

<b>Meeting</b>	<b>Authority Meeting</b>
<b>Date</b>	<b>20 May 2020</b>
<b>Location</b>	<b>Video-conference</b>
<b>Title of Paper</b>	<b>Interim Report of the Independent Advisory Group on Police Use of Temporary Powers related to the Coronavirus Crisis</b>
<b>Presented By</b>	<b>John Scott QC</b>
<b>Recommendation to Members</b>	<b>For discussion</b>
<b>Appendix Attached</b>	<b>Appendix A, B and C</b>

**PURPOSE**

To provide an interim report to the Scottish Police Authority on the work of the Independent Advisory Group on Police Use of Temporary Powers related to the Coronavirus Crisis.

To the Board of the Scottish Police Authority

For the Meeting of 20 May 2020

## **Interim Report of the Independent Advisory Group on Police Use of Temporary Powers related to the Coronavirus Crisis**

### **1. Chair's Introduction**

We are living, and many are dying, in the most extraordinary of times as a result of the global Coronavirus pandemic. All parts of our society have been affected. It seems scarcely believable that, only a matter of weeks ago, we could go about our lives as usual – taking buses, going to any shop we wanted, having parties, going to work and even visiting a pub or restaurant. We could shake hands and hug friends and family. We could see our parents and extended families whenever we wanted. That all changed on 23 March 2020. Soon after, the law changed to support and reinforce much of what was now expected of the public: staying at home, social distancing when leaving home for essential purposes, isolating and shielding. Owing to the circumstances, the rules, and our lives, changed without consultation, debate or scrutiny. Of the changes, Liberty's Director Martha Spurrier said: "This new law is without doubt the biggest restriction on our individual and collective freedoms in a generation."<sup>1</sup>

It was on 25 March 2020 that the UK Parliament passed the Coronavirus Act 2020. It did so in a single day, with Royal Assent received the same day. There was an Impact Assessment from the Department of Health and Social Care ("DHSC") published on 26 March and a Human Rights

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<https://www.libertyhumanrights.org.uk/issue/new-law-is-biggest-restriction-on-our-freedom-in-a-generation/>

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Memorandum<sup>2</sup> dated 20 March issued by the DHSC to assist the Joint Committee on Human Rights with its scrutiny of the Bill's human rights implications.

On 27 March, the Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations ('the Regulations') were laid before the Scottish Parliament and came into force that day (they were very similar, almost identical in relevant respects, to the Regulations enacted for the other parts of the United Kingdom although some divergence has occurred since then). No impact assessments, human rights or otherwise, were prepared for the Regulations "because of the need to make and lay the instrument urgently to encourage self-isolation and minimise the risks to public health arising from Covid-19."<sup>3</sup> Addressing the lack of such assessments, reference was made in the Policy Note for the Scottish Regulations to the fact that they will expire after 6 months (in September) unless renewed and also the strict obligations on the Scottish Government to review the Regulations at least every 3 weeks.

There has been discussion, in the context of human rights, of some of the strengths and weaknesses in approach to the Coronavirus Crisis taken by different countries. Examples include: the level of continuing parliamentary and other scrutiny of emergency measures which have been implemented across the world; the lack of specificity and therefore lawfulness of certain new restrictions with criminal penalties (see, for example, the report<sup>4</sup> dated 6 May 2020 by the Bonavero Institute of Human Rights).

Importantly, as the Crisis continues, some criticisms are relevant now as there may yet be further need to impose or re-impose restrictions. It is

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<sup>2</sup> <https://publications.parliament.uk/pa/bills/cbill/58-01/0122/Memorandum%20to%20the%20Joint%20Committee%20on%20Human%20Rights%20-%20The%20Coronavirus%20Bill%202020.pdf>

<sup>3</sup> [https://www.legislation.gov.uk/ssi/2020/103/pdfs/ssipn\\_20200103\\_en.pdf](https://www.legislation.gov.uk/ssi/2020/103/pdfs/ssipn_20200103_en.pdf)

<sup>4</sup>

[https://www.law.ox.ac.uk/sites/files/oxlaw/v3\\_bonavero\\_reports\\_series\\_human\\_rights\\_and\\_covid\\_19\\_20203.pdf](https://www.law.ox.ac.uk/sites/files/oxlaw/v3_bonavero_reports_series_human_rights_and_covid_19_20203.pdf)

crucial to learn, as soon as we can, any lessons available from recent and current decisions, especially with the same bodies and individuals involved in key roles.

Human rights oversight of the Crisis has also offered us some notes of caution. On 2 April, the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Killings issued Guidance on the use of force by law-enforcement personnel in time of COVID-19 emergency<sup>5</sup> with a reminder to police services across the world of the *“duty to respect and protect the human rights of every person, irrespective of their race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”*

The statement emphasises a very welcome policing focus on supporting and protecting those who *“seek to make their and their family’s existence viable under the shadow of contagion’s heavy threat, inevitably it is they who are also more likely to find themselves in breach of state of emergency regulations, particularly as they pertain to freedom of movement”*. This, and other statements, serve as reminders that it is in times of the greatest challenge for societies and states that human rights, especially of all those who are vulnerable in some way, can be most important. Even some of the new restrictions are framed around that most basic of human rights – the right to life.

Both enactments – the UK Act and Scottish Regulations - formed part of the response of government to the Coronavirus Crisis, a national public health emergency of unprecedented scale, with the Regulations explicitly designed “for the purpose of preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection or contamination in Scotland (whether from risks originating there or elsewhere).”<sup>6</sup>

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<https://www.ohchr.org/Documents/Issues/Executions/HumanRightsDispatch1.pdf>

<sup>6</sup> <http://www.legislation.gov.uk/ukpga/2020/7/section/49/enacted?view=plain>

The overall response by government included the national “lockdown” (restrictions on movements and gatherings, as well as requirements to close premises and businesses), imposed with legal effect from 27 March 2020 along with clear advice to stay at home to avoid transmission of the disease, thereby saving lives and seeking to ensure that the NHS remained able to cope with the expected additional demand. The advice to stay at home was incorporated into a legislative requirement with exceptions allowed only if there was a “reasonable excuse”. The Regulations give some examples of reasonable excuses but, over time, experience has suggested others, for example, due to the additional needs of specific individuals, such as autistic people, those with learning disabilities or those requiring to leave their residence due to domestic or sexual or child abuse. Appropriate refinement of approach in the light of experience has been an obvious response to omissions caused by the speed with which these measures were introduced.

While the public have been required, for the sake of public health, to comply with the law and expected to comply with the associated guidance – and the vast majority of people have done so, providing, amongst other things, practical emphasis of the concept of policing by consent – it was apparent that powers of enforcement would be necessary as a last resort for flagrant or persistent breaches of the Regulations. The Regulations made explicit mention of the human rights concepts of “necessity” and “proportionality” as preconditions to the exercise of the various powers of enforcement – issuing prohibition notices and directions, and removing persons using reasonable force. From the outset, consistent with the requirements of necessity and proportionality, Police Scotland and government emphasised that police officers should take a “4 Es” approach: *engage* with members of the public in the first instance, *explain* the legal requirements and *encourage* compliance where necessary; moving to *enforcement* only when absolutely necessary. In the majority of instances, the first 3 Es have been sufficient to secure compliance, again offering practical emphasis of the principle of policing by consent.

As a public health issue, firmly within Police Scotland’s main statutory purpose - to improve the safety and wellbeing of people, places and communities in Scotland - enforcement is intended as a backstop, to be used only when all else has failed. Use of the powers may give the

appearance of a public order initiative, but the context is crucial - police officers on the front-line of an essential public health response. While the safety and wellbeing of people is the main statutory purpose of Police Scotland, the Crisis has given emphasis to that purpose in a heightened manner never envisaged. Nonetheless, despite the consistency between lockdown and purpose, it was recognised that the two enactments gave extraordinary powers of enforcement to Police Scotland to allow police officers to ensure compliance with temporary but severe and unprecedented restrictions on the freedom of the population.

