House of Commons
Home Affairs Committee

Policing Protocol

Oral evidence

20 December 2011

Rt Hon Nick Herbert MP, Minister for Policing and Criminal Justice

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The Home Affairs Committee

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Oral evidence

Taken before the Home Affairs Committee
on Tuesday 20 December 2011

Members present:

Keith Vaz (Chair)
Nicola Blackwood
James Clappison
Michael Ellis
Dr Julian Huppert
Steve McCabe
Alun Michael
Mark Reckless
Mr David Winnick

Examination of Witness

Witness: Rt Hon Nick Herbert MP, Minister of State for Policing and Criminal Justice.

Q1 Chair: Minister, thank you for coming. My apologies for keeping you waiting. This is our last session, and we have put on some heavy witnesses of whom you are the biggest and most heavyweight. We have kept you for last, so you are our last witness before Christmas. We will come on to the protocol in a moment, but may I start with the report that Denis O’Connor has published this morning, and before that may I take the declarations of interest?

Q2 Alun Michael: My son is the Chief Executive of the North Wales Police Authority.

Q3 Chair: Denis O’Connor’s report today seems to suggest that arsonists who set fire to shops with flats above them could be shot when there is a serious risk to life. Do you support that view that police officers in a riot should be able to shoot people?

Nick Herbert: First, I think we should be clear about what the report says and does not say. The issue arose because of the advice that was provided as an addendum to the report, Annex C, by Timothy Otty QC, who gave advice on the use of force by police in the context of civil unrest and riots. When giving that advice and setting out the range of scenarios in which the police may use force, and in relation to his consideration of an arson attack on a commercial building with linkage to residential dwellings—that was the crucial point—he said, “Given the immediacy of the risk and the gravity of the consequences it would be likely to justify at least the use of AEPs targeted at specific individuals in order to bring about the cessation of the conduct, and potentially the use of firearms (subject to the serious policy issue identified earlier in this advice).”

If you then look back at that serious policy issue that he identifies, he points out: “Lethal or potentially lethal force should only be used when absolutely necessary in self-defence, or in the defence of others against the threat of death or serious injury”. That is in accordance with the UN basic principles. It has always been the case and should remain the case that the police can act, including, if necessary, when absolutely necessary, either in self-defence or in the defence of others, against the threat of death or serious injury with the use of lethal force.

Q4 Chair: So let us be very clear about what you are saying to this Committee. Given the report that has been published today and the legal advice that you have just quoted—we have had a lot of lawyers before us today—you are satisfied that in the circumstances you have described, it would be acceptable for the police to be able to use firearms.

Nick Herbert: It has always been the case, and will always remain the case, that the police not only can but should act, including, if necessary, with the use of lethal force, when absolutely necessary in self-defence or in the defence of others against the threat of death or serious injury. That is the legal principle that is stated by Tim Otty QC. That principle must be right. Indeed, invert it and consider the proposition that the police should not act in circumstances where they could prevent death or serious injury, and one can see that that would not be acceptable. To draw from that the suggestion that Sir Denis has recommended this in his report today would go too far. This is simply a statement of the existing law by an eminent QC.

Q5 Chair: What about the issue of water cannon and plastic bullets? You know that the Committee published our report on Monday and we have heard what the Home Secretary has said about the use of water cannon, in the House, just after the August riots. Do you think that water cannon ought to be used in these circumstances—in disorders of this kind—or do you agree with the Home Secretary and the Committee? That is an easy question. Do you agree with the Home Affairs Committee?

Nick Herbert: I do not accept the way in which you have framed the question. I will say that straight away. Clearly, we must consider both reports very carefully and we will do so. Water cannon is not currently authorised and it is clear that the Inspectorate of Constabulary is not ruling out its use. It draws attention to a number of issues that we all need to pay attention to. We have received no request from the police to use water cannon. The Prime Minister during the disorder made clear that it could potentially be brought up if necessary. These are operational decisions, but the police have not yet asked for it.

It would then, obviously, have to be considered very carefully, but we have always taken the view that we should provide the police with the resources they need
Q6 Chair: But you are the Police Minister and, obviously, you, like the rest of us, watched what was going on in August. Do you think that water cannon ought to have been used?

Nick Herbert: The police did not ask for it to be used and I do not think it would be right for us as politicians, even the Police Minister or the Chairman of the Select Committee, to substitute our judgment over the operational view of the police. They judged that it was not something that they wanted or thought was necessary. We did, however, make clear that the police should have whatever equipment they judged to be necessary. That remains our position.

Q7 Alun Michael: A couple of things seem slightly surprising; I wonder whether they surprised you. In the report, the chief inspector says that it involved “widespread, fast-moving and opportunistic criminal attacks on property”—I cannot disagree with that—“loosely organised using social media”. There was clearly an element of that. He goes on, “and sometimes involving alliances between normally rival gangs.” Have you seen any evidence of that organisational element?

