



SCOTTISH POLICE FEDERATION

Established by Act of Parliament

The Independent Commission on UK Public Health Emergency Powers
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Dear Sir / Madam

Independent Commission on UK Public Health Emergency Powers

I refer to the above and thank you for inviting the Scottish Police Federation (SPF) to contribute to the work of your Commission.

The SPF appreciates the Commission's overarching strategic purpose is to make recommendations that represent best practice both from a Rule of Law perspective and in enabling a swift legislative response to a crisis so as to achieve optimum public health outcomes.

Whilst clearly such a purpose is laudable, and perhaps inevitable given the terms of reference, we would suggest that absent consideration of the practical effects of the desirability, and enforceability of such emergency laws that the Commission's outputs will be seen as largely technocratic. To that end this response will also touch upon some of the practical hurdles and barriers that faced the police service in responding to these emergency laws.

Unless explicitly obvious, our comments relate to the legislative frameworks and approaches in Scotland, and to the considerations and implications for the police service only.

Existing legislative options during a public health emergency

1. *The Commission's starting point is that any primary legislation designed to address public health emergencies must contain provision for urgent law making. Do you agree with this position? If not, why?*

The SPF agrees with this. We would however add that as well as the provision for urgent law making, that legislatures should also be required to design systems that allow for proper and meaningful oversight, including real-time parliamentary scrutiny of, and amendment to any such laws.

In line with our opening remarks, we would also suggest that the practicality of institutional responses (primarily in police forces and local authorities) as well as public acceptance, to such emergency laws should, if not necessarily be separately considered, inform your deliberations.

As a general principle the SPF would argue that in order to maintain legitimacy and public trust, governments and parliamentarians in particular should be looking for reasons not to have sweeping executive law-making powers, and certainly not to be able to pass sweeping powers to the police.

2. *To what extent does existing primary legislation available for use in a future public health emergency allow for urgent law-making while:
 - a. *promoting adequate levels of accountability, transparency and appropriate parliamentary control of executive action in the context of an emergency situation;**

The SPF agrees that existing primary legislation certainly allows for urgent law-making. That is evidenced by the fact that urgent laws were brought into effect in response to the Coronavirus emergency. Whether existing primary legislation is as enabling as it could (or should) be is clearly a matter your Commission is considering. We find the submissions of Dr Andrew Tickell, Senior Lecturer in Law, Glasgow Caledonian University and Professor Alison Britton, Professor of Healthcare and Medical Law, Glasgow Caledonian University¹ to be particularly helpful from a Scottish context on this question.

We would also highlight that Scotland retains a number of wide-reaching common law offences and whilst law making in emergencies extends beyond criminalisation, the existence of such offences provides considerable flexibility to the police service to respond to emergencies. An example of this can be found in Culpable and Reckless Conduct which was used as a direct alternative to newly created offences under Coronavirus regulations.

We do not agree however that legislation necessarily achieves any of the issues suggested at (a) above.

¹ https://yourviews.parliament.scot/covid19/recovery-bill-detailed/consultation/download_public_attachment?sqId=pasted-question-1633528828-01-69573-publishablefilesubquestion&uuld=105336071

If we look specifically at the responses to the Coronavirus pandemic, the signs of an emergency situation were apparent across our news networks from late December 2019 and into early January 2020. Despite this, the parliaments did not appear to act 'till well into March² with the Coronavirus bill only being laid on the 19th March.

It is of course arguable this is not a specific shortcoming of legislation. The SPF would however suggest that the triggering mechanisms for activating emergency provisions being left substantially to the discretion of the executive is a failure in itself.

We would contend that some form of permanent civil emergencies committee possibly drawn representatively from across parliament (and which transcends parliamentary cycles) should be able to compel the executive to account for its decisions to enact (or not as the case may be) such emergency powers. Such a mechanism could allow for a less partisan consideration to trigger emergency powers. It could also ensure that some form of parliamentary consideration is able to take place in advance of any formal executive action.

Given the inherent interdependencies between the powers of the UK Government, and the governments in the devolved administrations, it is arguable that the powers available to such administrations are substantially hampered unless the UK Government itself acts.