Mindful of the extraordinary nature of the powers, Police Scotland and the Scottish Police Authority agreed that it was appropriate to establish additional measures for scrutiny of this “public health policing”, involving all aspects of engagement with the public, but also including the use of the powers. This would serve to reassure the public that the temporary powers of enforcement were being used appropriately, and only as a last resort. It would also provide a “real time” forum for exchange of information and experiences between the police and public to deal with the sort of mistakes and misunderstandings – on the part of the public and the police - that are inevitable in a situation where significant new powers are introduced as a matter of urgency and without the opportunity for training, dissemination and communication which would be considered necessary in normal circumstances.

After consultation, it was decided that such scrutiny could be undertaken by an Independent Advisory Group. A similar model was used in 2015 to look at the use by Police Scotland of the tactic of non-statutory “stop and search”. I chaired the Independent Advisory Group (“IAG”) on Stop and Search and was asked, and agreed, to chair the new Group.

Mindful of the relevant statutory and other oversight responsibilities in relation to policing, it was agreed that it would be appropriate to have certain key organisations represented on the Group – Police Scotland, the Scottish Police Authority, Her Majesty’s Inspectorate of Constabulary in Scotland and the Crown Office and Procurator Fiscal Service. This direct participation of ongoing oversight bodies, along with the SPA senior officers attending with the SPA secretariat, helps to ensure that there is no unnecessary duplication and that the respective roles and jurisdictions are respected, while collaborating on additional oversight of the exceptional activity in the space between them. On the human rights

aspects, key human rights scrutiny bodies and organisations agreed to provide members for the Group. Importantly, there is also representation from the third sector and from academia to support the evidence gathering function of the group. Full membership of the Group, which may change over time, can be seen at <http://www.spa.police.uk/news/617687/> and in Appendix C.

To ensure the continuing independence of members of the Group in their own right, it is acknowledged that they remain free to express views that differ from any conclusions reached by the Group and to contribute to wider debate. For the avoidance of doubt, participation in the work of the Group is without prejudice to the statutory independence of the National Human Rights Institutions (the Children and Young People's Commissioner Scotland, the Scottish Human Rights Commission and the Equality and Human Rights Commission) and their compliance with the requirements of the Paris Principles<sup>7</sup>, as well as the independence and statutory responsibilities of any other bodies from which Group members have been drawn.

Terms of reference were quickly agreed (see Appendix A). These reflect the idea that this group would offer enhanced human rights based scrutiny of the use of these exceptional but temporary powers, using the PANEL principles<sup>8</sup> - Participation, Accountability, Non-Discrimination, Empowerment and Legality – to inform a synthesis of assessment of data and other evidence, including lived experience, considered against the relevant human rights principles. This will be done “real time” and dynamically, as well as in retrospect and with the benefit of hindsight. It will allow for the identification of questions, issues, problems and misunderstandings, and allow these to be raised and hopefully resolved, with inevitable mistakes being identified, acknowledged and not repeated.

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<sup>7</sup>A comprehensive series of recommendations on the role, composition, status and also functions of [National Human Rights Institutions](https://www.ohchr.org/en/professionalinterest/pages/statusofnationalinstitutions.aspx) - <https://www.ohchr.org/en/professionalinterest/pages/statusofnationalinstitutions.aspx>

<sup>8</sup> <https://www.scottishhumanrights.com/rights-in-practice/human-rights-based-approach/#the-panel-principles-1210>

## **2. Executive Summary - Emerging Themes and Findings**

### **Compliance**

The significant levels of public compliance with Regulations and guidance have rightly been the subject of much comment and appreciation. Significant levels of compliance should not mask the fact that the impact of restrictions has not been equally felt, with those living in already difficult circumstances, such as overcrowded housing and poverty, often more seriously impacted.

### **Public Attitudes**

Overall, public support for the police appears high. One recent survey indicates not only public support but, remarkably, suggests increased levels of public support and approval of policing in Scotland. There is certainly no evidence of any decline in public confidence. This is a useful indication of the principle of policing by consent in practice in the most

challenging of circumstances, especially with policing at the forefront of enforcement at this stage.

There are some tensions in public thinking about where to strike a balance, with some expressing the desire for more enforcement and some thinking that current powers go too far.

**“Normal” Policing** (Outwith Terms of Reference for IAG but relevant for context)

Lockdown may have impacted on the commission of certain types of crime but serious concerns have been expressed about the impact of lockdown for those in violent and abusive relationships and increased time spent online has also increased risks to various forms of cybercrime, especially amongst children and young people.

### **Communications - General**

Public messaging from constabularies in England and Wales has been, at times, contradictory and confusing, and some of that confusion has filtered through to Scotland. The approach of Police Scotland in public statements has been to emphasise ‘common sense’ as the key guiding principle rather than detailed guidance. The absence of detailed guidance in Scotland has no doubt prompted some questions here that may have been answered in England, and created particular difficulties for some, but Police Scotland have not had to issue the number of “clarifications” that have been a feature of communications in England and Wales.

### **Communications - Regulations/ Guidance**

One of the key areas of confusion in communications has been the difference between the new criminal offences contained in Regulations, and advice to the public from government by way of guidance. Clear messaging was needed to ensure that there was sufficient awareness of what members of the public were being asked to do and what they were required to do or avoid doing. That the law criminalised less than the guidance, was not always fully or clearly articulated or understood.

### **Exercise of the Powers**

In general terms, our informed impression at this stage is that enforcement powers have been used only as a last resort and only when necessary and proportionate.

Mistakes will be made but in Scotland. we have heard, as possible examples, of a small number of issues and problems, for example, in relation to people sitting down or stopping in public parks.

Training for officers on the emergency powers needs to offer reminders of the need for awareness and care, for example, as regards autistic persons or those with hidden disabilities in terms of their needs to access spaces outside their homes for mental and physical health. We acknowledge that a lot is being asked of frontline officers.

Data indicates variation in the extent of use of the powers in different geographical areas. This is likely to have happened for a variety of reasons, including cultural. The data prompts questions and we hope to pick up on the reasons for geographical variations in engagement with police officers and affected members of the public.

### **Fixed Penalty Notices**

A number of factors may have contributed to an increase in the numbers of Fixed Penalty Notices (FPNs). The more people out and about, the greater the likelihood of FPNs. The Chief Constable has acknowledged that some Fixed Penalty Notices have been issued in error.

### **Complaints**

Some individuals may wish to let us know of their experience but also to pursue other courses of action or remedies through established procedures in place for complaints involving Police Scotland. We will continue to ensure appropriate signposting.

### **Transitions and Differentiation – Policing by Consent**

Increasing differentiation between different sections of the public as to who is impacted by the powers may jeopardise the extent of public support.

There is a need for society to find ‘enablers’ for those who are most susceptible to the impacts of the pandemic to comply, so as not just to criminalise the already disadvantaged. There will be an increasing role for local authorities and others, for example, in ensuring that more public parks and other spaces are available to allow for our right to exercise without limit.

If rules are introduced that allow some people more freedoms than others, this may be perceived as unfair and, potentially, illegitimate in the eyes of the public. The police have a difficult line to tread, and this requires governmental recognition of the impact of developing policies that breach normal principles of equity, albeit in the interests of saving lives.

Revised College of Policing guidance is that officers should only enforce the Health Protection Regulations – government guidance is not enforceable, for example two-metre distancing, avoiding public transport or the wearing of face coverings in enclosed spaces. We consider that this key message should continue to be emphasised in Scotland.

### **3. Work of the Group**

The Group has met, by suitable electronic means, twice a week, since its first meeting on 16 April. The frequency of meetings was arranged to enable the sort of dynamic review originally discussed between Police Scotland and the Scottish Police Authority, meaning that the Group is able to provide assistance and guidance on matters as, or shortly after, they arise in ever changing circumstances. Much work has also been done in between meetings by way of telephone calls and email exchanges between Group members, members of the SPA Board and staff (the SPA providing the Secretariat and support for the work of the IAG), and senior officers at Police Scotland.

