

## **Paper to Independent Advisory Group Considering Police Scotland Use of Temporary Emergency Powers**

### **Human Rights Guide to Examining New Police Powers in Response to COVID-19**

**June 2020**

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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.

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## Introduction

1. The Scottish Human Rights Commission welcomes the commitment to safeguarding human rights outlined by the First Minister across the coronavirus response, especially the commitment to ensuring that any restrictions are justified, necessary and proportionate<sup>1</sup>. Given the broad powers that are being conferred on Ministers, and the very limited (pre-legislative) scrutiny that emergency legislation receives, it is vital that this commitment is accompanied by appropriate scrutiny and reporting by external and independent bodies.
2. We welcome the establishment by Police Scotland, Scottish Government and the Scottish Police Authority of an Independent Advisory Group to review Police Scotland's use of new temporary police powers in the current health emergency (IAG). The group chaired by John Scott QC will report directly to the Scottish Police Authority. The key aim of the Commission, as a part of the group, is to ensure that human rights standards are duly considered throughout the life of the emergency powers by Police Scotland.
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.
4. Police Scotland is given considerable powers to enforce restrictions on movement and gathering under the Health Protection

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<sup>1</sup> COVID-19 – A Framework for Decision Making, Scottish Government, March 2020. Available at: <https://www.gov.scot/binaries/content/documents/govscot/publications/strategy-plan/2020/04/coronavirus-COVID-19-framework-decision-making/documents/coronavirus-COVID-19-framework-decision-making/coronavirus-COVID-19-framework-decision-making/govscot%3Adocument/coronavirus-COVID-19-framework-decision-making.pdf>

Regulations,<sup>2</sup> which more are likely to impact particular groups, including those living in poverty forced to go out to make a living, disabled persons, homeless people, ethnic and religious minorities, LGBTI people, children in conflict with the law, 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. 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.

5. Police and other law enforcement measures should be guided by international human rights law and standards, in particular by the principles of:
  - the inherent respect for **human dignity**,
  - the principle of **legality**,
  - the principle of **necessity**,
  - the principle of **proportionality**,<sup>3</sup>
  - the principle of **precaution**,
  - the **rights of the detainees** in the provision of criminal justice, and
  - the principle of **non-discrimination**.
  
6. This guide outlines the human rights obligations and principles which must apply to police emergency powers, and will focus principally on the Human Rights Act 1998 (HRA) and the European Convention on Human Rights (ECHR). This paper aims to ensure that the analytical framework, the parameters of data collection and reporting by the Group cover compliance with the relevant human rights. It is hoped that members will find this reference paper a useful tool to scrutinise

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<sup>2</sup> Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020. The date of this review covers the law as of 25 May 2020.

<sup>3</sup> The proportionality concept does not apply to absolute rights such as Article 3.

the application of the new police powers and their potential impacts in Scotland. The paper is not an exhaustive list of human rights and is a work in progress due to the rapid changes in the current environment. The Guide focuses on the ECHR due to the enforceable nature of it in Scottish courts, and the significant time constraints in developing a full guide. A range of other international human rights treaties are also legally binding on public authorities in Scotland including the ICCPR, UNCAT, CRC, CRPD, CERD, and CEDAW. Reference to these and to other standards focused on COVID-19 are included in Annex 2. The Scottish Government is currently exploring how to add or incorporate some of these international treaties into Scots law.<sup>4</sup>

7. The first part of this guide is an overview of the key human rights that should be taken into account in relation to the use of the emergency police powers. This section also recommends a rights-based approach to be applied when using the new powers. The second part examines the new powers in relation to their impact on human rights. This part also devotes space to evidence gathering -to be completed by all. During the group discussions, Police Scotland has expressed an urgent need for real time advice and guidance on human rights. This guide is not intended to provide that advice but may offer a background for their strategic and operational decisions.

## Human Rights

8. The HRA, which incorporates the ECHR into UK law, sets out the fundamental civil and political rights and freedoms that everyone in the UK is entitled to, and makes it unlawful for a public authority to act in a way which is incompatible with Convention rights. A range of other international human rights treaties are also legally binding on public authorities in Scotland including those in Annex 2 (A). In

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<sup>4</sup> CYPCS is working on a separate framework for the IAG in relation to children and young people and the CRC.

addition, the Equality Act 2010<sup>5</sup> sets a number of general and specific duties for public sector organisations in relation to non-discrimination.<sup>6</sup> These obligations, together with human rights standards emerging from international organisations, human rights treaty bodies and special procedures provide a legal and practical framework for the police (and public authorities) in their use of the new emergency powers. We are going through an exceptional health emergency situation and even in this most difficult circumstance, the adherence to the rule of law in a democratic society should be unconditional.

