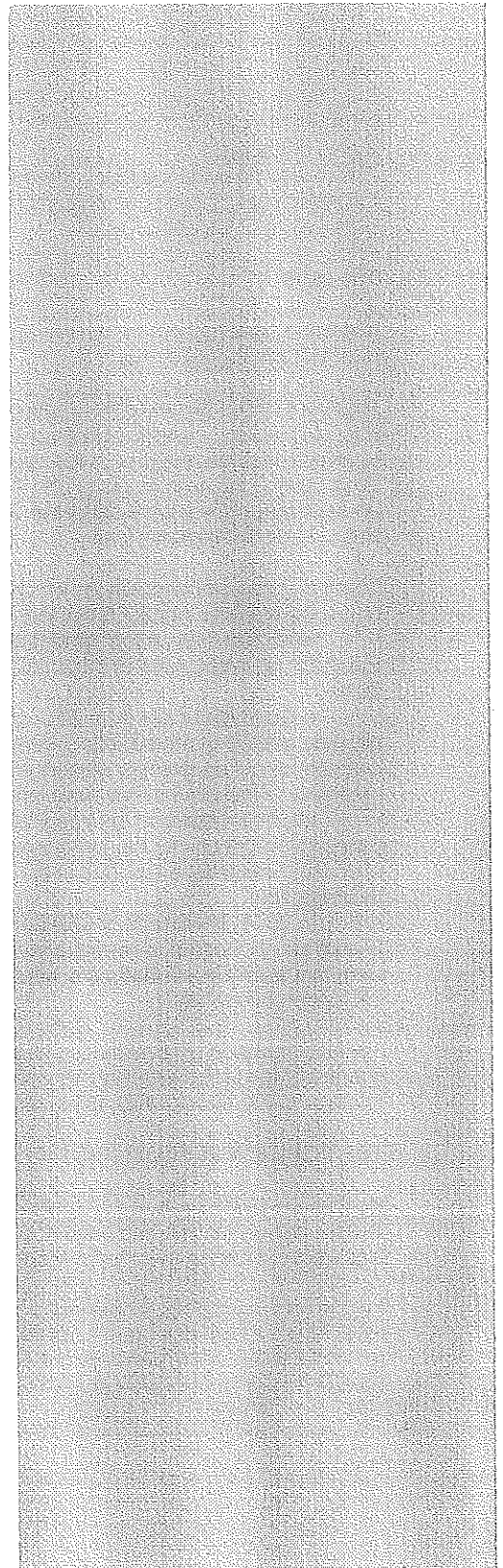
"The SDS, the NPOIU and other deployments of undercover officers at the G8 Summit were undertaken with the full knowledge, co-operation and authorisation of Tayside Police. Outwith the policing of the G8 summit, the undercover deployments by the SDS and the NPOIU to Scotland were the responsibility of the SDS and NPOIU."

The report makes clear that outwith G8 Scottish police forces were unsighted on SDS and NPOIU operations in Scotland. I therefore welcome the HMICS recommendation that Police Scotland establish a formal process for the reciprocal notification of cross border undercover operations.

CALLS FOR A SCOTTISH INQUIRY

Presiding Officer, Members in this chamber and others elsewhere have called on the Scottish Government to establish a Scottish inquiry under the Inquiries Act 2005.

Members may also be aware that both the Scottish and UK Governments are currently subject to a judicial review related to the Undercover Policing Inquiry. Because of that legal process I cannot go into detail about that judicial review but its



terms are a matter of public record. It challenges the UK Government on its decision not to extend the Undercover Policing Inquiry to cover Scotland, and it challenges the Scottish Government on our decision not to hold an inquiry with similar terms of reference in Scotland.

The HMICS strategic review was always going to be instrumental in informing my decision on how to respond to calls for a separate Scottish inquiry. Indeed, I think it would have been remiss of me to have reached a decision in the absence of the evidence I now have.

That evidence paints a very different picture to that which has taken place south of the border.

We have seen no evidence of the sorts of behaviours by Scottish police forces that led to the establishment of the Undercover Policing Inquiry.

The HMICS review provides reassurance to the public and to this Parliament around Scottish policing's use of undercover police officers since 2000, identifies room for improvement and makes a number of recommendations that Police Scotland will implement in full.

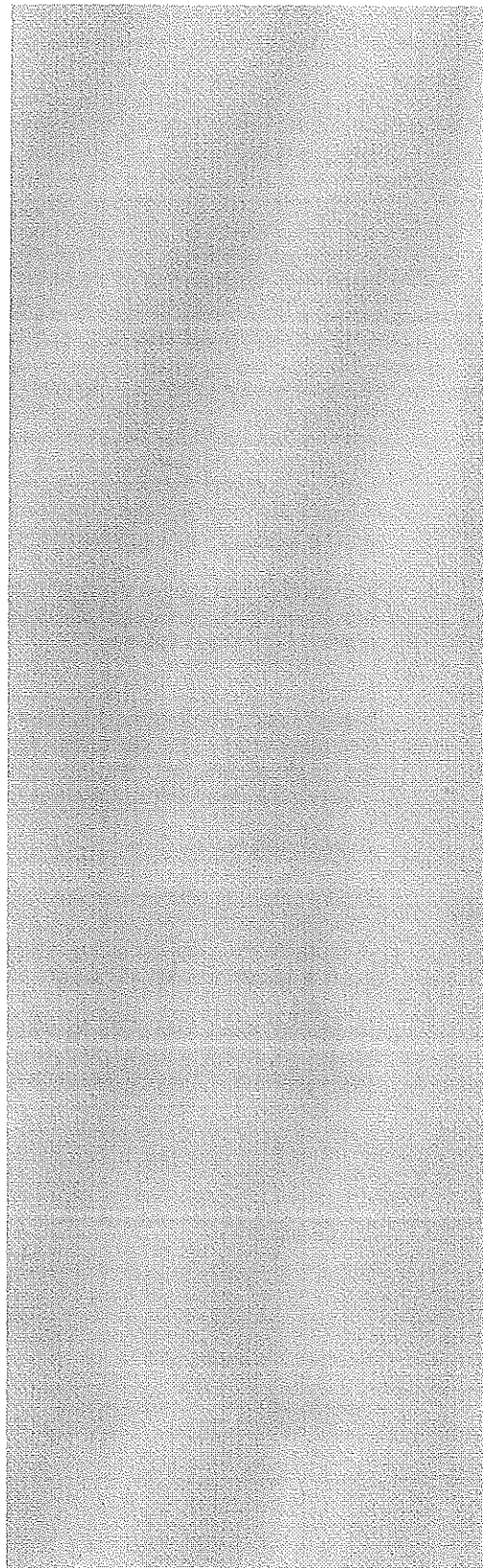
I have weighed up the case for and against a separate inquiry in Scotland and I do not consider that establishing a separate inquiry would serve the public interest.

While there is some legitimate public concern around the activities of Metropolitan Police units in Scotland, I consider that establishing a Scottish public inquiry into undercover policing is not justified by the evidence in the HMICS review. There is no evidence of any systemic failings within undercover policing in Scotland, and in light of the limited scale of the activities of SDS and NPOIU police officers in Scotland, I believe setting up a further inquiry would not be a proportionate response.

I believe such an inquiry would inevitably create a measure of duplication with the UCPI by involving many of the same core participants, law enforcement officers and potential overlap in conclusions and remedies. It could, because of the scale and duration of the UCPI, be subject to potential delay in obtaining Metropolitan Police Service participation and documentation, and would not represent value for money for the Scottish tax payer.

Responsibility for the actions of English and Welsh police units sits with the UK Government, London's Deputy Mayor for Policing and Crime, and the relevant Chief Officers. The Scottish Government's position remains that the clearest and most effective way of addressing concerns about what may have happened in Scotland is for the terms of reference of the Undercover Policing Inquiry to be amended to allow it to look at the activity of English and Welsh police operations which took place across Great Britain.

Accordingly, I have today written again to the Home Secretary to ask her to reconsider those terms of reference and have provided her with a copy of HMICS's strategic review.



NEXT STEPS

Despite the use of undercover policing not being widespread in Scotland, the Scottish Government undertook to tighten the arrangements for the authorisation of undercover policing in 2014. We did so by making an Order, which Parliament approved, requiring that all long-term undercover deployments be notified to the Office of Surveillance Commissioners, and that any renewal of such a long-term deployment be approved by the Office of Surveillance Commissioners.

Those enhanced oversight functions are now a matter for the newly established Investigatory Powers Commissioner's Office, which provides a crucial independent scrutiny function in this sensitive area.

I can also provide Parliament with the reassurance that any recommendations that do arise from the Undercover Policing Inquiry will be considered carefully and, where appropriate and necessary, will be implemented in Scotland.

Presiding Officer, I have every sympathy for individuals who have suffered due to the actions of undercover police officers who have behaved in ways that are entirely unethical and unacceptable.

However, I am clear, on the basis of the evidence that we have, that such behaviours by police officers in particular units is properly a matter for the Home Secretary and that the most effective way for the Undercover Policing Inquiry to see the 'whole picture' that the current Prime Minister referred to previously is for that Inquiry to be allowed to consider all the relevant evidence.

CONCLUSION

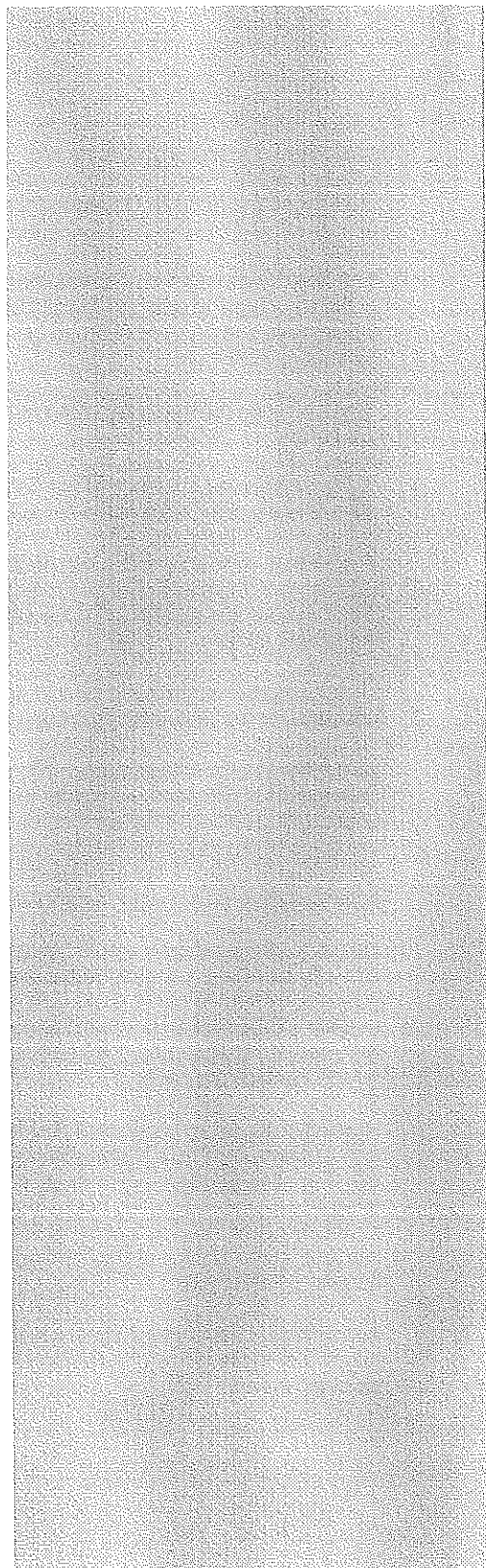
Before concluding this statement I want to pay tribute to those men and women within our police service who volunteer to be trained in undercover policing work, who undertake a difficult, sometimes dangerous, role and who put themselves at risk in order to help to keep us all safe.

By its very nature their role precludes public recognition, but I know that Members across the chamber will want to join me in thanking them for their part in helping to address some of the most serious crimes that happen in our society.

1, 959 words

Four emails dated 16/1/18

Hi [Redacted]



We spoke. Suggest responding to say that we would not comment on the contents of the report before it's published in Parliament.

Grateful if you could confirm you're content with that approach?

Thanks, [Redacted]

* * *

Hi [Redacted]

No need to respond on this tonight but could we have a quick chat about response tomorrow and whether there is anything further to say? Thanks
[Redacted]

* * *

Hi [Redacted]

Thank you for your email.

Can I assume then, for the purposes of the article, that answers to my four questions will be contained in the HMCIS Report?

