

Witness Name: Professor Susan McVie

Statement No.:1

Exhibits:

Dated: 12 December 2023

UK COVID-19 INQUIRY

WITNESS STATEMENT OF [PROFESSOR SUSAN MCVIE]

I, [Susan McVie], will say as follows: -

A. Background

1. Please provide details about your academic qualifications and professional experience.

1.1. I have an MSc in Legal Studies (Criminology) (1992) from the University of Edinburgh; and a BSc (First Class) in Biological Sciences (1991) and an HNC in Secretarial Studies and Languages (1987) from Edinburgh Napier University.

1.2. Since 2010, I have been Professor of Quantitative Criminology in the School of Law at the University of Edinburgh. Prior to this, I was a Research Fellow, then Senior Research Fellow in the Criminology Branch of the Central Research Unit in the Scottish Office (now Scottish Government) between 1992 and 1997; and then a Senior Research Fellow in the Law School at the University of Edinburgh from 1998 before taking up my Chair in 2010.

1.3. With over 25 years of experience in academia, I am an internationally renowned and respected scholar with many publications in various fields of criminology, including:

policing policy and practice; youth crime and juvenile justice; gang violence and knife crime; crime trends and patterns; and criminal careers and life course criminology. I specialise in empirical research (mainly using advanced quantitative statistical methods) and have secured around £40m in research grants from a wide variety of funders. I have played a leading role in the establishment and long-term sustainability of several major investments, including the Edinburgh Study of Youth Transitions and Crime (founded 1998), the Scottish Centre for Crime and Justice Research (founded 2006), the Applied Quantitative Methods Network (founded 2009), the Administrative Data Research Centre in Scotland (founded 2013) and the Understanding Inequalities project (founded 2017). I have won several prestigious prizes for research impact, most recently the Economic and Social Research Council award for Outstanding Public Policy Impact (2019). I have also been involved in many advisory committees for governments in Scotland, the wider UK, and internationally. This includes membership of two prior Independent Advisory Groups on Scottish policing (on stop and search, and police use of biometric data).

1.4. Of specific relevance to this Covid-19 Inquiry, I was a member of the Independent Advisory Group (IAG) on Police Use of Temporary Powers related to the Coronavirus Crisis in Scotland from its inception in April 2020 until it ended in May 2022. I was also the grant-holder and principal investigator for a UKRI funded research project titled 'Policing the Pandemic in Scotland', and a consultant to the National Police Chiefs Council on police use of enforcement in England and Wales.

2. Please explain the role of the Independent Advisory Group (IAG) on Police Use of Temporary Powers related to the Coronavirus Crisis in Scotland established by Police Scotland and the Scottish Police Authority in April 2020.

2.1. The Independent Advisory Group (IAG) on Police Use of Temporary Powers related to the Coronavirus Crisis in Scotland was established by the Scottish Police Authority (SPA), at the request of the Chief Constable of Police Scotland (PS), in April 2020. According to an announcement released by the SPA at the inception of the IAG, the purpose of the group was "to establish additional measures for scrutiny of this 'public health policing', involving all aspects of engagement with the public, but also including the use of the powers. This would serve to reassure the public that the temporary powers of enforcement were being used appropriately, and only as a last resort" (SMV/1 - INQ000369769). The then Chief Executive of the SPA appointed leading human rights lawyer John Scott QC (now Lord Scott) to Chair the

IAG and select a group of individuals who could provide oversight of the police use of the new powers conferred by the Coronavirus Act 2020. In addition to myself, the membership included representatives from the SPA, PS, HM Inspectorate of Constabulary in Scotland, Crown Office and Procurator Fiscal Service, Public Health Scotland, Scotland's Children's Commissioner, Scottish Disability Alliance, Scottish Human Rights Commission, Equalities and Human Rights Commission, Police Scotland's National Independent Strategic Advisory Group (NISAG) and Amar Anwar KC. The IAG had dedicated secretariate from the SPA and was supported by a team of officers from Police Scotland, known as the Operation Talla Information Collation, Assurance and Liaison (OpTICAL) Group.

- 2.2. Members of the IAG met at least once a week from April 2020 until August 2021, and then on a less frequent basis until it was formally ended by Lord Scott in May 2022, by which point the majority of restrictions had ended. The IAG received regular verbal updates from senior police officers (at Deputy Chief Constable, Assistant Chief Constable, and Chief Superintendent level) on the challenges facing supervisory and frontline police officers during this period. It also reviewed data on policing activities, including police use of enforcement, and received regular reports in relation to particularly complex aspects of the government legislation (e.g. the policing response to quarantine regulations, local levels and cross-border restrictions). It reviewed regular data reports, showing trends in police use of enforcement, examining geographical variation in policing, and reviewing the characteristics of those who were issued with Covid Fixed Penalty Notices (FPNs).
- 2.3. Other relevant evidence was gathered on behalf of the IAG, including a series of public surveys commissioned by the SPA, information gathered via an online CitizenSpace portal designed to elicit personal experiences of members of the public having contact with the police, and the results of national studies of compliance behaviour. The IAG also invited contributions from those involved in advising government on the regulatory framework and use of public guidance, including policing advisors to the UK Government's SAGE Committee and behavioural scientists advising Scottish Government.
- 2.4. The Chair of the IAG reported back to the SPA by means of eight formal reports to the SPA Board, and members of the IAG presented to the SPA Board at several online meetings, to apprise members on how policing had been impacted and giving the views of the IAG on police performance.

3. Please explain your role with the IAG.

3.1. I joined the IAG at its inception, following a formal invitation from the then Chief Executive of the SPA. Initially, I had no specific remit; however, as the only academic member of the IAG, I gradually took on the role of amassing evidence and advising on research which could help to inform policing practice, and examine police use of their new powers from an empirical perspective. Police Scotland had created an internal data collection system, known as the Coronavirus Intervention System (CVS), and frontline officers were asked to record information about their encounters with members of the public on a daily basis. This generated significant data, which I used to produce regular reports for the IAG. Police Scotland also created a database containing information on all of the FPNs issued during the pandemic (which was initially done manually using paper tickets, as it took some time to transform the existing FPN data recording system).

3.2. I took responsibility for analysing the FPN data on a regular basis and produced frequent (often weekly) reports on changing trends and patterns in police use of enforcement during different phases of the pandemic. The majority of reports were for IAG use only; however, seven detailed data reports were attached as appendices to the formal reports submitted by the IAG Chair to the SPA Board. The data reports were also published in the public domain (via a University of Edinburgh website). In addition, I provided regular updates to the IAG on other relevant published research, helped to design the CitizenSpace portal, invited selected guests to speak to the IAG, and represented the IAG at meetings of the SPA Board and a range of other online events (including two roundtables held to discuss various issues relating to policing during the pandemic).

3.3. On the strength of the work I had undertaken for the IAG, and with the SPA and Police Scotland's express permission, I applied for funding under the UKRI Covid-19 Rapid Response funding scheme and was awarded a research grant to conduct further academic study into policing during the pandemic. The project, titled Policing the Pandemic in Scotland (PPS), involved further analysis of the FPN data collected by PS (including linkage to health and other data), interviews with members of PS, and interviews with members of the public who had received FPNs. In recognition of my work in Scotland, I was also awarded a consultancy contract from the National Police Chiefs' Council to analyse the FPN data for all 43 police forces in England and Wales.

4. Please set out the general remit and main findings of any reports, articles or papers you have published about the response of the Scottish and/or UK Government to the Covid-19 pandemic.

4.1. The remit of the reports published in relation to the work of the IAG was to provide transparency around policing practice and raise awareness amongst stakeholder and public audiences about police use of the new powers of enforcement. The following key findings are based on the contents of IAG data reports plus additional research conducted by the Policing the Pandemic in Scotland project team. This includes reports titled 'Police Use of Covid-19 Fixed Penalty Notices in Scotland: Trends in enforcement from March 2020 to May 2021' (SMV/2 - INQ000369770), Policing the Pandemic in England and Wales: Police use of Fixed Penalty Notices from 27 March 2020 to 31 May 2021' (SMV/3 - INQ000369771), and 'Payment Outcomes of Police Fixed Penalty Notices registered by the Scottish Courts and Tribunal Service during the Coronavirus Pandemic' (SMV/4 - INQ000369772). Some information from wider studies is also included to provide context. This represents a broad snapshot of the research, for which more detailed information can be requested.

4.2. **Overall, Police Scotland largely followed the Four Es guidance issued by the College of Policing.** Analysis of the CVS data shows that only an estimated 12% of encounters with the public during the pandemic resulted in the issue of an FPN or an arrest. It is not possible to compare this with other police forces in the UK as data on public encounters were not routinely collected.

4.3. Police use of enforcement in Scotland spiked during the first few weeks of lockdown in April 2021 and remained high, albeit declining, during May 2021. Data analysis suggests that those who were fined during this period were disproportionately likely to be living in areas of high deprivation and the majority were already known to the police. Interviews conducted with police officers confirmed that those who were encountered breaching the regulations during the early stages of lockdown were often people they would have routine contact with, and might describe as 'usual suspects'. Analysis of linked police and health data shows that those who were fined during the first lockdown were significantly more likely to have had contact with health services in relation to underlying health vulnerabilities (such as mental health difficulties, alcohol dependency and/or drug addiction) compared to similar individuals who were not fined. Overall, therefore, **police enforcement during the**

first lockdown fell disproportionately on those who were likely to have been least able and/or willing to comply with the stay at home restrictions.