Nick Herbert: Yes. If you were to talk to the chief constable of West Midlands police, he would talk about the involvement of that kind of organised criminality in relation to the disorder in the West Midlands. It varies—

Q8 Alun Michael: So was it specific to specific areas?

Nick Herbert: That would certainly be one example. It varies between areas. There certainly was some gang involvement.

Q9 Alun Michael: The other thing is the question of the threat. On training, he says, “Before the number of officers who should be given specialist public order training can be determined, the national threat needs to be reassessed in the light of the August riots”. One might have expected some sort of assessment of that. Whose responsibility is it to make that sort of assessment, and is there a process under way for doing that, other than through the chief inspector’s report?

Nick Herbert: Yes, because this goes to the discussion that we are currently having with police leaders and with those who hold the police to account locally about the strategic policing requirement and how police forces should be configured in order to deal with national threats, of which this level of public disorder would be one.

Q10 Alun Michael: But the assessment of the threat?

Nick Herbert: The assessment clearly has to be made on the basis of professional advice. There is the involvement of ACPO and also the Cabinet Office when it comes to that kind of national assessment. That will continue. What we want to do is to ensure that police forces are equipped to deal with all national threats in the future. This is one, and in having those discussions and in taking these decisions, we will certainly have regard to the Select Committee’s and inspectorate’s reports, which are helpful in informing that debate.

Q11 Alun Michael: I accept that situation. There is a problem, though. Given that circumstances have become clearer as evidence has come to light, it is clear that there was a trigger in the death of Mark Duggan. The causes are still quite difficult to identify. That must make it difficult to get a proper assessment of the threat.

Nick Herbert: The causes will continue to be debated. There has been quite a full debate during the last few weeks and months, but it is the job of policing in the widest sense to ensure that, should such events occur in future, they are ready to deal with them.

Q12 Mr Winnick: Of course, when it comes to police shooting, we are waiting for the inquiries into the death of Mark Duggan and the unfortunate shooting by the police. Obviously, Minister, you will have to await the result of the inquiries that are taking place. In answer to the questions that were put to you by the Chair, in a scenario where the police shoot and the person dies, is it not the case, as in Northern Ireland, that instead of the emphasis being on how the incident started and the attempted looting and the rest of it, all the emphasis understandably goes on the casualty in the fatal shooting that takes place?

Is there not a need in all the circumstances, bearing in mind what happened in August, for restraint to be used in such a way, as indeed did happen in August, so that it was the thugs and the rest who were seen to be what they were, and the police were doing the job that they are, of course, recruited to do, which is to maintain the rule of law?

Nick Herbert: The police are very well aware of that. That is part of the assessment that they have to make. If you are talking about baton rounds as opposed to the issue that was raised by the Chairman in relation to live rounds, where they would be taking action to protect someone in a serious life-threatening situation, the report specifically talks about the importance of having regard to those actions by police on the ground that could entirely change the way in which people on the ground are reacting to the police, so the force of what you say is right. That must be one of the considerations. That is why it must always be the case that the police, as the operational commanders, have to exercise their judgment about how to deal with these situations on the ground.

Q13 Mr Winnick: There are reports that the Metropolitan police are purchasing water cannons. Can you give us any information on that?

Nick Herbert: We have not had a formal request for that to happen.

Q14 Mr Winnick: Is a formal request absolutely essential?

Nick Herbert: Yes. We would have to approve the use of water cannons.

Q15 Chair: Is that the purchase or the use?

Nick Herbert: They could not be used without us.
Q16 Chair: So they could buy it without asking. 
Nick Herbert: That is my understanding, yes, but it is important to say that there are others who would be involved in these decisions.

Q17 Chair: The Mayor, presumably. 
Nick Herbert: The Mayor, indeed. It is actually inconceivable that such a decision would be taken by the Metropolitan police without the proper discussion, currently with the MPA and then with the Mayor, when we make the reforms.

Q18 Mr Winnick: And the Home Secretary would be very much directly involved. 
Nick Herbert: The Home Secretary would have to approve—

Q19 Chair: Is that the purchase or the use? 
Nick Herbert: My understanding is that the Home Secretary would have to approve the use of them, so there would be little point in purchasing them unless use could be approved. This is something that I understand the Metropolitan police have been considering, but they have not made a formal request to us.

Q20 Mr Winnick: They have not done so. 
Nick Herbert: No, they haven’t. The point of Sir Dení’s report today is that what he urges is a proper discussion about these issues, and your report is one contribution to those discussions.