* * *

[Redacted]

Hi [Redacted]

I was passed your email re undercover policing. Please see Scottish Government response below -

A Scottish Government spokesperson said:

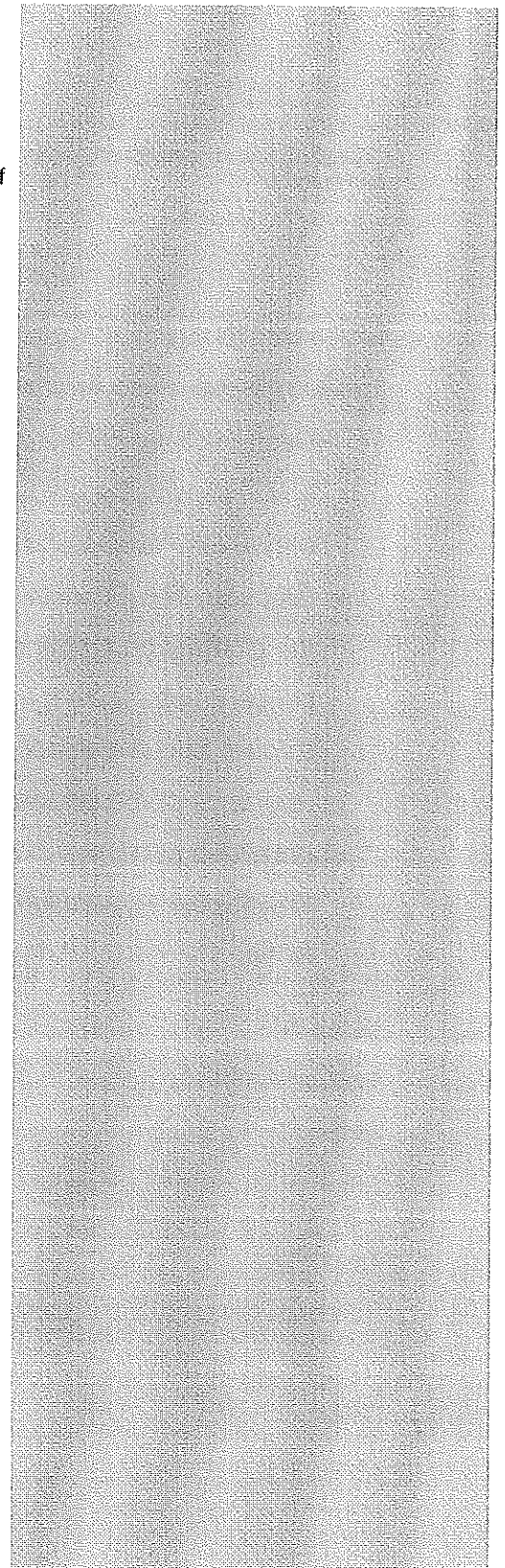
"The Cabinet Secretary for Justice received HMICS's report, "A Strategic Review of Undercover Policing in Scotland" in November 2017. Once HMICS' report's findings have been fully considered, arrangements will be made to lay the report in the Scottish Parliament."

Thanks

[Redacted]

Email dated 17/1/18

[Redacted]



Thanks for this. I have left you a hard copy with some comments/suggested amends on your desk.

L

Email dated 18/1/18

The second sentence needs adjusted:

Responsibility for the actions of English and Welsh police units sits with the UK Government, London's Deputy Mayor for Policing and Crime, and the relevant Chief Officers. The Scottish Government's position remains that the clearest and most effective way of addressing concerns about what may have happened in Scotland by English and Welsh police officers is for the terms of reference of the Undercover Policing Inquiry to be amended to allow it to look at the activity of English and Welsh police operations which took place across Great Britain.

[Redacted]

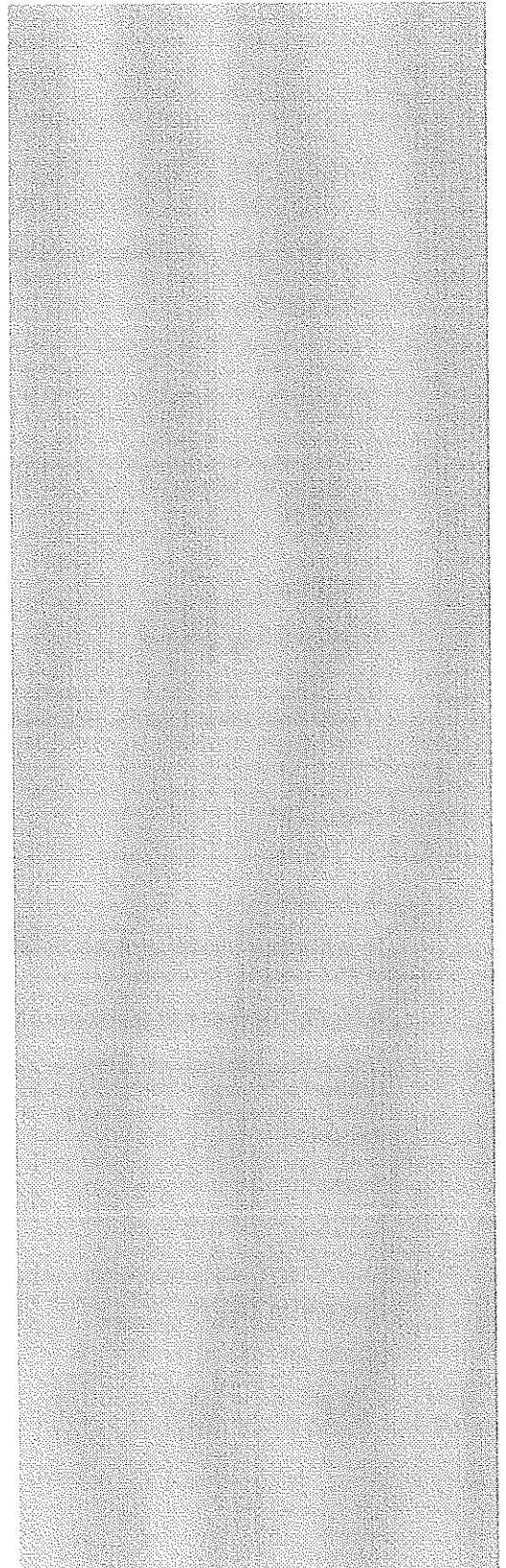
Email dated 19/1/18

[Redacted]

I've taken the statement and put it into an IPQ. It's pretty much a cut and paste, but I've had a go at removing the bits that sounded more appropriate for a speech. I'm not sure if we can use headings within an IPQ answer, but I've left them in for the time being.

This will probably need a bit of work to get it into shape, but I'm not just sure what that shape should be for this format of announcement.

[Redacted]



Email dated 19/1/18

Some suggestions from me.

[Redacted]

Email dated 22/1/18

[Redacted]

[Redacted] has two MACCS cases in connection to HMICS's undercover policing review. Both are from previous correspondents on this matter. The Private Office deadlines for these are 26 January and 31 January (with final response deadlines of 9 February and 14 February respectively). Timing-wise, it would be better for both responses to issue on 2 February, which – subject to Cab Sec's agreement – is when we will aim to lay the report in the Scottish Parliament.

I'm copying Cab Sec's team (and [Redacted], for info) into this so that they're sighted on the various bits and pieces which are orbiting around this report at the moment. I've sent along a draft PQ answer today. Colleagues in Justice Directorate have been dealing with a related PQ on the matter of refusal of legal aid for the judicial review petitioner. There is also an email correspondence campaign on the go around that same SLAB decision.

[Redacted]

Hi [Redacted]

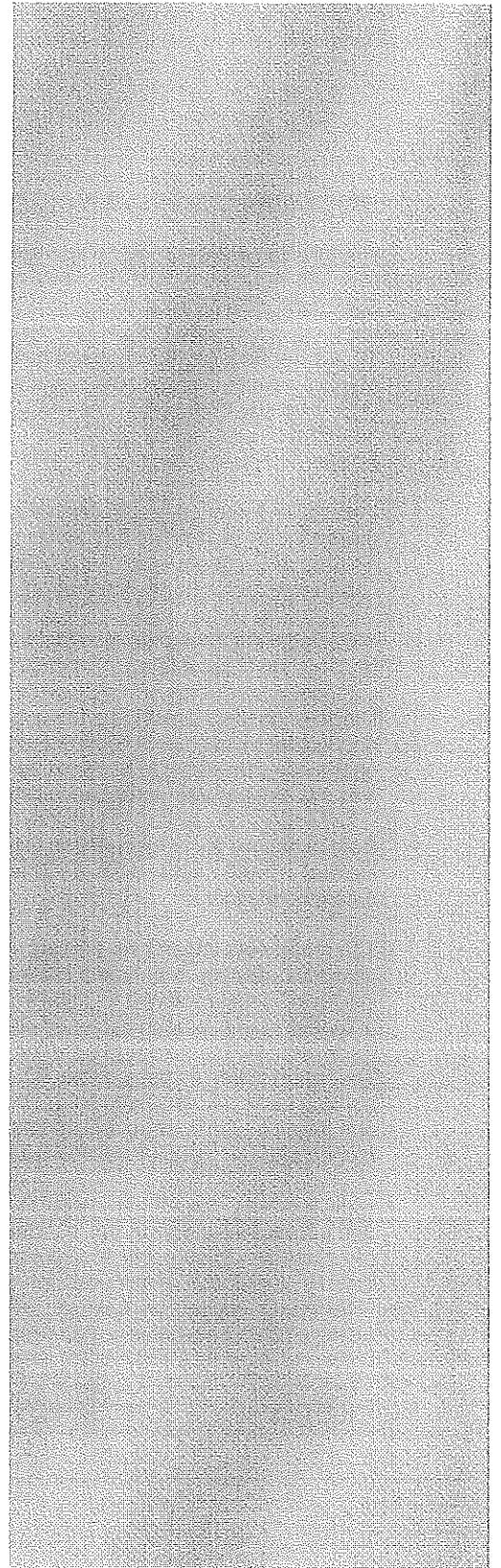
We spoke briefly yesterday about a draft press release to coincide with the publishing of the undercover policing report, which the cab sec intends to take forward using a GIQ. We are (still!) aiming towards that GIQ being answered on Monday 29/1.

I've attached a draft (annex B on the submission) for you to massacre, and have also attached the full text of the answer (haven't inserted this in the sub as we're consulting with [Redacted] on it) to allow you to carry out any massacring.

We can make sure to take anything [Redacted] has to say into account if it impinges on whatever ends up in the press release. Hope that makes sense.

[Redacted]

(Draft PQ)



ANNEX A

HMICS STRATEGIC REVIEW OF UNDERCOVER POLICING IN SCOTLAND

Draft Parliamentary Question and Answer

Question

To ask the Scottish Government, having fully considered the contents of Her Majesty's Chief Inspector of Constabulary in Scotland's report, "A Strategic Review of Undercover Policing in Scotland", what action it will now take.

Answer

I would like to put on record my thanks to HMICS Derek Penman and his team for the work they have done on producing this report, *A Strategic Review of Undercover Policing in Scotland*, which I laid before Parliament today. I have carefully considered the findings of the report which I received on 2 November.

I directed HMICS to undertake this review on 22 September 2016. I asked that the review should: provide an independent review of the operation, procedures and safeguards in place by Police Scotland with a view to providing assurance to Ministers, the Parliament and the public; and examine the extent and scale of undercover policing in Scotland from 2000, including the undercover policing operations carried out in Scotland by the Special Demonstration Squad and the National Public Order Intelligence Unit.

HMICS has made 19 recommendations, all of which are for Police Scotland to take forward. Police Scotland has undertaken to implement all 19 of the recommendations.

The report puts undercover policing in the context of the *Policing 2026* strategy, assesses capacity, reports the scale of undercover policing in Scotland as being at a low level, identifies scope for improvements, and records that procedures for authorisation have been tightened up.

The report states on page 8 that: *'The use of undercover officers is a legitimate policing tactic and has been used effectively in Scotland. Operational activity has primarily focused on drug related offences, child sexual abuse and exploitation, human trafficking and exploitation, and serious organised crime.'*

HMICS makes clear at paragraph 157 of his report that since 2000 the use of the undercover policing tactic has not been widespread in Scotland. He advises that: *'... the number of undercover deployments by Scottish policing lead us to the conclusion that the use of undercover policing in Scotland cannot be considered to be widespread. Indeed, we believe that undercover advanced officers and undercover online officers have been underutilised.'*

He also notes that: *'There was no evidence that undercover advanced officers from Police Scotland had infiltrated social justice campaigns or that officers had operated outwith the parameters of the authorisation.'*

The purpose of the Undercover Policing Inquiry – previously known as the Pitchford Inquiry – is to investigate and report on undercover police operations conducted by English and Welsh police forces in England and Wales since 1968, including the full scope of undercover policing, the work of the Special Demonstration Squad and the National Public Order Intelligence Unit.

A number of issues led to the instigation in 2014 of the Undercover Policing Inquiry under the Inquiries Act 2005 by the then Home Secretary. These include:

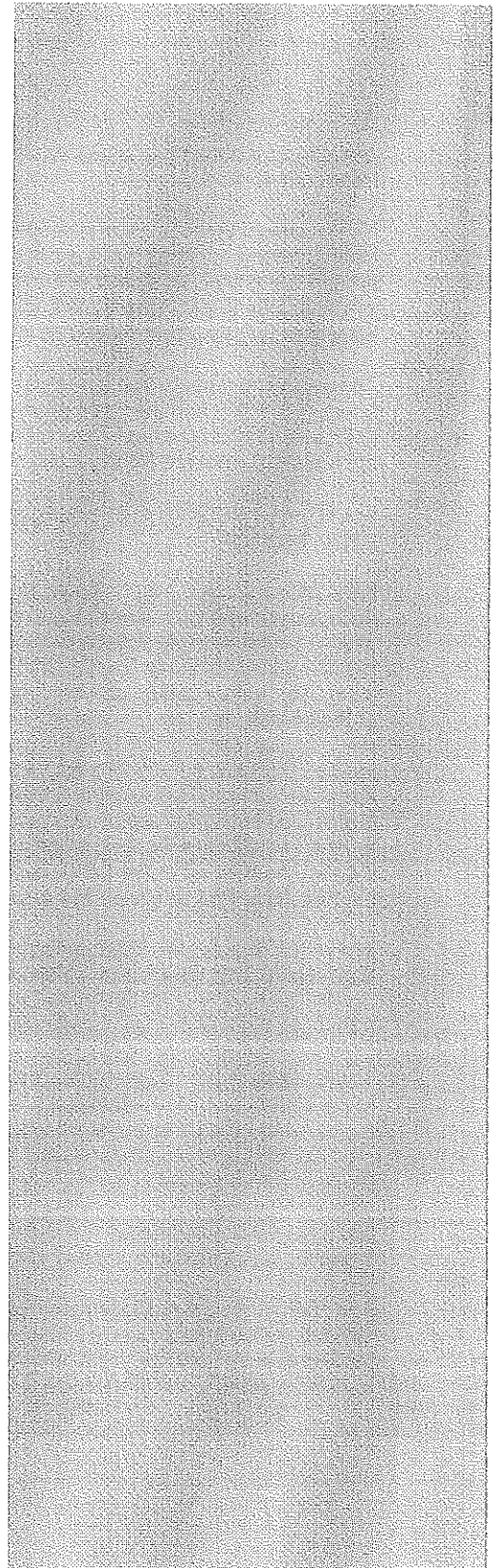
- Mark Kennedy, a former Metropolitan Police officer attached to the National Public Order Intelligence Unit had infiltrated many protest groups between 2003 and 2010.
- A *Guardian* article from 2011 claiming that undercover officers routinely adopted a tactic of promiscuity, and some entered into long-term relationships with members of the groups they had infiltrated.
- In 2012, Theresa May appointed Mark Ellison QC to carry out a review of the police investigation into the murder of Stephen Lawrence for the purpose of examining allegations reported in the media that the investigation had been tainted by corruption.
- In 2014, Theresa May told the House of Commons that the findings of Mark Ellison and of Operation Herne, a review of the Metropolitan Police's Special Demonstration Squad, had persuaded her of the need for a judge-led public inquiry into undercover policing.