- 4.4. Young people (especially students) became a focus of policing in Scotland during September/October 2020 when the colleges and university re-opened. Significant police attention was focused on parties and social gatherings, and a substantial proportion of all enforcement took place in student accommodation during this period. Data suggests that students in Edinburgh and Glasgow were affected more than those in other Scottish cities.
- 4.5. Enforcement was most prevalent during the second lockdown in Scotland and the period of restrictions that followed, with well over half of all FPNs being issued between January and May 2021. **As a percentage of all encounters, enforcement went from representing around 4% in May 2020 to 37% in February 2021.** This coincided with a strengthening of police messaging around the importance of complying with the regulations. Trends in the use of FPNs in England and Wales were very similar to those in Scotland, which suggests that the temporal nature of the policing challenges were largely consistent across countries.
- 4.6. Trends in police use of enforcement in Scotland very closely mirrored trends in deaths during the pandemic until around the end of February 2021. **From around March to May 2021, deaths from Covid dropped markedly; however, police use of enforcement remained high in response to significant political and public concern about non-compliance with the regulations.** Senior police officers talked about frustration at the extent of blatant non-compliance and noted that frontline officers were taking a more 'muscular' response to breaches and moving more swiftly through the first three Es. **Frontline officers described a distinct shift over time in the profile of those they were issuing fines to, including more of those who might be defined as the 'unusual suspects'** (including people from professional backgrounds, those living in expensive houses and calls out to very affluent areas).
- 4.7. **There are some notable inequalities in terms of those who were issued with FPNs** (as estimated based on survey data on patterns of non-compliance within the population). Young people were most likely to be fined; however, this does accord with survey data that shows they were least likely to comply with the regulations. Men were more likely to be fined than women; although the gap in enforcement was

wider than expected based on sex differences in non-compliance observed in survey data.

- 4.8. **Ethnic disparity in police use of enforcement was evident across all police force areas in England, Wales and Scotland.** The difference in the rate per capita of fines issued to people from black or minority ethnic backgrounds, compared to the rate of fines issued to people from white backgrounds, ranged from 1.4 in Scotland to 8.4 in Cumbria. These disparities are not explainable by differences in non-compliance as measured by surveys. There is evidence that the disproportionate policing of people from black and minority ethnic backgrounds may have involved over-policing of individuals crossing police force area boundaries during periods of tiered restrictions.
- 4.9. **Around three quarters of those who received FPNs during the first lockdown in Scotland were already known to the police.** While there is no data source that indicates what proportion of the population is known on police systems, this figure is far higher than might be expected based on criminal convictions data. **The proportion of those receiving FPNs who were known to the police did decline after the first lockdown,** most probably as a result of an increase in non-compliance across the wider population.
- 4.10. **People living in areas of higher deprivation were disproportionately likely to be fined,** with high disparity rates compared to those living in areas of lowest deprivation observed across Scotland, England and Wales. However, disparities based on area deprivation did reduce markedly between the first lockdown and subsequent periods of lockdown/tightened restriction, especially in Scotland. It is not possible to verify these findings using survey results; however, surveys did show evidence of an increasing trend over time in non-compliance amongst those from more well-educated and higher income groups (which is consistent with the findings discussed above about the ‘unusual suspects’).
- 4.11. The majority of people who were fined during the pandemic received only one FPN; however, a minority of people received two or more FPNs, in which case the cost of each additional fine doubled. **Evidence suggests that repeat fining was particularly prevalent during the first few weeks of lockdown, when there may have been confusion amongst officers about how to apply the regulations.** Data on rescinding shows that many fines were withdrawn following review by senior

officers; however, evidence shows that **those living in more deprived areas and those with a prior police record were significantly more likely to receive multiple FPNs in Scotland.**

- 4.12. **Repeat fining may well have resulted in financial hardship for some recipients** (especially in England where fines were generally higher); however, evidence suggests that **those who received repeat fines were least likely to pay them.** It is uncertain how many of these individuals were, or still are being, pursued through the courts for payment.

B. Fixed Penalty Notices – generally

5. Do you consider that FPNs are an appropriate means of enforcing public health restrictions in an emergency?

- 5.1. There are three main reasons why the use of FPNs may be considered an appropriate means of enforcing public health restrictions in an emergency.
- 5.2. Firstly, police FPNs are an established part of the out-of-court-disposal (O OCD) landscape in the UK, most commonly used to deal with low level anti-social behaviour and motoring offences. They are a familiar and proportionate form of punishment that is typically set at a low cost, and are well understood and accepted by the public. From this perspective, **FPNs have an established level of legitimacy in the eyes of the public.**
- 5.3. Secondly, FPNs represent a 'light touch' disposal which does not result in a conviction or a criminal record and, in the context of the Coronavirus Regulations (which placed unprecedented restrictions on the public in terms of their day to day routines and behaviours), they were, therefore, preferable to other (more punitive) responses. From this perspective, **using FPNs minimised the potential for criminalising people who were unable or unwilling to comply.**
- 5.4. Thirdly, FPNs are typically issued by police officers 'on the spot' which makes them timeous and responsive. They involve a minimal administrative burden for both the police and the individual, and they are dealt with via routine administrative systems. From this perspective, **using FPNs as the main penalty during the pandemic**

helped to minimise the impact on other parts of the justice system and not increase prison numbers at a time of considerable turmoil.

- 5.5. Nevertheless, there are a number of considerations in relation to FPNs in general – and, specifically, in relation to the FPNs introduced under the Coronavirus legislation – that potentially reduced their applicability for enforcing the public health restrictions.
- 5.6. Firstly, FPNs are inherently inequitable, with uneven punishment effects that depend on income. For some people, the sanction will have been trivial (in interviews, police officers described Covid-FPNs as the ‘price of a party’ for those from more affluent backgrounds). Also, payment does not need to be met by the individual offender (the State is not interested in who pays the fine), which means that people with more social capital may have relied on others to pay it for them. However, for those with more limited means, even a small fine may have been felt as punitive, and they may have been less able to rely on others to help them to pay it. From this perspective, **the punishment effect of using FPNs did not have an equal impact on everyone.**
- 5.7. Secondly, whilst the inequitable punishment effect of FPNs is unavoidable (because the fine is fixed), it is generally limited by restricting FPNs to narrowly defined, objective set of offences, that involve minimal discretion on the part of the police. During the first lockdown, the ‘stay at home’ nature of the restrictions was clear and understandable; however, as the pandemic progressed, the Health Regulations began to include a much broader range of activities that were not always clearly articulated to the public and were subject to much wider discretionary application by the police. For example, police officers had considerable discretion to decide what constituted a ‘reasonable excuse’ which may not have been easily anticipated by members of the public. From this perspective, **issuing FPNs for a wide range of offences that were not always transparent to the public, and over which police officers had extensive discretion, was not in keeping with the rule of law.**
- 5.8. Thirdly, the cost of FPNs for anti-social behaviour (ASB-FPNs) is fixed at a modest amount, with no incremental punishment effect for repeated offences. Under the Health Regulations, each additional FPN doubled in value, thus incurring an incrementally large penalty for each new offence. In Scotland, the maximum value of an FPN that could be issued by the police was set by the Scottish Government at

£960 (for five offences); however, this was reduced to £480 (for four offences) under guidelines issued by the Lord Advocate. In Wales, the maximum FPN value was initially set at £120 (for two or more offences) but this was subsequently raised to £1,920 (for six offences); while in England, the maximum fine value was increased from £960 (for five offences) to £6,400 (for seven offences). Moreover, the minimum value of the FPNs remained constant at £60 in Scotland and Wales, whereas it increased to £200 in England. This means that **the Health Regulations introduced a new and very different model of issuing FPNs, that was far different to what might have been expected by the public. In addition, different fining structures were in place in different parts of the UK for ostensibly the same behaviours, which introduced geographical inequity in the effect of punishment.**

5.9. In the way that Covid FPNs were applied, unfair and inequitable outcomes could have been reasonably anticipated from the outset. It was for example, foreseeable that applying a penalty with baked-in inequity on such a scale would lead to unfairness, with some people struggling to pay fines, and others treating the sanction as a retrospective licence for the same behaviour. It was also predictable that compliance was likely to be more challenging for those from more deprived backgrounds, people living in cramped or inadequate housing without access to outdoor space, people already predisposed to commit crimes, and those with alcohol and/or drug dependencies, and mental health vulnerabilities, who would struggle to meet payment, especially in the event of receiving multiple fines. For these reasons, **the widespread use of a financial penalty, especially one with an incremental value structure, could be described as inappropriate.**

6. What are the advantages and disadvantages of using FPNs as a means of enforcement in a pandemic situation?

6.1. **For the government and criminal justice stakeholders, the advantage of using FPNs was that they were an established and expedient disposal,** already known to police officers, and familiar to the public. In oral evidence to the House of Commons Justice Committee, the then Justice Minister Mr Kit Malthouse, referred to familiarity, proportionality and efficiency:

6.2. “FPNs were, I think, selected because they are a known science. They are a familiar part of the landscape and are proportionate in terms of us dealing with human

behaviour. From speeding to dog fouling or littering, an FPN is an easy and quick way to make an enforcement point that we felt would be recognised and understood by the public... in terms of the familiarity of the public with the method, it seemed to be the best way." (SMV/5 - INQ000369773)

6.3. In respect of expediency, **FPNs usually involve a minimal administrative burden for police officers** as the majority of fines are issued on-the-spot via a mobile device. Therefore, it was anticipated that sanctions could be dealt with via routine administrative systems, and that relying on police issued FPNs would reduce the impact on other parts of the justice system.

