

Martyn Evans
Chair
Scottish Police Authority
1 Pacific Quay
Glasgow
G51 1DZ

24 May 2021

Dear Martyn,

THE POLICING OF PROTEST AND ASSEMBLY IN A PANDEMIC

This letter is to update the Board in relation to recent IAG discussions around the still-topical issue of the policing of assembly and protest in a pandemic.

You and I spoke between the IAG meetings on 14 and 21 May when the group again discussed this issue in detail, discussion having been prompted by events in Glasgow this month. I agreed to submit this letter in time for the SPA Board meeting on 26 May.

Our last detailed report was submitted for the Board meeting in February, although, following discussion with you, we also sent a letter to the Cabinet Secretary for Justice on 22 March in relation to football-related events in Glasgow on 6 and 7 March. As with our reports to the Board, that letter has been published on the SPA website¹. Obviously we continue to liaise with the Authority through discussions in between meetings and SPA attendance at IAG and OpTICAL meetings. The Authority's continuing support of the work of the IAG through our ever-impressive secretariat also ensures that you remain sighted on all aspects of our work.

In view of the importance and continued topicality of issues around the policing of assembly and protest in a pandemic, the IAG decided, as we had in March

¹ <https://www.spa.police.uk/strategy-performance/independent-advisory-group-coronavirus-powers/iag-public-reports/>

following a request from the Chief Constable, to discuss matters over the course of two meetings – 14 and 21 May. Also as in March, we agreed to send you a letter after our meetings to offer our thoughts, views and advice.

EVENTS IN KENMURE STREET AND GEORGE SQUARE, GLASGOW

On 14 May, we heard in detail from IAG member, solicitor Aamer Anwar, who himself played a part in events in Kenmure Street on 13 May at the request of local elected members. Aamer offered his experience and views of those events and assisted us with discussion, with input also from ACC Gary Ritchie.

On 21 May, Chief Superintendent Mark Sutherland, Divisional Commander of Greater Glasgow, attended the IAG meeting once more to discuss the same events in Kenmure Street as well as what happened in Glasgow during the weekend of 15/16 May in relation to celebrations, vandalism and violence by supporters of Rangers Football Club.

Much of what was discussed with Chief Superintendent Sutherland at the IAG in March was relevant to discussions on 21 May. Chief Superintendent Sutherland confirmed that the pandemic and related regulations were considered, albeit, as matters developed, other considerations were prioritised. He reminded us of the Disorder Model, the assessment of risk and threat, the use of force principles (in effect, lawfulness, necessity and proportionality), the range of policing responses available, management of risk and safely minimising harm.

We discussed the similarities and differences between the events in Kenmure Street and George Square.

The former was spontaneous, with public safety (including all occupants and personnel in the immediate vicinity of the Immigration Enforcement van) the main priority. Chief Superintendent Sutherland did not say this but it appeared to the IAG that, even recognising that immigration enforcement is a reserved matter, the way the situation developed suggests a lack of appropriate planning and communication by the Home Office which served to exacerbate the situation.

Events at George Square on 15 May were similar to those in March, at least for a while. While the gathering of Rangers supporters on 15 May was allowed to continue for several hours, despite relatively low-level disturbance and

nuisance, when the behaviour of the crowd degenerated into significant aggression and violence, the policing response escalated.

There was enforcement on 15 May – 28 arrests were made and more are likely², although steps were taken to try to ensure that the crowd had the opportunity to disperse before more forceful action was taken.

COMMUNICATIONS

In all of our discussions, the importance of early and clear communications has been emphasised. It is also a key aspect of the policing of large gatherings. It is important that the public understands the general policing approach to be adopted. In our letter in March, we quoted from a report in 2009³:

A no surprises communication philosophy with protesters, the wider public and the media. Protesters and the public should be made aware of likely police action in order to make informed choices and decisions.

We went on to say:

Communications should allow policing decisions to be explained to the greatest extent possible. This will be important not only in advance of known gatherings but also afterwards. Clear and effective communications are important to assist in explaining the different policing approach taken in different situations which might otherwise be portrayed as inconsistencies, especially as comparisons with other events are a central part of many political, media and other narratives around the policing of assemblies.