9. The current health emergency adds new challenges to everyday policing, so it is also crucial to ensure that there is greater transparency and greater public participation, including with children and vulnerable people around the use of policing. It is vital Police take appropriate and heightened precautionary measures, and conduct context-based assessment of whether the use of force is necessary and proportionate. The public must have clear information as to what the police powers are and what is expected of them under the legislation and/or as a matter of public health guidance.<sup>7</sup> It is crucial the public understand the temporary nature of the restriction

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<sup>5</sup> Together with the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012; Equality Act 2010 (Specific Duties) (Scotland) Amendment Regulations 2015; and Equality Act 2010 (Specific Duties) (Scotland) Amendment Regulations 2016.

<sup>6</sup> We are not providing an Equalities framework tool with this document. EHRC is part of IAG and will provide advice on EA issues. There are a number of UK laws which are also relevant here for example General Data Protection Regulation, which covers the use of personal data. It is also important to note that a significant shift is taking place in the way government and private companies interact with each other. This is largely positive but present also challenges in terms of accountability and legitimacy. This is even more visible in the context of the current health emergency. For example on developing AI tools for policing and health purposes, vaccines, PPE and medical equipment, primarily due to technological developments and investment from private actors. However, very little attention has been paid to the issues of corporate responsibility. There is a legitimate public expectation that private actors (e.g. business enterprises dealing with the issues above) need to comply with all applicable laws and respect human rights. For more information see: UN Guiding Principles on Business and Human Rights.

<sup>7</sup> Measures relating to the pandemic also have a significant impact on other internationally protected rights such as the right to health (Article 12 International Covenant on Economic, Social and Cultural Rights), in terms of which States must ensure that goods and services related to health are available, accessible, acceptable and of good quality.

and police powers. The use of emergency powers by the police must be at all times consistent with the human rights framework (a list of international standards in relation to policing are included in Annex 2 to this document). Police Scotland already includes important human rights as part of their values.<sup>8</sup>

10. Another important point for Police Scotland is the manner in which it approaches policing. Every policy, training exercise and operational application of (new) powers and duties should begin with a consideration of the rights at issue. A human rights based approach to policing will ensure that the rights of individuals and society are fairly balanced and protected and that the state is complying with its legal obligations. A rights based approach is also a powerful tool for the Police in terms of capacity, ability and independence. Policing with a human rights based approach guarantees that it is not subject to the whim of politics or power but beholden to and protective of the rule of law. Public confidence in policing is more important than ever.

**Table 1. Key elements for a Human Rights Based Approach to policing.<sup>9</sup>**

<b>Participation</b>	Everyone has the right to participate in decisions which affect them. Participation must be active, free, and meaningful and give attention to issues of accessibility, including access to information in a form and a language which can be understood.
<b>Accountability</b>	Accountability requires effective monitoring of human rights standards. For accountability to be effective there must be appropriate laws, policies, administrative procedures and mechanisms of redress in order to secure human rights.

<sup>8</sup> See Police Code of Ethics: <https://www.scotland.police.uk/about-us/code-of-ethics-for-policing-in-scotland/>

<sup>9</sup> This framework can also be used for the collection of data.

<b>Non-discrimination and equality</b>	A human rights based approach means that all forms of discrimination must be prohibited, prevented and eliminated. It also requires the prioritisation of those in the most vulnerable situations who face the biggest barriers to realising their rights.
<b>Empowerment</b>	People should understand their rights, and be fully supported to participate in the development of policy and practices which affect their lives. People should be able to claim their rights where necessary.
<b>Legality</b>	The full range of legally protected human rights must be respected, protected and fulfilled. A human rights based approach requires the recognition of rights as legally enforceable entitlements, and is linked in to national and international human rights law.