6.4. In terms of disadvantages, however, **differences in the specification of the new Covid FPNs compared to existing legislation led to practical difficulties**. The initial fine value of Covid-FPNs was set at £60, compared to £40 for existing ASB-FPNs; furthermore, Covid FPN recipients were offered a 50% reduction if paid within 28 days, whereas, anti-social behaviour fines increase by 50% if not paid within 28 days. These (even slight) differences led to technical difficulties that were not favoured by justice organisations in Scotland, with the Scottish Courts and Tribunal Service warning that the new fining system 'may lead to the need for prosecutions' (see Section H, Q39b, email 1.4). Police IT systems were not set up to record and process the new fine amounts, which meant that frontline officers initially had to manually issue adapted paper tickets, adding a significant burden to police staff tasked with recording this information and passing it on to the SCTS. The SCTS also had problems with their administrative systems, and had to develop a number of manual work arounds. Discussions with senior NPCC officers suggest similar practical problems were faced by police forces and court services across the UK. While sympathetic, the perspective of Scottish civil servants was that 'Ministers... will want to follow England though' (Section H, Q39b, email 1.5).

6.5. For some members of the public, FPNs provided a 'lighter-touch' disposal insofar as contact with the criminal justice system was minimal (avoiding stigmatising effects), no criminal record was incurred, and the punishment was not intrusive. The main disadvantages related to the inherent inequity that underpins FPNs and unequal punishment effects, as outlined in section 5 above. In his oral evidence to the House of Commons Justice Committee, Mr Malthouse also stated:

- 6.6. "I think it is worth saying that the FPN system was designed to be relatively light touch. There is a big discount for early payment... A relatively small number per force were issued. I acknowledge that to quite a lot of our fellow citizens £100 is a lot of money, nevertheless it is not a huge sledgehammer of a penalty designed to encourage compliance." (SMV/5 - INQ000369773)
- 6.7. The underpinning inequity was further exacerbated by the incremental fining structure, the variation in fine values over time, and the increasingly divergent size of fines issued in different UK countries (as discussed in Section 5). More controversially, in August 2020 the UK government introduced £10,000 fines for organising gatherings of over 30 people in England. It is difficult to square the very large values of these police issued on the spot fines with principles of proportionality, cost limitation and 'light touch' justice.
- 6.8. It is worth noting that thousands of unpaid or contested cases have subsequently been prosecuted in England and Wales, despite the UK Government's stated intention not to criminalise breaches. In July 2023, the Guardian newspaper reported that "more than 28,000 people had been convicted of breaches of the Covid-19 regulations, despite the government's insistence that it never intended to criminalise people for minor infractions during the pandemic".
- 6.9. Section C provides further evidence on the unequal impact of enforcement across different demographic groups.
7. What are the alternative means of enforcing public health restrictions in a pandemic situation? What are your views on the appropriateness and effectiveness of those alternatives in a pandemic situation?
- 7.1. Prior to the pandemic, the use of FPNs among UK police forces had fallen away sharply. In Scotland, the number of ASB-FPNs issued fell by 91% between 2013/14 and 2021/22, from around 56,000 to just over 5,000 in 2021/22. Similarly, there was a 96% drop in the number of Penalty Notices for Disorder (a type of FPN for anti-social behaviour) issued in England and Wales between 2005 and 2022. In this respect, the decision to use FPNs in the pandemic ran counter to contemporaneous policing trends.

7.2. In Scotland, Recorded Police Warnings (RPWs) are now the most common criminal justice disposal. Warnings are used to respond to a wide range of low-level offending behaviours, including drug offences, shoplifting and minor assault. Scottish criminal proceedings data shows that in 2020/21 the use of RPWs outstripped all other court and non-court disposals. A similar shift to a cautions based out-of-court disposal (OOC) framework is also evident in England and Wales. For example, the Police, Crime, Sentencing and Courts Act 2022 provides for a largely caution-based OOC framework.

7.3. The vast majority of people who were fined for breaching the Health Regulations across Scotland, England and Wales received only one FPN. In such cases, it is highly likely that a formal warning would have been sufficient to prevent a further offence under the Health Regulations. Therefore, in a future pandemic situation, legislators should consider warnings as a potential response, as per the prevailing direction of policing. This is, however, with the very strong caveat that advance research is needed into the impact and limitations of these sanctions. Whilst warnings and cautions are widely used across the UK, we are not aware of any evaluative research on their use.

7.4. For those who were fined more than once, the evidence suggests that many of them struggled to comply with the stay at home restrictions for a range of reasons relating to underlying poverty or vulnerability. Unfortunately, in the absence of community-based services, these individuals would have been more visible to police officers. It is questionable how appropriate or effective it was to issue these individuals with fines (especially multiple fines) which were unlikely to be paid and, therefore, may have resulted in court proceedings. Greater efforts should have been made to support these individuals to comply, rather than punish them for not complying.

7.5. For those who bluntly refused to follow the rules, and had no mitigating circumstances for doing so, the use of FPNs was a proportionate response, albeit it is unknown how effective they were in terms of deterrence.

C. Fixed Penalty Notices - Covid-19 pandemic in Scotland (Data to add)

8. What was the rationale for the use of FPNs as a means of enforcing public health restrictions during the Covid-19 pandemic in Scotland?

- 8.1. There is no publicly available formal documentation that clearly sets out the rationale for choosing FPNs to help secure compliance with the Regulations, or the decision to introduce an incremental fining structure, in Scotland or any other part of the UK.
- 8.2. Internal Scottish Government correspondence (shown in Section H, Q.39, emails 1.1 and 1.5) suggests that Scottish Ministers took the lead from the UK Government on offences and fixed penalties. Email 2.1 shows that Police Scotland welcomed the proposed use of FPNs. A Scottish Government Ministerial briefing noted that the UK Government wanted Scotland to introduce the same incremental fining structure (email 2.5), but no explanation was given as to why this model was chosen.
- 8.3. There is no available evidence to suggest that Scottish or UK law-makers gave consideration to equality issues in respect of the decision to use fixed penalties. In Scotland, Equality Impact Assessments published for the Coronavirus (Scotland) Bill (SMV/6 - INQ000369774) and the Health Protection (Coronavirus) (Restrictions and Requirements) (Scotland) Regulations 2020 (SMV/7 - INQ000369775) made no reference to the new policing powers or police use of enforcement. Nor can we find evidence that retrospective Equality Impact Assessments considered this issue. The cross-national legislative harmony suggests that no significant concerns were raised at the early stages of the pandemic (although we cannot evidence this).
- 8.4. Retrospective accounts of government decision-making have tended to focus on deterrence rationales. For example, in relation to the £10,000 fines for organising gathering of more than thirty people, the UK Government told the Joint Committee on Human Rights (2021a: 34) “this FPN is intentionally high in order to act as a deterrent to anyone who might otherwise choose to organise a gathering that would significantly breach the gathering restriction limits’. In July 2023, the Home Office were reported in an article in The Times as stating that ‘Fixed penalty notices were a strong deterrent for the small minority of people who broke Covid rules. [They] allowed individuals to avoid conviction in exchange for a fee’.
- 8.5. It is important to note, however, that the research evidence on the deterrent effect of FPNs is minimal, and there have been no studies on the additional effect of police officers issuing such unusually large FPNs.

9. In your view, was the use of FPNs as a means of enforcing public health restrictions during the Covid-19 pandemic in Scotland a departure from the normal reasons for the use of FPNs (such as their “light touch” qualities)? If so, why?
- 9.1. The approach developed for the Covid FPNs was a clear departure from the normal model. As noted in section 5, FPNs are most suitable for clearly defined, objective offences that involve minimum discretion on the part of police officers. This was one of the main principles considered by parliament when FPNs were introduced under the Road Traffic and Road Improvements Act 1960, for parking and other minor traffic offences.
- 9.2. Whilst research on the use of FPNs is limited, there is evidence that the use of FPNs in some parts of Scotland had departed from the ‘light touch principle’ in the decades prior to the pandemic. In the early 2000s, both the UK and Scottish Governments extended the offences eligible for police FPNs, to include a range of lower-level anti-social behaviours, which allowed for more officer discretion. In Scotland, an evaluation of ASB-FPNs carried out by the Scottish Government found evidence of net-widening, with FPNs issued in situations that might previously not have resulted in a formal disposal. There is also evidence to suggest that the legacy Strathclyde police force increased the use of FPNs as part of an enforcement-based policing approach. In this respect, it is arguable that the use of FPNs in some areas had already departed from the lighter touch response intended by legislators in the 1960s.
- 9.3. Whilst these observations are historical, they illustrate how a simple light-touch disposal, when applied to more subjective offences, become more vulnerable to individual officer discretion and organisational pressures. In the context of the pandemic, this observation took on far greater salience, given the extraordinary breadth of the Regulations and the much larger size of the fines being issued, especially to repeat offenders and those involved in organising social gatherings. It is unlikely that many people would equate the term ‘light touch’ with a £10,000 fine.
10. Do you know whether any potential alternatives to FPNs were considered by decision-makers as a means of enforcing public health restrictions during the Covid-19 pandemic in Scotland? If so, do you know why such alternatives were not used as a means of enforcement?

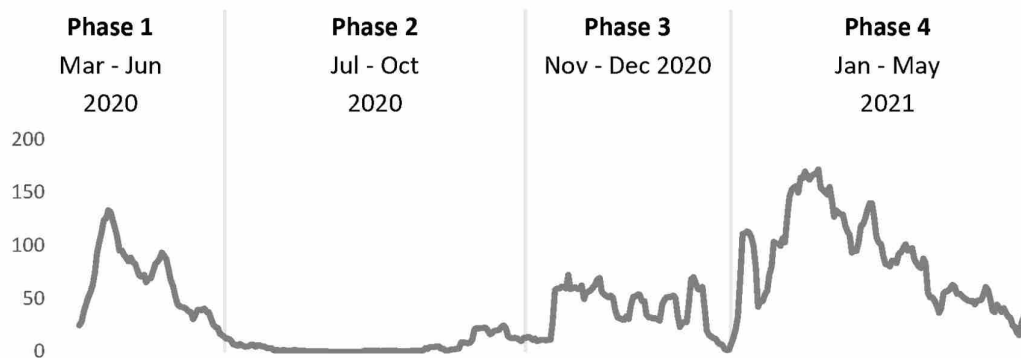
10.1. We are not aware that the Scottish Government or Police Scotland considered alternative enforcement mechanisms. As noted above, it appears the Scottish Government took its lead from the UK Government.

