

Humza Yousaf
Cabinet Secretary for Justice
Scottish Government

12 February 2021

Dear Cabinet Secretary,

QUARANTINE AND BORDER CONTROLS

From time to time during our work in the Independent Advisory Group on Police use of emergency powers (“the IAG”), matters have arisen that require more urgent attention than is possible through our usual reporting procedures to the Scottish Police Authority at Board meetings. These might be dealt with by way of discussions at our weekly IAG meetings or even telephone calls in between meetings. Part of the intention of the IAG, as you will recall, in addition to offering additional human rights-focussed scrutiny, was to allow “real-time” advice and challenge.

On one occasion, on 13 July 2020, I wrote to David Crichton as acting Chair of the SPA Board to express our thoughts and concerns about an amendment to the main regulations that required the wearing of face coverings in certain situations other than where there was a reasonable excuse. We highlighted matters that had come to our attention in our work, for example, the position of those with hidden disabilities who may be unable to wear face coverings. Our plea was for the Police Scotland approach of the 4 Es to be considered by shop staff and others when dealing with the enforcement of the new restriction.

On this occasion, my letter concerns the proposed new regulations on quarantine and associated matters as regards international travel. Recognising the statutory responsibilities of the SPA and, in view of the urgency of the matter, we have decided to write direct to you on this occasion. Martyn Evans of the Board and DCC Will Kerr have been copied into the letter.

At the outset, I should clarify that this letter, while on IAG headed paper, is not sent on behalf of all IAG members. As you will appreciate, there are some group members whose other duties and responsibilities mean that they cannot comment directly on government policy. While all members of the IAG have been able to contribute to discussions on the subject-matter, the letter is sent

only on behalf of those who are able to do so. Specifically, John Logue of COPFS, DCC Will Kerr, and Barry Sillers, Deputy Chief Executive of the SPA, although members of the IAG, are not included in the group for the purposes of this letter.

We recognise, of course, that international travel is a source of concern for importation of various strains of coronavirus, perhaps especially new variants. It appears that that importation was at least partly responsible for an increase in cases after significant progress in reducing numbers last summer in Scotland. Clearly, it is an area that demands government attention and additional restrictions may well be considered necessary.

Nonetheless, as a group we have several concerns.

Once again, while the general plan has been announced by the UK and Scottish Governments, the relevant regulations (UK and Scottish) have not been published (I am writing this at 1524 hours on 12 February). No doubt, considerable work is required between the governments of the Four Nations on an issue like this which, apart from other complexities, may cross aspects of the distinction between reserved and devolved powers and needs proper co-ordination. Equally, there may be, as seems to be the case here, different approaches taken by the different governments. Where the issue concerned is international travel, it is most unfortunate if this co-ordination fails to produce a wholly coherent approach across the whole of the United Kingdom. That gives rise to issues that may create additional and, perhaps, unnecessary problems.

We have commented repeatedly as a group on the human rights and other implications of failing to publish the detail of important legislative changes until just before they come into force. We are unconvinced that late publication of significant legislative changes without adequate (or any) scrutiny, has in fact always been necessary. It is unfair on the public and the police, and is likely to result in good faith errors on the part of both. For a matter as important as this, there should also be as much Parliamentary and other scrutiny as possible. This scrutiny should take place before enactment. If the situation is truly so urgent that it cannot happen beforehand, it should nonetheless occur shortly afterwards. Human rights and other impact assessments have been another casualty of “urgency” but should not be considered optional extras. We would welcome sight of all impact assessments for the new regulations, in particular equalities, children’s rights and human rights.

Meaningful Parliamentary scrutiny is essential for the introduction of significant measures which may impact on the right of individuals to be free from unlawful detention. No doubt thought has been given to the implications of articles 5 and 8 of ECHR and articles 3, 16 and 37 of the UNCRC for the planned legislation, with access to the courts another minimum safeguard. This will all require proper communications, funding and signposting to ensure the practical and effective realisation of rights.

In particular, in the policing context, we want to raise the question of the Border between Scotland and England. The position in Scotland throughout, as clearly articulated by the Chief Constable, has been that there would be no routine roadblocks or vehicle stops solely on the basis of attempting to stop travel which is not allowed in terms of the regulations. Travel regulation breaches have been picked up with resultant warnings and fixed penalty notices as required, but only where the unlawful travel has come to the attention of the police while performing other duties or, occasionally, in flagrant cases that came to their attention. An increase in mobile patrols, with greater visibility as a deterrent, has been implemented but the overall policing approach has remained consistent.