Q21 Mr Winnick: If there is a formal application, which would require, as you say, at the end of the day, the Home Secretary’s approval, will the Committee be notified? 
Nick Herbert: I do not think there is any requirement to notify—

Q22 Mr Winnick: No, that is quite so, but can I ask if we can be notified, even though, as you say, there is no necessity as such in legislation to do so? I think the Chair, unless he disagrees with me, and colleagues would like to feel that we should be consulted. 
Nick Herbert: If I may answer in general terms, I am sure that we will keep the Committee and Parliament up to date with a whole range of policing matters. However, I repeat that the Prime Minister said, in the course of the disorder, that water cannon could be made available, but there was no formal request for the police to do so.

Q23 Chair: Let us be clear: there has been no formal request to purchase a water cannon. 
Nick Herbert: No.

Q24 Chair: The Home Secretary will need to be involved in that decision, along with the Mayor. 
Nick Herbert: Because the Home Secretary has to approve the use. 
Mr Winnick: She is the deciding factor.

Q25 Chair: So there is no point in buying it unless you have permission to use it at some stage in the future.

Q26 Chair: Has there been an informal approach? 
Nick Herbert: There have been general discussions of the kind that we are having now, and we are aware of course that the Metropolitan police—

Q27 Chair: Between whom? Who has the informal discussion taken place with? You, as Police Minister? Mr Bernard Hogan-Howe? The Mayor? Who has been involved? 
Nick Herbert: Since the disorder, these are the kinds of discussions we have had because of reviewing the whole range of things that happened during the disorder.

Q28 Chair: So you have had an informal discussion, but no informal or formal approach. 
Nick Herbert: No. It is very important to say that we have not had a formal request from the Metropolitan police.

Q29 Mr Winnick: What about baton rounds? 
Nick Herbert: They are already authorised, and indeed, they were brought up during the course of the disorder, so that would not require another authorisation by us, and their use would be an operational decision by the police. 
Chair: Colleagues, although we have spent a long time on this, I will take two more Members, Mr Reckless and Mr Ellis. We need to move on to the protocol, which is the reason why we have Mr Herbert here.

Q30 Mark Reckless: Minister, could the Mayor or the MPA prevent the potential use of water cannon by refusing to buy them? 
Nick Herbert: Yes. That is currently the case in relation to the MPA. Effectively, the MPA took that decision a few a years ago in relation to Taser deployment. So whatever the legal position here, the reality is that, although the MPA does not formally have to approve such use, because they are the body that holds the force to account and they are the body that funds the force, it would not be possible, in my judgment—indeed it has not been possible in the past—for such a deployment to be made without their agreement. That is the realpolitik of the situation, and that will be the case going forward with Police and Crime Commissioners.

Q31 Michael Ellis: Moving away very much from the water cannon point, but staying on the point of the report, is the Riot (Damages) Act 1886 working as effectively as we would like, or is this something that the Government can look at with a view to the effectiveness of compensation for damage caused in such incidents as occurred in August? 
Nick Herbert: No, it is not working as effectively as we would like, and we are reviewing it. We have already said that. It clearly makes sense to do so. We have been concerned about the speed with which there have been payments in relation to those who should be compensated following the disorder. Actually, I am going to be going on from this meeting to convene a
meeting of police authorities and the insurance industry to discuss how we can speed up those payments, which is essential. We did of course extend the period in which claims could be made, so the Government have done everything possible in order to try to ensure that we can look after those who were affected by the disorder. However, we will, in my view, have to review the Act.

Q32 Michael Ellis: Many insurance companies have already made out payments, but of course the provisions under the Riot (Damages) Act 1886 are operating more slowly than many insurance companies.

Nick Herbert: Yes, and the Act itself actually affects the speed with which insurance companies are paying out as well, so that is one of the things that we will need to have a look at. I have asked police authorities outside of London that they should ensure that the majority of their claims for the uninsured losses that the Act will be covering are paid out before Christmas. With the MPA, which has the lion’s share of the claims—a great deal more—it will take a little longer than that, but the Government are doing everything that we can to work constructively with the authorities and with the industry to ensure that the rate of payments speeds up.

Q33 Chair: Both our report and Sir Denis’s report conclude that the police tactics were wrong. Is that the Government’s view as well? It certainly backs up what the Home Secretary said to the House just after the riots began.

Nick Herbert: Yes. As you know, the Government said at the time that it was obviously the case that there was insufficient policing in the early stages of the disorder. I think the police themselves have concluded that policing needed to be brought up more swiftly. It is not an issue about the overall numbers of police officers, as was suggested by some at the time, which was an entirely wrong suggestion. It is about how quickly resources can be brought up and how many police officers are trained to the relevant standard. All those issues are covered fully in Sir Denis’s report. The police need to study all of these reports, and they have of course been conducting their own inquiries as well. They need to—I am sure they will—learn the lessons from all of this.