11. For human rights protections to become practical and effective they must be monitored and reviewed. Data collection plays a useful and often essential role in creating effective human rights monitoring. Analysing data provides useful evidence for reviewing and improving operational responses by, for example, highlighting the perspective of victims and those in contact with the police. Independent monitoring mechanisms such as the IAG, NGOs, academics and NHRIs play a key role in this respect.

## **The European Convention on Human Rights**

### **Article 2 – The Obligation to Protect the Right to Life**

12. Article 2 safeguards the right to life and sets out the circumstances when deprivation of life may be justified.<sup>10</sup> This is one of the most

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<sup>10</sup> Article 2, see the Convention here: [https://www.echr.coe.int/Documents/Convention\\_ENG.pdf](https://www.echr.coe.int/Documents/Convention_ENG.pdf)



fundamental provisions in the Convention 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.<sup>11</sup> Article 2 also means that the police needs to take preventive measures to minimise the risk to life posed by their operations.<sup>12</sup> This is crucial as the Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020 (the Regulations) allow for the use of force in the exercise of the new powers. For example the Police need to 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 as well as an appropriate level of priority COVID-19 testing.

13. 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.<sup>13</sup> 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.

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<sup>11</sup> 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.

<sup>12</sup> 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.

<sup>13</sup> 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)).

14. 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 3, see below).<sup>14</sup>

- **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 - The Prohibition of Torture, Inhuman, Degrading Treatment or Punishment**

15. Article 3 is an absolute guarantee which enshrines one of the most fundamental values of democratic societies. Article 3 includes no exceptions or limitations and no derogation from it is permissible, even in the event of a public emergency.<sup>15</sup> As interpreted by the European Court of Human Rights, this provision involves not only obligations upon States to refrain from infliction of ill-treatment, but also positive duties to protect persons and to investigate effectively allegations of breach of this guarantee.<sup>16</sup> 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

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<sup>14</sup> Special Rapporteur on Extrajudicial, Summary or Arbitrary Killings COVID-19 POLICE AND MILITARY USE OF FORCE IN A STATE OF EMERGENCY. Available in Annex 1.

<sup>15</sup> *Chahal v the United Kingdom* (23 EHRR 413) 1996.

<sup>16</sup> 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.

as is necessary" to enforce any requirement or restriction imposed by the Regulations.

16. The use of lethal or potentially lethal force requires the exercise of restraint to minimise damage and injury as well as render assistance and medical aid at the earliest opportunity and notify relatives or other persons if a person has been injured (or killed).<sup>17</sup> 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)<sup>18</sup> 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 (Article 14).

17. 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 or child 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.<sup>19</sup>

## **Article 5 – The Right to Liberty and Security of person**

18. One of the most significant forms of interference with individual's rights is the police power to deprive an individual of her liberty. Article

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<sup>17</sup> Rehbock v Slovenia (App no 29462/95) ECHR 28 November 2000

<sup>18</sup> Engage, explain, encourage and enforce.

<sup>19</sup> Opuz v Turkey, (Application no. 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.

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.

19. 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. Therefore compliance with Article 5 guarantees is particularly important when implementing the Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020 and the UK Act. For example, prolonged police custody or delayed judicial review of deprivation of liberty could lead to violation of article 5. This Article is also fundamental for the application of any other police powers given to the police in response to Covid-19. Police officers are given significant amounts of discretionary powers in the legislation, which includes prohibition notices, pre-trial detention, physical removal of persons and fixed penalty notices. 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 and the Coronavirus Act 2020.

20. 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 (see annex 1 for the human rights standards). The European Committee for the Prevention of Torture, Inhuman or Degrading Treatment or Punishment (the CPT) considers that the period immediately after

deprivation of liberty is when an individual is most vulnerable.<sup>20</sup> This consideration is crucial as today more than ever communication with the outside world is significantly restricted.

21. 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.

22. 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.<sup>21</sup> 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 two-metre distancing, avoiding public transport or the wearing of face coverings in enclosed spaces is not based on 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.

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<sup>20</sup> 6th General Report [CPT/Inf (96) 21], paragraph 15.

<sup>21</sup> The lawfulness of any deprivation of liberty is tested both in respect of Scots 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.

- 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**

23. 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. 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, which seems to become a key element of the lockdown exit strategy, 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.