The IAG welcomed and supported this approach which was proportionate as well realistic in terms of the reach of existing police powers and resources. The question of the Border or ground crossing between Scotland and England has come up before and the policing position on this has also been clear – there will be no border checks. Until this week, there seemed to be no great demand for revisiting the issue, although that may have been because discussions between the Scottish and UK Government were continuing on the issue of quarantine.

In any event, the issue has come back and we wanted to express our additional concerns as regards potential implications for Police Scotland.

We will return to this in more detail in our report to the SPA Board for its meeting on 24 February and will therefore only address our concerns briefly.

There may be a serious question around the proportionality of any steps to “close (or control) the Border”.

Travel across the Border would have to remain possible.

There would have to be exceptions for certain individuals – for example, freight drivers, other key workers, those with caring responsibilities, and those whose essential medical treatment was across the Border.

Additional care will be required if the (eventually) published regulations differ between Scotland and England, as presently seems likely. If England and Wales introduce additional legal requirements for those arriving from only some countries, a policy that appears to defy the logic of the measure, whereas Scotland imposes blanket requirements for all countries, an individual might arrive in England entirely lawfully and yet, on travelling to Scotland, with no other activity beyond that journey, might commit a crime here if they fail to proceed directly to a quarantine hotel. Such an individual may live in Scotland and be travelling, lawfully up to the Border, with the intention of quarantining at home. Children aged 16 and 17 are treated differently in law in the different jurisdictions. Such discrepancies in regulations would allow for good faith misunderstandings even with the clearest of public messaging.

Are police officers or others to be located at all train and bus stations in Scotland? Is the plan for there to be roadblocks?

What powers is it suggested that officers of Police Scotland would use to stop travellers and drivers? Are new powers planned to accompany such a change? It would certainly seem inappropriate to try to use existing powers under Road Traffic legislation when legislators had no such circumstances in mind when passing the relevant Acts. At least if a new power was suggested in draft legislation that had been seen in advance and debated by the Scottish Parliament, such radical steps would be seen to have greater legitimacy.

As things stand, we are concerned that policing the Border and all inward travel to Scotland is a practical impossibility. We have previously referred to the need to recognise “compliance realism”. It seems to us that this may be another example.

Roadblocks are sometimes suggested as potentially popular measures with the public. Experience elsewhere suggests, however, that the delays and inconvenience created by roadblocks, often for key workers and those lawfully entitled to be travelling, quickly reduces their appeal.

Border controls and travel checks at bus and train stations, especially if delegated to Police Scotland, would see an increase in the cry of “police state” which is unjustified here and, in fairness, less common in Scotland than even in England.

We should say that brief consideration of the International Health Regulations 2005 suggests that there are requirements around quarantine and ground crossings which must inform the approach of the United Kingdom and Scottish

Governments. In particular, we are not convinced that the two governments have done enough in terms of joint agreements and arrangements. Certainly, there is no evidence yet of such agreements and arrangements,

It appears that, in terms of the 2005 Regulations, suitable medical arrangements should be in place for airports, ports and ground crossings. Has any thought been given to this? It might be that NHS personnel would be required in addition to police officers or other officials.

What planning and assessment has been undertaken of the impact on:

- children
- families
- those with disabilities (including hidden disabilities)
- those who may suffer from PTSD
- those from a minority ethnic background (who may require to travel more frequently and, in some cases, may not have English as a first language)

What communications have been put in place, in particular in England for those intending to travel on to Scotland?

If quarantine hotels are to be used, what are the arrangements for enforcement? Are security staff to be given powers? We would be concerned about such powers for untrained (or even trained) civilians but, without such provisions, we foresee the prospect of significant policing demand every time there are flashpoints.

(One point which is not strictly a policing matter, relates to whether consideration has been given to the restrictions in the 2005 Regulations on charging travellers for health measures, including quarantine.)

In conclusion, in Scotland the approach to policing has been notable for its consistency and respect for human rights. The 4Es allow for engagement with the public which provides the space for good faith errors. Enforcement is used, but only where necessary. Flagrant or repeated breaches can see acceleration through the 4Es or even direct moves to enforcement. All of this has been commended by the IAG and others. This has no doubt contributed to the impressive levels of public confidence which highlight the significance of the principle of policing by consent. Public confidence in policing and government in Scotland have appeared higher than elsewhere in the UK. We are concerned that, for the sake of what may be a policy lacking in proper coherence and clear

proportionality, it may be damaged. That confidence is more than merely nice to have. It has been essential in underpinning the central public health messages and encouraging remarkable levels of public adherence to unprecedented restrictions.

Yours sincerely

John Scott

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