Q34 Chair: On the IPCC, you have a shortlist of four at the moment for the job. You will have seen our concerns that a whole year and a half has gone since the departure of Nick Hardwick. On an island of 60 million people, can we not find somebody qualified to become the chairman of the IPCC? It has been put to us that the Home Secretary did put forward a name to the Prime Minister, but this was rejected by No. 10. Is that correct?

Nick Herbert: The Government took the view that we wished to reopen the contest. I should just say two things. First, it is very important that we get this appointment right; the IPCC is a very important body. Secondly, where I would, if I may, slightly disagree with one of the points in your report was the suggestion that somehow, the work of the IPCC had been affected detrimentally by the absence of a permanent chairman. I don’t think there is any evidence of that, and you did not adduce any evidence to support that.

I would like to say for the record that the interim chairman of the IPCC, Len Jackson, who has stood in while a permanent appointment is being made, is someone in whom the Government have the greatest confidence. He is an individual of the utmost integrity and calibre. We have full confidence in the IPCC under his interim chairmanship.

Q35 Chair: The idea that the former chairman should be interviewing his or her successor, I’ve not come across this before. Someone retiring from the chairmanship—

Nick Herbert: Well, he is interim chair.

Q36 Chair: Well, that he should then be chairing the panel for his successor is rather odd, isn’t it?

Nick Herbert: I don’t think it’s odd.

Q37 Chair: So it’s happened before?

Nick Herbert: I think it’s valuable to have his advice and input. It is one thing simply to observe that there has been a period of time until a permanent chair is appointed; it is another thing to draw the conclusion that the IPCC has been adversely affected. I do not think there is any evidence to support that conclusion at all.

Q38 Chair: So when can we have the name of the new chairman?

Nick Herbert: Well, as soon as possible.

Q39 Chair: Sounds very vague.

Let us go on to the protocol. The protocol states that it is the will of Parliament and Government that the office of constable should not be “open to improper political interference”. What would be proper political interference?

Nick Herbert: The original drafting did not include the word “improper”. The working party that looked at these issues considered the kind of scenarios that, for instance, we have seen in London, where the mayoral candidates stood on various platforms, made pledges that related to policing, and clearly sought to ensure that when the Mayor was elected he wanted to fulfil those pledges. An example would be tackling knife crime or placing uniformed officers on public transport. You could argue that strictly, such matters, in legal terms, cut across the control and direction that a chief constable has of their force, but I think most of us would agree that it was entirely proper that the Mayor was able to make such pledges. What the Mayor did is sit down with the new Commissioner and work out a way in which to deliver them. It was in order to ensure that that kind of process could happen in the future that the wording was revised.

What we don’t seek is improper interference with policing, which would be a situation in which an elected politician sought to direct a police officer as to whom they should or should not arrest, or whether they should or should not pursue an investigation. That is clearly outwith the responsibility and
entitlement of the elected individual, and should always be a matter for police officers.

Chair: Very helpful.

Q40 Alun Michael: The protocol states that the Police and Crime Commissioners are the recipients of the police force’s funding, and that how the money is allocated is a matter for the Police and Crime Commissioner “in consultation with the chief constable.” What would happen if the Commissioner and chief constable did not agree on the allocation?

Nick Herbert: Ultimately, the legal position is clear—these are matters for the elected Police and Crime Commissioner—as, currently, they are ultimately matters for police authorities. There is no change in that respect.

Q41 Alun Michael: The reason for looking at this is that, obviously, we do not want to look entirely at the negative and assume that it is not going to work: it is a question of how it works well. In that sense, the protocol seems slightly odd. Our original recommendation referred to the fact that the concept of operational responsibility is important and needs to be developed. We said that it should be clarified in “a memorandum of understanding…between the Home Secretary, Chief Constables and Police and Crime Commissioners”.

As I recall, we were talking about how to make sure that things work practically on the ground, which means having a good practical understanding between the different parties, particularly the chief constable and the Commissioner. The protocol, as it stands, does not do that, because it is, effectively, the Home Office’s expectations of the chief constables and Commissioners. Will there not need to be a memorandum of understanding, separate from the protocol, that is drawn up when the Commissioners are there to be a party to getting that sort of detailed arrangement?

Nick Herbert: I do not think so. Please remember that things work practically on the ground, which means having a good practical understanding. The protocol does not do that, because it is, effectively, the Home Office’s expectations of the chief constables and Commissioners. Will there not need to be a memorandum of understanding, separate from the protocol, that is drawn up when the Commissioners are there to be a party to getting that sort of detailed arrangement?

Q42 Alun Michael: But one of them does not exist at the moment.