The Group has already started to involve and seek to hear the voices of community and grassroots representatives, advocates and activists, including:

- those which deal with issues of equality, race, domestic and sexual violence, children and young people, refugee and asylum matters, the Gypsy, Roma and Traveller community, autistic

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people, people affected by disability, carers, older people and any other groups that may be impacted the use of such powers.

This has been done by use of personal contacts and networks, letters, emails and social media. We have made it clear that we want to hear from people with their experience and views on the use of the emergency powers.

Recognising the importance of access to data, Police Scotland convened a group chaired by Assistant Chief Constable Gary Ritchie. This group is Operation TALLA<sup>9</sup> Information, Assurance and Liaison Group (OpTICAL). It has been meeting on a weekly basis since 20 April. To assist with speed and clarity of communication between the IAG and OpTICAL, IAG Chair John Scott and IAG members Professor Susan McVie and Martyn Evans are also members of the OpTICAL Group.

The purpose of OpTICAL is:

- to provide strategic oversight of information and data gathering under Operation TALLA to support Divisional Commanders in the operational approach
- meet internal and external demands for information
- monitor assurance processes to maintain public engagement, proportionate use of police powers and advise divisional commanders as appropriate regarding approaches and best practice
- maintain oversight of community impact, equality and human rights considerations and any special considerations required to mitigate issues identified including access to the National Independent Strategic Advisory Group (NISAG)
- provide liaison function with the IAG.

OpTICAL will assess and respond to changes in governmental policy and, ultimately, would conclude at the end of the crisis. The group could, however, assist with the move into Recovery phase and 'after action' considerations including review and learning.

The IAG has been considering early data and other information about engagement and enforcement. This will inform recommendations to the

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<sup>9</sup> Operation TALLA is the name given to the police operation established to respond to the Coronavirus Crisis.  
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Scottish Police Authority about aspects of implementation or communication, always recognising the need for operational independence on the part of the Chief Constable and the independent role, and responsibilities, of the Lord Advocate and the Procurator Fiscal in relation to policing in Scotland and the investigation and prosecution of crime. When the Crisis is over, the IAG will make recommendations arising from its work during the Crisis. This may be important in case of any recurrence of circumstances, whether related to Covid-19 or similar, which necessitate consideration of the deployment of similar exceptional powers.

Group members have brought considerable relevant expertise to the review, but we recognised that there were ongoing developments regarding public health which we had to ensure we were sighted on. Much of the lead on the development of government thinking and guidance coming from health imperatives has meant that the involvement in the Group of Dr Elizabeth Kelly is particularly welcome.

To supplement our thinking, the Group has heard from Professor Steve Reicher of the University of St Andrews, Professor Ben Bradford of University College London and Dr Peter Neyroud of Cambridge University.

### **Professor Reicher**

- briefed on group behaviour and compliance. He indicated that overall levels of compliance are remarkably high. Where there is non-compliance this is often because of practical difficulties such as the need to keep working or get to work. He suggested that the most effective strategy for compliance is to enable, and focus on where people need help to comply.
- flagged a key challenge of addressing the 9-10 % who are resistant to restrictions, without alienating the 90% who are not; and that one means of doing so is to engage directly at the micro level, consider how best to make this a positive and enabling interaction, and for this to inform intelligence gathering, strategy and tactics.
- emphasised the importance of fairness, equity, and common sense in retaining public support and to underpin consideration of what regulations could be reasonably relaxed without increasing

the infection rate. Transition requires a rapid and nimble process of taking information from the grassroots, using it to inform police and government approach, and feeding back to people on how their input has impacted the process.

### **Professor Bradford**

- referenced early findings from longitudinal survey work he has been involved in on public attitudes to policing the lockdown; indicated that while not a representative sample, it is weighted by age and gender. Further work to provide data from a representative sample is underway. The work focuses on the reasons why people are complying with the restrictions.
- particularly highlighted the importance of a sense of legitimacy – people believing that what is prescribed by the law is the right thing to do, and that this moral judgement and sense of legitimacy is a key factor in driving compliance, along with compliance with social norms, and, importantly, people’s ability to comply.
- supported the view that people’s acceptance of police legitimacy is informed by their own and vicarious contact with policing. The use of additional powers requires public “buy in”, and it is important not to transgress the boundaries of what most people will allow and bring people with you to maintain high levels of compliance.
- discussion included consideration of the speed with which legislation was passed and new powers implemented, limiting the opportunity for public engagement and early scrutiny.
- often there is a correlation between groups who are least compliant or who find it most difficult to comply with the regulations, and those groups which may already have a less good relationship with police, for example, some groups of young men.
- also considered support for informed public consideration of the use of additional powers and technologies and any human rights implications, including any difference in impact or perceived legitimacy of the use of surveillance technologies to support law enforcement and their use to support public health.

### **Dr Peter Neyroud**

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- highlighted a range of work underway and evidence the group may wish to consider. This includes work at Oxford University to map the stringency of enforcement of Covid-19 restrictions with patterns of infection, and work underway relating to the Covid-19 approach across different countries, undertaken by the Violence Research Centre.
- offending rates for Covid-19 in England and Wales are highest among groups of young males (aged 15 – 35). From a random group sample, there also appears to be a high correlation between people who are already persistent offenders and levels of enforcement around Covid-19. It is not clear whether those with a record of offending are being more closely policed with regard to Covid-19; or if people who have a history of offending are also more likely to break the Covid-19 regulations.
- Scottish data on the Police Scotland website appear to be of high quality. Officers in Scotland have been recording any engagement with the public on FPNs and dispersals since the beginning of lockdown, so there is good baseline data available.
- distinguished 3 types of response which can be expected to various elements of the restrictions –
  - high compliance and high self-policing, and where people can fairly easily comply
  - some “grey areas” where there is a more flexible interpretation of regulations where they are not a good fit with what may be achievable, or where the purpose of the regulations appears to have been respected matters
  - where it is crystal clear that breach of regulations has occurred, and where there is scope to build a supporting narrative around these, so people can clearly understand where the boundaries lie
- encouraged the use of narrative as we move out of lockdown, focusing effort on ensuring people understand the risks to encourage as much self-policing as possible.
- an element missing so far has been the ability to link policing activity with health data, which could potentially enable police to target activity informed by information from testing and areas with higher risk of infection.
- emphasised three key element in assessing response –

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- tracking what officers are doing e.g. random sampling from body worn video camera footage in England and Wales
  - testing public opinion
  - increasing focus on the wider impact (for example, any increase in fraud)
- referenced the possibility of police being asked to conduct visits to check quarantine regulations are being observed, which in his view may not be desirable for the service; or to focus attention on areas where there is still a high “R” factor.

We continue to engage with relevant outside experts.

John Scott has established contacts with relevant individuals who are looking at aspects of policing in the Crisis, for example, Counsel and the Special Adviser to the Joint Committee on Human Rights (JCHR) at Westminster<sup>10</sup>.

We also met with three Divisional Commanders from different parts of Scotland, offering some assurance around local awareness and operational activity.

## 4. Work Programme

### Areas of Focus

5 key areas of focus for the IAG have emerged in discussions so far for ongoing work. Throughout all of our work on these and other themes, we have been mindful of the need for clear lines of communication, especially in view of the cluttered landscape of advice/guidance/regulation, and consequent confusion of message. We do not wish to add any confusion. Indeed, we are offering our advice on ways to avoid it. We will do this by respecting the lines of reporting to the

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<sup>10</sup> The JCHR is currently conducting an Inquiry and receiving evidence on the human rights implications of the UK Government’s response to COVID-19, albeit wider than the issue of policing

<https://committees.parliament.uk/work/218/the-governments-response-to-covid19-human-rights-implications/>

SPA and ensuring transparency in our work, in particular through this reporting.