24. 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.<sup>22</sup>

## **Article 8 – Right to Respect for Private Life, Home and Correspondence**

25. Article 8 requires respect for private and family life, home and correspondence. These concepts are sometimes indistinguishable and cover the protection of the moral and physical integrity of the individual. Article 8 therefore encompasses a wide range of issues which are relevant for policing in the times of COVID-19. This includes police powers to charge parents and detain children under the Coronavirus Act 2020 as well as those related to surveillance technology. As Scotland/UK restarts the economy while containing the spread of COVID-19, track and trace technology will become one of the largest risks of the next phase of the pandemic response. The use of surveillance technology is by its nature intrusive.<sup>23</sup> If Police Scotland is going to use surveillance technology, for example use of drones, telecoms tracing or cyber and smart access, it is crucial that sufficient procedural safeguards and specification requirements are integrated, including diligent protection of the collected data, appropriate oversight over the use of the data, proportionality and

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<sup>22</sup> Article 13, which was not included into UK law by the HRA, still has an important relevance for police authorities as it provides that “Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

<sup>23</sup> See *S and Marper v the UK*, the European Court of Human Rights, which clarified some years ago 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.’

limited duration of the adopted measures, and transparency about data collection, analysis, storage and deletion.<sup>24</sup>

26. Article 8 is a qualified right, which means that any interference has to be justified:

- In accordance with the law: 'requires the impugned measure both to have some basis in domestic law and to be compatible with the rule of law. The law must thus be adequately accessible and foreseeable.
- In pursuit of a legitimate aim: the 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', and be,
- 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.

27. There are no explicit powers to search a person or premises under the Regulations. However, if this happens due to the use of general police powers or new extra powers the decision to carry out (a form of electronic) surveillance, this will give rise to an interference with Article 8. Technological solutions such as deployment of drones, facial recognition and phone contact tracing triage are being deployed around the world to support health data analysis as well as analyse people's movements.<sup>25</sup> While these applications such as the

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<sup>24</sup> 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 vs the UK*.

<sup>25</sup> The Scottish Government has set out plans to enhance existing contact tracing capacity across Scotland, and anticipate that up to 2,000 additional contact tracing staff will be required. The Digital Health and Care Institute are developing a secure web-based tool for the NHS in Scotland which will allow people to input details of those they have been in close contact with, and for these to be sent directly to contact tracing teams.



contact tracing app<sup>26</sup> can help prevent the spread of the virus, they can also have significant privacy and data protection issues.<sup>27</sup> It is important that contact tracing data is used for public health purposes only.

## Articles 9 to 11 – Democratic Freedoms

28. In the past months our lives have changed. The coronavirus disease and its response have 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.<sup>28</sup> These freedoms are fundamental to the existence of a democratic society, where views, ideas and information can be exchanged and peacefully discussed.

29. 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 Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020 and Coronavirus Act 2020. However, 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. These conditions are:

- (i) the interference must be in accordance with the law;
- (ii) it must be in pursuance of a legitimate aim;
- (iii) it must be temporary; and
- (iv) it must be necessary in a democratic society.

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<sup>26</sup> The app is already being rolled out on the Isle of Wight and is being developed by NHSX.

<sup>27</sup> Contact tracing apps have the potential to store a substantial amount of data around an individual's movements and social interactions, essentially creating a map of a person's private life. This data, if not properly regulated, could reveal a significant amount of detail about a person's private life and could be used in a number of ways. Although contact tracing apps are being developed in response to a public health crisis, it is not unforeseeable that data could be used for policing and immigration control.

<sup>28</sup> Freedom of religion (Article 9 of the ECHR), Freedom of expression (Article 10) and Freedom of Association (Article 11 of the ECHR).

30. There is significant case law of the European Court of Human Rights, making it clear that any decision to restrict the right to freedom of assembly must only be done in pursuance of a legitimate aim, on the basis of a lawful power and for reasons that are necessary in a democratic society. While courts will assess the circumstances for the interference, the police and other authorities are best placed to assess the feasibility of dealing with anticipated disorder in the current health emergency and take action in line with the principles above. In addition, there may be situations where the police are under a positive obligation to protect these freedoms from attack by others, including private individuals.<sup>29</sup>

#### **Article 14 - The Prohibition of Discrimination**

31. 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 forced to go out to make a living, disabled persons, homeless people, ethnic and religious minorities, LGBTI, children in conflict with the law, 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.