11. How prevalent was the use of FPNs as a means of enforcing public health restrictions during the Covid-19 pandemic in Scotland? Did the use of FPNs change over the course of the pandemic? If so, how? What particular trends has research shown?

11.1. Between March 2020 and May 2021, Police Scotland issued 20,410 Covid-19 FPNs.¹ This is three times higher than the number of FPNs issued for anti-social behaviour in the year prior to the pandemic. However, it is relatively small when compared with other types of policing activity; for example, the police in Scotland recorded just under 150,000 Covid-related encounters, and around 570,000 crimes and offences, over the same time period. Moreover, less than 0.5% of Scotland's adult population was fined which means that prevalence of enforcement was very low.

11.2. Figure 1 shows that the use of FPNs in Scotland varied over the course of the pandemic, increasing most during periods of tight restrictions. Looking at four broad phases of enforcement, around 22% of FPNs were issued during phase 1 which covered the first lockdown, while 59% of FPNs were issued during phase 4, which spanned from January to May 2021 and included the second lockdown.

Figure 1: Number of FPNs issued in Scotland during different phases of restriction



¹ The data used to respond to questions 11 to 17 can be found in SMV/2 - INQ000369770.

11.3. The trends in the police use of enforcement in Scotland mapped closely onto surges in the death rate, at least until the roll out of the vaccination programme which resulted in a marked drop in deaths in March 2021. After this point, there was a time lag before enforcement fell in a similar manner, which is most likely explained by ongoing public and political concern about the number of Covid cases and some degree of frustration at waning levels of compliance as a result of 'lockdown fatigue'. Overall, the data suggests that trends in policing activity were prompted by the spread of the disease, but it would be very difficult to tease out the impact (if any) that enforcement had on preventing its spread or saving lives.

12. What were the general characteristics of the FPNs issued during the Covid-19 pandemic in Scotland, including the value of the fines, the timing and locus of incidents resulting in enforcement?

12.1. In Scotland, fines of £60 were issued for a first offence (although this was reduced to £30 if paid within 28 days). In the case of repeated offences, the Regulations provided that five FPNs could be issued to the same individual, with the amount of the fine doubling each time up to a maximum of £960; however, this was reduced to £480 (for four fines) under guidelines issued by Scotland's Lord Advocate. Data from Police Scotland shows that, between March 2020 and May 2021, the vast majority (91.2%) of fines issued were for the lowest amount of £60, with the remaining 8.8% involving fines of £120 or more. Less than one in ten (6.9%) FPNs issued during this period were for the value of £120 and only 1.4% had a value of £240. Only 0.5% of all tickets were issued for the maximum amount of £480.

12.2. Policing activity tends to have very distinct temporal patterns which reflect changes in the nature of demand for police resources over the course of the day. When Scotland went into lockdown in March 2020, and the public were told to stay at home, this had a dramatic effect on patterns of policing activity. During phase 1, enforcement activity was highest in the late afternoon (5pm – 6pm) or around midnight. Whereas, in subsequent phases of the pandemic most FPNs were issued during the late evening and early morning hours (10pm – 3am), with very few being issued during afternoon hours. This changing temporal pattern of enforcement largely reflects a shift away from daytime policing of open spaces when people were told to stay at home, towards a 'night time economy' pattern of policing focused on

private places when the restrictions were more focused on preventing parties and social gatherings.

13. What were the personal characteristics of those who received FPNs during the Covid-19 pandemic in Scotland, such as sex, age, ethnicity, country of birth and home neighbourhood deprivation level? What particular trends has research shown?

13.1. **Age and sex:** Rates of FPNs were disproportionately high amongst younger people, especially men, compared to their population share. Just under three quarters (72.4%) were issued to people aged 30 or under, compared to 18.9% of the population, with recipients having a median age of 23 years. In addition, around two thirds of all FPNs were issued to men (67.4%), compared to 48.7% of the population. Nevertheless, the age profile for male and female FPN recipients was almost identical, with younger people being far more likely to receive fines. This fits with wider research evidence that compliance tended to be lower amongst young people².

13.2. The median age of FPN recipients was higher during the first lockdown than later phases. During phase one, around half (53.6%) of FPNs were issued to people up to age 30; however, during phase two this increased to over eight in ten FPNs (82.1%) and remained at around the same level (81.5%) during phase three, before reducing slightly in phase four (76.5%). Change over time in the proportion of FPNs issued to people in the youngest age group (16-20) is particularly noteworthy, as this more than doubled between phases one and two. A larger percentage of FPNs were issued to men than women during all four phases of the pandemic; however, the proportion of FPNs issued to women increased from 21.7% in phase 1 to 37.9% in phase 4. This is most likely as a result of the police responding to a growing number of parties or social gatherings involving mixed groups of males and females.

13.3. **Ethnicity:** The vast majority (92.3%) of FPNs issued in Scotland went to people from white (including white minorities) ethnic groups. This is slightly lower than the most recent population estimates, which show that 94.3% of the Scottish population is from white ethnic groups.³ The remaining 7.7% of FPNs were issued

² See Wright et al. (2021) Patterns of compliance with COVID-19 preventive behaviours: a latent class analysis of 20 000 UK adults. *Journal of Epidemiology and Community Health*, 76:247-253.

³ Population figures by ethnic group were based on estimates from the 2020 Annual Population Survey, provided on request by the National Records of Scotland.

to people from an ethnic minority group, although this reflects only around 0.01% of the Scottish population aged 18 and over. Taking population size into account, people from ethnic minority backgrounds were 1.4 times more likely to receive an FPN than those from white groups. Looking at specific groups, the ethnic disparity rate was highest for people from African, Black or Caribbean backgrounds (1.8) and lowest for those from Asian (1.3) or Other/Mixed/Multiple (1.2) ethnic groups.

13.4. Disparity in the rate of FPNs for ethnic minority groups, compared to those from white backgrounds, was highest during phase 2 (July to August 2020) and phase 4 (January to May 2021).

13.5. **Country of birth:** Nine out of ten (89.1%) FPNs were issued to individuals born in the UK, which is slightly lower than the most recent population figure for Scotland (92.8%).⁴ Of the remaining FPNs, 5.9% were issued to those born in other EU countries (compared to 4.3% of the population) and 5.0% were issued to people born elsewhere in the world (compared to 2.9% of the population). Compared to those born in the UK, the estimated disparity in the rate of FPNs issued to EU born people was 1.4, while for those born outside the EU it was 1.9.⁵

13.6. Compared to those born in the UK, disparity in the rate of FPNs issued to people born in the EU ranged from 1.1 to 1.7 times at different points in the pandemic, and for those born outside the EU the disparity rates were even higher, ranging from 1.4 and 2.9 times. The disparity rates for both groups peaked in phase two (July to October 2020), which coincides with the return of students to Scottish universities. It is highly likely that these larger disparity rates are due to students from abroad (who may not have been aware of the Scottish Regulations) being involved in illegal gatherings.

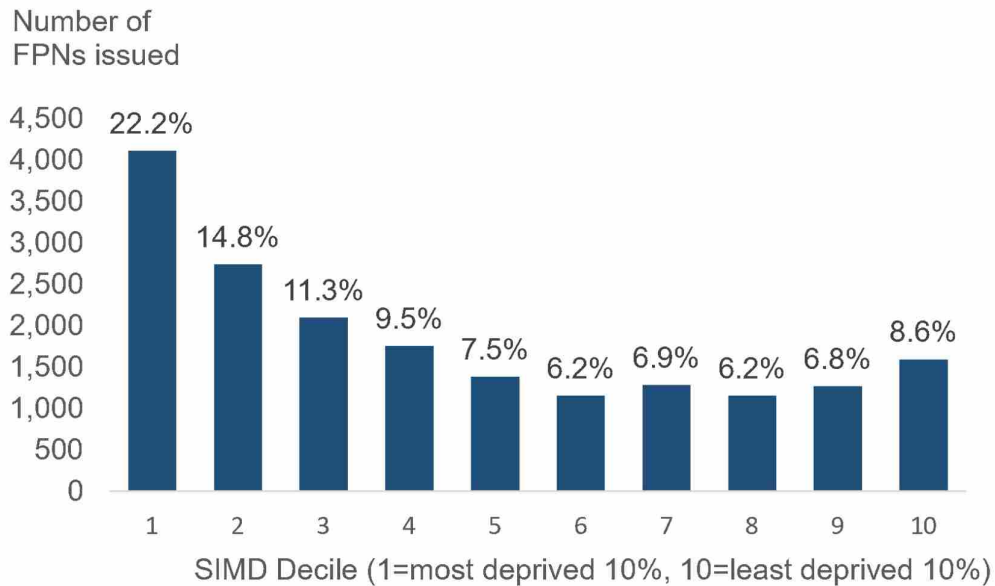
13.7. **Neighbourhood deprivation:** Figure 2 shows that, between March 2020 and May 2021, more than one in four (22.2%) FPNs were issued to people living in one of the 10% *most* deprived areas of Scotland, while less than one in ten (8.6%) were issued to people living in one of the 10% *least* deprived areas (based on the Scottish

⁴ National Records of Scotland (2020) Population by Country of Birth and Nationality, 2019.

⁵ These rates are estimates since the data represent 'tickets' and not 'people', which means they could be artificially inflated if people from any one group were more likely than the others to receive multiple tickets.

Index of Multiple Deprivation). This represents an enforcement disparity rate of 2.6 between those living in the most and least deprived communities.