Executive delay in responding therefore curtails the ability to scrutinise; a mechanism to mitigate such delay should therefore be promoted.

We are aware that many correctly argue that as the courts are the ultimate check on the use of executive power that there is no absence of accountability and oversight. Although true, we cannot ignore that such oversight, and check on the application of the executive powers, comes at the end of the process. Such arguments also take little cognisance of the fact that for many, the process is regarded as a punishment in itself.

b. complying with the UK's international legal obligations, including those relating to human rights; and

We limit our observations on this question to the practical effects of such emergency laws insofar as they relate to human rights. In that regard, it is questionable if this occurs at all, not least as the evidence from the myriad of coronavirus regulations was at best a mixed bag of application.

It will no doubt be argued that the provisions of the European Convention on Human Rights transcend all domestic legislation, and as such it is down to the practitioners of the law (principally the police) to ensure such rights are upheld at all costs. Indeed, Section 57(2) of The Scotland Act 1998³ provides that the Scottish Government "*has no power to make any legislation, or to do any other act, so far as the legislation or act is incompatible with any of the Convention rights...*"

² <https://commonslibrary.parliament.uk/house-of-commons-coronavirus-timeline/#march2020>

³ <https://www.legislation.gov.uk/ukpga/1998/46/section/57/enacted>

This however manifestly failed in practice when it came to the freedom to protest (article 11) the right to a private and family life (article 8) , and the right to a fair trial (article 6) - albeit the conflicting provisions fell from secondary regulation.

Freedom to protest - Coronavirus legislation (in all jurisdictions) created specific offences for gatherings of groups from different households in public spaces. Whilst exemptions were expressly stated, no exemption for the purpose of protest were amongst them. This appears to have been deliberate as the accompanying guidance messaging at the time was particularly sobering. From a policing perspective it appeared the Government(s) were placing a greater emphasis in guidance messaging, and the implied reach of the law, than designing legislation that matched the guidance.

This was inherently problematic as was shown in stark terms when mass protests began to take place. This was compounded by the fact differing approaches to the policing of protests occurred not only between the devolved nations, but also between police forces themselves.

Police officers sanctioning groups, of a proscribed number, in one part of a town or city, whilst denser and larger groups were protesting in another (on occasion without police intervention) was frankly incoherent.

Right to a private and Family Life – the de-facto criminalisation surrounding household mixing has been described as a “sex ban.” Whilst recognising the simplicity of the descriptor, the limitations amounted to a serious infringement on the relationships of couples who did not live in the same dwelling. It is notable that whilst the police developed a greater sophistication in respect to the policing of protests, there appeared to have been no such sophistication for mixed household established relationships.

Right to a fair trial – this extent of sanction by Fixed Penalty Notice (FPN) is clearly at odds with the right to a fair trial. Whilst the SPF has reservations about the conflation between the role of the police, and the separation that should exist between law enforcement and criminal sanction in general, it is unarguable that FPNs had a disproportionate impact on the poorer, and otherwise socially disadvantaged members of our society.

c. otherwise reflecting Rule of Law values?

The SPF simply observes that policing experienced grater levels of compliance with government guidance when legislation was minimal. It may well be that the fear that associated the early days and weeks of the pandemic account for this but we also question whether the increased threat of “stick” over “carrot” ended up damaging the basic fact that laws can only be enforced on a population that is willing to accept them.

The sheer number of amendments to regulations created the impression that the Government(s) weren't in control of the situation, leading to compliance fatigue amongst the general population.

3. *What, if any, changes should be made to the existing legislative framework for public health emergencies to facilitate urgent law-making while also satisfying (a), (b) and (c) above?*

The SPF has no particular insight to offer in respect of the existing legislative framework other than to observe that it is difficult to justify the sustained use of emergency provisions so long after an emergency has been declared. We also observe that practitioner input into law making was severely curtailed (and was often non-existent) during the constant stream of amendments that were being made. Whilst we accept the need for urgency as events unfold, it is our strong view that the absence of a stakeholder voice on the practicality of implementation of what was proposed, could have led to a less cumbersome legislative framework, and provided some form of independence within the political decision making sphere.