The accumulation of revelations of highly questionable and unethical behaviours eventually led to the establishment of the Undercover Policing Inquiry. They all relate to English police forces which fall within the ultimate responsibility of the Home Secretary.

Despite the evidence that the Special Demonstration Squad (SDS) and the National Public Order Intelligence Unit (NPOIU) had been active in Scotland, the terms of reference for the Undercover Policing Inquiry did not and do not extend to Scotland.

I wrote on a number of occasions to both Theresa May and Amber Rudd stating that I was disappointed that the terms of reference of the Undercover Policing Inquiry would not be extended to allow it to consider the evidence of these two English and Welsh units' activity north of the border. In her letter of January 2016, Theresa May wrote that the Inquiry is '...interested in the whole story and are bound to encourage those coming forward to provide a complete picture when submitting their evidence.'. Despite that response, neither Mrs May nor her successor saw fit to extend the terms of reference in order to allow that 'whole story' to be considered.

The HMICS report confirms that undercover officers from the SDS and the NPOIU, were active in Scotland. This activity, however, was not, as the Scottish Government understands it, standalone and not self-contained within Scotland. Nor did it have any particularly Scottish focus. There was nothing that set it aside as something



distinctive from the units' activities which were being considered by the Undercover Policing Inquiry.

The activity of these units' undercover officers required to be authorised. The HMICS review confirms that, with the exception of a number of authorisations made around G8, it was authorised under the Regulation of Investigatory Powers Act 2000, referred to as RIPA. That is the appropriate statute for the authorisation of such activity by law enforcement bodies in England and Wales.

The review comments that a number of G8 authorisations were dual authorised, under both RIPA and the Regulation of Investigatory Powers (Scotland) Act 2000 (RIP(S)A). My understanding of that is that this was seen as a 'belt and braces' approach and that the RIP(S)A authorisations – which were made by Tayside Police – were effectively a subset of the wider RIPA authorisations. Those authorisations would have been subject to oversight at the time by the Office of Surveillance Commissioners.

RIPA allows for authorised activity to cross the border north into Scotland. But it does so with one very important caveat. It can only do so, so long as not all the activity authorised takes place in Scotland. In simple terms, the legislation requires that the activity of these English and Welsh undercover officers in Scotland would have been authorised as part of an operation that began, or mainly took place, south of the border.

In 2005 SDS and NPOIU officers were deployed in support of the Scottish policing operation for the G8 Summit at Gleneagles. The HMICS review states: *'The SDS, the NPOIU and other deployments of undercover officers at the G8 Summit were undertaken with the full knowledge, co-operation and authorisation of Tayside Police. Outwith the policing of the G8 summit, the undercover deployments by the SDS and the NPOIU to Scotland were the responsibility of the SDS and NPOIU.'*

The report makes clear that, outwith G8, Scottish police forces were unsighted on SDS and NPOIU operations in Scotland. I welcome the HMICS recommendation that Police Scotland should, in partnership with the relevant UK bodies, establish a formal process for the reciprocal notification of cross-border undercover operations.

The Scottish and UK Governments are currently subject to a judicial review related to the Undercover Policing Inquiry. It challenges the UK Government on its decision not to extend the Undercover Policing Inquiry to cover Scotland, and it challenges the Scottish Government because it has not held a 2005 Act inquiry with similar terms of reference in Scotland.

We have seen no evidence of the sorts of behaviours by Scottish police forces that led to the establishment of the Undercover Policing Inquiry.

The HMICS review provides reassurance to the public and to Parliament around Scottish police forces' use of undercover police officers since 2000, identifies room for improvement and makes a number of recommendations that Police Scotland have committed to implement in full.

I have considered carefully whether to exercise the power under the Inquiries Act 2005 to establish a separate Scottish Inquiry under that Act. In all the circumstances I am not satisfied that establishing a separate inquiry is necessary or is in the public interest.

There is some legitimate public concern around undercover policing activity in Scotland and I have had regard to those concerns in reaching a decision on this matter. However, on balance, I consider that establishing a Scottish inquiry under the 2005 Act into undercover policing is not justified. A number of factors have led me to that view including the lack of evidence of any systemic failings within undercover policing in Scotland. In light of the limited scale of the activities of SDS and NPOIU police officers in Scotland, I believe setting up a further inquiry would not be a proportionate response.

I believe such an inquiry would inevitably create a measure of duplication with the Undercover Policing Inquiry by involving many of the same core participants, law enforcement officers and has the potential to overlap in its conclusions and remedies.

It could, because of the scale and duration of the Undercover Policing Inquiry, be subject to potential delay in obtaining Metropolitan Police Service participation and documentation, and would not represent value for money for Scottish tax-payers.

Responsibility for the actions of English and Welsh police units sits with the UK Government, London's Deputy Mayor for Policing and Crime, and the relevant Chief Officers. The Scottish Government's position remains that the clearest and most effective way of addressing concerns about what may have happened in Scotland as a result of actions of English and Welsh police officers is for the terms of reference of the Undercover Policing Inquiry to be extended to allow it to look at the activity of English and Welsh police operations which took place across Great Britain. Accordingly, I have written again to the Home Secretary to ask her to reconsider those terms of reference and have provided her with a copy of HMICS's strategic review.

Despite the use of undercover policing not being widespread in Scotland, the Scottish Government undertook to tighten the arrangements for the authorisation of undercover policing in 2014. We did so by making an Order, which Parliament approved, requiring that all long-term undercover deployments be notified to the Office of Surveillance Commissioners, and that any renewal of such a long-term deployment be approved by the Office of Surveillance Commissioners. Those enhanced oversight functions are now a matter for the newly established Investigatory Powers Commissioner's Office, which provides a crucial independent scrutiny function in this sensitive area.

Any recommendations that arise from the Undercover Policing Inquiry will be considered carefully and, where appropriate and necessary, will be implemented in Scotland.

I am clear, on the basis of the evidence that we have, that such behaviours by police officers in particular units is properly a matter for the Home Secretary and that the

most effective way for the Undercover Policing Inquiry to see the 'whole story or complete picture' that the current Prime Minister referred to previously is for that Inquiry to be allowed to consider all the relevant evidence.

(Draft advice)

From:

[Redacted]
Safer Communities - DSCR
January 2018

Cabinet Secretary for Justice

LAYING HMICS STRATEGIC REVIEW OF UNDERCOVER POLICING IN SCOTLAND – GOVERNMENT INITIATED QUESTION

Purpose

60. To provide you with a draft question and answer for a Government Initiated Question (GIQ) to announce the laying of HMICS's report.

Priority

61. Immediate. Parliamentary Clerk require to receive the cleared question and answer by noon (at the latest) on 26 January in order for the question to be tabled and answered on Monday 29 January.

Background

62. You directed HMICS to undertake this review on 22 September 2016 and the terms of reference were published on 11 January 2017. The decision to direct HMICS was taken following consideration of a number of options around holding some form of inquiry into undercover policing in Scotland.

63. You decided that the most appropriate way to announce the laying – and subsequent publication – of HMICS's report was to do so via a GIQ. The text of the proposed question and answer is provide at Annex A.

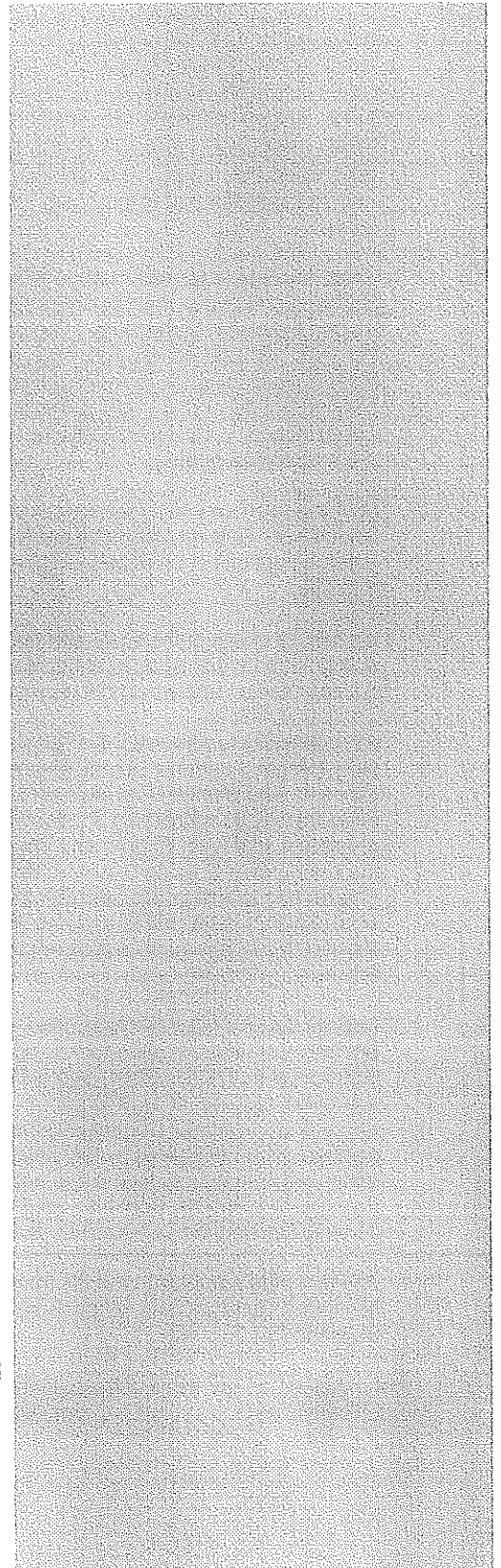
64. A press release agreed by Comms Justice is attached at Annex B for you to clear.

Timing

You are aware that there has been a degree of parliamentary and media interest with regard to the date of publication. In order to have the report laid and published in the short term, it would be helpful if the GIQ could be answered [Redacted]

Next Steps

65. Once you have indicated that you are content, it would be helpful if you could nominate an MSP to ask the question.



66. You have also agreed to write to the Home Secretary to provide her with a copy of the report and to ask her to reconsider the UK Government's decision not to extend the Undercover Policing Inquiry. A draft letter for your consideration is attached separately.

Recommendation

67. It is recommended that you:

- clear the draft question and answer provided at the annex A;
- clear the draft press release at annex B;
- agree to the suggested timing at paragraph 5;
- nominate an MSP to ask the question;
- send the attached letter to the Home Secretary.

[Redacted] Safer Communities – Defence, Security and Cyber Resilience Division
[Redacted] January 2018

ANNEX A

HMICS STRATEGIC REVIEW OF UNDERCOVER POLICING IN SCOTLAND

Annex B

LAYING HMICS STRATEGIC REVIEW OF UNDERCOVER POLICING IN SCOTLAND – GOVERNMENT INITIATED QUESTION

DRAFT PRESS RELEASE

The Cabinet Secretary for Justice, Michael Matheson, today laid the report, "A Strategic Review of Undercover Policing in Scotland" in the Scottish Parliament.

The Cabinet Secretary for Justice said:

"I directed HMICS to undertake this review on 22 September 2016. I asked that the review should provide an independent review of the operation, procedures and safeguards in place by Police Scotland with a view to providing assurance to Ministers, the Parliament and the public.

We have seen no evidence of the sorts of behaviours by Scottish police forces that led to the establishment of the Undercover Policing Inquiry in England and Wales.

The HMICS review provides reassurance to the public and to Parliament around Scottish police forces' use of undercover police officers since 2000, identifies room for improvement and makes 19 recommendations that Police Scotland has committed to implement in full.

The Scottish Government's position remains, therefore, that the most appropriate and most effective way for the activity of English and Welsh police units which have been active in Scotland is for the UK Government to extend the terms of reference to

the Undercover Policing Inquiry. I have written to the Home Secretary to provide her with a copy of the report and to ask that she reconsider the UK Government's position in relation to units which fall within the responsibility of the UK Government.

Two emails both dated 25/1/18

[Redacted]

I'm happy with that so long as you clear it with Cab Sec and SpAds.

[Redacted]

* * *

Hi [Redacted]

Now the GIQ wouldn't be answered until later next week, would you be unhappy if we modified the answer to this, something along the lines of

I am currently considering the HMICS report, "A strategic review of undercover policing in Scotland". Arrangements will be made shortly to lay the report in the Scottish Parliament, following which HMICS will publish the full report on its website.

The last answer given to Neil Findlay made reference to the previous question. However as we're very close to the laying of the report, a tweak of the previous answer would work. What do you think?

Email and draft press release dated 25/1/18

I can work fast when I need to...

See attached.

Five emails all dated 25/1/18

Thank

This strikes me as a presentational issue. The bottom line here is that the sub-committee can't take evidence from Mr Penman before the report is published. The decision on when the report should be published is a matter for the cabinet secretary and not the sub-committee.