These areas of focus are:

- Setting out what data is required to support the work of the IAG as laid out in the terms of reference, and understanding what the data and evidence is telling us. Data and evidence will: be collated and reviewed; inform recommendations on an ongoing basis; and be reflected in public reporting.
- Setting up access routes into the group via professional and community networks as well as open access via a public portal, to enable the public and impacted groups to share perspectives and give evidence to the IAG on their experiences. Particular attention will be paid to ensuring any disadvantaged or impacted groups are able to participate, including people living in poverty, ethnic and religious minorities, women, people with disabilities, older people, LGBT people, homeless people and those deprived of their liberty, migrants, refugees, children, and all others with protected characteristics. Findings will: be reviewed; inform recommendations on an ongoing basis; and be reflected in public reporting.
- Maximise the use of the professional input and expertise from within and outside the group, to access and review supporting evidence, offer advice, and inform associated recommendations.
- Focus on the human rights implications of the use of the temporary powers.
- Set up processes which allow the group to access data and public perspectives to offer advice on a “live” basis, to support the policing response to any changes in lock down and public health guidance.

What is set out in Appendix B is the current draft of our Work Plan, to reflect already agreed actions, what is complete or in place, and to stimulate ongoing discussion about the work required to ensure delivery against the terms of reference. It is an iterative programme, reflecting changes and priorities over time, while leaving sufficient flexibility to address matters urgently when this is required.

## **5. Emerging Themes**

It will be clear from what is said above, that we are still at an early stage when it comes to identifying, gathering and analysing data and other evidence. It is therefore still too early to be in a position to reach firm conclusions. What we have seen so far has prompted additional questions and work is ongoing to seek answers to these.

In order to inform the Board, however, it is thought helpful to offer some preliminary thoughts and impressions from what we have seen and heard to date.

It might be useful, therefore, to reflect on some emerging themes.

### **Compliance**

- The significant levels of public compliance with, and approval of, the Regulations and guidance have rightly been the subject of much comment and appreciation (and even surprise). Restrictions have transformed the lives of the majority of people. People have adapted to a very different way of life with little notice and therefore deprived of the opportunity to prepare for it.
- As previously acknowledged, it is increasingly recognised that the impact of the restrictions has not been equally felt, with those living in already difficult circumstances, such as overcrowded housing and poverty, often more seriously impacted. For some, the restrictions have exacerbated what we see in terms of the health impact of Covid-19 infection which has not affected all equally, with differentiation becoming increasingly apparent not only in terms of health conditions and age but in BME groups and wider demography, including people living in poverty, ethnic and religious minorities, women, people with disabilities, older people, LGBT people, homeless people and those deprived of their liberty, migrants, refugees, and children.
- This has been described by Glasgow Disability Alliance, which conducted a survey of over 3000 of 5000 disabled members -

“COVID19 is supercharging inequalities already faced” – in their case, by disabled people.

- Our discussions have led us to look to explore with the public the ways in which they think they might be better supported to comply, or continue to comply, with the lockdown.

## **Public Attitudes**

Quite a bit of work has been done by way of public surveys of attitudes to the police and policing during the Crisis, at a UK level and specifically in Scotland. We have noted the results of the various surveys, including the most recent survey commissioned by the SPA and published on 7 May<sup>11</sup>. This latter survey was summarised as follows:

- Public confidence in policing in Scotland was higher in April 2020 than when compared to the last Scottish Crime and Justice Survey (2017/2018)
- Public support for the approach taken by policing in Scotland to the COVID 19 emergency is higher than a recent YouGov survey finding for Great Britain.

Work is ongoing within the group to contribute to further public surveys, to ensure that there is no unnecessary duplication and also that we receive evidence that will be of use to our work.

In general, from the various surveys, it appears that there is significant public support for and confidence in Police Scotland. Given the exceptional nature of the restrictions and the inevitable role of the police in enforcement, the extent of public support is encouraging in terms of the principle of policing by consent. Indeed, the results may be considered surprising given that the police are seen by many as the “public face” of the restrictions.

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<sup>11</sup> <http://www.spa.police.uk/news/618708/>

We note a divergence in opinions amongst people<sup>12</sup> with:

- at least some of the public who have been surveyed expressing a wish for stronger enforcement action from the police.
- Some seem to think that, in some cases, it has gone too far.
- Most seem happy, perhaps even moreso in Scotland.

These findings highlight the impossibility of keeping everyone happy and the contradictory and conflicting positions which people can hold simultaneously:

- Some who have no experience of police activity in “normal” life, may resent it in their “lockdown life”. They may want less of it for themselves but more of it for those they see lying in the sunshine in parks.
- Assumptions may be made by members of the public about the good faith of some and the recklessness of others in their compliance.
- There have been some reports of an increase in reports to the police from neighbours about individuals who are out and about more than pleases their neighbours.

It is no doubt logical for the public and the police to assume that people who are out in public have a good reason for being there, but, even if such views form only part of a minority, assessing the complex mix of views must take account of the intolerant, the ill-informed, the over-privileged and the naïve.

We hope to hear more from some of those directly impacted by the use of police powers, to ensure that the implications from general public surveys are supplemented by views informed by specific experience.

We recognise, as do Police Scotland and the SPA, that public support is crucial and cannot be taken for granted, especially as we start the progression to what will hopefully be a continuing lifting of restrictions.

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<sup>12</sup> <https://www.crestadvisory.com/post/policing-the-covid-19-lockdown-what-the-public-thinks>

How such easing occurs, which might well be differentiated across different groups or areas of society, will require careful monitoring to ensure that public support is maintained.

**“Normal” Policing** (included for context but outwith Terms of Reference)

We will, of course, wait to see what is said in evidence but there is an issue around the impact of the virus on “normal” policing. Our Terms of Reference relate only to the use of the emergency powers but, from the perspective of the public and police, there is obviously an interconnection between “normal” policing and “public health” policing, not least in terms of the allocation of personnel and resources. There have been repeated messages to the public that they should still report crimes and contact the police in situations where they would have done so previously.

Lockdown may have impacted on the commission of certain types of crime (recall, for example, the Home Secretary emphasising, among other statistics, the reduction in shoplifting offences in England and Wales!) but recent experience suggests that there has been a return to some of the sort of activity, for example, street violence, which demands police attention, regardless of other circumstances

Serious concerns have been expressed about the impact of lockdown for those in violent and abusive relationships. In effect, lockdown may have contributed to enabling the abusers and served to further trap the abused. The First Minister, Lord Advocate and Chief Constable have emphasised the need for the abused and those in fear of abuse to prioritise their safety over the requirements of lockdown. The message has been very clear, if at times still difficult or seemingly impossible for the individuals affected, to contact the police or other help as soon as possible.

Increased time spent online has also increased the risks to various forms of cybercrime, perhaps amongst for children and young people.

The easing of restrictions should allow re-emphasis of the continuing availability of the police to intervene in the event of any criminal activity.

We mention this because of its significance in public discourse and the need for us to remain aware that Coronavirus policing is not happening in a vacuum but, it is not a matter within our remit. Rather it remains a matter for oversight by those charged with the statutory responsibilities for keeping under review all policing in Scotland. The demands on policing may change with the easing of restrictions and the increased role for others in the 4 Es.

## **Communications - General**

There has been discussion, generally and within the Group, of the cluttered landscape when it comes to communications about what is expected of the public and required of Police Scotland. Over the period of lockdown, but especially in the days following the Prime Minister's public statement on 10 May, the messaging from the UK Government has been different from that of the Scottish Government. Adding to the scope for confusion in the area which concerns the IAG, messaging from constabularies in England and Wales has been, at times, contradictory and confusing. Due to the nature of social and other media, some of that confusion has filtered through to Scotland, even where the particular cases and confused messaging have happened in England and Wales. To an extent, therefore, questions have been asked in Scotland which have been prompted not by activity on the part of Police Scotland but of one of the constabularies south of the border.