Legislation enacted during the Covid-19 pandemic

4. *During the Covid-19 pandemic, bespoke primary legislation was made by the UK and Scottish Parliaments. How far did these pieces of legislation allow for urgent law-making while also:*
 - a. *promoting adequate levels of accountability, transparency and appropriate parliamentary control of executive action in the context of an emergency situation;*
 - b. *complying with the UK's international legal obligations, including those relating to human rights; and*
 - c. *otherwise reflecting Rule of Law values?*

To a large extent our responses to question 3 (above) cover these points.

5. *What measures should be taken to ensure that primary legislation made during a future public health emergency allows for urgent law-making while also satisfying (a) (b) and (c) above?*

The SPF believes that whilst emergencies by their very nature demand emergency responses, it does not automatically follow that legislation for such CIVIL emergencies cannot to some extent be largely foreseeable and subject to proper rigorous parliamentary scrutiny. Indeed, we would argue that legislating in emergencies is itself sub-optimal and will inevitably lead to what would otherwise have been sober decision-making being clouded by febrility. For such reasons we would promote that emergency legislation should always be limited to those events which genuinely could not be reasonably foreseen.

We imagine for example that the once engrained practice of civil contingencies emergency planning and training will already have identified some key legislative requirements to enable effective responses. We also imagine that civil emergencies are likely to include for example health pandemics, weather or climate emergencies

or disaster, food or water shortages, energy and fuel shortages, and cyber / digital attacks on the systems of the state.

In all such instances frameworks for staged or incremental adaptations of a multitude of pre-defined approaches should be capable of being on the statute book to be “dusted down” when required. Crucially this would not deny the executive the ability to act in extremis, but would ensure that consideration of new emergency powers would only apply to genuine emergencies, and not simply issues that have become emergencies due to lack of planning.

We would again promote the creation of a permanent cross party, cross parliamentary Civil Emergencies Committee to ensure that responses to civil emergencies are not entirely owned by the executive.

6. *How far do you consider that secondary legislation made in response to the Covid-19 pandemic facilitated urgent law-making while:*
 - a. *promoting adequate levels of accountability, transparency and appropriate parliamentary control of executive action in the context of an emergency situation;*
 - b. *complying with the UK’s international legal obligations, including those relating to human rights; and*
 - c. *otherwise reflecting Rule of Law values?*

Similar to our response to question 2, the SPF agrees that secondary legislation made in response to the Covid-19 pandemic facilitated urgent law-making. We do not agree however that legislation necessarily achieves any of the issues suggested at (a), (b), and (c) above, and largely for the same stated reasons.

We cannot ignore that parliamentary processes themselves slowed down considerably during the Coronavirus pandemic. The move to an online parliament was clunky and did not allow for dynamic debate in the same manner a physical meeting of the parliament allows.

Additionally, the Scottish Government First Minister took a deliberate policy decision to deliver daily briefings on the pandemic. Whilst there was no doubt a strong public appetite for information, this created the impression of a presidential style of democracy which whether psychologically or otherwise, gave the impression that parliament itself was less important.

The political make up of the Scottish Parliament also had a hindering impact on consensus consideration due to the ever-present constitutional question. Scottish Minister clearly felt that UK ministers were dragging their feet on the introduction of some restrictions which often saw Scotland introduce restrictions in advance of England, only for the UK Government to largely follow suit a few weeks later.

This inevitably led to the opportunity for friction with allegations of one-upmanship being levied, ensuring that scrutiny of the actual measures was squeezed as a result.

7. *What measures should be taken to ensure that secondary legislation made during a future public health emergency facilitates urgent law-making while also satisfying (a), (b) and (c) above?*

We believe that the responses we made to the questions above are broadly relevant in this context.