Figure 2: Number of FPNs issued by SIMD decile in Scotland



13.8. Figure 2 shows that the relationship between deprivation and enforcement in Scotland was very skewed. There is a steep gradient in the likelihood of receiving an FPN between deciles 1-5 (at the more deprived end of the spectrum), but much more similarity in the likelihood of receiving an FPN between deciles 6-10 (at the less deprived end). In other words, while there was inequality in the likelihood of being fined at the top and bottom of the SIMD scale, there was also a greater degree of inequality between people living in communities with a higher concentration of deprivation than those living in communities with a lower concentration of deprivation.

13.9. The proportion of FPNs issued to people living in different SIMD deciles shifted over the course of the pandemic. During phase 1, when the Scottish population was subject to a strict lockdown, there was a very steep social gradient in the profile of FPN recipients and the disparity rate between those in the most and least deprived neighbourhoods was 12.6, demonstrating a high degree of inequality in the likelihood of receiving an FPN based on area of residence. The disparity rate was far narrower in subsequent phases of the pandemic, however.

14. We note from your research that FPNs were more likely to be issued to those living in the most deprived communities than those living in more affluent areas. We note that the deprivation disparity rate in Scotland of the likelihood of receiving an FPN was 12.6 during the first lockdown but then reduced to 2.5 during the second lockdown. Please explain the basis of these findings and their significance as regards the use of FPNs in the management of the pandemic in Scotland. Why was the deprivation disparity rate in Scotland so high in the first lockdown and why did it substantially reduce in the second lockdown?

14.1. The narrowing of the FPN disparity rate between those living in the most and least affluent areas of Scotland reflects a distinct shift in the profile of those who were subject to enforcement for failing to comply with the Regulations. There are two main explanations for this shift (although please note that this has not been subject to wider, population-level, research). Firstly, there was a sharp increase during phase 2 in the extent to which police activity involved dealing with young people (especially, students) for attending social gatherings or parties. Police officers in Edinburgh and Glasgow, in particular, reported regularly attending student accommodation and residences and issuing large numbers of fines to those in attendance. Student accommodation in these cities tends to be concentrated in some of the most affluent areas (especially in Edinburgh's city centre) so the shift in deprivation profile is at least partly due to the residential nature of the student population. Secondly, there was a more general increase over time in non-compliance within wider sectors of the general population, which meant the police were being called out to a far greater range of properties. In interviews, police officers described attending houses that they would normally only be called to if the householder had been a victim of crime. They also described increasingly having to deal with professional people and those on higher incomes. In other words, the reduction in the deprivation disparity rate appears to reflect a real change in policing demand as the pandemic continued.

15. Did the use of FPNs by police divisions vary across Scotland? If so, how and why? What particular trends has research shown?

15.1. The use of FPNs was higher in some police divisions than others, even when taking population size into account. Collectively, divisions in the North Command Area (North East, Highlands & Islands and Tayside) issued the fewest FPNs (10.0% of the total) and had lower estimated rates per capita; whereas, divisions in the West

Command Area (Greater Glasgow, Lanarkshire, Renfrewshire & Inverclyde, Argyll & West Dunbartonshire, Ayrshire, and Dumfries & Galloway) issued the most FPNs (69.4% of the total) and had the highest estimated rates per capita (with the exception of Dumfries and Galloway which had one of the lowest estimated rates per capita). The remaining divisions in the East Command Area (Edinburgh, Tayside, Fife, and the Lothians and Scottish Borders) issued around a fifth (20.6%) of all FPNs, but varied considerably in terms of estimated rates of FPNs issued.

15.2. Greater Glasgow division issued by far the largest number of FPNs. There were around three times more FPNs issued in Greater Glasgow than in the next nearest division, Lanarkshire. Even taking account of population size (which is larger in the Greater Glasgow area than any other Scottish division), Greater Glasgow had the highest estimated rate of FPNs. Relatively speaking, there were also higher than expected rates of FPNs issued in Argyll & Dunbartonshire, Renfrewshire & Inverclyde, Edinburgh, and Lanarkshire divisions. The differences in estimated rates between police divisions suggests that factors other than population size impacted on policing practice.

15.3. There was a distinct urban/rural shift in policing between the first lockdown and subsequent phases of the pandemic. The divisions that issued the highest relative proportion of FPNs during phase one tended to cover more rural parts of Scotland and/or include beauty spots and tourist destinations (which were the focus of the bulk of enforcement activities during the initial lockdown when people's ability to travel outside of their local area was severely restricted by the Regulations). For example, between 30% and 40% of all FPNs were issued during the first lockdown by Highlands and Islands (covering the rural north of Scotland), Forth Valley (covering many rural beauty spots in the heart of Scotland's central belt), Argyll and West Dunbartonshire (covering large parts of the southern Highlands, including the Trossachs National Park and Loch Lomond) and Dumfries and Galloway (covering the rural south west corner of Scotland and bordering Cumbria in England) divisions.

15.4. By contrast, divisions with more urban conurbations and concentrated populations issued a far larger relative proportion of FPNs during phases 3 and 4. For example, between 70% and 80% of all FPNs were issued during these two phases by Edinburgh (Scotland's capital city), Tayside (including the city of Dundee), and Greater Glasgow (including Scotland's largest population centre).

15.5. Using a standardized rate to allow for direct comparison across divisions (with different population sizes) and between two time periods (of different lengths), we found far less variation between police divisions in the use of enforcement during phase 4 (which covered the second lockdown) than during phase 1 (the first lockdown). Even though there were still differences, the narrowing of the gap suggests much greater consistency of approach across geographical areas during the latter stages of the pandemic.

16. Did the profile of the FPNs issued change over the course of the pandemic in Scotland? If so, how and why?

16.1. I believe this question has been fully answered above.

17. Did the use of FPNs impact particular groups or communities disproportionately relative to the overall population of Scotland? If so, which groups or communities were disproportionately impacted? How and why were they disproportionately impacted?

17.1. Using data linkage to connect together data from different health sources for those who received FPNs during the pandemic, we have identified that individuals who were in contact with unscheduled care specialists (e.g. ambulance, accident and emergency, or hospital admission) for underlying health vulnerabilities were at increased likelihood of being issued with a Covid FPN. This analysis matched a group of individuals who were similar to FPN recipients on the basis of age, sex, SIMD profile and local authority, and compared the health profiles of the two groups in the year prior to, and during, the pandemic. FPN recipients were substantially more likely to been in contact with health services for a mental health, drug or alcohol related condition during the pandemic, but especially during the first lockdown. The analysis confirms that, in addition to any other inequalities they may have experienced, people with underlying health vulnerabilities may have been disproportionately impacted by the finance consequences of police enforcement.

18. We understand that a difference between Scotland and the other UK nations was that regulation 9 of the Health Protection Regulations in Scotland allowed FPNs to be issued to people aged 16 or over compared to a lower age limit of 18 in the other UK nations. Do you know the rationale behind the decision to make the use of FPNs lawful for 16 and 17 year olds?

18.1. The Covid-FPN framework in Scotland was modelled on the Antisocial Behaviour etc. (Scotland) Act 2004, which allows for ASB-FPNs to be issued to people aged 16 years or over. The rationale for keeping the lower age limit is noted in the extract from a Ministerial briefing shown below. This refers to ensuring that the 'policy intention' (i.e., limiting spread of the virus) is not put at risk by limiting enforcement to older age-groups, and expediency considerations. (The full briefing is shown in Section H. Q.39: email 2.5).

18.2. 'If Ministers wished to mirror the approach in England and Wales in terms of issuing penalties to those over the age of 18 Police Scotland have noted that there is a potential gap for a group who may be more likely gather in groups etc. From a policy perspective we see merit in sticking as closely as possible to the current operation of antisocial behaviour legislation both from addressing potential risk to the policy intention of these powers but also to limit the additional burden to operational partners including the PS, COPFS and the Courts. Ministers are asked to confirm whether they comfortable with this approach'.

19. We understand that the Coronavirus (No. 2) (Scotland) Act amended regulation 9 to raise the minimum age to 18, which came into effect on 27 May 2020. This was intended to bring it in line with the UN Convention on the Rights of the Child, Police Scotland's Policing Approach to Children and Young People 2016-2020', and respond to calls by the UN to ensure children's rights were safeguarded during the pandemic. How many FPNs were issued to 16 and 17 year olds before the change in legislation?

19.1. Data provided by Police Scotland show that there were 256 FPNs issued to people aged under 18 prior to the amendment of Regulation 9. The data also show that there were a further 220 FPNs issued to people aged under 18 after Regulation 9 was amended. Unfortunately, due to changes in the way that the data were provided, it is not possible to identify how many of these FPNs were subsequently rescinded.

D. Policing during the Covid-19 pandemic in Scotland

20. Was there any difference between the powers given to the police in Scotland and the powers given to the police elsewhere in the UK? If so, what were those differences? Why did such differences exist?