I have my bit – the submission and the agreed GIQ text – done. I can redraft something around the pros and cons of timing ie announcements .v. sub-committee business. However, ParlyClerk will be copied into the submission so maybe this is something we need to get sorted separately.

Commented [A4]: Comms – I know you'll hate this and will want to reword. Fine with that, but the point that needs to be made is that these forces do not come under the SG's or the SP's responsibility. We need to be careful not to put out a message that says that there should be an inquiry, which would leave us vulnerable if the UKG again refuse to extend their's.

* * *

Re timing: I spoke briefly w John in between today's mania; His focus is clearly on other issues today, but sounded like he may be persuadable, however, the main driver for him to do it before next Friday was that HMIC(S) is giving evidence to committee on Thursday.

I'm not close enough but one judgement should be whether we think the merits of publishing before that outweigh the merits of doing so a bit later.

We have good stories to tell on Wed (Criminal Finances commencement) and particularly on Thur (Domestic Abuse Bill being passed), so would want to avoid, as much as possible, detracting from those 'delivery' messages.

[Redacted]

* * *

Thanks, [Redacted]. Will wait to hear from you.

[Redacted]

* * *

[Redacted]

Been rather swamped with policing issues this morning and haven't been able to look at this yet. Will look at it this afternoon. However, we're seeking further guidance from John as to whether Monday is a certainty.

[Redacted]

* * *

Comms – I now have a version of the text which has been seen by [Redacted], [Redacted] and [Redacted] on the judicial review which is ready to go to Cab Sec. Can you let me know where you are with the press release?

[Redacted]

Email and draft press release dated 25/1/18

Cheers. Tweaked this a bit.

* * *

Draft News Release

Undercover policing
Police Scotland to implement HMICS recommendations.

A new report has confirmed that there is no evidence of inappropriate behaviour by Scottish police forces.

The independent HM Inspectorate of Constabulary Scotland (HMICS) report 'A Strategic Review of Undercover Policing in Scotland' provides reassurance that there was no evidence of activities by Scottish forces similar to those that led to the establishment of the Undercover Policing Inquiry in England and Wales.

Justice Secretary Michael Matheson has welcomed the report which makes 19 recommendations for Police Scotland and confirmed that there was no justification for setting up a separate Scottish inquiry.

He said:

"I am very grateful for HMICS for their consideration of this issue and it's clear from their findings that there are some lessons to be learned. I am pleased to say that Police Scotland are committed to implementing these recommendations to provide further assurance around the operation of their undercover officers.

"I appreciate there is some legitimate public concern around such activity in Scotland. However, on balance, I consider that establishing a separate Scottish inquiry is not a proportionate response.

"There is no evidence of any systemic failings within undercover policing in Scotland and I believe such an inquiry would inevitably duplicate elements of the Undercover Policing Inquiry in England and Wales. I will again write to the Home Secretary asking her to reconsider extending the terms of reference of the England and Wales inquiry."

163

Email dated 26/1/18

Cheers, [Redacted]

[Redacted] – this being the plan, once you have confirmation of preferred timings from cab sec, we can choreograph the following:

- Having the draft GIQ agreed and cleared by **lunchtime on Monday** so that parlyclerk can make arrangements for Tuesday
- Providing SSI Unit with a pdf of the report for laying – the question I asked yesterday was about the order: presumably the report has to be laid before, or at the same time, as the GIQ is tabled?
- The letter to the Justice Sub-Committee – do we send that to coincide with the two points above?
- The letter to the Home Sec – are we sending that in advance, or to coincide with the above?
- Letting HMICS know so that they can fulfil their commitment to providing embargoed copies of their report to relevant stakeholders (Police Scotland and the Met – I've asked if there's anyone else)

From:
Safer Communities - DSCR
January 2018

Cabinet Secretary for Justice

LAYING HMICS STRATEGIC REVIEW OF UNDERCOVER POLICING IN SCOTLAND – GOVERNMENT INITIATED QUESTION

Purpose

1. To provide you with a draft question and answer for a Government Initiated Question (GIQ) to announce the laying of HMICS's report.

Priority

2. **Routine**, though please note that the Parliamentary Clerk's office require to receive the cleared question and answer by noon (at the latest) on the day before the question is to be tabled and answered.

Background

3. You directed HMICS to undertake this review on 22 September 2016 and the terms of reference were published on 11 January 2017. The decision to direct HMICS was taken following consideration of a number of options around holding some form of inquiry into undercover policing in Scotland.

4. You decided that the most appropriate way to announce the laying – and subsequent publication – of HMICS's report was to do so via a GIQ. The text of the proposed question and answer is provided at Annex A.

Timing

5. Subject to your decision on a publication date, steps will be taken to lay the report in the Scottish Parliament.

Next Steps

6. Once you have indicated that you are content, it would be helpful if you could nominate an MSP to ask the question.

Recommendation

7. It is recommended that you:

- clear the draft question and answer provided at Annex A;
- state your preference regarding timing; and
- nominate an MSP to ask the question;

Safer Communities – Defence, Security and Cyber Resilience Division

HMICS STRATEGIC REVIEW OF UNDERCOVER POLICING IN SCOTLAND

Draft Government Inspired Question and Answer

Question

To ask the Scottish Government, having fully considered the contents of Her Majesty's Inspectorate of Constabulary in Scotland's report, "A Strategic Review of Undercover Policing in Scotland", what action it will now take.

Answer

I would like to put on record my thanks to HM Chief Inspector of Constabulary in Scotland, Derek Penman, and his team for the work they have done on producing this report, *A Strategic Review of Undercover Policing in Scotland*, which I laid before Parliament today. I have carefully considered the findings of the report which I received on 2 November.

~~I directed Her Majesty's Inspectorate of Constabulary in Scotland (HMICS) to undertake this review on 22 September 2016. I asked that the review should provide an independent review of the operation, procedures and safeguards in place by Police Scotland with a view to providing assurance to Ministers, the Parliament and the public; and examine the extent and scale of undercover policing in Scotland from 2000, including the undercover policing operations carried out in Scotland by the Special Demonstration Squad and the National Public Order Intelligence Unit.~~

~~HMICS has made 19 recommendations, all of which are for Police Scotland to take forward. Police Scotland has undertaken to implement all 19 of the recommendations.~~

~~The report puts undercover policing in the context of the *Policing 2026* strategy, assesses capacity, reports the scale of undercover policing in Scotland as being at a low level, identifies scope for improvements, and records that procedures for authorisation have been tightened up.~~

The report states on page 8 that: *'The use of undercover officers is a legitimate policing tactic and has been used effectively in Scotland. Operational activity has primarily focused on drug related offences, child sexual abuse and exploitation, human trafficking and exploitation, and serious organised crime.'*

HMICS makes clear at paragraph 157 of the report that since 2000 the use of the undercover policing tactic has not been widespread in Scotland. The report advises that: *'... the number of undercover deployments by Scottish policing lead us to the conclusion that the use of undercover policing in Scotland cannot be considered to be widespread. Indeed, we believe that undercover advanced officers and undercover online officers have been underutilised.'*

The report also notes that: *'There was no evidence that undercover advanced officers from Police Scotland had infiltrated social justice campaigns or that officers had operated outwith the parameters of the authorisation.'*

The purpose of the Undercover Policing Inquiry — ~~previously known as the Pitchford Inquiry~~ — is to investigate and report on undercover police operations conducted by English and Welsh police forces in England and Wales since 1968, including the full scope of undercover policing, the work of the Special Demonstration Squad and the National Public Order Intelligence Unit.

A number of issues led to the instigation in 2014 of the Undercover Policing Inquiry under the Inquiries Act 2005 by the then Home Secretary. These include:

- Mark Kennedy, a former Metropolitan Police officer attached to the National Public Order Intelligence Unit had infiltrated many protest groups between 2003 and 2010.
- A *Guardian* article from 2011 claiming that undercover officers routinely adopted a tactic of promiscuity, and some entered into long-term relationships with members of the groups they had infiltrated.
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- In 2014, Theresa May told the House of Commons that the findings of Mark Ellison and of Operation Herne, a review of the Metropolitan Police's Special Demonstration Squad, had persuaded her of the need for a judge-led public inquiry into undercover policing.

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distinctive from the units' activities which are being considered by the Undercover Policing Inquiry.

~~The activity of these units' undercover officers required to be authorised. The HMICS review confirms that, with the exception of a number of authorisations made around G8, it was authorised under the Regulation of Investigatory Powers Act 2000, referred to as RIPA. That is the appropriate statute for the authorisation of such activity by law enforcement bodies in England and Wales.~~

The review comments that a number of G8 authorisations were dual authorised, under both the Regulation of Investigatory Powers Act 2000 (RIPA) and the Regulation of Investigatory Powers (Scotland) Act 2000 (RIP(S)A). My understanding of that is that this was seen as a 'belt and braces' approach and that the RIP(S)A authorisations — which were made by Tayside Police — were effectively a subset of the wider RIPA authorisations. Those authorisations would have been subject to oversight at the time by the Office of Surveillance Commissioners.

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The report makes clear that, outwith G8, Scottish police forces were unsighted on SDS and NPOIU operations in Scotland. I welcome the HMICS recommendation that Police Scotland should, in partnership with the relevant UK bodies, establish a formal process for the reciprocal notification of cross-border undercover operations.

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We have seen no evidence of the sorts of behaviours by Scottish police forces that led to the establishment of the Undercover Policing Inquiry.

~~The HMICS review provides reassurance to the public and to Parliament around Scottish police forces' use of undercover police officers since 2000, identifies room for improvement and makes a number of recommendations that Police Scotland have committed to implement in full.~~

I have considered carefully whether to exercise the power under the Inquiries Act 2005 to establish a separate Scottish Inquiry under that Act. In all the circumstances I am not satisfied that establishing a separate inquiry is necessary or is in the public interest.

There is some legitimate public concern around undercover policing activity in Scotland and I have had regard to those concerns in reaching a decision on this matter. On balance, however, I consider that establishing a Scottish inquiry under the 2005 Act into undercover policing is not justified. A number of factors have led me to that view including the lack of evidence of any systemic failings within undercover policing in Scotland. In light of the limited scale of the activities of SDS and NPOIU police officers in Scotland, I believe setting up a further inquiry would not be a proportionate response.

I believe such an inquiry would inevitably create a measure of duplication with the Undercover Policing Inquiry by involving many of the same core participants, law enforcement officers and has the potential to overlap in its conclusions and remedies.

It could, because of the scale and duration of the Undercover Policing Inquiry, be subject to potential delay in obtaining Metropolitan Police Service participation and documentation, and would not represent value for money for Scottish tax-payers.

Responsibility for the actions of English and Welsh police units sits with the UK Government, London's Deputy Mayor for Policing and Crime, and the relevant Chief Officers. The Scottish Government's position remains that the clearest and most effective way of addressing concerns about what may have happened in Scotland as a result of actions of English and Welsh police officers is for the terms of reference of the Undercover Policing Inquiry to be extended to allow it to look at the activity of English and Welsh police operations which took place across Great Britain. Accordingly, I have written again to the Home Secretary to ask her to reconsider those terms of reference and have provided her with a copy of HMICS's strategic review.

~~Despite the use of undercover policing not being widespread in Scotland, the Scottish Government undertook to tighten the arrangements for the authorisation of undercover policing in 2014. We did so by making an Order, which Parliament approved, requiring that all long-term undercover deployments be notified to the Office of Surveillance Commissioners, and that any renewal of such a long-term deployment be approved by the Office of Surveillance Commissioners. Those enhanced oversight functions are now a matter for the newly established Investigatory Powers Commissioner's Office, which provides a crucial independent scrutiny function in this sensitive area.~~

Any recommendations that arise from the Undercover Policing Inquiry will be considered carefully and, where appropriate and necessary, will be implemented in Scotland.

~~I am clear, on the basis of the evidence that we have, that such behaviours by police officers in English and Welsh units is properly a matter for the Home Secretary and~~

that the most effective way for the Undercover Policing Inquiry to see the 'whole story or complete picture' that the current Prime Minister referred to previously is for that Inquiry to be allowed to consider all the relevant evidence.

I also need to send you a copy of the report that has the 2018 laying number on it so that it can be sent to the Sub-Committee and the Home Sec. I'll do that once we know what we're working towards.

[Redacted]

Email and draft document attachment dated 26/1/18

[Redacted]

I have edited the answer on this version of the submission. Where I am suggesting deletions, they are shown in tracked changes so that you/Mr Matheson can easily see the changes. I have not been able to obtain views on this approach from all colleagues [Redacted] who contributed to the original answer and I would feel more comfortable in obtaining those views.

Having managed to have a quick word with one of [Redacted] contributors, our advice would be to stick with the answer as provided originally given the range of legal scrutiny it has been subjected to.

PS Have just seen Mr Fitzpatrick's response.

[Redacted]

* * *

From:

[Redacted]
Safer Communities - DSCR
January 2018

Cabinet Secretary for Justice

LAYING HMICS STRATEGIC REVIEW OF UNDERCOVER POLICING IN SCOTLAND – GOVERNMENT INITIATED QUESTION

Purpose

68. To provide you with a draft question and answer for a Government Initiated Question (GIQ) to announce the laying of HMICS's report.

Priority

69. Routine, though please note that the Parliamentary Clerk's office require to receive the cleared question and answer by noon (at the latest) on the day before the question is to be tabled and answered.

Background

70. You directed HMICS to undertake this review on 22 September 2016 and the terms of reference were published on 11 January 2017. The decision to direct HMICS

was taken following consideration of a number of options around holding some form of inquiry into undercover policing in Scotland.

71. You decided that the most appropriate way to announce the laying – and subsequent publication – of HMICS's report was to do so via a GIQ. The text of the proposed question and answer is provided at Annex A.