No doubt in part to address some of the confusion, the Crown Prosecution Service (CPS) in England and Wales produced some guidance for police officers on the issue of "reasonable excuses" which might be a defence to an allegation of breach of the regulations. This guidance was published for the public on 16 April by the National Police Chiefs' Council (NPCC) and the College of Policing (COP)<sup>13</sup>. This was a fairly detailed document which gave several examples of reasonable excuses. Some people in Scotland highlighted that there was no such detailed document or guidance available in Scotland. This reflects the different constitutional position of policing in Scotland where police officers play no role, unlike in England and Wales, in the initiation of prosecutions by way of charging suspected offenders. The traditional

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<sup>13</sup> <https://www.college.police.uk/What-we-do/COVID-19/Documents/What-constitutes-a-reasonable-excuse.pdf>

approach in relation to similar legislation in Scotland (e.g. in relation to the possession of knives or offensive weapons) is for the court to determine on a case by case basis whether an accused had a reasonable excuse as a defence to the offence.

This aspect of communications also highlights the difference in approach of Police Scotland, where, in particular, in public statements by the Chief Constable, “common sense” has been emphasised as the key guiding principle, with “courtesy” another related point of emphasis<sup>14</sup> in his contribution to the First Minister’s Coronavirus briefing on 8 May. It appears to us that “common sense” and “reasonable excuse” will usually be within touching-distance of each other. The absence of equivalent detailed guidance in Scotland to that contained in the document published by the NPCC and COP has no doubt prompted some questions here that may have been answered in England but, on the other hand, Police Scotland have not been required to issue the number of “clarifications” that have been a feature of communications from constabularies in England and Wales.

On the other hand, during a recent focus group run by Tressa Burke of GDA about the emergency powers, there was a clear consensus that statements about “common sense” leave too much space for unconscious bias and similar problems to those experienced by some in the past. A view was expressed at that meeting that greater clarity is needed to aid understanding for all – public and police alike – of what is a “reasonable excuse”.

It may be that there is no single communications strategy which will work effectively for everyone in every circumstance. Simple, clear messages appear to inspire more understanding and confidence for many but leave others with questions. We will continue to look with Police Scotland colleagues at what can be done to assist with clear communications for officers and the public, and whether, as we move into transitions from lockdown, a blend of different messaging and communication would assist.

## **Communications – Regulations/ Guidance**

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<sup>14</sup> <https://www.scotland.police.uk/whats-happening/news/2020/may/chief-constable-takes-part-in-coronavirus-briefing>

One of the key areas of confusion in communications, certainly in terms of public discourse, has been the difference between the new criminal offences contained in Regulations, and advice to the public from government by way of guidance.

When, later in the week of 23 March 2020, the law changed to support the guidance from government (UK and Scottish), albeit drafted to be less restrictive when it came to the creation of criminal offences, Police Scotland were propelled to the fore in this new version of policing – with public health at its core.

Clear messaging was needed to ensure that there was sufficient awareness of what we, as members of the public, were being asked to do and what we were required to do or avoid doing. That the law criminalised less than the ask, or guidance, was not always fully or clearly articulated, perhaps because it was not always understood. On the other hand, some confusion around this may have resulted in the public following the guidance which would mean that they were automatically, perhaps even comfortably, within the new limits of the criminal law.

Confusion around regulations/guidance has been an issue from the start of the lockdown. On social media, lawyers have debated the important differences, while in public places, officers have been challenged on the distinction when some have sought to explain their role as “enforcing the guidelines”. (While some stories of this sort of exchange have appeared in newspapers and social media, one member of the IAG recently had just such an engagement with officers in a park in the West End of Glasgow).

Police Scotland have never - at a corporate level in terms of training material, guidance to officers or public communications – conflated regulations with guidance. This may have assisted in avoiding some of the confusion experienced elsewhere.

### **Exercise of the Powers**

In general terms, as a matter of impression, informed by the currently available data and various other sources mentioned above, it seems to

us that enforcement powers have been used only as a last resort and only when necessary and appropriate. Some questions have been prompted by evidence and data.

Even ahead of the public portal going live, we have heard of a small number of issues and problems, for example, in relation to people sitting down or stopping in public parks. Queen's Park in the southside of Glasgow featured in one tabloid story (and social media) and another story relayed directly to a Group member. The first example related to a woman with hidden disability who was challenged in a manner she found intimidating when she sat down on her way home with her partner when they were carrying heavy messages. The latter was a young Asian man who had stopped while on his phone as he took a walk. He too found the police demand that he "keep moving" to have been expressed in too authoritarian a manner. Despite offering some criticisms, both individuals acknowledged the difficult role the police have to perform in the Crisis but found the engagement part of the 4 Es to have involved too early an escalation to threat of enforcement.

The frontline of the 4 Es is an even more precarious place than usual, for the public as well as police officers. In the present Crisis, a lot has been asked of the public. The legal restrictions have been imposed without regard to the circumstances of the individual, with some people undoubtedly finding it more difficult than others. A lot is also asked of officers. We acknowledge that officers have reason to be concerned for their own safety and wellbeing when they are out in public. There have been too many troubling reports of individuals, some of whom claim to be infected, spitting on officers. Despite this, officers are expected, ordered even, to engage with the public in as friendly a manner as possible. They are expected to approach each encounter with the public as if they had never had to deal with an awkward or aggressive individual and as if the individual had no bad experiences with a police officer. Both of those things may be true the majority of the time, but, where either or both are not the case, it asks a lot of the police officer and the individual to start each time with a clean slate.

Officers are expected to be able to identify autistic people, those with mental health problems, learning disabilities, other hidden disabilities. Sometimes this may be quickly apparent, but not always. And yet, in effect, police officers have to start each engagement leaving enough

time and space to check whether there are additional considerations in the particular encounter. This is not easy, especially in what may be, or quickly become, a seemingly adversarial situation. Despite the above challenges, police must engage in a courteous manner.

Training on the emergency powers needs to offer reminders of the need for awareness and care. Given the urgency of the need for enforcement powers, there may have been insufficient thought given, as in England, for example, to autistic people or those with hidden disabilities in terms of their needs as regards accessing spaces outside their homes for mental and physical health. It may be that it was too much of an afterthought, relying on officers' existing knowledge. That poses problems, in particular, for new officers or those out of the way of using their soft skills to deal with the public.

One quote, supplied through a GDA network, emphasises some of the challenges:

“I have autism and one of my things is to be completely informed of every fact. When I'm right I know I'm right so if they had introduced this new rule about keeping moving to me I'd have been confused and upset. I would likely have argued and got myself into trouble - I'd have been trying to process this new fact which I've never heard because I WANT to know all the rules and follow them. It upsets me when others don't follow the rules but this would have been new and I worry that I'd have gotten myself into trouble or arrested for being cheeky!”

Mindful of these issues, our colleague Catriona Stewart prepared a note about awareness around autistic people which may be of some assistance to officers.

It is important to be aware that cases in the media or on social media may not be representative of wider issues. Mistakes will be made and outliers are always going to appear when looking at a large organisation with considerable power and influence. In Scotland, there have been only a small number of such examples which have come to our attention. Care is needed, with social media in particular, that a small number of examples is not amplified beyond appropriate perspective. Care is also needed with social media to ensure that what happens elsewhere, England for example, is not mistaken as having happened

here. That is not to say that we ignore what we hear through these media, but we must be careful and check it against developing data and other evidence.

Variation may be more likely in novel circumstances with small data sets but clearly we will ask necessary questions and start making some assessments, even if caveats are needed and further context required. Looking at the enforcement data to 13 May 2020<sup>15</sup>, we see:

Dispersed when informed: 23,925

Dispersed but only when instructed: 5,397

Dispersed using reasonable force: 231

Issued a FPN: 2,644

Arrested: 166

We will look at comparisons with enforcement data from England and Wales, recognising the need to understand context.

Data indicates variation in the extent of use of the powers in different geographical areas within Scotland. This is likely to have happened for a variety of reasons, including cultural. Differences may relate, for example, to existing attitudes to the police in certain places, the particular difficulties in complying with lockdown in circumstances of significant deprivation, or the prevalence or otherwise of public parks or spaces which may act as an attraction for exercise or having human contact or simply spending some time outside a small, confined space.