- 20.1. There has been no detailed comparative research on the powers given to the police in Scotland, compared to elsewhere in the UK, so there may be differences that I am unaware of.
- 20.2. The biggest difference between UK nations was in respect of the value of the fines that could be issued which (as discussed under Q5.8) varied considerably as the respective Health Regulations were amended over time. Fines issued in Scotland were generally of lower value than those issued in Wales and, especially, England.
- 20.3. One further difference relates to powers of entry. In August 2020, the First Minister announced a new police power that allowed officers to enter private properties and break up suspected gatherings or house parties of sixteen or more people. The relevant provision came into effect on 28 August in The Health Protection (Coronavirus) (Restrictions) (Scotland) Amendment (No. 13) Regulations 2020. I understand that the Welsh Government also introduced a power of entry, but that no equivalent power was introduced in England.
21. We understand that from the start of the pandemic, police officers were encouraged by the College of Policing and the National Police Chiefs' Council to follow the Four E's strategy (engagement, explanation, encouragement, and, only when necessary, enforcement). How many of the recorded encounters relating to breaches of Covid-19 Regulations involve enforcement in comparison to engagement, explanation and encouragement? What particular trends has research shown?
- 21.1. Overall, between March 2020 and May 2021, 12.3% of all encounters recorded by Police Scotland on the CVI system involved the use of enforcement (11.6% involved FPNs and 0.7% involved arrests) (see SMV/2 - INQ000369770). Figure 3 shows the change over time in the number of encounters recorded as enforcement as a percentage of all recorded encounters on Police Scotland's CVI system. It illustrates the 'relative' daily use of enforcement activities (the fourth E) in comparison to other types of policing activity under the new temporary powers (the first three Es). Figures are presented as a 7-day rolling average, which smooths out fluctuations in the relative use of enforcement in periods with very low numbers of total interventions.

21.2. At the start of the first lockdown, use of enforcement made up around 20% of all interventions. However, this reduced quickly as restrictions were eased through the summer period and the total number of police interventions also declined. From September 2020 onwards, as restrictions were tightened again, there was a gradual increase in the relative use of enforcement, rising to around 30% of all interventions on some days during November and December. This coincides with the introduction of the rule of six, regional restrictions and the subsequent 'Level 4' restrictions imposed across mainland Scotland. As the UK entered the second national lockdown in January 2021, the relative use of enforcement continued to rise, peaking at the start of February at around 40% of interventions, before falling as restrictions eased during March and April 2021.

21.3. Relative use of enforcement was highest during the second lockdown period than at any other time during the pandemic. This provides strong evidence to suggest that public compliance with the restrictions, and/or police tolerance of non-compliance, was waning as the pandemic wore on. Nonetheless, the data from the CVI system indicate that enforcement represented a relatively small proportion of all policing activity during most periods of the pandemic.

Figure 3: Change in the relative use of enforcement in Scotland



22. What was done by the Scottish Government to seek to ensure that policing responses were consistent and coordinated with epidemiological evidence and advice about the

means by which the virus spread and those most at risk from becoming infected with it?
Were these steps proportionate and effective?

22.1. I am unable to answer this question as I was not involved in any discussions between Scottish Government and Police Scotland.

23. To what extent were policing responses coordinated and consistent with the Scottish Government's public messaging about the pandemic in Scotland? Were steps taken to achieve this proportionate and effective?

23.1. I am unable to answer this question as I have not conducted analysis of consistency in messaging.

24. What was done to ensure that the public understood the approach being taken by the police to the enforcement of the Covid-19 regulations and guidance in Scotland? How proportionate and effective were measures taken to achieve this aim?

24.1. As part of my work on the IAG, I am aware that Police Scotland was issuing press announcements both at a national level, and at divisional level. The messaging was broadly in line with the 4Es approach to the use of enforcement at the start of the pandemic; however, the messaging did become more strongly focused on taking action against those blatantly and flagrantly breaching the Regulations as time went on. I have not undertaken any research on how proportionate or effective these measures were.

25. Did the frequent changes in Covid-19 regulations have an impact on how the regulations were being enforced by police? If so, how?

25.1. As part of the work of the IAG, we regularly reviewed changes to the Covid-19 Regulations and the impacts this had on policing. Frustration was expressed by senior officers at times when the Regulations were changing on a frequent basis; however, (in my view) this did not impact significantly on their approach to enforcement which continued to be informed by the 4Es. Police Scotland generally took a pragmatic approach to applying the Regulations, especially in respect of some changes that were considered impractical or unenforceable.

- 25.2. In research interviews, frontline police officers reiterated the difficulty of keeping up with the Regulations. Most officers broadly viewed the rules as straightforward, particularly in periods of full lockdown during which it was felt that people 'knew the basics'. On the other hand, as the pandemic progressed, it is clear that officers struggled to keep track of the rules. In some areas, this was exacerbated by the Local Levels Regulations, which required officers to apply a different set of rules in some situations, for example, when providing assistance to officers from different divisions or police beats.
- 25.3. In written evidence to the Scottish Parliament in June 2020, the Scottish Police Federation Chair noted, "the police service itself did not know precisely what was being asked of it 'til the eve of the legislative restrictions coming into place" and that the "last-minute nature of the legislation being enacted" meant the police "having to devise practical 'workarounds' including genuine last minute online briefing materials and operational guidance to accommodate its provisions".
- 25.4. This last-minute approach to legislation, which relied on emergency powers, can also be seen in evidence from the Chief Constable to the Justice Sub-Committee on policing on 27 August 2020. Remarkably, this suggested that Police Scotland was still not fully sighted on the details of the new powers of entry in relation to parties within 24 hours of the Act coming into force, as evidenced below:
- 25.5. **The Convener:** "In the course of this meeting, information has been relayed to me about an announcement, which, clearly, was for the First Minister to make, rather than you. It relates to a change of powers that will take effect from tomorrow; if I am reading correctly, the police will have powers to break up house parties of 15 or more guests. Can you comment on any concerns that you might have about the implications of that change for resources or for engagement with the public, or about the public's response to that change?"
- 25.6. **Chief Constable Livingstone:** "That touches on an earlier question about our involvement in the development of the regulations... [I said] that I had been involved late last night and again this morning. I have not heard the specific detail of the changes that the First Minister has announced, which can change up to the last minute, but I completely understand the generality. It has been granted—with a number of parameters, I understand—and we will use it very lightly."

25.7. It is likely that the 4Es policy, which advised enforcement as a last resort, mitigated some of this confusion, particularly in more borderline breaches, or when officers were unsure of the rules. In oral evidence to the Scottish Parliament Justice Sub-Committee on policing on 27 August 2020, the Chief Constable stated: “I think that we are on the 14th or 15th set of regulations that we have needed collectively to interpret and apply, and I know how confusing that can be for police service officers and staff, let alone for members of the public. In no way do I question whether the changes have been necessary, but people have at times—inevitably—been a bit confused about what is expected or required. That is why policing has had to exercise discretion... “.

25.8. A written statement from Police Scotland to the Justice Sub-Committee on Policing on 27 August 2020 further noted: “The 4Es approach was essential in order to ensure everyone was treated fairly and that sufficient time was given to allow widespread understanding of the new legislation”. However, the same written evidence also indicated that Police Scotland was, at this stage, looking to move to enforcement more quickly: “consideration had to be given as to whether, with the passage of time and increased understanding of the rules and guidance, police action should be weighted towards enforcement”.

25.9. At IAG meetings, senior police officers described high levels of frustration at the apparent increase in non-compliance across all sectors of the population, and described taking ‘a more muscular approach’ to enforcement. This was reflected in press statements made by the Chief Constable in early 2021. Similarly, in research interviews, frontline officers described moving more swiftly through the first 3Es as the pandemic progressed. As such, it is likely that the mitigating function of the 4Es approach lessened over time.

26. Were there instances where new Covid-19 regulations were introduced which the police could not, or would not, enforce? If so, please provide examples. What were the consequences of the police not enforcing the regulations?

26.1. During IAG meetings, there were discussions with Police Scotland about new Regulations that were considered very difficult to enforce. For example, the regulations around quarantine restrictions on return from overseas visits were difficult to enforce because of delays in data sharing about who was subject to these laws. Very often, by the time Public Health Scotland had shared the relevant

information, the quarantine period had elapsed. Police Scotland issued some FPNs in relation to breaching the quarantine Regulations; however, it is likely that many other people were not sanctioned for the same behaviours.

26.2. In addition, travel restrictions introduced by the Scottish Government in late December 2020 which banned travel between Scotland and the rest of the UK were not practical from a policing point of view. Police Scotland did increase its presence along the border between Scotland and England as a deterrent measure, but issued press statements making it clear that it did not consider it appropriate or proportionate to establish checkpoints or roadblocks to enforce travel restrictions. At the same time, the Chief Constable stated that highly visible patrols would be 'proactively deployed on our road networks to continue our operational activity to ensure drivers and vehicles are in a fit condition to drive'. Whether Police Scotland indirectly used vehicle checks to enforce border restrictions is unclear.

26.3. There was also significant complexity in some of the Regulations that made them very difficult to interpret and, therefore, to apply by frontline police officers. For example, the following statement from the Explanatory Notes to the Health Protection (Coronavirus) (Restrictions and Requirements) (Scotland) Regulations 2020 (SSI 2020/279) that introduced the 'Rule of 6' in Scotland illustrates the difficulty in legislating for the minutiae of everyday life.

26.4. 'The Regulations also set out that children under the age of 12 do not count towards the 6 person limit for indoor gatherings in public places, such as restaurants. However, they do count towards the 2 household limit in these settings. When gathering outdoors, children under the age of 12 do not count towards the 2 household or 6 person limit in order to allow children to benefit from outdoor play. These regulations also allow young people aged 12 to 17 to meet up in groups of up to 6 at a time outdoors without being subject to the 2 household limit. If an outdoor gathering only consists of some children under 12 and some children aged 12 to 17 then the 6 person limit will apply to the entire gathering.'

27. Many Covid-19 regulations required police officers to undertake a proportionality assessment or consider whether people had a "reasonable excuse". Is this an appropriate way to enforce public health restrictions? Were the police able effectively to make judgments about what was proportionate and reasonable in the context of risks to public health?