8. *Were the concerns and interests of different groups, in particular marginalised and disadvantaged groups, properly taken into account in the formulation and review of emergency powers? If not, how could this be improved in future public health emergencies?*

It is the view of the SPF that the regulations did not take account of such things. This is particularly true in respect of the poorer sections of our society who had the least opportunity to seek to mitigate the effects of enforced isolation, and who found themselves facing disproportionate police attention as a result.

We are strongly of the view this could have been mitigated by government being more willing to listen to practitioner voices from a range of disciplines prior to the passing of regulation (or amended regulation). There is no doubt in our mind that ministerial decision making was often reactive and lacked the vision, and the three weekly reviews created an atmosphere where something had to be seen to be happening – regardless of the efficacy of that “something.”

The SPF also observes that the financial interdependencies between the Scottish and the UK Governments limited the abilities of Scottish Ministers to seek to ameliorate some of the consequences of its regulations (or desired regulations).

Whilst we understand the rationale for the 28-day limit on affirmative procedure, it is arguable this (at least in the context of the Coronavirus regulations) was an impediment to proper consideration, scrutiny and oversight of regulation. We ask whether extending this timeframe to 35-days might provide some important breathing space to take place.

We agree that the use of such procedure was not always justified (and this links with our remarks in response to question 3(c)).

The creation of offences and enforcement powers

9. *Did the creation of new offences and the legal framework for enforcing these offences during the Covid-19 pandemic reflect Rule of Law values? If not, how could this be improved in future public health emergencies?*

The SPF distinguishes between the existence of law that is intended by design to apply to all citizens equally, and the practical enforcement of such laws when measured against the demographics of our populations.

If we look for example at the limitations on household mixing, and ability to take physical exercise. There can be little doubt that high density housing as well as

population density made it inevitable that reports of breaches of regulation (or often, guidance) saw the police concentrate resources and responses in such areas. There is no reason to believe that the more affluent sections of our suburban societies were more (or less) law abiding on such issues – but it is true that such communities did not receive the same level of police scrutiny.

Social intercourse over the garden hedge is easier than through a flat wall, and it should have been predictable that humans would crave social contact with others (even where the only viable means to do so inevitably meant breaking the law).

We would contend therefore that whilst the law was intended not to discriminate, it was not equitable in its effects.

10. *Do additional safeguards need to be put in place to ensure that the creation of new offences and the legal framework for enforcing these offences are compliant with human rights law?*

The SPF would contend this is probably a question best suited to legal professionals. We would however reinforce our views that in respect of the various coronavirus regulations, there were inherent conflicts with Human Rights. We would also contend that the absence of specific government guidance (for police forces) compounded the policing difficulties these conflicts created.

We would also suggest that once the incoherence of such conflicts presented themselves, (for example a mass gathering protest being permitted but a smaller gathering of people in the open air to enjoy music, not being) the police forces should have defaulted to high levels of tolerance for such “offending” actions.

11. *Is the use of fixed penalty notices and/or the Single Justice Procedure an appropriate and proportionate way of enforcing emergency public health restrictions? If not, how should emergency public health powers be enforced in the future?*

For the reasons previously stated, the SPF has longstanding reservations about the police use of FPNs. Such notices, by their very design deliver a standard uniform sanction for alleged offenders, regardless of their personal circumstances. As we have previously stated this has a disproportionate impact on those from the poorest sections of our society.

We once again highlight that the early days of the pandemic, which were dominated by guidance and not by legislation, saw exceptionally high levels of public compliance.

The use of FPNs may well have taken pressure off the court system but the placing of the police at the front and centre of an enforcement approach to a public health emergency has arguably caused considerable harm to police and public relationships.

The SPF concedes that there is an inevitability that enforcement will be required at some stage but is not clear there is evidence to support that a financial penalty had any impact on mitigating the prevalence of, or spread of the virus. Scotland recorded approximately 25,000 Coronavirus offences over the two years 19/20 – 21/22⁴. This is a remarkably low number of offences given the breaches encountered. It seems unlikely to us that the use of FPNs had any meaningful public health impact.