At this stage, the data prompts more questions than answers and we hope to pick up on some of the reasons for geographical variations in engagement with police officers and affected members of the public.

In relation to Fixed Penalty Notices, a number of factors may have contributed to an increase in their numbers. More people have been out and for longer periods. Traffic has increased over time. In part, this may

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<sup>15</sup> <https://www.scotland.police.uk/about-us/covid-19-policescotlandresponse/enforcement-and-response-data>

have been caused by people adjusting to the lockdown and becoming more confident in their interpretation of “reasonable excuse”. In part, it may have been increasing numbers of “key workers” having to go out, for example, in relation to care responsibilities. It may have been others who have gone to work, out of necessity or otherwise, when they could not work from home. Some members of the public, at times, have been taking their chances in what appear to be flagrant breaches of (see, for example, the survey referred to in <https://www.theguardian.com/society/2020/may/09/young-men-more-like-than-women-to-break-lockdown-rules-uk-survey> ). The more people out and about, the greater the likelihood of FPNs.

### **Fixed Penalty Notices**

At the daily Media Conference by the First Minister on 8 May, the Chief Constable stated that some Fixed Penalty Notices (“FPNs”) had been issued in error. He explained that this was perhaps inevitable in current circumstances but, if such errors were brought to the attention of Police Scotland, they could be corrected, with the Notices rescinded. There are particular procedures for raising such issues. If any come to our attention, we will ensure that individuals are signposted appropriately.

The Chief Constable’s acknowledgement of errors has been mirrored in England with an undertaking by the Crown Prosecution Service to re-examine every charge, conviction and sentence brought under the new legislation. Several cases are being re-listed so they can be overturned after being found to have been incorrectly prosecuted. The system in Scotland is different regarding criminal charges and there is no evidence to suggest that such a review is necessary here. The situation regarding FPNs in Scotland may be different, especially given what was said by the Chief Constable.

In the Scottish justice context, it is also worth stressing the fundamental difference with England and Wales. The police in Scotland have no role in decisions about criminal prosecutions. Scottish police officers investigate offences and then report suspected offenders to the Procurator Fiscal and/or the Scottish Children’s Reporter Administration (SCRA) for consideration of prosecution or disposal.

If a FPN is not challenged, it is treated as accepted and the relevant penalty or penalties will apply. This was an approach adopted for FPNs many years ago which had significant benefits for the authorities but also risks in relation to the individual because failing to challenge a Notice is not always an indication of acceptance of the offence or penalty. Many Notices are issued to individuals with chaotic lifestyles, uncertain (or no) accommodation and often poor literacy skills and who, through poverty, may face difficulty paying the fine. Nonetheless, for the majority of offences, the State considers it a proportionate response to usually low-level offending, especially given that experience showed that almost all of those who did not pay their police issued fines pled guilty at the first opportunity when their case was escalated to court.

There is one particular issue around FPNs in relation to children. The Children and Young People's Commissioner has highlighted an anomaly in the emergency provisions between police powers in Scotland and those relating to England, Wales and Northern Ireland. The IAG notes that "a child" is defined in the other UK countries as an individual under the age of 18. This correlates with the international human rights' definition of a child in the UNCRC. It also mirrors other domestic law in Scotland [e.g. Children and Young People (Scotland) Act 2014 and the Criminal Justice (Scotland) Act 2016, s.51(3)]

Police Scotland is committed to implementation of the national Youth Justice Strategy, Whole Systems Approach (including the Early and Effective Intervention, prevention and diversionary responses for children and young people). Police Scotland's 'Standard Operating Procedures: Offending by Children 2019' defines a child as everyone under the age of 18, entitled to special protections within the Scottish criminal justice systems.

However, in Scotland, within the emergency provisions, children aged 16 and 17 are defined as 'adults' rendering them liable for FPNs, prosecution and potentially detention if held to be in breach of the new respective regulations and provisions. These Scottish children are therefore disproportionately affected by the emergency measures in comparison to their other UK counterparts.

The Commissioner has challenged the Scottish Government on human rights grounds on this, and a number of other issues relating to the

emergency provisions, and has sought assurances from Police Scotland that in practice children aged 16 or 17 will not be issued with FPNs, in line with their Policing Approach to Children and Young People 2016-2020 as well as the UN treaties' bodies' calls on States to ensure children rights are safeguarded in the pandemic.

## **Complaints**

Some individuals may wish to let us know of their experience but also to pursue other courses of action or remedies. As there are established procedures in place for complaints involving Police Scotland, we will continue to ensure that these are signposted.

## **Transitions and Differentiation – Policing by Consent**

The challenges for Police Scotland as we move through transitions become ever more daunting: we are embarking on an easing of restrictions, from a starting-point of continuing uncertainties, in a process with no inevitable destination or staging posts and no guarantee of travel in only one direction. Restrictions may have to be reintroduced or increased, depending on the course of the virus.

While the emergency powers should subsist only for as long as truly necessary, it seems unlikely that there will come a single day when everything returns immediately and finally to normal. Increasing differentiation between different sections of the public as to who is impacted by the powers may jeopardise the extent of public support.

“Policing by consent” is a complex idea, more easily recognised than described. It involves multiple factors, including a sense of fair treatment and consequent legitimacy. Compliance with the law and police engagement through transitions will increasingly rely, to some extent, on underlying perspectives of police legitimacy (not just those developed in the context of the pandemic) and the need for society to find ‘enablers’ for those who are most susceptible to the impacts of the pandemic to comply, so as not just to criminalise the already criminalised. There will be a role for local authorities and others, for example, in ensuring that more public parks and other spaces are available to allow for our right to exercise without limit. As and when changes are made to ‘lockdown’ restrictions, it is important that government, Police Scotland and the SPA

understand and make clear which other bodies share responsibility for public safety and the safety of employees. These will include public authorities who also have human rights responsibilities over and above any other relevant statutory duties.

To the extent that there is a continuing sense of legitimacy in the need for, and use of, the emergency powers, it appears to us that it comes in part from the strong sense for the majority of the public that “we are all in it together”. The relative accuracy and simplicity of that view, coupled with the more binary nature of lockdown thus far, will be challenged as we go forward. There are many - including equalities groups and those in poverty who are saying of the Crisis “We might all be in the same storm but we are not all in the same boat!”

Geographical or other variations, such as protected characteristics, poverty and existing inequalities, may create a greater sense of unfairness and therefore undermine the currently strong public support for the police and their use of the emergency powers. People may feel that they have “done their bit”. Easing of restrictions in England has already stimulated a variety of reactions, including resentment and confusion, as well as relief for a more cautious approach here.

The risks to the consent principle are fundamentally premised on notions of fairness. If rules are introduced that allow some more freedoms than others, this may be perceived as unfair and, potentially, illegitimate in the eyes of the public. The police have a difficult line to tread, and this requires governmental recognition of the impact of developing policies that breach normal principles of equity, albeit in the interests of saving lives.

Since the Prime Minister’s public address on 10 May, pointing to easing of restrictions in England only, we have seen some of the significant challenges occasioned by even early stages of transition. Changes in the English regulations have required early clarification from the NPCC and COP of the guidance on reasonable excuses<sup>16</sup>. Interestingly, the new document states an important additional clarification at the outset:

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<sup>16</sup> <https://www.college.police.uk/What-we-do/COVID-19/understanding-the-law/Documents/Health-Protection-Regulations-Amendments-England-changes-130520.pdf>

“Officers should only enforce the Health Protection Regulations – government guidance is not enforceable, for example two-metre distancing, avoiding public transport or the wearing of face coverings in enclosed spaces.”

We consider that this key message should continue to be emphasised in Scotland as it has been more recently in England. It is all the more important as we see police officers drawn increasingly back to “normal” policing duties. For Police Scotland, there are issues of capacity as well as legitimacy. The safety and wellbeing of people will remain the main statutory purpose of Police Scotland but it will have to be recalibrated to reflect a balance between the hopefully reducing emergency powers – perhaps confined more to premises and large gatherings than individuals or small groups in public – and “business as usual”.