Timing

72. Subject to your decision on a publication date, steps will be taken to lay the report in the Scottish Parliament.

Next Steps

73. Once you have indicated that you are content, it would be helpful if you could nominate an MSP to ask the question.

Recommendation

74. It is recommended that you:

- clear the draft question and answer provided at Annex A;
- state your preference regarding timing; and
- nominate an MSP to ask the question;

[Redacted]Safer Communities – Defence, Security and Cyber Resilience Division
[Redacted] January 2018

ANNEX A

HMICS STRATEGIC REVIEW OF UNDERCOVER POLICING IN SCOTLAND

Draft Government Inspired Question and Answer

Question

To ask the Scottish Government, having fully considered the contents of Her Majesty's Inspectorate of Constabulary in Scotland's report, "A Strategic Review of Undercover Policing in Scotland", what action it will now take.

Answer

I would like to put on record my thanks to HM Chief Inspector of Constabulary in Scotland, Derek Penman, and his team for the work they have done on producing this report, *A Strategic Review of Undercover Policing in Scotland*, which I laid before Parliament today. I have carefully considered the findings of the report which I received on 2 November.

The report states on page 8 that: *'The use of undercover officers is a legitimate policing tactic and has been used effectively in Scotland. Operational activity has primarily focused on drug related offences, child sexual abuse and exploitation, human trafficking and exploitation, and serious organised crime.'*

HMICS makes clear at paragraph 157 of the report that since 2000 the use of the undercover policing tactic has not been widespread in Scotland. The report advises that: *'... the number of undercover deployments by Scottish policing lead us to the conclusion that the use of undercover policing in Scotland cannot be considered to be widespread. Indeed, we believe that undercover advanced officers and undercover online officers have been underutilised.'*

The report also notes that: *'There was no evidence that undercover advanced officers from Police Scotland had infiltrated social justice campaigns or that officers had operated outwith the parameters of the authorisation.'*

The purpose of the Undercover Policing Inquiry is to investigate and report on undercover police operations conducted by English and Welsh police forces in England and Wales since 1968. A number of issues led to the instigation in 2014 of the Undercover Policing Inquiry under the Inquiries Act 2005 by the then Home Secretary. These include:

- Mark Kennedy, a former Metropolitan Police officer attached to the National Public Order Intelligence Unit had infiltrated many protest groups between 2003 and 2010.
- A *Guardian* article from 2011 claiming that undercover officers routinely adopted a tactic of promiscuity, and some entered into long-term relationships with members of the groups they had infiltrated.
- In 2012, Theresa May appointed Mark Ellison QC to carry out a review of the police investigation into the murder of Stephen Lawrence for the purpose of examining allegations reported in the media that the investigation had been tainted by corruption.
- In 2014, Theresa May told the House of Commons that the findings of Mark Ellison and of Operation Herne, a review of the Metropolitan Police's Special Demonstration Squad, had persuaded her of the need for a judge-led public inquiry into undercover policing.

Despite the evidence that the Special Demonstration Squad (SDS) and the National Public Order Intelligence Unit (NPOIU) had been active in Scotland, the terms of reference for the Undercover Policing Inquiry did not and do not extend to Scotland.

I wrote on a number of occasions to both Theresa May and Amber Rudd stating that I was disappointed that the terms of reference of the Undercover Policing Inquiry would not be extended to allow it to consider the evidence of these two English and Welsh units' activity north of the border. In her letter of January 2016, Theresa May wrote that the Inquiry is *'...interested in the whole story and are bound to encourage those coming forward to provide a complete picture when submitting their evidence.'* Despite that response, neither Mrs May nor her successor saw fit to extend the terms of reference in order to allow that *'whole story'* to be considered.

The HMICS report confirms that undercover officers from the SDS and the NPOIU, were active in Scotland. This activity, however, was not, as the Scottish Government understands it, standalone and not self-contained within Scotland. Nor did it have any particularly Scottish focus. There was nothing that set it aside as something distinctive from the units' activities which are being considered by the Undercover Policing Inquiry.

The review comments that a number of G8 authorisations were dual authorised, under both the Regulation of Investigatory Powers Act 2000 (RIPA) and the Regulation of Investigatory Powers (Scotland) Act 2000 (RIP(S)A). Those authorisations would have been subject to oversight at the time by the Office of Surveillance Commissioners.

RIPA allows for authorised activity to cross the border north into Scotland. But it does so with one very important caveat. It can only do so, so long as not all the activity authorised takes place in Scotland. In simple terms, the legislation requires that the activity of these English and Welsh undercover officers in Scotland would have been authorised as part of an operation that began, or mainly took place, south of the border.

The report makes clear that, outwith G8, Scottish police forces were unsighted on SDS and NPOIU operations in Scotland. I welcome the HMICS recommendation that Police Scotland should, in partnership with the relevant UK bodies, establish a formal process for the reciprocal notification of cross-border undercover operations.

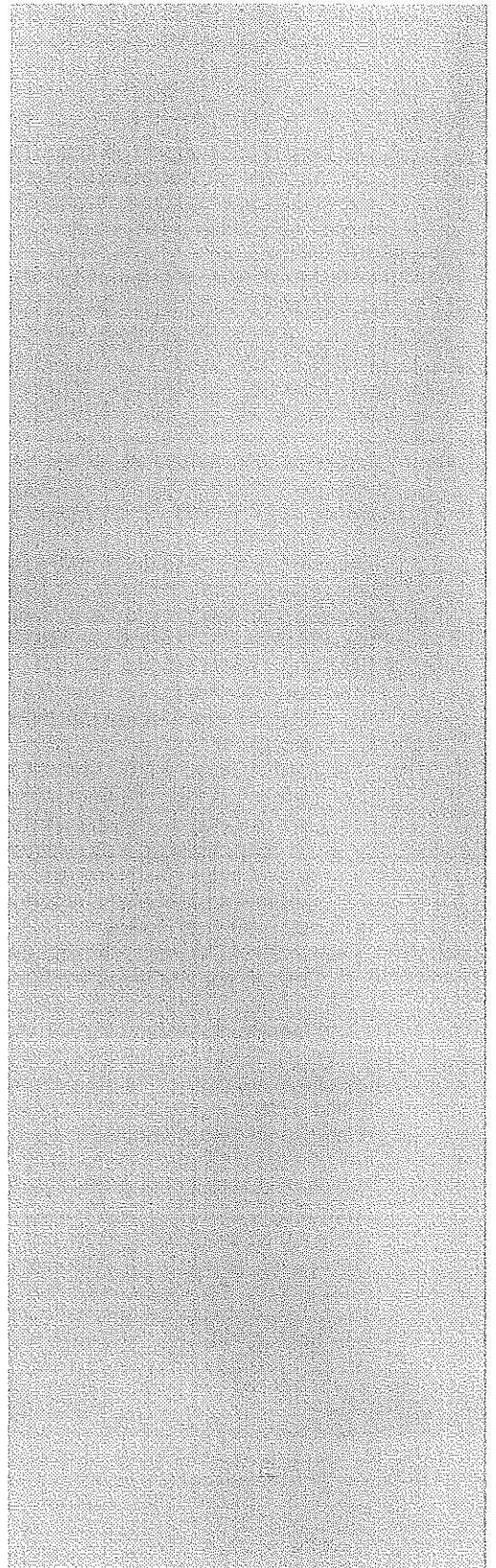
The Scottish and UK Governments are currently subject to a judicial review related to the Undercover Policing Inquiry. It challenges the UK Government on its decision not to extend the Undercover Policing Inquiry to cover Scotland, and it challenges the Scottish Government because it has not held a 2005 Act inquiry with similar terms of reference in Scotland.

We have seen no evidence of the sorts of behaviours by Scottish police forces that led to the establishment of the Undercover Policing Inquiry.

I have considered carefully whether to exercise the power under the Inquiries Act 2005 to establish a separate Scottish Inquiry under that Act. In all the circumstances I am not satisfied that establishing a separate inquiry is necessary or is in the public interest.

There is some legitimate public concern around undercover policing activity in Scotland and I have had regard to those concerns in reaching a decision on this matter. On balance, however, I consider that establishing a Scottish inquiry under the 2005 Act into undercover policing is not justified. A number of factors have led me to that view including the lack of evidence of any systemic failings within undercover policing in Scotland. In light of the limited scale of the activities of SDS and NPOIU police officers in Scotland, I believe setting up a further inquiry would not be a proportionate response.

I believe such an inquiry would inevitably create a measure of duplication with the Undercover Policing Inquiry by involving many of the same core participants, law



enforcement officers and has the potential to overlap in its conclusions and remedies.

It could, because of the scale and duration of the Undercover Policing Inquiry, be subject to potential delay in obtaining Metropolitan Police Service participation and documentation, and would not represent value for money for Scottish tax-payers.

Responsibility for the actions of English and Welsh police units sits with the UK Government, London's Deputy Mayor for Policing and Crime, and the relevant Chief Officers. The Scottish Government's position remains that the clearest and most effective way of addressing concerns about what may have happened in Scotland as a result of actions of English and Welsh police officers is for the terms of reference of the Undercover Policing Inquiry to be extended to allow it to look at the activity of English and Welsh police operations which took place across Great Britain. Accordingly, I have written again to the Home Secretary to ask her to reconsider those terms of reference and have provided her with a copy of HMICS's strategic review.

Any recommendations that arise from the Undercover Policing Inquiry will be considered carefully and, where appropriate and necessary, will be implemented in Scotland.

Email dated 30/1

We discuss later with parly bus.

Email dated 30/1/18

Colleagues/SpAds.

The PA have come on with a late request for response, to a press release issued by Policing convener John Finnie MSP, expressing his disappointment in a perceived failure to publish the HMICS report on undercover policing.

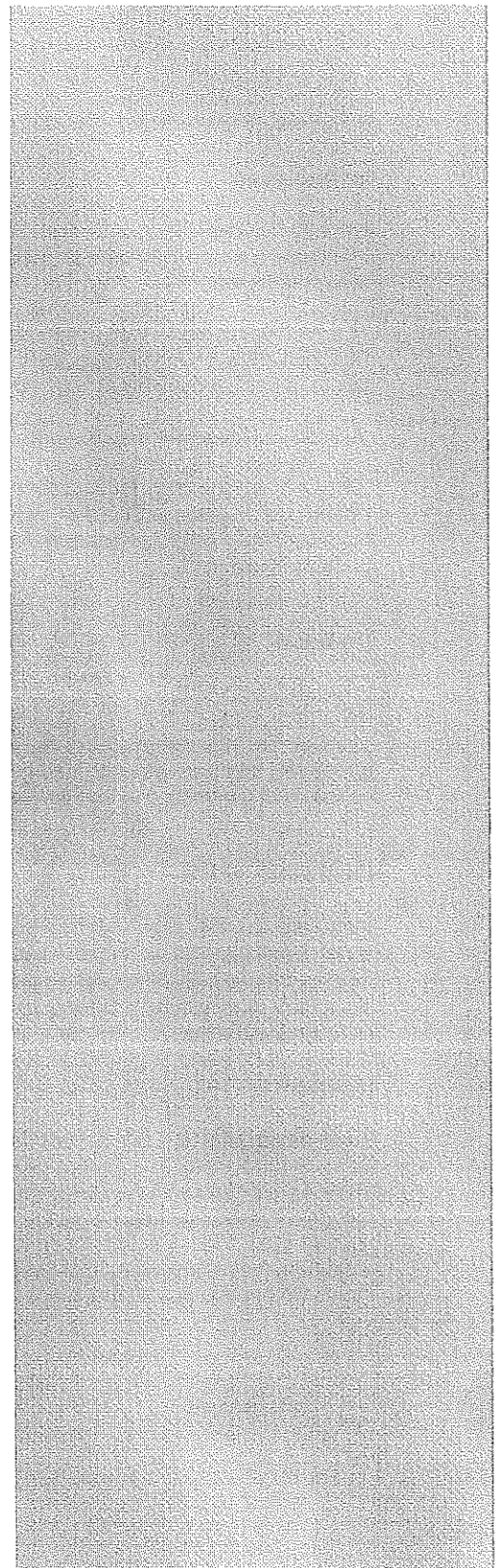
Grateful if you could confirm you are content for the lines from 19 Jan to be reissued pls – urgently if possible.

A Scottish Government spokesperson said:

"The Cabinet Secretary for Justice received HMICS's report, "A Strategic Review of Undercover Policing in Scotland" in November 2017. Once HMICS' report's findings have been fully considered, arrangements will be made to lay the report in the Scottish Parliament."

[Redacted]

Email dated 30/1/18



Mr Matheson.

Grateful for your clearance of lines below pls, which SpAds have cleared. I'm aware that there is a plan to issue a statement on this next week. Journalist is looking for response tonight.

The PA have come on with a late request for response, to a press release issued by Policing convener John Finnie MSP, expressing his disappointment in a perceived failure to publish the HMICS report on undercover policing.

A Scottish Government spokesperson said:

"The Cabinet Secretary for Justice received HMICS's report, "A Strategic Review of Undercover Policing in Scotland" in November 2017. Once HMICS' report's findings have been fully considered, arrangements will be made to lay the report in the Scottish Parliament."

[Redacted]

Email dated 30/1/18

The Cab Sec has come back directly to ask if there is a reason that prevents us from just saying that it will be published next week, following his statement? Are there concerns of committing to that timescale?