Divergences throughout the UK

12. *What were the key divergences in the legislative responses to the coronavirus pandemic in England, Wales, Scotland and Northern Ireland? What caused these divergences?*
13. *Did such divergences:*
 - a. *demonstrate best practice that could be instructive to the work of the Commission; or*
 - b. *impact upon the Rule of Law in ways that could be better managed in future public health emergencies?*

We have chosen to answer questions 12 and 13 together. Our response to question 6 is relevant here. The differences were in our view, simply down to pure raw politics.

The UK government was, if reports in the public domain are to be believed, largely libertarian in its philosophical approach to the pandemic. This was in stark contrast with the more authoritarian approach the Scottish Government pursued. We cannot see any way in which the partisan nature of politics could ever be discounted.

However, there is no doubt that the divergences caused a policing nightmare and led to a confused public. This was particularly true when it came to issues like mask wearing, or cross border travel.

The news reporting in traditional and new media often left the consumer with no detail over which part of the country was being talked about, when Coronavirus information was broadcast. The sheer volume of information to be consumed led to fatigue amongst many (including police officers).

Parliamentary scrutiny processes

14. *Did existing parliamentary scrutiny processes facilitate urgent law-making while enabling appropriate scrutiny of legislation made during the Covid-19 pandemic? If not, why?*
15. *Could parliamentary scrutiny processes be improved to facilitate urgent law-making while enabling appropriate scrutiny of legislation in future public health emergencies?*

⁴ <https://www.gov.scot/news/recorded-crime-in-scotland-2021-2022/>

16. *Do additional measures need to be taken to ensure that the UK and Scottish Parliaments, Welsh Senedd and/or Northern Ireland Assembly have appropriate oversight of the use of urgent procedures to enact secondary legislation in public health emergencies?*
17. *Were the UK and Scottish Parliaments, Welsh Senedd and/or Northern Ireland Assembly provided with sufficient information and evidence to properly scrutinise Government use of emergency powers during the Covid-19 pandemic? If not, how could this be improved in future public health emergencies?*
18. *How far did the four parliaments in the UK work together during Covid-19? Are there improvements that could be made in future public health emergencies?*

We have chosen to answer questions 14-18 together.

Our previous responses to the preceding questions all have relevance here. There is no doubt in our mind that those in the respective executives will argue their responses were proportionate given the unprecedented challenges they were facing.

We do not agree. For example, from a purely policing perspective we can find no evidence that specific occupational health risk factors for police officers were either known or sought. The nature of Henry VIII powers is such that legislation is in effect before scrutiny can be applied. Where such powers are used without even consulting key practitioners, this creates risks that the emergency laws themselves hinder the capacity to respond. A further example of this can be found when Scottish Ministers created offences for gatherings in homes, but did not give police officers a power of entry to deal with the offence.

We also consider it is next to impossible for a parliament to vote down any affirmative procedure as by that time new ways of working for the relevant provisions will already be in practical effect.

We also cannot accept that emergencies can effectively be open ended. There comes a point in any emergency where a new business as usual develops. As we have previously suggested, an extension of the 28-day time limit (before regulations fall) to 35-days should allow the ability for both backward looking scrutiny (of implemented regulations), as well as a forward consideration for proposed upcoming changes.

The Scottish Parliament has no second chamber, and whilst there is criticism of its committee structure, we would commend a similar approach to that we have suggested with a cross party, cross parliament civil emergencies committee. We would suggest that extending such committees on a cross jurisdictional basis should also be promoted. Whilst we recognise that not all nations of the UK will be in exactly the same impact point with any health emergency, we can think of no logical justification for each nation working in lock step with each other during a public health emergency.

The adaptation of parliamentary procedures

19. *How successful was the adaptation of parliamentary procedures in order to manage the meeting of the UK and Scottish Parliaments, Welsh Senedd and/or Northern Ireland Assembly throughout the Covid-19 pandemic and facilitate parliamentary oversight of executive action?*
20. *Could any improvements be made in future public health emergencies?*

The SPF has no view on questions 19 and 20.