Nick Herbert: Actually, the police authorities were represented and the deputy Mayor for policing was a party to all these discussions, so you should certainly not conclude that one side has been absent from them. That is not the case.

Q43 Alun Michael: With respect, the deputy Mayor may continue to have that role; the police authorities will not be there.

Nick Herbert: No, but the legs of the tripartite were represented and there was a great deal of discussion about these issues. The protocol—first the draft, then the final one that we have placed before the House—is a reflection of that very close discussion and, ultimately, agreement between the parties. That is important to understand, because a very sensitive balance has been struck and I would not want to see it upset. Police and Crime Commissioners have responsibility for public funds, but they also have a responsibility to ensure that effective and efficient policing is delivered. Therefore, the other thing to add in response to your question, Mr Michael, is that we have the existing arrangements of police authorities, and the legal position of chief constables has not changed. In essence, the control and direction of the force remains with the chief constable, which currently pertains to police authorities.

Q44 Dr Huppert: To work out how to allocate money, you have to have money to spare. Can I ask you how the precept would apply? That is obviously differently important for different forces. The protocol states clearly that the Police and Crime Panel has a “power of veto...over the level of the...proposed precept”, which fits with schedule 5 to the legislation. You have commented in your letter that the PCC cannot just ignore the recommendations—the proposed precept would need to alter. How real is that? Could the Police and Crime Commissioner change a precept by a penny and, to all intents and purposes, ignore everything the panel says?

Nick Herbert: We will come to this, because we will set out how that should be dealt with. Our concern was to ensure that a precept was set; we could not allow a situation of deadlock or some kind of limbo. We sought to set out procedures—we will have to elaborate on this further—that will be followed and that will ultimately ensure that a precept can be set, but not one that the Police and Crime Panel was fundamentally unhappy with when it was first proposed.

Q45 Dr Huppert: There is a lot of flexibility under section 8, which describes what the regulations must look at. Would you consider a model in which, for example, the Commissioner proposes something, the Panel proposes something and there is a local vote between the two, so that we get good, democratic accountability?

Nick Herbert: I am not quite sure what you mean by “local vote”.

Q46 Dr Huppert: You could have a local referendum of people who are affected by this.

Nick Herbert: No, a referendum would be triggered under different circumstances. If an excessive precept were set against a level determined by the Secretary of State, a referendum would automatically be triggered as a read-across of the measures set out in the Localism Act for local authorities. So there is provision for a referendum, but under different circumstances.

Q47 Dr Huppert: It seems to me that you have a panel that has a strong view and a Commissioner who has a strong view. If they cannot reach agreement, either one of those is superior—the Secretary of State decides or the local people decide, if you want to be
consistent with the idea that this is all about democracy.

**Nick Herbert:** Ultimately, our concern was to ensure that we give the Police and Crime Panel the power of veto, which is part of giving the Police and Crime Panel the effective powers and checks and balances that we pledged in the coalition agreement.

The fact that that power of veto exists is set out in the legislation and is noted in the protocol, but the Police and Crime Commissioner is the elected individual. The Police and Crime Commissioner will have a mandate. We also then have to think about how we would align what we are trying to do in relation to giving the panels this power with the additional provision whereby a democratic lock has been given in substitute of what was capping, and so on.

The route that we chose was to say that these two things should sit alongside each other—not the route that was suggested by some, including some members of this Committee, which is that the veto of the panel would automatically go to a referendum. As I said to the House at the time, one of the reasons why we decided not to choose that is because of the concern, first, that it could potentially cut across the mandate of the Police and Crime Commissioner and, secondly, that it could result in referendums being triggered at public expense. That did not seem to be desirable if a precept could be set that the panel regarded as reasonable.

**Q48 Mr Winnick:** Considering some of the points made by Mr Michael and your response, Minister, of course the Police and Crime Commissioner will be more personalised than a police authority.

I want to give you an illustration of what could happen. Say, for example, the elected Police and Crime Commissioner in a particular area set a budget of zero for Tasers and the police decided that such weapons should be used—this is just a theoretical question. That could well mean a sort of conflict between what the Police and Crime Commissioner has decided budget-wise and the operation of the police. Is that not a difficulty between politics and police operations that we want to avoid?

**Nick Herbert:** I do not think that we should pretend that these kinds of disagreements have not happened in the past, because they certainly have. Actually, that example of Tasers is a very real one.

There was a disagreement between the previous Commissioner of the Met and the MPA only a few years ago in London about Tasers. In the end, it was possible for the MPA to exert influence over that decision and say that they were not happy about it. Whether it was because they said they would not fund it or because they are a body to which the Commissioner felt he should pay attention, they certainly had influence in that debate. I think it is right that the public should have a voice in these kinds of decisions, and we are giving a clearer voice through the person of the elected individual.