There is recognition within Police Scotland of the power of media portrayal of police activity, and the scope for this to give misleading impressions. In relation to the extent of police presence in and near Kenmure Street on 13 May, photographs of numerous police vehicles may have given a misleading impression of the extent of officer numbers. Coronavirus considerations resulted in fewer officers in attendance than the number of vehicles would suggest.

² <https://www.scotland.police.uk/what-s-happening/news/2021/may/police-scotland-establishes-dedicated-team-and-online-portal-to-investigate-george-square-incidents/>

³ HMICFRS, *Adapting to Protest – Nurturing the British Model of Policing* (2009)

Some officers attended alone in vehicles that could accommodate several personnel. This might usefully have been the subject of communication to correct some media discussion and public concern.

We note the communications from Police Scotland before, during and after the events we have been discussing, for example, the statements regarding events at George Square on 15 May⁴. These appear to us to have been consistent with the philosophy of no surprises. Subsequent media appearances have also assisted in explaining the policing approach to the public. This allowed the public to see that difference is not the same as inconsistency. Not all have taken the same lesson from these events.

AFTERMATH – ANALYSIS AND COMPARISON

In the aftermath of both events, members of the public have expressed a range of views on the apparent tolerance of gatherings in Glasgow contrary to coronavirus regulations. Some have suggested that neither event should have been allowed to develop into a large gathering. That is to ignore the right of peaceful assembly which, especially outdoors, should be given considerable weight, even in a pandemic.

Some have compared the two events (many have mentioned earlier events as well in inevitable albeit often incomplete comparison) and suggested that Rangers supporters were treated differently than the Kenmure Street protestors. They are right but really only at a point when public order considerations required action to prevent serious injury and damage to property. In fact, serious injury was suffered by police officers and others on 15 May. That alone should be sufficient to distinguish the two events and explain the policing approach, despite attempts by some to indulge in “*whataboutery*”, including some politicians, who should know better.

⁴ <https://www.scotland.police.uk/what-s-happening/news/2021/may/police-scotland-statement-on-events-at-ibrox-stadium-and-george-square-glasgow/>; <https://www.scotland.police.uk/what-s-happening/news/2021/may/police-scotland-statement-regarding-george-square-glasgow/>; <https://www.scotland.police.uk/what-s-happening/news/2021/may/statement-from-chief-superintendent-mark-sutherland/>; <https://www.scotland.police.uk/what-s-happening/news/2021/may/statement-from-assistant-chief-constable-gary-ritchie-on-incidents-in-glasgow-on-saturday-15-may/>; <https://www.scotland.police.uk/what-s-happening/news/2021/may/police-scotland-establishes-dedicated-team-and-online-portal-to-investigate-george-square-incidents/>

Subsequent discussion of both events in the media, including new media, highlights some of the challenges for policing. Immigration (and associated enforcement) is a reserved matter. It is clear that there are differences of view as between the UK and Scottish Governments on how enforcement should be carried out and whether immigration should remain a reserved matter. Such differences of political opinion can create problems for Police Scotland. Operational independence and accountability cut across the reserved/devolved distinction but we have seen how policing decisions can be represented as demonstrating political or other sympathies. In turn, this may affect public confidence. Clear and accurate communications on police activity are not the exclusive responsibility of Police Scotland.

The policing approach to assemblies and protest cannot and should not be determined by public support or abhorrence for a particular group or cause, nor by how their decisions will be portrayed in the media. While there may have been little overlap between the participants in the two events, policing decisions are not driven by popularity. The similarities and differences in approach to the policing of both events have been explained to us in detail and the explanations make sense as well as demonstrating due regard to the relevant human rights considerations. The prioritisation of other policing considerations, in particular the physical safety of the public, over rigid enforcement of coronavirus restrictions made sense in the circumstances facing Police Scotland on both occasions.

