

COVID-19: Evidence to Justice Committee – Human rights and Police Scotland’s use of temporary powers

3 June 2020

The Scottish Human Rights Commission was established by the Scottish Commission for Human Rights Act 2006, and formed in 2008. The Commission is the National Human Rights Institution for Scotland and is independent of the Scottish Government and Parliament in the exercise of its functions. The Commission has a general duty to promote human rights and a series of specific powers to protect human rights for everyone in Scotland.

www.scottishhumanrights.com

Introduction

1. The UK and Scottish Governments have introduced separate pieces of legislation in order to reduce the spread of coronavirus. In Scotland, restrictions are mainly imposed by the Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020 (the “Regulations”). The Regulations impose restrictions and requirements upon the general population and are the means by which current social distancing measures are legally enforced. The legislation contains a range of new, temporary, police powers.
2. The Scottish Human Rights Commission (the “Commission”) welcomes the opportunity to submit evidence to the Justice Committee on the human rights implications of Police Scotland’s temporary powers. The Commission is represented on the Independent Advisory Group (“IAG”), which was established by the Scottish Police Authority, Police Scotland, and the Scottish Government, to monitor the use of temporary police powers in the current health emergency.¹ Part of the Commission’s contribution to the work of the IAG was to produce a human rights guide to examining the new police powers, which will soon be published by both the IAG and the Commission. This evidence summarises the key points made in the guide produced for the IAG.

Human rights and police powers

Overview

3. Policing and human rights protection are mutually supportive. Considering that police activities to a large extent are performed in close contact with the public, police efficiency is dependent on public support and respect for human rights. The Regulations give Police Scotland considerable powers to enforce restrictions on movement and gatherings. These powers are more likely to impact particular groups, including those living in poverty, disabled people, homeless people, ethnic and religious minorities, LGBTI people, women and children in situations of domestic violence, the

elderly and young people, and migrants and refugees for whom daily economic activity is essential for daily survival. Every effort should be made to address this impact and meet the needs of vulnerable groups. As the application, in practice, of those powers necessarily involves the discretion of individual police officers it is crucial that they are provided with appropriate guidance, training and equipment to deal with the current health emergency.

4. Police and other law enforcement measures should be guided by international human rights law and standards, in particular by:
 - the inherent respect for human dignity
 - the principle of legality
 - the principle of necessity
 - the principle of proportionalityⁱⁱ
 - the principle of precaution
 - the rights of detainees in the provision of criminal justice; and
 - the principle of non-discrimination.

5. The current health emergency adds new challenges to everyday policing. It is now crucial to ensure that there is greater transparency and public participation, including with children and vulnerable people, around policing. It is vital that Police Scotland take appropriate and heightened precautionary measures, and conduct context-based assessments of whether the use of force is necessary and proportionate. The public must have clear information and understanding as to what the police powers are and what is expected of them under both the legislation and/or as a matter of public health guidance. Data must also be collected around the use of police powers, and they must be consistently monitored and reviewed. Independent monitoring mechanisms such as the IAG, NGOs, academics and NHRIs play a key role in this respect.

European Convention on Human Rights

6. The use of emergency powers by the police must be at all times consistent with the human rights framework. The Commission's analysis focuses principally on the Human Rights Act 1998 ("HRA") and the European Convention on Human Rights ("ECHR"); this is due primarily to the enforceable nature of the ECHR in Scottish courts. A range of other international human rights treaties are also legally binding on public authorities in Scotland.ⁱⁱⁱ The Scottish Government is currently exploring how to incorporate some of these international treaties into Scots law.

Article 2 – right to life

7. Article 2 safeguards the right to life and sets out the circumstances when deprivation of life may be justified. This is one of the most fundamental provisions of the ECHR, which imposes a duty to protect life through taking practical steps to address situations where there is an identifiable and real threat to life, including from attacks by other private individuals.^{iv} Article 2 also obliges the police to take preventive measures to minimise the risk to life posed by their operations.^v This is crucial as the Regulations allow for the use of force in the exercise of the new powers. For example, the police must ensure people are not put at risk of Covid-19 when approaching, arresting, detaining and transporting individuals. Likewise, police officers should not be at risk when carrying out their jobs. In the context of Article 2, police officers should be provided with the appropriate equipment, training and guidance to comply with their legal duties and protect their lives.
8. The prohibition against arbitrary deprivation of life is non-derogable at all times, even in states of emergency, meaning it cannot be taken away or compromised.^{vi} The breaking of a curfew or any restriction under the Regulations and the Coronavirus Act 2020 should not constitute grounds for excessive use of force by the police, and under no circumstances should it lead to the use of lethal force. In the event that a use of force by police result in

death to any person, Article 2 also requires that there be an independent and effective investigation.