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<sup>29</sup> It is important to acknowledge that this will place great operational demands on the police.

32. Addressing increased vulnerability and the consecutive risks to life and dignity must be integrated in the design and implementation of emergency regulations and policing across Scotland. Any measures having the purpose or effect of creating a difference in treatment (based on a prohibited ground), which is not reasonably or objectively justified, will be discriminatory.<sup>30</sup> The UN Special Rapporteur on Extrajudicial, Summary and Arbitrary Killings has recommended appropriate and heightened precautionary measures and context-based assessment of whether the use of force is necessary and proportionate to ensure compliance with this principle.<sup>31</sup>

## **Equality law<sup>32</sup>**

33. The Equality Act 2010 makes it unlawful for service providers and those exercising a public function, including the police service, to do anything that constitutes discrimination, harassment or victimisation. The 9 protected characteristics under the Act include age, disability and race. Relevant forms of discrimination include: direct discrimination, indirect discrimination.<sup>33</sup> There is also a general duty on public bodies to have due regard to three 'needs' when exercising their public functions. These are to:

1. Eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Act.
2. Advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it.
3. Foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

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<sup>30</sup> Abdulaziz, Cabales and Balkandaliv The United Kingdom (Application nos. 9214/80; 9473/81 and 9474/81) May 1985.

<sup>31</sup> Guidance on the use of force by law enforcement personnel in time of COVID-19 emergency. United Nations Human Rights Special Procedures. Special Rapporteur on Extrajudicial, Summary or Arbitrary Killings. April 2020.

<sup>32</sup> We are not providing an Equalities framework tool in this document.

<sup>33</sup> Direct discrimination and indirect discrimination can only be justified if the person seeking to justify the discrimination can demonstrate that their action was a proportionate means of achieving a legitimate aim.

34. In Scotland additionally there are nine specific duties for listed public bodies to help them meet the general duty. They include assessing the impact of new or revised policies and practices on the needs of the general duty and reviewing existing policies and practices. More information can be found in the [Equality Act 2010 Code of Practice: services and public functions](#) and the [Technical Guidance on the Public Sector Equality Duty: Scotland](#)

## Human Rights Impact of the New Police Powers

35. The UK and Scottish Governments have now introduced separate pieces of legislation in order to reduce the spread of coronavirus.<sup>34</sup> In Scotland, restrictions are mainly imposed by the Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020. The Regulations impose restrictions and requirements upon the general population and are the means by which current social distancing measures are legally enforced.<sup>35</sup> The legislation contains a range of new, temporary, police powers. This section will identify the key human rights which are engaged by the use of these powers. This section examines the law as of the end of May.

36. This analysis does not cover the Coronavirus Act 2020, which covers additional law enforcement powers relating to the removal of potentially infectious persons for screening and assessment, to enforce a quarantine, retention of fingerprints and DNA profiles and arrest without a warrant. The measures introduced by the UK government raise a number of human rights concerns, in particular the police powers to isolate potentially infectious persons and enforce movement restrictions that interfere with Article 5 and Article 8 of the Convention. Restrictions on gatherings potentially pose a threat to democratic freedoms (Articles 9, 10 and 11) and there is also impacts on the right to peaceful enjoyment of property (Protocol 1, Article 1 to the ECHR).

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<sup>34</sup> Coronavirus Act 2020; Coronavirus (Scotland) Act 2020; Coronavirus (Scotland) (No.2) Act 2020

<sup>35</sup> Police Scotland has a '4Es' approach to the enforcement of the Regulations: officers should engage, explain, encourage and enforce it.

Fundamental rights	Police interference	Data required (to be completed by the AIG members)
<b>Right to life</b>	<p>Any use of lethal force by police in the context of the Health Protection Regulations or the Coronavirus Act 2020.</p> <p>A police officer may transmit or contract the corona virus or expose the public to it when they are approaching, engaging, arresting and detaining people.</p> <p>Regulation 7 (3b) Where a relevant person considers that a person is outside the place where they are living, the relevant person may remove that person to the place where they are living.</p>	
<b>Prohibition of ill treatment and punishment</b>	<p>Arrest and custody, for example questioning.</p> <p>Regulation 7 (1) and (3) provides that where a constable considers that a person is outside their home the constable may direct the person to return there, or remove the person there.</p>	<p><i>For example: any documentation showing that an individual had access to a lawyer and to a doctor.</i></p> <p><i>Notifications to third parties and family.</i></p>
<b>Right to liberty and security of person</b>	<p>Any formal arrest, restrictions of physical movement of a certain duration. There is no power of search for offences committed under the Health Protection Regulations or the Coronavirus Act 2020.</p> <p>Regulation 5(1) provides that during the emergency period, no person may leave "the place where</p>	