HUMAN RIGHTS CONSIDERATIONS AND OPERATIONAL INDEPENDENCE

The same key considerations remained of significance in both events in Glasgow:

- rights to assembly and freedom of expression in terms of ECHR Articles 10 and 11 of the European Convention on Human Rights (BOTH)
- the fact that, even though the large numbers of people did not comprise a single group, this was not the policing of a clash of groups with the additional complications that arise in such situations (BOTH) – albeit events later on 15 May involved violence between what appeared to be groups of Rangers supporters
- the advantages of having the large numbers of people gathered in as few locations as possible (RANGERS)

- the fact that some of the people gathered in Kenmure Street and in and around George Square included women and children (BOTH)
- children (under the age of 18) have additional rights to freedoms of expression; thought, conscience and religion; privacy; association and peaceful protest, and protection from harm, in terms of UNCRC Articles 13, 14, 15, 16 and 19 of the United Nations Convention on the Rights of the Child. (BOTH).

At our meeting, Chief Superintendent Sutherland answered all questions from members of the IAG. We discussed the interplay of Articles 10 and 11 and coronavirus restrictions, noting that, even in a pandemic, blanket bans of assemblies conflict with these important rights and may be vulnerable to court challenge. We also discussed the rights of general members of the public to go about their lawful business, albeit noting that assembly and protest will generally involve at least some inconvenience.

Chief Superintendent Sutherland provided a full and clear explanation of his thinking on the relevant days, emphasising the operational independence of policing even when there is political interest but also acknowledging, indeed welcoming, the operational accountability that must accompany such independence.

His contribution reinforced our view that there is a good grasp within Police Scotland of relevant human rights law and principles. As we said in March, consistent consideration and application of these principles is crucial but will not always result in the same policing approach in every situation. The specific approach taken has to be informed also by a number of factors specific to the particular assemblies, protests or gatherings.

Key to understanding the right to freedom of assembly, and the policing response, is that the right relates to *peaceful* assembly and protest.

We quote again from the recently adopted **United Nations Human Rights Committee's General Comment No. 37 on Article 21 of the International Covenant on Civil and Political Rights – Right of peaceful assembly**⁵ which summarises some relevant principles:

⁵ <https://www.ohchr.org/EN/HRBodies/CCPR/Pages/GCArticle21.aspx>

6. *Article 21 of the Covenant protects peaceful assemblies wherever they take place: outdoors, indoors and online; in public and private spaces; or a combination thereof. Such assemblies may take many forms, including demonstrations, protests, meetings, processions, rallies, sit-ins, candlelit vigils and flash mobs. They are protected under article 21 whether they are stationary, such as pickets, or mobile, such as processions or marches.*

7. *In many cases, peaceful assemblies do not pursue controversial goals and cause little or no disruption. The aim might indeed be, for example, to commemorate a national day or **celebrate the outcome of a sporting event**. However, peaceful assemblies can sometimes be used to pursue contentious ideas or goals. Their scale or nature can cause disruption, for example of vehicular or pedestrian movement or economic activity. These consequences, whether intended or unintended, do not call into question the protection such assemblies enjoy. To the extent that an event may create such disruptions or risks, these must be managed within the framework of the Covenant.*

8. *The recognition of the right of peaceful assembly imposes a corresponding obligation on States parties to respect and ensure its exercise without discrimination. This requires States to allow such assemblies to take place without unwarranted interference and to facilitate the exercise of the right and to protect the participants. The second sentence of article 21 provides grounds for potential restrictions, but any such restrictions must be narrowly drawn. There are, in effect, limits on the restrictions that may be imposed...*

23. *The obligation to respect and ensure peaceful assemblies imposes negative and positive duties on States before, during and after assemblies. The negative duty entails that there be no unwarranted interference with peaceful assemblies. States are obliged, for example, not to prohibit, restrict, block, disperse or disrupt peaceful assemblies without compelling justification, nor to sanction participants or organizers without legitimate cause.*

The emphasis on peaceful assembly is obvious but the General Comment also reminds us of a number of important considerations, including the need for care in ensuring that peaceful assemblies and gatherings are facilitated – an important positive obligation on the State – even if the relevant cause or purpose is unpopular and causes disruption.