9. When police use force under a state of emergency as the current one, they must continue abiding by the principles of necessity, proportionality and precaution in relation to Article 2 (and Article 3, see below).^{vii}
 - Necessity: Law enforcement officials may only use force when it is strictly necessary and only to the extent required for the performance of their duties.
 - Proportionality: Force used must be proportionate to the legitimate objective to be achieved by the new powers.
 - Precaution: Reasonable precautions must be adopted to prevent loss of life in this emergency time. This includes putting in place appropriate guidance and command and control structures and ensuring medical assistance is available.

Article 3 - prohibition of torture, inhuman, degrading treatment or punishment

10. Article 3 an absolute guarantee; it includes no exceptions nor limitations and no derogation from it is permissible, even in the event of a public emergency.^{viii} Article 3 involves not only obligations upon states to refrain from infliction of ill-treatment, but also positive duties to protect persons and to investigate alleged breaches of article 3 effectively.^{ix} There are clear implications of Article 3 for police in the context of the use of force when using the new powers, in particular Regulation 7(1) which provides that a "relevant person" (which includes a constable) may take "such action as is necessary" to enforce any requirement or restriction imposed by the Regulations.
11. The use of lethal or potentially lethal force requires the exercise of restraint to minimise damage and injury, as well as rendering assistance and medical aid at the earliest opportunity and notifying relatives or other persons if a person has been

injured or killed.^x When Police use force, under the current health emergency, they must comply with the principles of necessity, proportionality and precaution in relation to Article 3. Any policy or approach to managing conflict in the current pandemic (e.g. 4 Es approach)^{xi} should have a central statement of mission and values which recognises the need to protect and respect the human rights of all, regardless of their personal characteristic and status.

12. Article 3 also includes a positive obligation on the police to take steps to seek to prevent the infliction of torture or ill-treatment by private persons or groups. This obligation could be very important during the current environment. For example, there is a positive obligation to promptly investigate allegations of rape and/or domestic abuse due to the lockdown, including with regard to children and other vulnerable individuals (elderly or LGBTI people), in order to prevent ill-treatment of which the police were or ought to have been aware.^{xii}

Article 5 – right to liberty and security of person

13. Article 5 guarantees the circumstances in which a person may be deprived of their liberty and the minimum rights to which they are entitled when deprived of it, including a right to compensation for unlawful deprivation of liberty. One of the most significant forms of interference with an individual's rights is the police power to deprive an individual of their liberty.
14. Deprivation of liberty is an important tool in the current pandemic for police officers seeking to address the perceived risks posed by individuals to the community. In times of severe threat to the life of the community, it may indeed become one of the principal means of first response. Compliance with Article 5 is therefore particularly important when implementing the Regulations. For example, prolonged police custody or delayed judicial review of deprivation of liberty could lead to violation of Article 5. Police officers are given significant amounts of discretionary powers, which includes prohibition notices, pre-trial

detention, physical removal of persons and fixed penalties. It is also an offence to obstruct a constable exercising any function under the Regulations. A person who commits an offence under Regulation 8 is liable on summary conviction to a fine not exceeding the statutory maximum and Regulation 7(1) provides that a constable may take "action as is necessary" to enforce any requirement or restriction imposed by the Regulations.