**Q49 Mr Winnick:** In disturbances outside of London—including London, but outside of London, too—such as what happened in August, would the Police and Crime Commissioner be telling the chief constable that certain actions should be taken? What sort of pressure would be put on the chief constable to take action if the Police and Crime Commissioner was not in a position to instruct the chief constable, as presumably he or she would not be?

**Nick Herbert:** You are absolutely right that they are not in a position, any more than a police authority is at the moment, to interfere with the control and direction of the force, which rests with the chief constable. That is as it should be. Clearly, these will be positions of influence.

One of the things that Sir Denis is saying in his report is that it is important that these issues are discussed. There is a legitimate public interest, particularly when it comes to the use of force by the police. You cannot cut the public, or the public’s elected representatives, out of the equation, in my judgment. The elected Police and Crime Commissioner for a force covering a major city would clearly have a voice. What would not be proper is for them to seek to direct the police or an operation. Those operational decisions must be taken by a chief officer.

**Q50 Mark Reckless:** But they could politically interfere, as long as they didn’t do so improperly.

**Nick Herbert:** Well, I have already described to you the kind of scenario that we are envisaging and that that form of wording was designed to accommodate. Of course there have been a raft of cases in the past, in relation to the actions of police authorities, which were considered by chief constables to cut across their legal control and direction of the force. Ultimately, if there was disagreement, those things had to go to the courts and be tested by them.

**Q51 Mark Reckless:** Despite the disagreement of this Committee, you and the Home Secretary state in this protocol—is it you and the Home Secretary? The legislation says, in brackets, that it should be the Home Secretary’s view. You said just now that the protocol reflects agreement between ACPO, the Association of Police Authorities and the Association of Police Authority Chief Executives.

**Nick Herbert:** It does. There is a working party that I convened in order to draw up the protocol, but ultimately, the protocol is issued by the Home Secretary.

**Q52 Mark Reckless:** But isn’t it the constitutional convention that the statutory instrument reflects the will and intention of Parliament?

**Nick Herbert:** Indeed. It is before Parliament.

**Q53 Mark Reckless:** You say “before Parliament”, but the protocol was only referenced in the legislation through an amendment on Third Reading in the Lords. Isn’t it appropriate for elected Members of Parliament to be able to scrutinise this appropriately?

**Nick Herbert:** There is a clear parliamentary procedure for dealing with statutory instruments like this, so it is open to Members of Parliament, if they object to the protocol, to seek to debate it. I believe that there has been—
Q54 Mark Reckless: Are you happy for such a debate to take place?
Nick Herbert: I am always happy to debate these issues, and I am doing so now.

Q55 Mark Reckless: Excellent. But would you be happy for such a debate to do so further in a Statutory Instrument Committee?
Nick Herbert: That isn’t a matter for me.

Q56 Chair: Minister, just to explain why you are here today, having suggested the memorandum of understanding that became the protocol, this Committee and yourself had a dialogue. We are always grateful for dialogue with Ministers. We suggested that Mr Reckless meet with you and a working party. You were not around at the time when these discussions were taking place.

The reason why you are here is that we felt this dialogue had ceased. We think it is a very good idea, and that is why a majority of this Committee prayed against this matter in the House—so that we could have a statutory instrument debate about it. We know it is not a matter for you, but had we had a better dialogue between you and us, it might have occurred. Anyway, that is all in the past. Let’s move on.

Nick Herbert: I just want to say in passing that I note that the Committee proposed a memorandum of understanding, and I have always welcomed that. I actually proposed that there should be something like this before the Committee’s recommendation, but I am glad that there has been general agreement that this is valuable and important.

I just want to repeat, though, that it is important to understand that this has been drawn up with careful consultation with interested parties, in light of the debate that took place in Parliament during the course of the Bill. To characterise this as something that has been conducted without consultation is, I am afraid, not something that I would accept. The Home Secretary is required by the Act to consult with those as she sees fit.

Q57 Chair: We are in new territory here. The Home Secretary, as a result of the representations of the Deputy Prime Minister, has put off the election until next November, so there is more time. The fact is that we want to be involved, and your working party is drawn in a very narrow way. With the greatest respect to Kit Malthouse—we rate him as a witness—he is not the equivalent of 650 Members of Parliament. That is why the Committee wanted to work with you. Anyway, that is all in the past. What we are saying is that we would like a debate, and an SI Committee would be best. Let us all get on together and try to make progress and give you a protocol that you can be proud of.