In our letter of March, we mentioned the recent report of the Joint Committee on Human Rights of the UK Parliament - *The Government response to covid-19: freedom of assembly and the right to protest*⁶. We pointed out that, while many of the criticisms in that report are specific to England and Wales, some are relevant also to Scotland. We suggested that more should be done by the Scottish Government to clarify the legal position with assemblies and protests, especially as we moved towards further easing of restrictions. This has been addressed in part in guidance published by the Scottish Government on 17 May - *Coronavirus (COVID-19): guidance on marches and parades*⁷. This seeks to clarify the position with marches and parades, bringing it more in line with procedures before the pandemic. The underpinning regulations have also been amended⁸.

Some of the communications and regulatory hints used to suggest that protest and assembly were banned due to the pandemic went too far. As a fundamental human right, the right to assembly/protest cannot be removed or eroded by implication in secondary legislation.

It is important to make this area of law as clear as possible, not least with COP 26 fast approaching in Glasgow, and to make sure that the relevant rights are as well understood and enjoyed as any legitimate restrictions.

CONCLUSION

Some political and media portrayal of events in Glasgow this month has used the differences in policing approaches to the different events to suggest bias on the part of police Scotland. Our work confirms us in our view that bias played no part in operational decisions. Public confidence and police legitimacy can nonetheless be impacted by such portrayals.

We are of the view that the overall approach to the policing of these events in Glasgow in May 2021 was informed by, and consistent with, relevant human rights principles and considerations, in particular, lawfulness, necessity and

⁶ <https://committees.parliament.uk/committee/93/human-rights-joint-committee/publications/>

⁷ <https://www.gov.scot/publications/coronavirus-covid-19-guidance-on-marches-and-parades/>

⁸ The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 23) Regulations 2021

proportionality. Different outcomes in the different events do not undermine that conclusion.

The best protection – both for the integrity of the rule of law, and for the protection of rights of every citizen in Scotland – lies in the operational independence of policing, and its ability to rise above media and political noise and make decisions based on the law and public safety. That operational independence may be an important point of constancy in a period of increasingly unsettled constitutional politics.

WORK OF THE IAG

As restrictions continue to be removed in large parts of the country – 17 May saw the latest regulatory easing, albeit with Glasgow remaining in Level 3 and additional domestic travel restrictions introduced⁹ – we have been discussing a winding-down of the work of the IAG following the submission of the additional data reports and associated analysis and advice. We are aware that transitions between different levels of restrictions can create issues for policing and that some measures, for example, quarantine (hotel and at home) may continue for longer than those which affect the general population. Accordingly, we will continue to liaise with you to determine the best time for us to end our exceptional human rights based addition to the ongoing statutory oversight of Police Scotland by the SPA.

I had hoped that we would be in a position to submit a more detailed report for the May Board meeting, to include more of Professor McVie's analysis of additional data but we have agreed at the IAG and OpTICAL Group that more time is needed to analyse, consider and discuss the data, to continue to cross-refer it to data from the Crown Office and Procurator Fiscal Service and the Scottish Courts and Tribunals Service, and to explore additional areas of context for the data.

⁹ The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 24) Regulations 2021

Meantime, Police Scotland continue to publish relevant data on a weekly basis¹⁰ as well as feeding data into the IAG on a weekly basis through reports discussed in the first instance at OpTICAL. The weekly reports to OpTICAL and the IAG continue to assist in providing assurance on questions of proportionality and prompt important discussions when there are changes in numbers over time. These reports allow us to track police interventions, for example, confirming the low number of forced entries and, despite increased activity at times, a relatively low and stable number of fixed penalty notices. This allows us to supplement SPA oversight on an ongoing basis, offering one aspect of the triangulation of sources of assurance mentioned at previous Board meetings.

Having regard to the data and other evidence and sources mentioned in previous reports, it remains our view that use of emergency powers by Police Scotland in general remains 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.

This continues to satisfy the primary role of the IAG in the Terms of Reference¹¹.

Yours sincerely

John Scott

¹⁰ <https://www.scotland.police.uk/about-us/covid-19-police-scotland-response/enforcement-and-response-data/>

¹¹ <https://www.spa.police.uk/spa-media/5gXHinni/tor-final-27-4-20.pdf>

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on Police Use of Temporary Powers Relating to the Coronavirus Crisis

John Scott QC Solicitor Advocate

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