15. Article 5 protections do not only cover the power to deprive an individual of their liberty, but other issues such as conditions of detention in police cells or the manner in which a suspect is questioned – all of this very relevant in the current context.
16. Any deprivation of liberty must be lawful or in accordance with the law, and further fall within one of the circumstances prescribed in the six sub-paragraphs of paragraph 1 of Article 5. It is important to note that not all of the grounds will be of relevance to police officers as the sub-paragraphs are designed to cover the whole range of circumstances in which state officials may feel compelled to deprive an individual of their liberty, including detention for the prevention of the spread of infectious diseases.
17. Under Article 5, key considerations for police officers include:
 - Is the deprivation of liberty, 'in accordance with a procedure prescribed by law'? This means it is based on a legal provision and free from arbitrariness.^{xiii} There will be a breach of Article 5 where a detention has taken place without legal foundation in Scots law. Government guidance is not enforceable. For example, the two metre distancing rule, avoiding public transport or the wearing of face coverings in enclosed spaces, is guidance, not law.
 - Is the detention permissible under Article 5? Article 5 recognises a number of grounds that may justify the use of deprivation of liberty. An exhaustive examination of all those issues is beyond the scope of this paper.

- Have the procedural safeguards provided in Article 5 been provided to the detainee? This includes the right to be informed promptly, in a language which s/he understands of the reasons for arrest and the requirement that a person detained is brought promptly before a judge. It is particularly important to ensure that children and other vulnerable individuals such as suspected victims of sexual or gender-based violence are protected by additional safeguards.

Article 6 - Due process and the right to a fair trial

18. Article 6 guarantees that everyone charged with a criminal offence is entitled to certain protections, including the right to be presumed innocent until proven guilty, the right to a hearing with due guarantees and within a reasonable time by a competent, independent and impartial tribunal, and the right to have any conviction and sentence reviewed by a higher tribunal satisfying the same standards.
19. Police officers play a key role in the task of investigating allegations of criminal behaviour. This includes a number of activities beyond detention such as interrogating suspects and witnesses, carrying out searches, undertaking surveillance, and generally securing evidence. As these aspects of police investigation practices take place within the context of a criminal process, they may have an important impact upon the fairness of a criminal trial under Article 6.
20. The questioning of suspects is a vital part of policing. However, this must take place alongside a recognition of the suspect's rights, including the right to silence and the right against self-incrimination and the rights of detainees while in police custody. An individual should have the right to have the fact of detention notified to a third party, to be offered access to a lawyer; and to be accorded access to a doctor. As mentioned above, this is particularly important in the current context, where police and NHS capacity may be overextended. We also know that the

number of people detained in custody is increasing and it is expected to increase in the coming months, so the role of monitoring mechanisms such as the independent custody visitors play a key function for the welfare of detainees throughout Scotland. Equally important are the complaint mechanisms to ensure improvement and protection against potential abuses and arbitrariness.

Article 8 – Right to respect for private life, home and correspondence

21. Article 8 requires respect for private and family life, home and correspondence. Article 8 encompasses a wide range of issues which are relevant for policing in the times of Covid-19. As Scotland/UK restarts the economy while containing the spread of Covid-19, the use of track and trace technology could become one of the largest risks in the coming phases of the pandemic response. The Commission recently published a briefing on the human rights implications of digital contact tracing technology.^{xiv} The briefing acknowledged the UK contact tracing app is not currently part of the Scottish Government's strategy; however, the Commission made clear that if an app such as the one developed by NHSX were to be used in Scotland, data should be collected and used only for public health purposes to limit the spread of coronavirus. Any data should not be used for policing purposes.

22. The use of surveillance technology is by its nature intrusive.^{xv} If Police Scotland were to use other surveillance technology in enforcement of the Regulations, for example use of drones, telecoms tracing or cyber and smart access, it is crucial that sufficient procedural safeguards and specification requirements are integrated; this includes diligent protection of the collected data, appropriate oversight over the use of the data, proportionality and limited duration of the adopted measures, and transparency about data collection, analysis, storage and deletion.^{xvi}

23. Article 8 is a qualified right, which means that any interference must be justified:
- In accordance with the law. This requires the impugned measure both to have some basis in domestic law and to be compatible with the rule of law. The law must be adequately accessible and foreseeable.
 - In pursuit of a legitimate aim. This must be based on one of the legitimate aims set out in Article 8(2), including ‘the protection of health or morals, the prevention of disorder or crime’ and ‘the protection of the rights and freedoms of others’.
 - Necessary in a democratic society. An interference will be considered ‘necessary in a democratic society’ for a legitimate aim if it answers a ‘pressing social need’ and, in particular, if it is ‘proportionate’ to the legitimate aim pursued.