Fundamental rights	Police interference	Data required (to be completed by the AIG members)
	<p>they are living" except to the extent to which a "defence" would be available under regulation 8(4 and 5).</p> <p>The list is not exhaustive: a reasonable excuse is not confined to the specific activities set out in regulation 8(5).</p> <p>The Regulations extends the period during which a child can be placed in secure accommodation without an order.</p> <p>Part 2 of Schedule 3 amend the Social Work (Scotland) Act 1968, the Criminal Procedure (Scotland) Act 1995 and the Adults with Incapacity (Scotland) Act 2000 in relation to vulnerable adults.</p> <p>A police officer could also be considering or dealing offences using any other power in the exercise of their duty. e.g. those under the Anti-Social Behaviour Scotland Act 2004.</p>	
<p><b>Right to a fair trial</b></p>	<p>Any penalty based on criminal or administrative law, police investigations.</p> <p>A person who commits an offence under regulation 8 is liable on summary conviction to a fine not exceeding the statutory maximum.</p> <p>Regulation 9 provides that a constable may issue a fixed penalty notice to a person (over 16</p>	

Fundamental rights	Police interference	Data required (to be completed by the AIG members)
	<p>years) who s/he reasonably believes has committed an offence under the Regulations.</p> <p>It is an offence to obstruct a constable exercising any function under the Regulations. Regulation 8, a person who contravenes a direction given under regulation 7, or fails to comply with a reasonable instruction or a prohibition notice given by a relevant person under regulation 7, commits an offence.</p>	
<p><b>Right to private and family life, home and correspondence including data protection</b></p>	<p>There is no power of search of any person or place for offences committed under the Health Protection Regulations or the Coronavirus Act 2020. However, police officers can consider powers of entry under common law if required and existing legislation such as Section 54 of Civic Government (Scotland) Act 1982.</p> <p>A police officer may transmit or contract the corona virus or expose the public to it when they are approaching, engaging, arresting and detaining people.</p> <p>A police officer could also be considering or dealing with offences using any other power in the exercise of their duty. e.g. those under the Anti-Social Behaviour Scotland Act 2004.</p>	



Fundamental rights	Police interference	Data required (to be completed by the AIG members)
	<p>Under regulation 7(6) If a constable believes that a child is repeatedly failing to comply with the restriction in regulation 5(1), the parent or person responsible for the child may directed to secure, so far as reasonably practicable, that the child complies with that restriction.</p> <p>Child assessment orders, child protection orders and compulsory supervision orders. In particular, the regulation increases the periods of time such measures can be in place for and when they are to be reviewed</p> <p>Regulation 8, a person who contravenes a direction given under regulation 7, or fails to comply with a reasonable instruction or a prohibition notice given by a relevant person under regulation 7, commits an offence.</p> <p>Stop and search, video or communication surveillance (drones, face recognition and tracing app), use of biometric data to profile potential suspects, identity check, search of private premises and processing of personal data, data mining</p>	
<p><b>Right to freedom of Religion, Expression, Association and Assembly</b></p>	<p>Regulation 6 provides, subject to exceptions, that no person may participate in a gathering of more than two people in a public place.</p>	

Fundamental rights	Police interference	Data required (to be completed by the AIG members)
	<p>Regulation 7(9) provides that where a constable considers that three or more people are gathered in contravention of regulation 6, s/he may direct the gathering to disperse, direct any person in the gathering to return home, or remove any person in the gathering to their home.</p> <p>Regulation 8(5) lists numerous activities which would amount to a reasonable excuse for leaving one's home or participating in a gathering of more than two.</p> <p>Powers to enforce two meter distancing rules (guidance rather than law), including in the work place, police powers to isolate potentially infectious persons and enforce movement restrictions may interfere with these rights.</p> <p>Ban or dissolving demonstrations by police.</p> <p>Part 2 of Schedule 6 relates to Freedom of Information and amends the Freedom of Information (Scotland) Act 2002, which may impact police FOIs. (this change will be removed by the new legislation).</p>	