27.1. There is no detailed research on the way in which police officers interpreted the term 'reasonable excuse' during the pandemic. It is, therefore, not possible to say definitively whether officers were able to make effective judgements about what was proportionate and reasonable in the context of risks to public health. On the one hand, the police did apply the 4Es approach which (as evidence in response to Q21 shows) minimised the use of enforcement relative to other, less formal, interventions with the public. On the other hand, the research evidence shows that there was disproportionality in the use of enforcement that may not have been fully explained by differences in behaviour (e.g. discrepancies in relation to ethnicity, deprivation and underlying health conditions). Interviews with police officers suggested that they took steps to minimise the use of enforcement by only fining those who had blatantly or flagrantly breached the Regulations; however, they also acknowledged confusion around how to apply the rules during periods when they were changing frequently and when there was a lack of consistency between the rules and guidance.

27.2. Ordinarily FPNs are issued in situations in which offending behaviour is well defined and clearly evidenced, such as speeding, littering, or drinking in public. While an officer may choose to exercise discretion, for example, in the choice of disposal, the offending behaviour tends not to be in question. In the context of the pandemic, the Scottish Police Federation highlighted in a written submission to the Scottish Parliament's Covid-19 Committee in 2021 (REF NO. CVD/S5/21/8/WS4) that the 'reasonable excuse' provision put police officers in the position of 'being expected to perform the function of the court in determining if a defence is reasonable'. A lack of clarity or training on what constituted a reasonable excuse would invariably have led to inconsistencies in the judgements exercised by individual officers. It is also highly likely that the interpretation of what constituted a 'reasonable excuse' changed over time, as forces moved to swifter enforcement, and police tolerance for breaches declined. Further research on the application of police officer discretion in specific situations would be needed to fully answer this question.

28. To what extent were police forces able and prepared to reconsider FPNs notices issued?

28.1. There is limited information on how police forces across the UK went about reviewing FPNs, what this scrutiny process involved and what factors were taken into account when considering the legal validity of tickets. However, data shows that

processes were in place to review FPNs and that many were rescinded or cancelled. In Scotland, data on the rescinding of FPNs is only available for the period from March to May 2020 (SMV/4 - INQ000369772). This report shows that 8% of all Covid FPNs were cancelled by Police Scotland or withdrawn after having been submitted to the Scottish Courts and Tribunal Service (SCTS). There is no information on the reasons for rescinding.

28.2. A report written for the National Police Chiefs Council (SMV/3 - INQ000369771) notes that 'review processes were in place which led to some fines being rejected by ACRO or cancelled by individual police forces'. Data shows that, over the period from March 2020 to May 2021, 5.2% of all FPNs issued in England and Wales were cancelled, although this varied by police force area (from 1.1% in Warwickshire to 23.5% in West Midlands). In the majority of cases, fines were cancelled 'due to: lack of, or incorrect, information provided on the actual ticket; lack of sufficient evidence that an offence had been committed; or failure of officers to follow the 4Es'.

29. Are there any ways in which policing a public health emergency could be better managed in the future?

29.1. To a large extent, the policing approach adopted during the pandemic was appropriate, proportionate and aimed at minimising impact on the public. This is evidenced in the fact that less than 0.5% of the population of Scotland were subject to enforcement, and around 88% of all police-public encounters involved use of the first 3Es. However, the policing response was highly dependent on the legislative framework. The complexity of the Regulations, the volume and frequency of legislative change, and the confusion between what was law and what was guidance, put Police Scotland and its frontline officers at a serious disadvantage. To avoid the type of challenges outlined in this submission will require advance planning of alternative legislative options (defined in relation to anticipated levels of potential risk and harm). Importantly, any such planning processes for future health emergencies should be conducted in close consultation with the police in order to determine what is possible, practical and in line with contemporaneous policing practice. In addition, standard police officer training should include some element of emergency planning so that, in the event of a future pandemic, they are at least partially prepared as to the likely policing response.

29.2. Recognising that fines may impose considerable hardship on many individuals, especially those most at risk of being subject to enforcement, much greater consideration should be given to the use of formal warnings as an intermediate step in the police decision making process. In Scotland, England and Wales, the use of police FPNs has been declining in recent years, and replaced with alternative measures that largely involve formal warnings, cautions or other out of court disposals. It would be in line with contemporaneous policing practice to use formal warnings as an alternative to a first fine; and move only to financial penalties for those who are the most repeated and flagrant offenders. It would also represent a more proportionate and equitable response (following use of the first 3Es) that would not have discriminated against those who were unable or struggled to pay a fine. The fact that most individuals were fined only once suggests that one 'formal' encounter with the police may be sufficient to prevent further non-compliance. The relative deterrent effect of these different options require thorough investigation, however.

29.3. Whatever method of approach is chosen for any future pandemic, the policing response will be reliant on the dedication and sacrifice of frontline officers. It is difficult to overstate the degree of anger and disappointment felt by officers in the wake of the (UK and) Scottish Government's decision not to prioritise them for vaccination, at the same time that it expected them to enter houses and break-up parties; putting officers, their colleagues and families at unknown levels of risk of infection. Research by Rhodes et al. (2022)⁶ has shown that infection risks for 'police and protective services' were 45% higher than for non-essential workers, making them most at risk of all essential worker categories between April 2020 and November 2021. In future, as front-line responders, police officers should not be put in this position.

⁶ Rhodes S., Wilkinson J., Pearce N., et al. (2022) Occupational differences in SARS-CoV-2 infection: analysis of the UK ONS COVID-19 infection survey. *Journal of Epidemiology and Community Health*,76:841-846.

E. The difference between guidance and law

30. Was the distinction between law and guidance relating to public health restrictions during the Covid-19 pandemic in Scotland always clear in the public health messaging of the Scottish Government? If not, please provide examples.

30.1. As in other parts of the UK, the distinction between law and guidance was at times blurred in Scotland. During full lockdown, there was good clarity around what the public could not do and how the police would deal with non-compliance. However, as the restrictions began to ease, and more guidance was issued, it often became difficult to distinguish the two – even for those responsible for creating the legislation. As an example, in May 2020, the then First Minister made a confusing announcement around changes to the guidance on physical exercise which was widely reported to be a change in the law:

30.2. “The only change we’ve made, here in Scotland is to the **guidance** on exercise. As of today, we have removed the once-a-day limit on exercise. It means that - **if you want** to go for a walk more often - or to go for a run and also a walk - **then you can now do so**... you will still need to stay relatively close to your own home. **And at all times, you need to stay at least 2 metres away from people from other households**... It’s just one very minor change to the **existing rules**. But all of the restrictions in Scotland for now remain in place.”
(Sturgeon, 11 May 2020, emphasis added)

30.3. Taking cues from government, in reporting the announcement, media headlines included ‘First Minister lifts exercise rule in Scotland’s lockdown’ with the strapline, ‘Scots will now be allowed to go out more than once a day’ (The Scotsman, 2020), ‘Sturgeon removes once-a-day-limit on exercise from lockdown measures, as she warns ‘mixed messages’ could cost lives’ (The Independent, 2020) and ‘Once-a-day outdoor exercise cap dropped in Scotland’ (The National, 2020). The law had not however changed, only the public health advice.

30.4. Online government advice also blurred the two sources. Whilst the Scottish Government ‘Coronavirus in Scotland’ website linked to multiple pieces of guidance, it did not link directly to the relevant regulations, nor signpost the legislation.gov.uk

website.⁷ Instead, the Scottish Government website presented descriptive text that segued between the two, without clearly distinguishing the respective source. For example, a webpage titled 'what you can and can't do'⁸ in relation to seeing friends and family listed Regulations on social mixing alongside advice on hand washing, keeping a 2m social distance, and car-sharing, none of which was provided for in law.

31. Was the distinction between law and guidance always understood by police officers? If not, why not?

31.1. In research interviews, Police Scotland officers stated that the distinction between law and guidance was not always clear. In part this related to the pace of legislative change, which saw some officers relying on a range of sources for updated information, in addition to internal Police Scotland communications. This was exacerbated by police officer training, which relied largely on email-based or intranet explanations that were distributed as quickly as possible, but were not backed up by face to face training. Supervisory officers also stated that they struggled to give advice to their officers during periods in which both law and guidance were being operationalised in confusing and, sometimes, conflicting ways during public messaging. Examples of confusion that were cited in interviews included discrepancies between Scottish Government statements and media reports (such as the example given in response to Q30), neither of which clearly distinguished between the law and guidance.

32. In your view, could the Scottish Government have addressed the pandemic response solely through guidance without the use of criminal sanctions? What would the advantages and disadvantages of such an approach have been?

32.1. In the absence of a pharmaceutical solution to the Coronavirus, there was a need to create some restrictions on members of the public. However, there is no clear evidence as to the additional advantage of using sanctions as opposed to relying on social distancing and other guidelines (the role and effectiveness of enforcement during the pandemic has been subject to surprisingly little research). Most countries did rely on sanctions – many that were far more draconian than

⁷ Delegated Powers and Law Reform Committee 2022. Inquiry into the use of the made affirmative procedure during the coronavirus pandemic. See paragraph 54.

⁸ Scottish Government. 28 September 2020. Coronavirus (COVID-19): what you can and cannot do

those imposed in the UK; while, some countries did not (such as Sweden, which is often used as a comparator country for Scotland due to its geographical location and population characteristics).

32.2. Australian research on compliance with Regulations⁹ suggests that public compliance was principally motivated by normative considerations or public duty, over and above more instrumental cost-benefit considerations to the individual. This was also echoed in research interviews with Police Scotland officers. When asked whether the threat of sanction acted as a deterrent, many officers thought that the 'law-abiding majority' would have adhered to the Regulations irrespective of criminal sanctions. The problem, therefore, is what to do about those who do not fall into the 'law-abiding majority'.