The use of guidance vs. law

21. *When it is constitutionally appropriate to use guidance rather than law to respond to public health emergencies?*
22. *Was the right balance struck during the Covid-19 pandemic between the use of law and guidance to impose non-pharmaceutical interventions? If not, what could be improved in future public health emergencies?*
23. *How and when was public health guidance incorporated into law during the Covid-19 pandemic? Were any Rule of Law issues caused by this incorporation and, if so, how could these be addressed in future public health emergencies?*

We have chosen to answer questions 21-23 together.

We would once again highlight that compliance with Government guidance was at its highest when legislation was at its lowest. We won't rehearse the reasons for why this might have been the case, but this does demonstrate that if the message is clear enough, and the public is receptive, that legislation, or enforcement may not be necessary. We draw a parallel with the smoking ban. Whilst clearly that ban is backed up by legislation, public compliance is almost universal. We believe this is due to the ability to convince the public of the message.

We consider question 21 is constructed the wrong way around, and should ask when is it right to use law over guidance for public health emergencies. We recognise that for some provisions relating to businesses (and the ability to be compensated for loss) that legislation will always be necessary to some degree. In addition, we should ask whether the "criminalisation" of sections of our society had any material impact on the prevalence of, or spread of disease. We would ask the Commission to consider whether the only real offence that required to be established was one of failing to comply with a reasonable direction (to return home to a specified place) made by a constable.

Legal clarity

24. *Were the emergency public health laws governing the Covid-19 pandemic sufficiently clear and accessible? If not, how could this be improved in future public health emergencies?*

Unequivocally not. The absence of a permanently consolidated set of regulations was nothing short of disgraceful. Anyone wishing to attempt to understand the law in effect at any moment in time faced an incoherent maze of legislative revocations and additions to navigate. It was notable that prominent legal academics and practitioners of the law faced the same challenges.

These challenges were problematic for the public but were equally so for police officers. Legislation changes were notified to the police service with as little as an hours' notice to their coming into effect. The ability of the police service to develop briefings and guidance was therefore severely hindered. It was not uncommon for police officers to commence their shifts having taken their own view of new legislation purely from news and media reporting.

25. *How far did the use of Government guidance affect public understanding of restrictions imposed during the Covid-19 pandemic? Could improvements be made in future public health emergencies?*

We believe Government guidance was deliberately designed to imply the reach of the law, rather than state it. It will be for psychologists and academics to debate the legitimacy and effectiveness of such an approach but it did lead to public confusion.

It is important to clarify however that confusion arose primarily on a cross border basis (for example when citizens in Scotland took their information from a UK briefing) rather than within the devolved regions themselves. The reason for this was that guidance in almost all instances went beyond the law meaning that compliance with the guidance invariably meant compliance with the law.

Policing challenges however manifested themselves when the public would report non-compliance with guidance that did not amount to a breach of the law. This led to perceptions that law breaking was being tolerated and led to resentment in some parts of our communities.

26. *Are there any other matters that affected the clarity and accessibility of coronavirus legislation and guidance? Could improvements be made in future public health emergencies?*

The SPF has no view on this issue other than to observe that in a technological age, the absence of simple and engaging public health app or website was unforgivable. The constant need to click from link to link to find information meant people were often on the equivalent of a virtual hamster wheel in the pursuit of information.

International comparisons

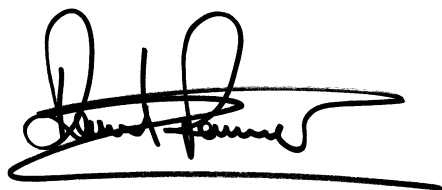
27. *Are there any examples of best practice from other jurisdictions that could be instructive for the work of the Commission?*

Whilst the SPF has information on different policing approaches in different parts of the world, we do not have any insight on the parliamentary processes utilised in different jurisdictions. We are aware however that the operational policing

challenges were almost universal and police officers feel they were largely abandoned despite being at the very front line of the public health emergency.

We trust you find this response is helpful to your deliberations.

Yours faithfully

A handwritten signature in black ink, appearing to read 'David Kennedy', with a long horizontal flourish extending to the right.

DAVID KENNEDY
General Secretary