Articles 9 to 11 – Democratic Freedoms

24. The pandemic has created extraordinary challenges for all, including significant implications for our democratic freedoms. These freedoms include the right to respect for freedom of expression, assembly and association, and freedom of thought, conscience and religion.^{xvii}

25. While there is a general requirement to respect these rights and refrain from unjustified interferences, there may be situations where the police force is justified in doing so to enforce the Regulations. Any interference with these rights must comply with a number of conditions in the current pandemic, if it is to be consistent with the rule of law and the Convention. Interferences must be:
- in accordance with the law
 - in pursuance of a legitimate aim;
 - temporary; and
 - necessary in a democratic society.

Article 14 – the prohibition of discrimination

26. Article 14 ensures that the enjoyment of the rights and freedoms in the Convention are secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. The principle of equality and non-discrimination is central to human rights law and is recognised as a norm in both the domestic and international framework. This principle is one of the foundations of Scottish society and Police Scotland should ensure that it is applied consistently when using the new temporary powers. It is worth noting that the application of the new powers may have a severe, unintended and inhibiting effect on particular individuals and groups, including those living in poverty, disabled persons, homeless people, ethnic and religious minorities, LGBTI, women and children in situations of domestic violence, the elderly and young people, migrants and refugees for whom daily economic activity is essential for daily survival.

ⁱ <http://www.spa.police.uk/news/615837/>

ⁱⁱ The proportionality concept does not apply to absolute rights such as Article 3 ECHR, which prohibits torture and inhuman and degrading treatment or punishment.

ⁱⁱⁱ These include: ICCPR; UNCAT; CRC; CRPD; CERD and CEDAW.

^{iv} The action required must be reasonable without imposing an impossible or disproportionate burden on the authorities. Deprivation of life by the police will not be regarded as being unlawful when it results from the use of force which is no more than absolutely necessary for a specified aim which must, as properly interpreted, be to save life or prevent serious injury.

^v *Ireland v. United Kingdom*, (5310/71) ECHR 1 (18 January 1978) and *Lopes de Sousa Fernandes v Portugal*, (Application no. 56080/13). The State has positive obligations under Article 2 to take reasonable steps to minimise the risk to life posed by the current outbreak. In the context of Article 2 Police officers should be provided with the appropriate equipment, training and guidance to comply with their legal duties and protect their lives.

^{vi} Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection. (Article 2(2)).

^{vii} Special Rapporteur on Extrajudicial, Summary or Arbitrary Killings, Covid-19 Police and Military Use of Force in a State of Emergency.

viii *Chahal v the United Kingdom* (23 EHRR 413) 1996.

ix The application of Article 3 involves two specific issues. The first is the level of the treatment or punishment in question to come within the scope of Article 3. And the second is what is the appropriate label to be applied

to the treatment or punishment: torture, inhuman or degrading.

x *Rehbock v Slovenia* (App no 29462/95) ECHR 28 November 2000.

xi Engage, explain, encourage and enforce.

xii *Opuz v Turkey* (33401/02) June 2009 and *MC v Bulgaria*, (39272/98) December 2003. The obligation on the government in this context is to have a legal framework which provides appropriate protection for victims in the current circumstances of lockdown.

xiii The lawfulness of any deprivation of liberty is tested both in respect of Scottish law and also against European Convention to ensure it has not been applied in an arbitrary manner. ICCPR, article 2(3); UN Code of Conduct for Law Enforcement Officials article 2.

xiv <https://www.scottishhumanrights.com/media/2028/contact-tracing-briefing-180520-final.pdf>

xv See *S and Marper v the UK* (nos. 30562/04 and 30566/04) December 2008. The European Court of Human Rights clarified that ‘the protection afforded by Article 8 of the Convention would be unacceptably weakened if the use of modern scientific techniques in the criminal justice system were allowed at any cost and without carefully balancing the potential benefits of the extensive use of such techniques against important private life interests... The Court considers that any State claiming a pioneer role in the development of new technologies bears special responsibility for striking the right balance in this regard.’

xvi Both international and national courts have found that the blanket retention of biometric data is unlawful and constitutes an unjustified interference with the right to respect for private life, in violation of Article 8 of the ECHR. *S and Marper v the UK*

xvii Freedom of religion (Article 9 of the ECHR), Freedom of expression (Article 10) and Freedom of Association (Article 11 of the ECHR).