**Annex 1. The European Convention on Human Rights**

## Annex 2. International Human Rights Standards

### A. Applicable treaties

Instrument	Date	Date of ratification by the United Kingdom	Into force
ECHR European Convention for the Protection of Human Rights and Fundamental Freedoms	4 November 1950	8 March 1951	3 September 1953
ICCPR International Covenant on Civil and Political Rights	16 December 1966	20 of August 1976	23 March 1976
CEDAW Convention on the Elimination of All Forms of Discrimination Against Women	18 December 1979		
CAT UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment	December 1984	7 January 1989	26 June 1987
CERD UN Convention on the Elimination of All Forms of Racial Discrimination	21 December 1965		
CRC UN Convention on the Rights of the Child CRC	20 November 1989	15 January 1992	2 September 1990
UN CRPD The Convention on the Rights of Persons with Disabilities	13 December 2006		

## B. Relevant non-binding standards published by human rights bodies in response to COVID-19

Body	Title of publication	Date of publication	Themes relevant to policing or detention
UN Secretary General	<a href="#">‘We are all in this together’</a> Human Rights Policy Paper	24 April 2020	<ul style="list-style-type: none"> <li>• The role of law enforcement in fighting the disease and protecting population.</li> <li>• Ensuring law enforcement is maintained to protect the most vulnerable</li> <li>• Ensuring heavy-handed security responses do not undermine health responses</li> <li>• Misuse of COVID-19 directives to target minority groups</li> <li>• Restrictions on freedom of movement</li> <li>• Treatment of racial, ethnic and religious minorities</li> </ul>
Office of the High Commissioner for Human Rights	<a href="#">COVID-19 Guidance</a>	March 2020- updated regularly	<ul style="list-style-type: none"> <li>• Emergency measures- powers only to be used for legitimate public health goals</li> <li>• Rights which cannot be restricted, even in state of emergency</li> <li>• People in detention and institutions</li> <li>• Countering rise of xenophobia and racism</li> <li>• Privacy</li> <li>• Trafficking</li> </ul>
Joint Treaty Body Statement	<a href="#">Statement</a> in response to COVID-19	24 March 2020	<ul style="list-style-type: none"> <li>• Protecting against racism and xenophobia</li> <li>• Restrictions relating to freedom of movement, peaceful assembly and</li> </ul>

Body	Title of publication	Date of publication	Themes relevant to policing or detention
			privacy must be undertaken on with valid legal framework-exceptional, temporary and strictly necessary and justified
Committee on Economic, Social and Cultural Rights	<a href="#">Statement on the coronavirus disease (COVID-19) pandemic and economic, social and cultural rights</a>	7 April 2020	<ul style="list-style-type: none"> <li>• Need for law enforcement officials to respond to cases of domestic violence and that access to justice is available.</li> </ul>
Committee on the Rights of the Child	<a href="#">Statement</a>	8 April 2020	<ul style="list-style-type: none"> <li>• Protection of vulnerable children whose vulnerability increased by the exceptional circumstances- including children deprived of their liberty or confined in police lock-up facilities, prisons, secure care etc.</li> <li>• Release of children from all forms of detention where possible and provision with means of regular contact to families for those that cannot be released</li> <li>• Preventing arrest and detention of children violating state guidance relating to COVID-19</li> </ul>
UN Sub-Committee on the Prevention of Torture	<a href="#">Advice to States Parties and National Preventive Mechanisms relating to the</a>	25 March 2020	<ul style="list-style-type: none"> <li>• Prohibition of torture, cruel and inhuman or degrading treatment or punishment cannot be derogated from, even during exceptional</li> </ul>