Q58 Mark Reckless: The protocol continues to say, despite our objections, “primary legislation and common law already provide clarity on the legal principles that underpin operational independence”. Richard Clayton QC and Hugh Tomlinson QC said that operational independence needs to be clarified by police authorities pursuing applications for judicial review. John Beggs QC and Hugh Davies say that the division between strategy and day-to-day direction and control is becoming increasingly confused, and Professor Stenning of Keele University concludes that there is “continued disagreement and confusion about the scope, application and implications” of operational independence. Why is it that Ministers know better?
Nick Herbert: It is not a question of Ministers’ knowing better. It was the view of the Association of Chief Police Officers as well. Indeed, I think it was the view of most people who took part in the debate during the months of consideration before the Bill, and when the Bill was introduced, that we should not seek to try to define operational independence; that the legal position is that control and direction is given under the Act to chief constables; that the nature of this thing called “operational independence” has grown up according to case law; that we are talking here about something that most people would agree is a grey area; and that we would have got into trouble, collectively, if we had sought to try to define it more precisely than that.

It was not just a question of Ministers’ views, therefore; I was paying attention to the views of the Association of Chief Police Officers, which was most concerned to ensure that its operational independence was not prejudiced by the new legislation.

Q59 Mark Reckless: No doubt. You have just said that it was a grey area. Why, then, does the protocol say that primary legislation and common law already provide clarity?
Nick Herbert: Because the legislation says that control and direction rest with the chief constable. That much is clear. There are then judgments that impact on that. The very fact that we can have discussions, for instance about whether it would be proper for a chief constable to take a decision about the purchase of some equipment if a Police and Crime Commissioner did not agree—or if, before that, a police authority did not agree—indicates that these are matters that will be the subject of ongoing discussion. In most cases, we believe that they can, with the assistance of the protocol, be resolved by sensible discussion between the parties. Ultimately, if there is disagreement, it will have to go to the courts. That has been the case in the past, as you are very well aware.

Q60 Mark Reckless: Surely the risk is that by bringing in this protocol and not having clarity either through operational independence or the protocol, there will be more litigation than there otherwise would be. You say in your letter of 15 December to us that paragraph 6 of the protocol is simply intended to make it clear that the Common Council and the Commission of the City of London do not have to have regard to the protocol. Why does it not say that, then?
Nick Herbert: The legislation does say that. The protocol, remember, is designed to assist in the understanding of what the legislation says. It is not the job of the protocol to make new law. It does not; it is designed to try to get an understanding of all the parties—principally the chief constables and Police and Crime Commissioners, but also Police and Crime Authority
Panels and, with regard to the role of the centre, the Home Office as well—as to what their roles will be in the new landscape.

Had we done what I think you are inviting us to do, which is to try to define operational independence more closely than we have done, I do not believe that that would have been possible and I think it would have created difficulties. One could have played out a whole range of scenarios—

Q61 Mark Reckless: I am not inviting you to do that.

Nick Herbert: I thought you were.

Q62 Mark Reckless: I am observing that you may have accidentally done that. At a minimum, you have created uncertainty, because of drafting where you specify that the protocol is not legally binding on two particular bodies, creating the risk that the courts will infer that that is intended to be. The use of “have regard”—

Nick Herbert: You will know from the letter that I sent to you that our legal advice is that no such risk is created.

Q63 Mark Reckless: When the courts come to rule on this litigation about these issues, they will look at the legislation; in many of these issues it has been fudged and we have this “have regard” phrase. When it comes to the veto of the panel, you say that “have regard” means that it only needs to be considered. But when it comes to this you are saying that “have regard” is the same as legally binding. Which is it?

Nick Herbert: The legal position is that Police and Crime Commissioners and chief constables must have regard to the protocol. We consider that that is a strong duty. I think that is important. In the end, in that sense, it is legally binding on them to have regard to it. The provisions themselves are not legally binding except where they are statements of things that are the law as set out under existing legislation.

Q64 Mark Reckless: But were this a Statutory Instrument Committee, judges could refer to your attempts to clarify the inconsistencies previously put down. Would it not be sensible to have that discussion?

Nick Herbert: With the greatest respect, I don’t accept that there have been such inconsistencies and I think this discussion is probably losing the public and most of the rest of the Committee. The whole purpose of the protocol was to be of assistance to chief constables and Police and Crime Commissioners when they are elected, and others. I note that those who have been closely involved in drawing it up, which includes chief constables and representatives of police authorities, are content with the wording and regard it as being of assistance to them.

Q65 Mark Reckless: Minister, the whole idea, surely, of elected Commissioners is to move away from the current system, where we have various quangos and people who are unelected—be it ACPO or police authorities—making decisions, and to make things locally and democratically accountable.

Why have you not done that with the protocol? Why are the only people who are involved in this working group—the only people who have influenced this—the House of Lords with an amendment on Third Reading, ACPO and various police authorities? Why has there been no opportunity for the House of Commons to scrutinise this in terms that judges will be able to refer to when dealing with the litigation you may trigger?