Email dated 30/1/18

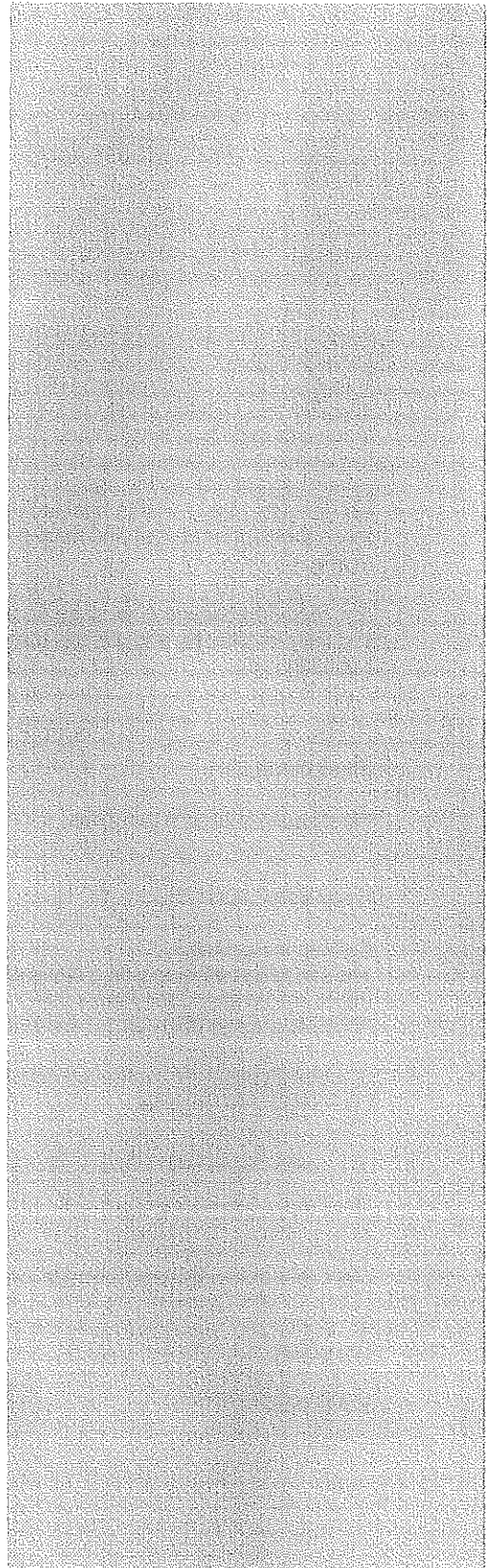
John/Linda to advise pls what level of certainty we have, but subject to that advice, might we confirm either that we intend to publish within the next week, or (more risky perhaps) - further - that we are/ will be seeking within the next week/fortnight to publish the report alongside a statement to Parliament in order to allow members across the chamber to discuss the matter, etc?

[Redacted]

Email dated 30/1/18

From a policy perspective, I have no difficulty with that as we are keen to press on, though SPADS have been more involved in dates etc so John can confirm his views. Just on a technical note, the report would be made available before Cab Sec's statement (not afterwards), to give opposition a chance to consider its terms, not that I think we need to go into that much detail in any line.

Linda



Email dated 30/1/18

Officials – grateful if you could confirm you are happy the additional line below pls, before we send back to Cab Sec.

A Scottish Government spokesperson said:

"The Cabinet Secretary for Justice received HMICS's report, "A Strategic Review of Undercover Policing in Scotland" in November 2017. Once HMICS' report's findings have been fully considered, arrangements will be made to lay the report in the Scottish Parliament. The Scottish Government will then respond with a ministerial statement."

Email dated 30/1/18

[Redacted]

Fine by me - you could just say "make" a ministerial statement rather than "respond" - simply because the statement is likely to go further than the HMCICS report (for your background information only, we will be going into detail on whether to hold a public inquiry).

Thanks

[Redacted]

Email dated 30/1/18

Thanks again Linda. Will send to Cab Sec.

A Scottish Government spokesperson said:

"The Cabinet Secretary for Justice received HMICS's report, "A Strategic Review of Undercover Policing in Scotland" in November 2017. Once HMICS' report's findings have been fully considered, arrangements will be made to lay the report in the Scottish Parliament. The Scottish Government will then make a ministerial statement."

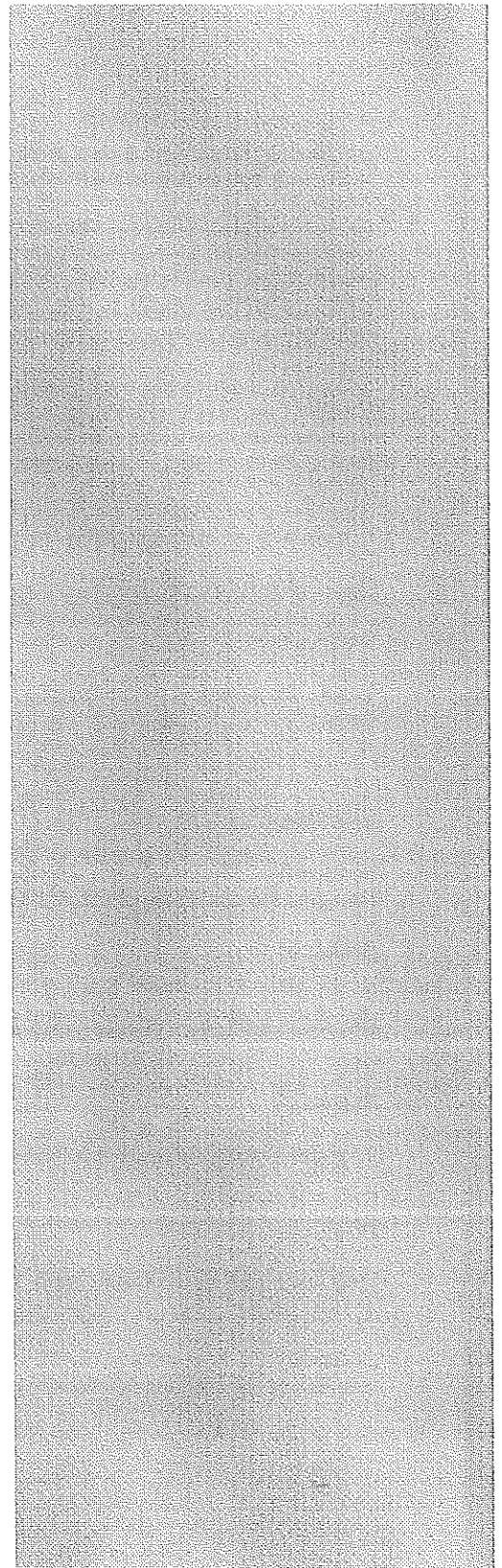
Email dated 30/1/18

For info - Mr Matheson has cleared the lines.

Email dated 31/1/18

[Redacted]

When sending the FM the statement, we should also send the original advice and the undercover report (not that she needs to read the detail). We should also



confirm that [Redacted] will clear the final version (I saw we had heard back from [Redacted], but am not aware that [Redacted] has reverted yet [Redacted])

Can we make sure that our FMQ is bang up to date and incorporate the Committee letter and (hopefully, if we hear back from the FM in good time), that a statement will take place next week. We will need some lines on the perceived delay here – I think a line around the complexity of this issue and how it had to be fully considered would be helpful, if we don't already have it.

Separately, I am sure you are already on the case with pulling together a briefing pack for the statement, but I assume we will need a pre brief and some detailed Q&A – not sure whether Comms will want to proactively put out a media release on the back of the statement. I know someone was preparing letters for those involved to advise that the report was to be published, but worth checking in with [Redacted] in case they want to write to [Redacted] solicitors (the case is sisted, but there is nothing to prevent them from doing that – [Redacted] will have a view on what is best).

Give me a shout if you need any support, assistance or clearance for anything. I am off on leave next Thursday and Friday, so ideally, we can get a statement slot on Wednesday.

Thanks for all your work on this so far – you are doing a great job.
Linda

Email dated 31/1/18

[Redacted]
I imagine the substance of this won't need to change?

[Redacted]

Email and draft news release dated 31/1/18

Thanks.

This now includes [Redacted] comments and mine.

[Redacted]

Email and draft news release dated 31/1/18

[Redacted]
Some suggested changes following Ian and Linda's consideration.

[Redacted]

(Draft News Release)
Undercover policing

Police Scotland to implement HMICS recommendations.

A new report has confirmed that there is no evidence of inappropriate behaviour by Scottish police forces.

The independent HM Inspectorate of Constabulary in Scotland (HMICS) report 'A Strategic Review of Undercover Policing in Scotland' provides reassurance that it found no evidence of activities by Scottish forces similar to those that led to the establishment of the Undercover Policing Inquiry in England and Wales.

Justice Secretary Michael Matheson has welcomed the report which makes 19 recommendations for Police Scotland and confirmed that setting up a separate Scottish inquiry would not be in the public interest.

He said:

"I am very grateful to HMCICS for his comprehensive consideration of this issue and it's clear from the findings that there are lessons to be learned. I am pleased to say that Police Scotland are committed to implementing these recommendations to provide further assurance around the operation of their undercover officers.

"I appreciate there is some legitimate public concern around undercover policing activity in Scotland and I have had regard to those concerns in reaching a decision. However, on balance, I consider that establishing a separate Scottish inquiry is not a proportionate response.

"There is no evidence of any systemic failings within undercover policing by Scottish police. I have again written to the Home Secretary asking her to reconsider extending the terms of reference of the Undercover Policing Inquiry to allow it look at the activity of English and Welsh police units in Scotland."

Background

Contact

[Redacted]

Email dated 31/1/18

[Redacted]

Thanks for pulling this together.

Commented [u5]: – taken this out given we're not going down this route. Not sure if you'd substitute it for the text of the statement?

Here are my additions. You might need to move some of my additions into the appropriate sections.

Can you have a look at the edited highlights document (also attached) and consider if there are any lines of attack/questions arising from the extracts on pages 3 and 4 that we should be preparing answers for. We probably have most of them covered but can you check please.

* * *

A STRATEGIC REVIEW OF UNDERCOVER POLICING IN SCOTLAND – Q + A

HMICS Report - General

Q: Why has it taken you so long to publish this report?

A: I mentioned the ongoing Judicial Review on this matter earlier in my statement. That has had to be taken into account in the detailed consideration I have given to HMICS's report.

Q: The report uncovers none of the types of unethical behaviour by Scottish police that we have seen reported about their counterparts in England and Wales. Does that surprise you?

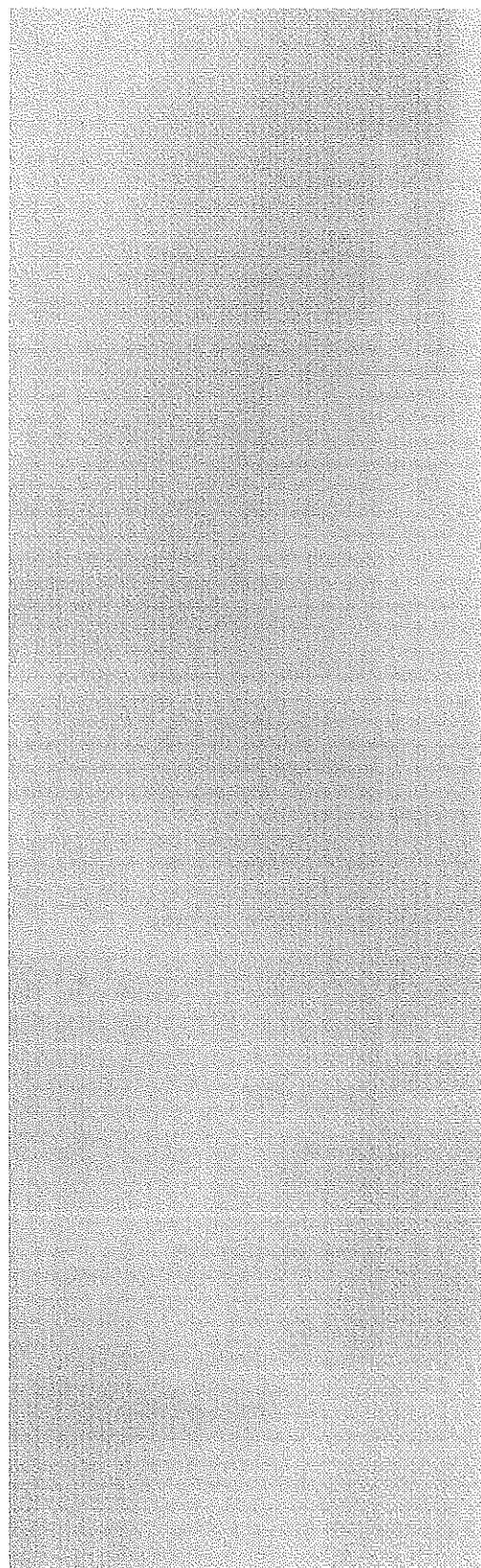
A: No. I am pleased that the report provides Parliament and the wider general public with reassurance around how this sensitive area of policing is managed in Scotland. That is not to say, however, that we are complacent. In 2014, we introduced new legislative measures to further tighten the authorisation of undercover officers. All authorisations require to be authorised by an Assistant Chief Constable and to be notified to the Investigatory Powers Commissioner's Office. Once that deployment reaches the 12-month stage, the authorisation requires to be renewed by a Deputy Chief Constable and approved by the Investigatory Powers Commissioner's in order for it to continue.

Q: The report makes 19 recommendations. Does that sound as though 'everything is alright'?

A: The recommendations represent tightening in matters of governance and procedures and I am pleased that Police Scotland has committed to implementing them in full.

Q: The report states that the information provided in respect of the NPOIU deployments in Scotland should be considered as provisional and not conclusive. Doesn't that concern you?

A: [Page 5 of] The report states that examining the scale and extent of NPOIU operations in Scotland required the cooperation of the National Police Chiefs' Council, National Co-ordinating Team. That team is in the process of recording, indexing and analysing several million documents in response to the UCPI. This



underlines one of the reasons why extending the terms of reference of the UCPI is the most sensible and efficient thing to do.