32.3. At one level, it is fair to say that the Scottish Government could have addressed the pandemic without the use of sanctions. Certainly, during the first lockdown, the level of public concern about the potential risks of the virus resulted in widespread support for the government approach to locking down, so it is unlikely that the introduction of sanctions made much of a material difference to behaviour. An approach based on guidance would have avoided the inequities experienced by vulnerable groups that resulted from the legislative model. However, in the longer term, the reduction in compliance (as measured through surveys) suggests that public support waned and efforts to comply became more conditional (based on personal cost-benefit analysis). It is harder to argue that sanctions should not have been available to deal non-compliance as it widened across the population; however, the effectiveness of this has not been properly tested.

32.4. The advantages of using an enforcement-based approach are that it reinforces the messaging of the government, signals the severity of the situation, and is likely to act as a deterrent for the law-abiding majority. However, the disadvantages are that the use of enforcement creates justice inequalities which may exacerbate other inequalities that emerge in the context of a public health emergency. As far as possible, people should be supported to behave in ways that protect public health rather than punished for failing to do so. Trust that the government is doing its best to control the virus – through clarity of messaging and

⁹ Murphy, K., Williamson, H., Sargeant, E., and McCarthy, M. (2020), Why people comply with COVID-19 social distancing restrictions: Self-interest or duty? *Australian & New Zealand Journal of Criminology*, 53/4: 477-496.

robust use of evidence – is likely to be more effective in maintaining good levels of compliance than threats of punishment.

F. Acceptance of and compliance with public health restrictions

33. What was the level of public acceptance of the use of FPNs to enforce public health restrictions during the Covid-19 pandemic in Scotland? Did the acceptance and attitudes of the public to the use of FPNs change over the course of the pandemic? If so, how and why?

33.1. There was no dedicated research on public acceptance of the FPNs to enforce public health restrictions in Scotland. Neither was there national research that monitored how people's attitudes to FPNs changed over the course of the pandemic.

34. What was the overall level of public compliance with public health restrictions during the Covid-19 pandemic in Scotland? Did the compliance levels change over the course of the pandemic? If so, how and why?

34.1. Research for the UK as a whole has shown that compliance with public health restrictions was very high during the first lockdown, but declined over time (especially amongst some groups). One study¹⁰ of patterns of compliance with preventive behaviours found no difference between Scotland and the other 3 UK nations; however, another found that compliance reduced over time to a greater degree in England and Wales than Scotland¹¹. There is, however, some evidence that the gap in public compliance between Scotland and England widened after the Dominic Cummings incident, with adherence to the rules falling at a faster rate in England.¹² The reasons for falling compliance are varied and complex; however, they include increasing frustration with the restrictions, a widening gap in perceptions as to how the virus was likely to impact on individuals, falling trust in the government response to the pandemic, increasing issues around mental health, and

¹⁰ See Wright, L., Steptoe, A., and Fancourt, D. (2021) Patterns of compliance with Covid-19 preventive behaviours: a latent class analysis of 20,000 UK adults. *Journal of Epidemiology and Community Health*, 76:247-253.

¹¹ Wright, L. and Fancourt, D. (2021) Do predictors of adherence to pandemic guidelines change over time? A panel study of 22,000 UK adults during the COVID-19 pandemic. *Preventative Medicine*.

¹² Fancourt, D., Steptoe, A., and Wright, L. (2020) The Cummings Effect: politics, trust and behaviours during the Covid-19 pandemic. *The Lancet*, 396: 464-465.

an increase in members of the public making personal judgements about what would constitute risky behaviour.

35. Were there particular groups or communities which had lower levels of compliance with public health restrictions during the Covid-19 pandemic in Scotland relative to the overall population? If so, which groups or communities? Why did these groups or communities have lower levels of compliance?

35.1. There has been no dedicated research on compliance patterns in Scotland; however, one UK study¹³ has shown that compliance fell significantly more amongst some groups based on: age (younger people), sex (men), level of education (higher education), household income (higher), economic activity (students), living arrangements (living alone with a child) and overcrowding. Compliance was also lower and/or fell more amongst those with certain personality traits, including low openness, low conscientiousness, extraversion, low agreeableness, low neuroticism, low resilience and those with risk taking attitudes. Low cognitive and emotional empathy, low social capital, poor attachment to neighbourhoods and low neighbourhood satisfaction were also associated with lower levels of compliance. As noted above, compliance fell at a greater rate in other UK countries compared to Scotland, but there has been no analysis of whether the traits of those who failed to comply differed across countries. The authors of this particular study recommended that public health communications should adopt 'a plurality of messages to maximize broad adherence'.

35.2. For further information on research about compliance, we recommend referring to the work of the UCL Covid-19 Social Study led by Daisy Fancourt.

36. What effect, if any, did enforcement of public health restrictions (such as through FPNs) have on the spread and impact of the virus in Scotland?

36.1. See response to Q11.

¹³ Wright, L. and Fancourt, D. (2021) Do predictors of adherence to pandemic guidelines change over time? A panel study of 22,000 UK adults during the COVID-19 pandemic. *Preventative Medicine*.

G. Key challenges and lessons learned

Do you have any concerns regarding the enforcement of non-pharmaceutical interventions and proposed penalties used in the management of the Covid-19 pandemic in Scotland (including fixed penalty notices, level of fines and the availability of custodial sentences), with specific reference to their proportionality and effectiveness?

Please identify any key areas which you consider worked well, and any key areas in which you consider there were issues, obstacles or missed opportunities, in relation to the enforcement of public health restrictions during the Covid-19 pandemic in Scotland, including:

- I. The proportionality and necessity of the legislation and regulations, including in relation to their enforcement and the decision to impose criminal sanctions;
- II. Consideration of any Equality Impact Assessments when making decisions about the legislation and regulations;
- III. Consideration of the impact of the legislation and regulations on 'at risk' and other vulnerable groups in light of existing inequalities, including those groups with a protected characteristic;
- IV. The alignment of legislation and guidance; and
- V. Any improvements which could have been made to increase the effectiveness of, or public compliance with, the legislation and regulations.

- a. I hope that the responses given to the questions above highlight the concerns that our research has raised around the use of financial penalties in respect of non-compliance with the Coronavirus Regulations. It is fair to say that only a small proportion of the Scottish population were impacted by enforcement (less than 0.5%); however, this still equates to many thousands of people.

- b. More importantly, the effects of enforcement fell more heavily on some groups in the population than others, including those who were perhaps least able (and/or willing) to comply with the unprecedented restrictions put in place to control the spread of the virus. The decision to use of financial penalties (which are inherently unequal in their punishment effects), and to do so in a way that ratcheted up the costs for those who broke the rules repeatedly, resulted in highly inequitable impacts across the population. The decision to use fines, and to introduce an incremental fining system, has never been properly explained or justified by the Scottish Government or other governments across the UK.
- c. While generally considered a 'light touch' sanction, the way in which the fines were imposed bore little relation to the fixed penalty notices that are generally understood and accepted by members of the public (especially in terms of the incremental approach), and the size of the fines that could be applied on the spot by police officers was far higher than would normally be found in Scotland. In Scotland, this issue was tempered by the decision of the Lord Advocate to limit the maximum fine to £480; however, there are significant human rights issues in relation to issuing excessively high FPNs in other parts of the UK, especially England where fines reached £10,000.
- d. Moreover, the nature of what constituted an offence changed frequently and considerably during the pandemic, with little or no parliamentary scrutiny, making it difficult for both the public and the police to keep up with the Regulations. There is no evidence that Equality Impact Assessments were considered in respect of the enforcement approach taken in Scotland (or other parts of the UK). Moreover, there was little or no parliamentary scrutiny around the legislative decision making, and very little consultation with Police Scotland around the impact of new restrictions on the public. There are unanswered questions, therefore, about the legitimacy of the Regulations and whether they would meet the threshold of the rule of law.
- e. In the event of any future pandemic, much greater consideration should be given to supporting people to comply with any restrictions rather than punishing them for failure to comply (especially those for whom there may have been particular mitigating circumstances). In addition, there should be far greater clarity with respect to what is law and what is only guidance

(perhaps these two messages should be dealt with by different groups of professionals). Legislation should be changed as infrequently as possible, and with as much advance warning as is achievable within a fast changing situation, allowing both the public and the police to adapt at a reasonable pace. With respect to the policing response, the decision to use an out of court disposal for the most part, which does not incur a criminal conviction, was probably the correct decision. However, a more proportionate and fairer response would have been: a) to use a formal warning prior to moving to a financial punishment (which is likely to have deterred many individuals from offending again); and b) to have avoided an incremental fining system, which would be in line with current practice in respect of anti-social behaviour fixed penalty notices, and would have significantly reduced inequity of financial impact.

H. Documents

Please provide copies of the following, other than that which has already been provided to the Inquiry or has been requested above:

- a. Any reports, articles or papers you have published about the response of the Scottish and/ or UK Government to the Covid-19 pandemic;

See SMV/2 - INQ000369770, SMV/3 - INQ000369771 and SMV/4 - INQ000369772.

Further reports can be accessed at <https://www.law.ed.ac.uk/research/research-projects/policing-the-pandemic> (under Outputs).

- b. Key emails and other correspondence in relation to the issues you have discussed in your witness statement;

On 23 June 2022 Dr Kath Murray (a member of the Policing the Pandemic Project team) submitted a Freedom of Information request to the Scottish Government (**see Annex A**). This asked, 'I am interested in the decision to include Fixed Notice Penalties (FPNs) as a penalty for breaching the Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020, and the decision making process behind this. Please provide copies of any correspondence, notes, briefings or other documentation that refers to this, including information provided to the Scottish Government from the UK and other devolved governments.'

The Scottish Government response is presented as two email chains (see **Annex B**). All text and emphasises (highlighting, bold type, etc) are original. We have reordered the correspondence in chronological order, added email reference numbers and descriptions, for cross-referencing with the main submission.

Statement of Truth

I believe that the facts stated in this witness statement are true. I understand that proceedings may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief of its truth.

Signed: **PD**

Dated: ____ 15 December 2023_____