Nick Herbert: I repeat that this was laid before the House and we have been consulting closely with these parties, which included the chair of the MPA, Kit Malthouse—

Q66 Chair: He is the only elected person? Sorry, he is not elected.

Nick Herbert: He is a member of the GLA and he is the appointed chair of the MPA—the chair of Surrey Police Authority, who is not elected. He is an independent person who was also represented. So, as I said before, if you like, all legs of the tripartite were represented. The protocol is a statement of the existing legal position, which had been agreed by Parliament during the course of the legislation.

The fundamental balance was not altered. It is simply a wrong characterisation to say that there has been some kind of closed discussion. That is not the case. There has been a very good discussion about all this. There has been helpful, in the main, input from others and I think it is worth repeating a third time because it is so important: there has been agreement between the two parties who might have disagreed about this. It would be helpful if the Committee noted the significance of that agreement between the two parties.

Chair: The Committee does note that but I think the Committee’s view is that this should be debated further. That is why I have written to the Leader of the House to ask that this be referred to a Statutory Instrument Committee and Mr Ellis is a member of that Committee.

Q67 Michael Ellis: It might interest you to know, Minister, if you didn’t already, that although it is not one of the more famous Committees, there is already a Joint Committee on Statutory Instruments. I consider myself to be, and am, an elected Member of this place and I am on that Committee, so there is some scrutiny in that regard. No doubt it will be before us. Can I ask you this: presumably there will be an opportunity to amend the protocol at a later date after Police and Crime Commissioners have been appointed?

Nick Herbert: Yes. The Home Secretary can issue a new protocol. There would have to be consultation about that. So it is certainly not set in stone for ever. We have issued this protocol, subject to parliamentary approval. That means that it is up and running in time for the transition to the handover in London, which will go from before the mayoral elections next month through to the election of Police and Crime Commissioners—a period of time. We can then see how things work. Of course, we should constantly keep these things under review.
Q68 Michael Ellis: So you are open-minded about it?
Nick Herbert: Yes.

Q69 Michael Ellis: As you say, it will not be written in stone; it has not been and it will not be. Up to this point, are you satisfied that you have secured the consent and ready agreement of all interested parties—the authorities, the chief constables and the like?
Nick Herbert: Exactly so. The chief constable of Northamptonshire, Adrian Lee, negotiated on behalf of ACPO. Tim Godwin, the then deputy Commissioner of the Met police, and subsequently the acting Commissioner, was also a party to the discussions. I have mentioned Peter Williams, who was the chair of Surrey Police Authority, and Kit Malthouse, who is chair of the Metropolitan Police Authority.

The police authority chief executives were represented, and, of course, the Home Office was represented, with a strong interest in ensuring that the integrity of reforms that the Government have proposed, and which Parliament has now endorsed, was protected.

Q70 Chair: The majority of the Committee—obviously, different Members have different views—has prayed against what you have laid before Parliament. We believe this will help the Government to have a further discussion. May I just ask for two points of clarification on the National Crime Agency?
Do you now have a figure for the NCA's budget? When I asked you last time, you said it was a little higher than £476 million. We just want a quick answer. Do you have a figure yet?
Nick Herbert: I did not say that.

Q71 Chair: Sorry, that is a direct quote. You said it was a little higher than £476 million.
Nick Herbert: The National Crime Agency has not yet been set up. It needs to be set up by an Act of Parliament. We believe this will help the Government to have a further discussion. May I just ask for two points of clarification on the National Crime Agency? Do you now have a figure for the NCA's budget? When I asked you last time, you said it was a little higher than £476 million. We just want a quick answer. Do you have a figure yet?
Nick Herbert: I did not say that.

Chair: And form-filling.
Nick Herbert: And form-filling. It will enable them to exercise professional discretion, without the box-ticking and form-filling means of holding them to account and attempting to drive up standards, as we have seen in the past. This is a very positive agenda for policing reform, which will be good for policing and improve IT and the professionalism of the police.

In particular, the creation of a professional body for policing will be welcomed by officers as something that is very positive for them and that will enable us to pursue the agenda of de-bureaucratising the police.
It will also enable us to ensure that we have a future in which police officers are equipped with the training and skills that enable them to exercise professional discretion, without the box-ticking and form-filling means of holding them to account and attempting to drive up standards, as we have seen in the past. This is a very positive agenda for policing, but is also a good one for the public interest, because there will be more accountability.
Chair: Minister, thank you very much for coming today. I apologise for keeping you waiting outside. We have gone on slightly longer than we intended, but I hope you found the questions interesting. On behalf of the Committee, I wish you a very happy Christmas.
Nick Herbert: Have a happy Christmas. Thank you for having me.