In these transitions, the IAG hopes to be able to offer additional value in deployment of its collective experience and knowledge. Most recently, Police Scotland shared with the IAG - on a confidential basis - their revised internal guidance to officers following the First Minister’s announcement on the 10 May about changes to the guidance on public exercise. Whilst not, at this stage, considered by Police Scotland as appropriate to disclose that guidance in public, the IAG were able to shape and guide the thinking of Police Scotland, in this most dynamic of operational environments, in its communications to officers that subtly, but appropriately, emphasised some of the realities of changing public behaviour in public space.

## **Changing Phases and Responsibilities**

As restrictions ease, it appears to us to be likely that there will be greater emphasis on the responsibilities, statutory and human rights-based, of other bodies, with emphasis on the role of Police Scotland in public health enforcement shifting and reducing. The role of local authorities will become more prominent.

The next phase of dealing with the virus includes Test, Trace and Isolate, albeit with residual elements of current enforcement remaining, perhaps reduced and widening out from policing. There remains a deal of uncertainty about what this phase will involve and what role, if any, there will be for additional legal restrictions and enforcement, for

example, in isolation. It is unknown whether such enforcement would involve new responsibilities for Police Scotland. We know that DCC Malcolm Graham has stated at an SPA Board meeting that there were no plans within Police Scotland for surveillance related to the Coronavirus Crisis. We will keep the moves towards next phases on our radar.

## **Dynamic Review**

We have sought to emphasise the “real time”, dynamic nature of this review. It is intended in the spirit of co-operation and collegiality with our colleagues in Police Scotland - to inform, advise and ultimately to help. The original vision within Police Scotland and the SPA was of an independent review which could operate in a number of ways – ethics advisory group, data and evidence analysis and expert panel. This has allowed us to make a contribution even before we start to see all of the evidence and beginning to understand what the data are telling us. So far, this vision has been implemented by discussions at our IAG meetings in which senior officers within Police Scotland have participated.

Discussions at the IAG have inspired off-line conversations between members of the Group and Police Scotland. For example, there have been very useful bilateral meetings between Police Scotland and the Children and Young People’s Commissioner Scotland (and his policy lead), and a further series of meetings with YoungScot. Both are helping to shape and inform operational protocols within Police Scotland.

Following our discussions with the three Divisional Commanders, we have arranged to exchange contact details between the officers and Group members. This will allow for “real time” contact, or such contemporaneous contact as circumstances permit, perhaps even shortly after events. Feedback and advice will be offered and networks used to listen and disseminate what we have heard. It is a new type of human rights based review for policing in Scotland, and still a work in progress. With the efforts of our experienced Group members, we aim to make a real contribution to those who are “writing the manual” on how to police in a pandemic.

## APPENDIX A

### Terms of Reference

The Terms of Reference for the Group are:

1. To ensure that use of powers by Police Scotland is compliant - both in application and spirit – with:
  - (a) human rights principles and legal obligations, including those set out in the Human Rights Act 1998 and the Scotland Act 1998
  - (b) the values of Police Scotland – integrity, fairness and respect - and its 'safety and wellbeing' remit as laid out in the Police and Fire Reform Act (Scotland) 2012, and
  - (c) the purpose of the 2020 Act and Regulations, namely safeguarding public health.
  
2. The powers which will be considered by the Group include the powers:
  - (a) relating to potentially infectious persons under section 51 of the Coronavirus Act 2020 and schedule 21 to the Act;
  - (b) to issue directions relating to events, gatherings and premises under section 52 of the Coronavirus Act 2020 and schedule 22 to the Act; and
  - (c) to enforce requirements to close premises and businesses and restrictions on movement and gatherings, all under Part

4 of the Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020.

3. The following are not within the scope of this review:
  - (a) the terms of the Lord Advocate's guidelines on the investigation and prosecution of crime, including liberation from custody and the reporting of offences;
  - (b) compliance by police officers with the Lord Advocate's guidelines on the investigation and prosecution of crime, including liberation from custody and the reporting of offences; and
  - (c) any specific case in which the police have taken action in respect of criminal offences under the Act and regulations.
4. To seek and take account of the views of police officers and members of the public in relation to the scope, clarity and use of the powers during the crisis period.
5. To pay particular attention to any use of powers involving children<sup>17</sup>, young people, or persons within disadvantaged communities including those with protected characteristics under the Equality Act 2010, to ensure that they are fully reflective of Police Scotland's duties.
6. To report to the Scottish Police Authority, as regularly and within structures as agreed to be appropriate, on Police Scotland's use of these powers, and associated public communication and community engagement.
7. To assess, and highlight as appropriate, any gap in powers between the role of Police Scotland in responding to the pandemic and the statutory framework in which they operate.
8. To assess and comment on Police Scotland's process for managing and updating their Community Impact Assessment, Equality and Human Rights Impact Assessment and Child Rights

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<sup>17</sup> For our purposes, we adopt the UNCRC definition of a child as "every human being below the age of 18 years".

and Wellbeing Impact Assessment in the context of the Coronavirus Crisis.

Paragraph 1 describes the core role of the Group which will be performed using the expertise and skills of the Group members. Extensive knowledge of human rights, policing and public health all feature in these essential skills and experience.

Paragraphs 2 and 3 emphasise the focus of the Group in respect of relevant powers, bearing in mind the exclusive role of the Lord Advocate and Procurator Fiscal in the investigation and prosecution of crime.

Paragraph 4 emphasises that, in addition to looking at the emerging data, the Group will work by considering evidence from those directly involved in the use of the emergency powers, whether officers or members of the public. This will inform our approach to wider evidence by way, for example, of data. It will also allow the “real time” scrutiny and review which was part of the vision of the review on the part of Police Scotland and the SPA.

Consistent with the College of Policing definition<sup>18</sup> of ‘evidence-based’ policing, we will review and use the best available evidence to inform and challenge policies, practices and decisions. To identify the ‘best available’ evidence, we will use appropriate methods and sources for the questions being asked. We will be transparent about our methods, limitations, and how our conclusions were reached. Where there is little or no formal research, other evidence such as police and other professional experience, civil society organisations judgement and beneficiaries’ feedback, public experience through surveys and case studies and more, may be regarded as the ‘best available’ in these circumstances. We will reach out to the public to feed in their lived experience. All evidence will be gathered and documented in a careful and transparent way.

An ‘evidence-based policing’ approach does not provide definitive answers that should be applied uncritically. Nevertheless, it is based on the premise that policies, practices and decisions should be assessed, informed and challenged based on the best evidence available and, so,

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<sup>18</sup> <https://whatworks.college.police.uk/About/Pages/What-is-EBP.aspx>

it offers a suitable way of working for the Group. It should mean all can ask questions, challenge accepted practices and innovate in the public interest in these extraordinary circumstances.

From this, it will be seen that 'data' is just one form of evidence we will consider. In these extraordinary circumstances, having access to timeous and appropriate data is of value in driving discussion, debate and decision making, although this brings challenges given the pace of change and the need to provide regular and relevant advice to the SPA Board which will, in any event, receive data direct from Police Scotland. Relevant data is being made public by Police Scotland and is available for wider scrutiny.

Data has been compared to '*driving by looking through the rear mirror.*' That obviously has even greater dangers in the current crisis where rapid judgement is critical and, crucially, that judgement has to be made with whatever imperfect data is available at any given time, with any lags or qualifications which are necessary to contextualise the data.