Q: Do you agree that there should be cross border provision for advising Police Scotland when undercover officers from England and Wales are deployed to Scotland? There are also no reciprocal arrangements for advising when Police Scotland officers are deployed in England and Wales.

A: This is one of the recommendations made by HMICS which Police Scotland has agreed to implement. Police Scotland will take this forward with partners in other law enforcement agencies.

Q: But couldn't you legislate for it, or at least stipulate it in the CHIS Code of Practice?

A: To legislate for change that would impact equally on both sides of the border would require amendments to Scottish and UK legislation. Equally, the relevant Scottish code of practice relates only to Scottish public authorities. It is sensible and proportionate that law enforcement agencies work together in the first instance in order for an agreement to be reached on this matter.

HMICS believe that in a ten year period between 1997 and 2007 the SDS deployed 11 undercover officers to Scotland. Deployments were aligned to a range of groups including terrorist, anarchist and anti-capitalist activity and were time limited to a few days as opposed to long-term community infiltration. (p.67)

Excluding G8 we established that in a ten year period between 1997 and 2007, there were six SDS officers who visited Scotland on 11 occasions comprising a total of 28 days. From the records held by Operation Herne it does not appear that Scottish police forces were sighted on these deployments. (p.47)

A: In my statement, I acknowledged that the HMICS report confirms that undercover officers from the SDS and the NPOIU were active in Scotland. This activity, however, was not, as we understand it, standalone and not self-contained within Scotland. Nor did it have any particularly Scottish focus. There was nothing that set it aside as something distinctive from the units' activities which were being considered by the Undercover Policing Inquiry.

Q: HMICS established that a small number of Scottish police officers were seconded to the NPOIU carrying out a variety of different functions including the cover officer role. Are you happy with that?

A: The secondment of police officers is an operational matter for the relevant Chief Constable.

G8

Q: The reports states that some G8 activity was dual authorised. What does that mean?

A: From the evidence provided in the report, there were 18 undercover officers authorised. Of those, 12 were attached to the SDS and NPOIU and it is these authorisations which were authorised under both the UK Act: the Regulation of Investigatory Powers Act 2000, and the Scottish Act: the Regulation of Investigatory Powers (Scotland) Act.

As I said in my statement, our understanding is that this was seen as belt-and-braces approach. But what we are clear about is that RIPA did not – and does not – allow the Metropolitan Police to authorise such activity that is contained wholly within Scotland. The Scottish element of those RIPA authorisations, therefore, could only have been a small part of wider operational activity by the SDS and NPOIU that mainly took place outwith Scotland.

Q: Are you happy with that arrangement [of dual authorising]?

A: This was an operational decision taken at the time and would have been subject to oversight by the Office of Surveillance Commissioners.

Q: 18 undercover officers sounds a lot.

As members will recall, the G8 Summit involved a major security operation. The number of officers deployed was an operational matter for the relevant police forces.

Scottish inquiry

Q: This is a whitewash, isn't it?

A: No. The report provides Parliament and the wider general public with reassurance around how this sensitive area of policing is managed in Scotland. That is something which everyone in this Parliament should welcome.

The report states, however, that there was a degree of activity in Scotland by both SDS and NPOIU officers. I am clear that those officers ultimately fall within the responsibility of the Home Secretary and that their activity in Scotland was part of a wider operation. That is why I have again written to the Home Secretary asking her to reconsider extending the Undercover Policing Inquiry to allow it to take into account the activity of these units throughout Great Britain.

Q: If the Home Secretary refuses, will you direct a Scottish Inquiry under the Inquiries Act?

A: I have set out my decision, and the reasons for it, in my statement.

I acknowledged that there is some legitimate public concern around undercover policing activity in Scotland and I have had regard to those concerns in reaching a decision on this matter. However, on balance, I consider that establishing a Scottish inquiry under the 2005 Act into undercover policing is not justified. The factors that have led me to that view include:

- The lack of evidence of any systemic failings within undercover policing in Scotland,
- the limited scale of the activities of SDS and NPOIU police officers in Scotland,
- I believe an inquiry would inevitably create a measure of duplication with the UCPI by involving many of the same core participants, law enforcement officers and has the potential to overlap in its conclusions and remedies,
- It could, because of the scale and duration of the UCPI, be subject to potential delay in obtaining Metropolitan Police Service participation and documentation, and would not represent value for money for the Scottish tax payer,
- responsibility for the actions of English and Welsh police units sits with the UK Government.

Q: Surely people should be able to protest legitimately without fear of being spied upon?

A: I fully support the right to peaceful protest. It is a fundamental part of our democracy.

The Regulation of Investigatory Powers (Scotland) Act does not allow surveillance to be carried out based on whether you are a member of one organisation or another. What it makes clear is that surveillance can only be carried out for the purposes of preventing or detecting crime, preventing disorder, protecting public safety, or protecting public health. And it must be considered to be necessary and proportionate by a senior officer before it can be authorised.

Those intent on committing crime or disrupting public order use a variety of fronts to mask their criminality. The police need a range of tools to investigate them.

Q: What can individuals do if they feel believe they have been the victims of unlawful surveillance?

A: A person who is aggrieved about any conduct authorised under RIP(S)A is entitled to make a complaint to the Investigatory Powers Tribunal. Information about the Tribunal, including details of how to make a complaint, are included on its website.

The Regulation of Investigatory Powers (Authorisation of Covert Human Intelligence Sources) (Scotland) Order 2014

Q: What led to this Order being put in place?

A: An HMIC report for England and Wales followed the media coverage of NPOIU undercover police officer Mark Kennedy's long term undercover deployment. The report made a number of recommendations including raising the rank of the internal police authorisation and making it subject to external approval by the independent Office of Surveillance Commissioners.

Q: Did it reflect concerns in Scotland?

A: No. At the time the HMIC (England and Wales) report was published, however, ACPOS supported the recommendations, as did, subsequently, the Police Service of Scotland. It made sense to ensure that the proper legislative framework was put in place, and that the framework struck the proper balance between allowing the police to operate while providing the proper degree of protection to our right to privacy.

The role of Police Scotland and predecessor forces

Q: Were Scottish police forces informed of undercover Special Demonstration Squad or the National Public Order Intelligence Unit activities in Scotland?

A: Undercover policing activities are operational matters for the relevant chief officer. The extent of any liaison between forces would depend on the nature of the operation.

Q: How many Scottish police officers have been seconded to the SDS and NPOIU?

A: The deployment of officers is a matter for the Chief Constable. As such the Scottish Government would not normally be made aware of the details of secondments or transfers between police forces, which are operational matters for the forces themselves.

Q: Was the Chief Constable of Police Scotland previously responsible for the SDS or the NPOIU?

A: The Chief Constable of Police Scotland, Phil Gormley has said before that he would be happy to talk to the Pitchford Inquiry about his previous roles in the Metropolitan Police.

Q: Were senior Scottish police officers involved in the oversight of the SDS or the NPOIU through ACPO - TAM?

A: ACPO TAM (the Association of Chief Police Officers - Terrorism and Allied Matters) was the high level group responsible for setting the strategic direction of police counter terrorism activity across the UK. A senior Scottish officer attended to represent Scottish policing. The group's agenda was strategic and did not cover undercover policing. (ACPO TAM has now been subsumed within the National Police Chiefs Council.)

Regulation of undercover policing/oversight of Police Scotland

Q: Do you have no concerns about Police Scotland monitoring groups/activists?

A: Police surveillance is regulated by the Regulation of Investigatory Powers (Scotland) Act 2000. Any activity, which is of course an operational matter for Police

Scotland, carried out under RIP(S)A must be shown to be necessary and proportionate before it can be authorised.

Q: Does the Scottish Government accept no responsibility for Police Scotland's conduct?

A: Prior to September 2017, RIP(S)A provided that oversight is carried out by the independent, judicially-led Office of Surveillance Commissioners. From September 2017, that oversight role became the responsibility of the Investigatory Powers Commissioner's Office - IPCO.

If the OSC had found issues with Police Scotland's activity in this area, it would have made Police Scotland aware and made recommendations about remedial action, which it would then follow up to ensure compliance. Additionally, if OSC's concerns were sufficiently serious, it could have reported directly to me. These same arrangements remain in place in respect of IPCO.

Q: Has the OSC made you aware of any concerns?

A: No. And neither has an issue been raised by OSC or IPCO in the reports it makes both to this Parliament and to Westminster.

Police use of the identities of dead children as covers for undercover police officers

Q: Has Police Scotland ever used the identities of dead children as covers for undercover police officers?

A: No. Police Scotland has confirmed that neither they nor their predecessor forces used this abhorrent practice.

Q: Did the Metropolitan Police use the identities of dead Scottish children as covers for undercover police officers?

A: Undercover policing activities within England and Wales are operational matters for the relevant chief officer. The Scottish Government believes that whenever the police service does not live up to the high standards expected of it they should be held to account.

Q: How will victims ever get truth and justice about what went on in Scotland?

A: I have every sympathy for individuals if they have suffered due to the actions of undercover police officers who have behaved in ways that are entirely unethical and unacceptable. However, I am clear, on the basis of the evidence that we have, that such behaviours by police officers in particular units is properly a matter for the Home Secretary.

HMICS's report makes clear that: "There was no evidence that undercover advanced officers from Police Scotland had infiltrated social justice campaigns or that officers had operated outwith the parameters of the authorisation."

Q: Do you support Police Scotland's undercover policing tactics and do you agree with HMICS that they are underutilised.

A: HMICS states that the "use of undercover officers is a legitimate policing tactic and has been used effectively in Scotland". The report also makes clear that undercover policing activity has primarily focused on drug related offences, child sexual abuse and exploitation, human trafficking and exploitation, and serious organised crime.

HMICS believe that undercover policing is an essential element of keeping communities safe. The report states that that undercover advanced officers and undercover online officers have been underutilised, but that is an operational matter for the Chief Constable to consider.

Q: Are you happy with the behaviour of Police Scotland's undercover officers?

A: The report notes that all Police Scotland undercover officers "displayed a good understanding of ethical standards and were conversant with the organisation's values and the code of ethics for policing".

The men and women within Police Scotland who volunteer to be trained in undercover policing work, undertake a difficult, sometimes dangerous, role and put themselves at risk in order to help to keep us all safe. By its very nature their role precludes public recognition, but I know that Members across the chamber recognise their part in helping to address some of the most serious crimes that happen in our society.

[Redacted]

Email and draft advice dated 31/1/18

Some minor suggestions from me.

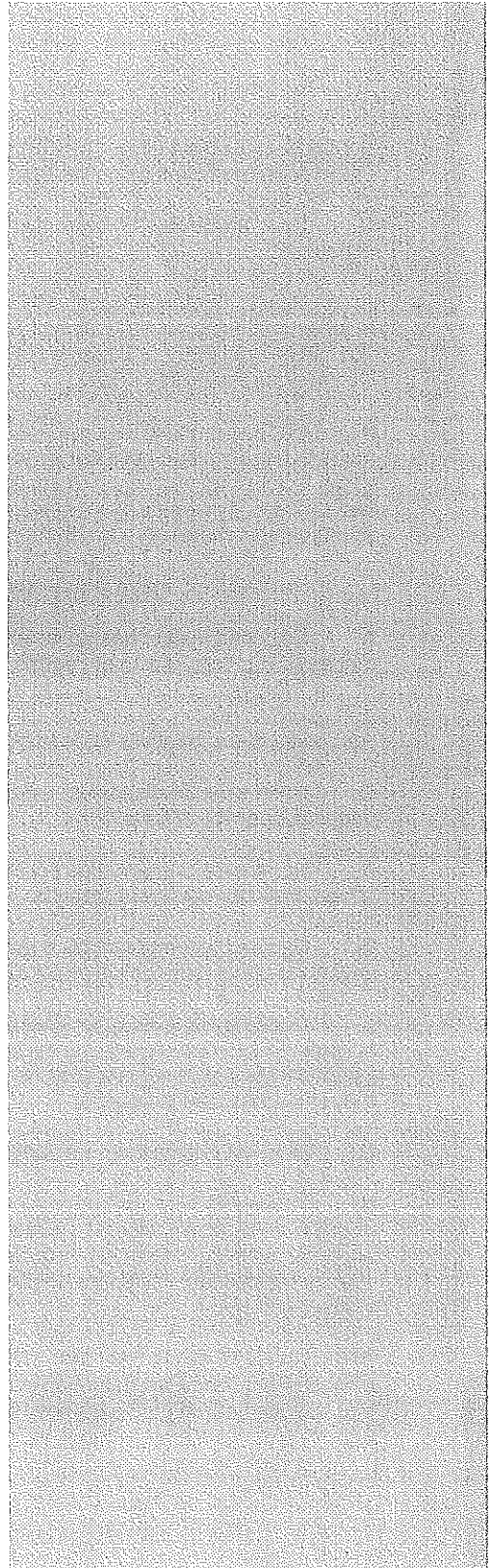
The reference to a decision might raise expectations but I don't think we can avoid using that as the reason for the length of the consideration time.

The advance copy for the Committee seems courteous but the Cabinet Secretary for Justice may strike it out, or ask about timing of when we give them it.

P.S. Only one minor amendment from the Cabinet Secretary for Justice is tribute to the quality of the draft and the various contributors. Let's see how many amendments the FM has.

* * *

(Draft letter to John Finnie MSP, Convenor, Justice Sub Committee)



John Finnie MSP
Convenor, Justice Sub-Committee on Policing
c/o Justice Sub-Committee Clerks
Room T2.60
The Scottish Parliament
Edinburgh
EH99 1SP

1 February 2018

Thank you for your letter of 30 January regarding Her Majesty's Inspectorate of Constabulary in Scotland's (HMICS) report on undercover policing.