Body	Title of publication	Date of publication	Themes relevant to policing or detention
	<a href="#">Coronavirus Pandemic</a>  Advice on compulsory quarantine for COVID-19	31 March 2020	circumstances and emergencies. <ul style="list-style-type: none"> <li>It confirms that places of quarantine fall within the visiting mandate of the NPM, although access may be restricted temporarily for strictly limited reasons and not on the basis that it is a place of quarantine.</li> </ul> It also highlights that quarantine should not result in ill-treatment of those detained
Council of Europe Secretary General	<a href="#">Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis: A toolkit for member states</a>	7 April 2020	<ul style="list-style-type: none"> <li>Police detention</li> <li>Prolonged police custody or delayed judicial review of deprivation of liberty could lead to violation of article 5.</li> <li>Privacy and data protection</li> <li>Protection from crime and protecting victims of crime e.g. domestic violence, trafficking, sexual abuse</li> <li>Cyber Crime</li> </ul>
Commissioner for human rights at the Council of Europe	<a href="#">Privacy</a> in relation to COVID-19 measures	1 May 2020	<ul style="list-style-type: none"> <li>Privacy- use of technology to monitor citizens</li> <li>Human rights compliant surveillance- adequate legal safeguards and independent supervision</li> </ul>
European Committee for the Prevention	<a href="#">Statement of principles relating to the</a>	20 March 2020	<ul style="list-style-type: none"> <li>legal basis for restrictive measures</li> <li>Fundamental safeguards against ill-</li> </ul>

Body	Title of publication	Date of publication	Themes relevant to policing or detention
of Torture (CPT)	<a href="#">treatment of persons deprived of their liberty in the context of the coronavirus disease (COVID-19) pandemic</a>		treatment of persons in custody must be upheld
Fundamental Rights Agency (FRA)	<a href="#">Coronavirus pandemic in the EU: Fundamental Rights Implications</a>	11 May 2020	<p>Comparison of different measures adopted by EU member states, including:</p> <ul style="list-style-type: none"> <li>• Enforcement and penalties for those not complying with emergency measures- financial sanctions and custodial sentences</li> <li>• Women and children at risk of domestic violence- police powers to deal with this</li> <li>• Discrimination and racist/ xenophobic incidents</li> <li>• Impact on people in detention</li> </ul>
Special Procedures Mandate Holders	<a href="#">Statement</a>	17 April 2020	<ul style="list-style-type: none"> <li>• Reminder of Non-derogation of Article 3</li> <li>• Calls on law-enforcement agencies to use force only when strictly necessary and lethal force only to be used to protect against imminent risk to life.</li> <li>• Breaking curfew or restrictions of freedom of movement should not result in use of excessive force</li> </ul>



Body	Title of publication	Date of publication	Themes relevant to policing or detention
			<ul style="list-style-type: none"> <li>• police interactions with public may represent additional source of risk infection due to high numbers of COVID-19 reported amongst police officers.</li> </ul>
Special Rapporteur on Extra-judicial, Summary or Arbitrary Executions	<a href="#">Guidance on the use of force by law-enforcement personnel in time of COVID-19 emergency</a>	2 April 2020	<ul style="list-style-type: none"> <li>• States of emergency are exceptional; their duration should be strictly limited</li> <li>• The right to life is non-derogable</li> <li>• Law-enforcement measures should be guided by the principles of legality, necessity, proportion, precaution and non-discrimination.</li> <li>• Vulnerable groups – such as the poor, migrant workers, the homeless – are already affected disproportionately by the virus. They should not be rendered victimized further because of state of emergency measures. Police must take appropriate and heightened precautionary measures, and conduct context-based assessment of whether the use of force is necessary and proportionate</li> <li>• Discussion, instruction, consultation and community engagement – these should be the operating principles for the police</li> </ul>

Body	Title of publication	Date of publication	Themes relevant to policing or detention
Special Rapporteur on the right to freedoms of peaceful assembly and association	<a href="#">Statement</a>	14 April 2020	<ul style="list-style-type: none"> <li>• States response to COVID-19 should not halt freedom of assembly and association</li> <li>• Ensuring public health emergency is not used as pretext for rights infringements</li> <li>• No justification for excessive use of force to be used for dispersing assemblies or for disproportionate penalties to be imposed.</li> </ul>
Special Rapporteur on the independence of judges and lawyers	<a href="#">Seven key guidelines</a> to ensure judges, justice workers, prosecutors and lawyers maintain functioning judicial systems.	22 April	<ul style="list-style-type: none"> <li>• Matters oriented to protect rights, when serious crimes are committed (including corruption connected to this crisis) and cases of domestic violence should receive prior attention and space</li> <li>• Innovation around reporting of abuses</li> </ul>