Paragraph 5 highlights the need for special care and attention when it comes to already disadvantaged groups (in the widest sense), including people living in [poverty](#), ethnic and religious [minorities](#), [women](#), [people with disabilities](#), [older people](#), [LGBT](#) people, homeless people and those deprived of their liberty, [migrants](#), [refugees](#), [children](#) and all others with protected characteristics. Poverty is a particularly striking feature of the obviously unequal impact of the Crisis. Apart from evidence of an unequal impact from the virus itself, there is some evidence of there being more police activity in deprived areas. Context requires an appreciation of the often greater difficulties for those living in poverty to abide by guidance or even requirements to stay at home. Gardens, for example, are a luxury during lockdown, and not available to all. In such circumstances, access to public spaces is a necessity, for a variety of good reasons which are not always apparent at first glance. Moreover, the economic effects of the lockdown are likely to have had the greatest impact amongst those in low paid or precarious employment, which may have affected their ability to comply fully with the guidance. Awareness of such factors is important in assessing some of the data and other evidence.

Paragraph 6 makes clear the primary lines of reporting by the IAG. This helps to avoid unnecessary duplication and additional confusion through too many voices in an already cluttered landscape.

Paragraph 7 ties in to paragraph 4. Assessing whether there are gaps will depend on evidence received, in particular from police officers, and a continuing appreciation of the distinction between regulations and guidance.

Paragraph 8 addresses scrutiny of procedural aspects of how Police Scotland might go about addressing some of the new challenges. In the present phase of the Crisis, consideration may be required of the opportunity costs of detailed procedural requirements, especially with the development of new procedures and templates. With the expected transitions, this is an area which may benefit from ongoing review as the opportunity costs may well change.

## APPENDIX B

### Work Plan

Work Stream	Actions	Status Update	Scheduled discussions	Current Priorities
Communications	<p>Email address for public communications</p> <p>Supporting correspondence for partners, public and interested groups</p> <p>Citizen Space facility to be set up and questions to be finalised</p> <p>Website presence and updates provided</p>	<p>Complete - <a href="mailto:COVID19IndependentAdvisoryGroup@spa.pnn.police.uk">COVID19IndependentAdvisoryGroup@spa.pnn.police.uk</a></p> <p>Complete and supplied to IAG members</p> <p>Citizen Space to go live W/B 25 May 2020 – accompanying text to be approved at IAG meeting on 15 May</p> <p>Web presence established; updates aligned to reports to SPA</p>		

Work Stream	Actions	Status Update	Scheduled discussions	Current Priorities
Engagement	IAG members to reach out across their own networks to facilitate evidence gathering and support participation	In process	Ongoing	Promote participation  Identify and address gaps in participation, in particular recognising and seeking to address digital exclusion  Follow up actions to be identified / additional engagement processes to be set out

**OFFICIAL**

Work Stream	Actions	Status Update	Scheduled discussions	Current Priorities
<p>Data and Evidence Gathering</p>	<p>Supporting papers (Professor McVie) detailing options, key questions; sources of evidence, and alignment with terms of reference</p> <p>Data gaps to be noted where they cannot be addressed</p> <p>Ongoing liaison with OPTICAL group – Susan McVie and John Scott are both members of OPTICAL and participate in their weekly meetings</p>	<p>Members to finalise feedback agree priorities – Susan McVie is finalising “Data ask” of Police Scotland – revised version has been approved by IAG and is being considered within OPTICAL</p>	<p>Weekly updates</p>	<p>Analytical capacity to be identified / clarified</p> <p>Evidence review and evaluation – extent of submissions and evidence will inform discussions around resources needed to analyse – SPA to assist in sourcing if additional resources are needed beyond current capacity</p>

**OFFICIAL**

	Focus Groups with officers in different areas to discuss issues around the 4 Es.	Being arranged		
Work Stream	Actions	Status Update	Scheduled discussions	Current Priorities
Assessment of Human Rights Impacts	D Quiroz (SHRC) leading on preparation of guidance note for the IAG, incorporating relevant human rights provisions, for example, UN Guidance on the use of force by law-enforcement personnel in time of COVID-19 emergency	To be circulated week commencing 18 May	Discussion – IAG meeting on 25 May	Review and evaluate, to inform guidance and advice
	Maria Galli (CYPCS) leading on preparation of guidance note for IAG on human rights implications of regulations for	To be circulated week commencing 18 May	Discussion – IAG meeting on 25 May	Review and evaluate, to inform guidance and advice

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	children and young people			
Work Stream	Actions	Status Update	Scheduled discussions	Current Priorities
Drawing in additional expertise	<p>Professor Steve Reicher 1 May meeting; Professor Ben Bradford 4 May meeting, focused on factors supporting compliance, managing change and retaining public confidence.</p> <p>Dr Peter Neyroud 15 May</p> <p>Dr Megan O'Neill, University of Dundee and Assoc Director of SIPR (Scottish Institute for</p>	Maintain contact as additional evidence and data becomes available	Ongoing	

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	Policing Research) to address the IAG on 22 May Identify additional expert input /evidence and insight required to inform the work of the Group			
Work Stream	Actions	Status Update	Scheduled discussions	Current Priorities
“Sounding board” for Police Scotland forward planning and communications	Ongoing role for group members, as representatives of civic Scotland, offering personal and professional expertise, and insight from across their professional and community networks	1 May IAG meeting – ACC Bernard Higgins (leads Police Scotland strategy and operations on service transition from lock down) in attendance to allow IAG discussions to assist in informing strategy, including Communications	18 May meeting – Gold Commander DCC Malcolm Graham attending	Transitions from lockdown

Work Stream	Actions	Status Update	Scheduled discussions	Current Priorities
<p>“Real time” advice and guidance – to Police Scotland; and to wider stakeholders via professional and community networks</p>	<p>Completed – submissions of open letter to Police Scotland from SWAN Scotland.</p> <p>Supporting evidence from GDA supplied, and guidance to follow</p>	<p>Ongoing</p>	<p>Weekly IAG</p>	<p>Managing the ongoing challenge of offering advice and support for policing’s response in a developing and “live” situation, and when there may be a time lag in the availability of supporting evidence. Arrangements for this to be a “two-way street” involving real time updates to members, and</p>

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				offering “live” input to Police Scotland to inform planning and response – agreed at meeting of 11 May for contact details of IAG members and Divisional Commanders to be exchanged to allow immediate discussion in appropriate circumstances
Work Stream	Actions	Status Update	Scheduled discussions	Current Priorities
Identify any additional work priorities to deliver against TOR			Ongoing	
Public reporting on progress	<p>Verbal report to SPA from IAG Chair 30 April</p> <p>Written report to SPA board 20 May</p> <p>Oral evidence to SPA from IAG Chair 20 May – questions</p>	<p>Complete</p> <p>Arranged</p> <p>Ongoing – IAG minutes to be published on</p>		

	arising from report  Ongoing web updates	the website after the SPA Board meeting on 20 <sup>th</sup> May		
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## APPENDIX C

### IAG Members

- John Scott QC Solicitor Advocate, Chair of the Independent Advisory Group
- Susan Kemp, Commissioner, Scottish Human Rights Commission (SHRC) – Diego Quiroz, SHRC, as substitute
- Professor Susan McVie OBE FRSE, Chair of Quantitative Criminology within the University of Edinburgh’s School of Law
- Alastair Pringle, Executive Director at the Equality and Human Rights Commission (EHRC) - Martin Hayward, EHRC, as substitute
- Ephraim Borowski MBE, Chair of Police Scotland’s National Independent Strategic Advisory Group (NISAG)
- Naomi McAuliffe, Programme Director Scotland, Amnesty International
- Bruce Adamson, Children and Young People’s Commissioner Scotland - Maria Galli as substitute

Authority Meeting  
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Interim Report of the Independent Advisory Group on Police Use of Temporary Powers related to the Coronavirus Crisis

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- John T Logue, Deputy Crown Agent Operational Support, COPFS
- Martyn Evans, SPA Board Member
- DCC Will Kerr, Police Scotland
- Gill Imery QPM, HM Chief Inspector of Constabulary in Scotland (HMICS)
- Tressa Burke, Glasgow Disability Alliance (GDA) – Brian Scott, GDA, as substitute
- Aamer Anwar, Solicitor and Human Rights Campaigner
- Dr Catriona Stewart OBE, Scottish Women’s Autism Network
- Dr Elizabeth Kelly, NHS Scotland, Associate Carnegie UK Trust