I received the report, 'A Strategic Review of Undercover Policing in Scotland' on 2 November. You will be aware that the Scottish Government is currently being judicially reviewed on the issue of not having held a public inquiry in Scotland. This being the case, I have taken my time to carefully consider what is a detailed and comprehensive report with a view to making a decision on the matter of a public inquiry in Scotland. I will publish the report and make a statement to Parliament setting out my intentions on Wednesday 7 February. I will also ensure that the Committee receives an embargoed advance copy of the report.

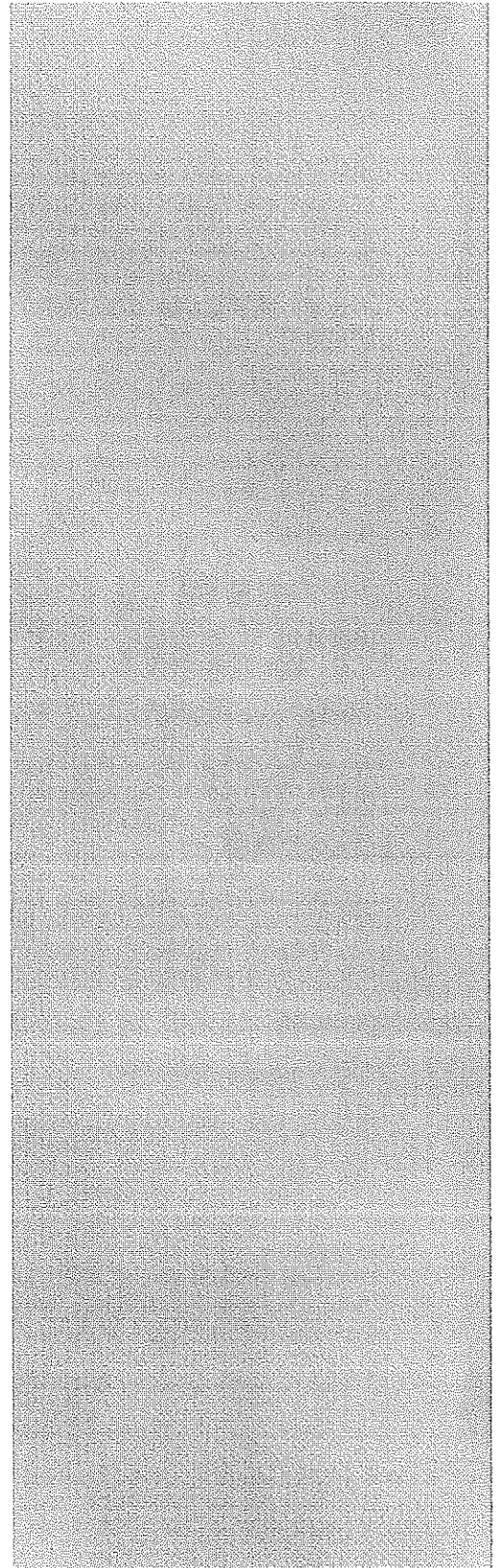
While I regret that you feel the Justice Sub-Committee has been inconvenienced, I feel this matter is important and required the length of time I have taken in order to make a fully informed decision.

I trust that you will find this helpful.

MICHAEL MATHESON

Email dated 31/1/18

Folks



Just to let you know that I've been made aware that [Redacted] from *The Scotsman* has been onto HMICS to ask if they have any concerns about the Cab Sec not publishing the undercover report. HMICS have responded by saying that they provided the report on 2 November and it's up to the Cab Sec when he publishes it.

If we get any inquiries on the back of this, I think we go with the line that was agreed last night:

"The Cabinet Secretary for Justice received HMICS's report, "A Strategic Review of Undercover Policing in Scotland" in November 2017. Once HMICS' report's findings have been fully considered, arrangements will be made to lay the report in the Scottish Parliament. The Scottish Government will then make a ministerial statement."

[Redacted]

Email dated 31/1/18

[Redacted]

copy as above

Thanks, this is helpful.

We spoke briefly about timings. This is a carefully crafted statement which has been agreed by the Cabinet Secretary for Justice and the FM. [Redacted]. As I said on the phone, it would be unfortunate if it had to be butchered because of Parliamentary time constraints.

I appreciate that the longer the Cabinet Secretary speaks, the longer members will have to question him but it is important that we have the content on the record. If necessary we will trim it to whatever length the Cabinet Secretary for Justice wants or the Parliament demands but I would prefer to keep it all.

[Redacted]

Two emails dated 31/1/18

[Redacted] and I discussed this very briefly on Monday and will get something ready.

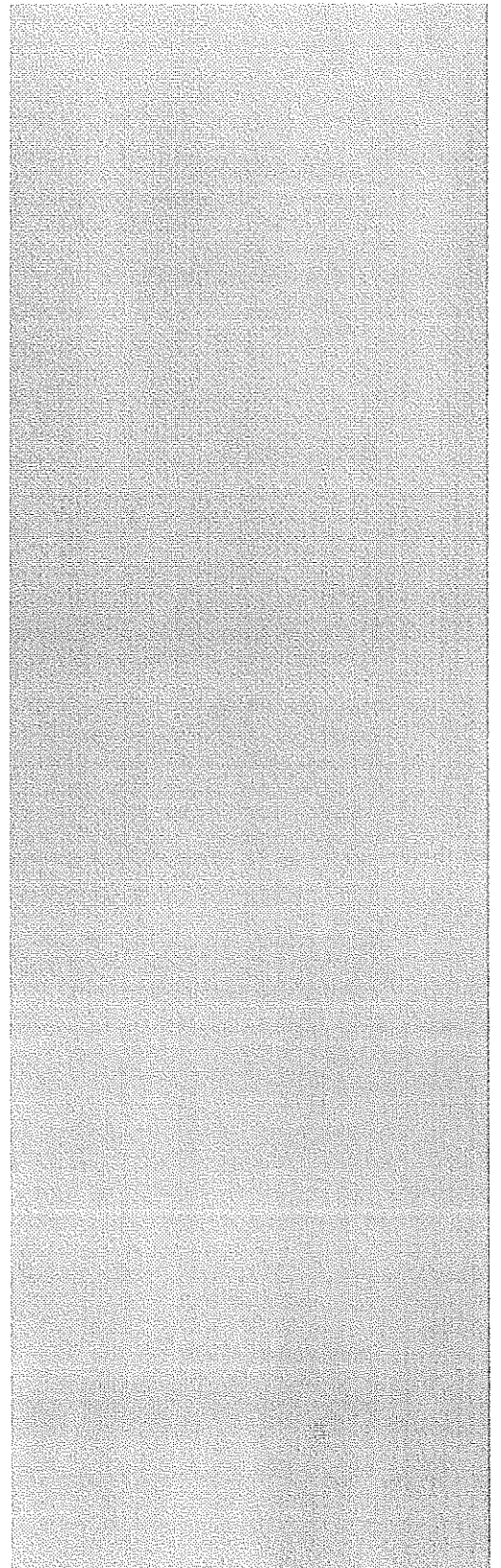
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* * *

[Redacted]

I think we should have a SCANCE piece on the undercover policing statement – though perhaps worth linking in with wider police colleagues, who may be intending to provide one anyway on some of the other issues at play.

There is a new requirement around the Perm Sec, which you can see below too.



Thanks
[Redacted]

Five emails dated 1/2/18

[Redacted]
That's them both done and sent back. Not sure about the timing for sending these out, but I think it makes sense just to keep in mind the number of things that we have on the go around this issue. They should go before next Wednesday, but maybe SpAds will have a view on timing.

[Redacted]

Morning [Redacted]

That makes sense. I've sent the two cases back for you to update.

Many thanks,
[Redacted]

Hi [Redacted]

If these two cases haven't issued, it would probably make sense for me to redraft them to incorporate the more up to date and informative line about a statement being made next Wednesday. If you agree with that, just send the cases back. Thanks.

[Redacted]

...and have just sent a second MR along on same matter, therefore same answer.

[Redacted]

Hi [Redacted]

I've just sent along a draft response to a MR MACCS case. It's a couple of days beyond the PO deadline. Apologies for that, but the action officer, [Redacted], has been, and remains, off sick and I'm just trying to catch up with these sorts of thing. It's a very short reply and uses the same line that we used in the latest PQ answer on this matter.

[Redacted]

Email dated 1/2/18

[Redacted]

Mr Matheson has asked for a slight change to the line below. Can we remove the wording in red [Redacted] (will let you decide on appropriate wording) that required the length of time to consider.

While I regret that you feel the Justice Sub-Committee has been inconvenienced, this matter is important and required the length of time I have taken in order to make a fully informed decision.

Grateful for a re-draft today.

Regards,
[Redacted]

Email dated 1/2/18

[Redacted]

[Redacted], I suggest changing it to:

While I regret that you feel the Justice Sub-Committee has been inconvenienced, the consideration of a number of issues resulted in the length of time I have taken in order to make a fully informed decision.

[Redacted]

Email dated 1/2/18

[Redacted]

I left some thoughts (more than colons, adding value as ever) on your Q&A on your seat.

L

Two emails dated 2/2/18

Thanks for letting me know, [Redacted]

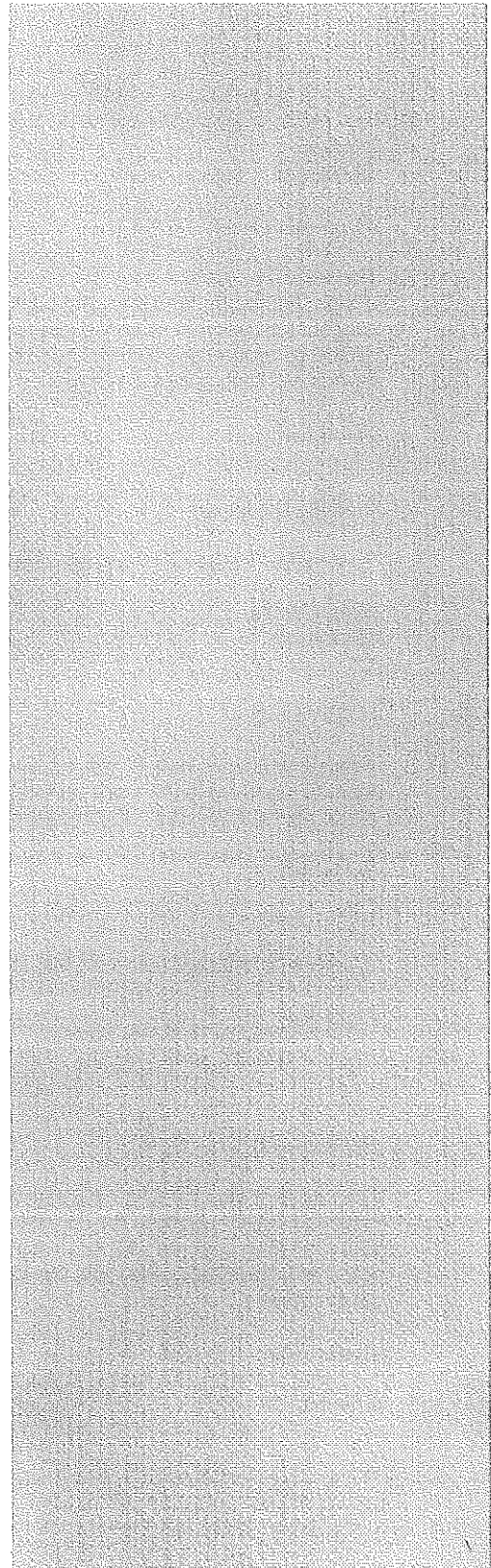
[Redacted]

Hi [Redacted]

I spoke with John and as the letter has been issued to the Sub Committee Convener there wasn't any objection to these going today

[Redacted]

Email dated 2/2/18



Morning [Redacted]

I'm preparing Q+A. One of the questions is about who will monitor PS progress on implementing recommendations. I'm saying something about the steering group and HMICS being on that group, but will there be an intention to carry out a follow up report at a later date to measure progress?

[Redacted]

Email dated 2/2/18

Hi – hoping one of you can help me. I'm preparing Q+A for cab sec who will be making a ministerial statement on undercover policing in parliament next week.

In relation to oversight of undercover policing by Police Scotland, one of the questions is: **Is there a role for the SPA, here?** While there is no specific role for the SPA, I'd like to include something in general about the SPA's overall oversight responsibility for Police Scotland. Could someone provide me with a form of words, please?

Thanks

[Redacted]

Email dated 2/2/18

[Redacted] for your answer Police Scotland have established a steering group chaired by ACC Crime to oversee delivery of the 19 recommendations. HMICS are represented at the group to provide advice and context behind each recommendation. As the service will implement the recommendations HMICS will monitor delivery. An update on progress against the recommendations will be published by HMICS.

[Redacted].

Email dated 2/2/18

Sure, no problem, will send it by COP today

[Redacted]

Email dated 2/2/18

Hi [Redacted]

How about:

The SPA's Main Duties and Functions

The SPA is responsible for the governance, oversight, and administration of the Police Service of Scotland and the provision of forensic services.

The SPA is required to undertake strategic planning and reporting, and to consult stakeholders on the use of its powers.

The creation of the SPA ensured that the Chief Constable is free from undue political influence in making decisions about the investigation of crime, while also providing strong governance arrangements and clear accountability.

The SPA's Role in Policing

The Act sets out a number of actions and responsibilities relating to policing, which the SPA is required to undertake, relating to:

- appointments & pay, including providing police officers with pay, vehicles, equipment and other services; and the Chief Constable with an annual budget; appointing Senior Officers; and employing Police Staff
- disciplinary procedures, conduct, and performance, in relation to senior officers
- the provision of Forensic Services; and Independent Custody Visiting
- maintaining suitable complaints handling arrangements
- the provision of Scottish Ministers with information relating to the SPA or the Police Service
- the preparation of a Strategic Police Plan and commenting on the draft Annual Police Plan.

[Redacted]

