Justice Committee

Post-legislative scrutiny of the Police and Fire Reform (Scotland) Act 2012

Written submission from Dr Ali Malik

Police governance and accountability

This submission¹ focuses on the impact of the Police and Fire Reform (Scotland) Act 2012 (henceforth the 2012 Act) on police governance and accountability. By specifically focusing on the rationale for the creation of the Scottish Police Authority (SPA), I argue that the SPA was created to address weaknesses in police governance that existed prior to the 2012 Act. However, five years on, those weaknesses have not been adequately resolved. Further, the trials and tribulations of the SPA since 2012 are due to organisational, structural and legislative frailties rather than due to personalities. In this submission, I highlight some of the limitations of the 2012 Act and put forward suggestions for improvement.

What was wrong with the local police authorities?

The 2012 Act replaced the former tripartite structure of governance, that had been in place at least formally, since the Police (Scotland) Act 1967. Under the tripartite arrangement, powers of police governance were distributed among central government, local government, in the form of local police authorities and chief constables. The tripartite structure sought to provide a balance between the local and the central. In practice, however, the structure was decidedly lop-sided in favour of central government and chief constables. The local police authorities were largely perceived to be subservient to their chief constables, often rubberstamping key decisions such as chief officer appointments². The local police authorities were also routinely criticised for not providing robust scrutiny over allocation of resources³, national policing priorities⁴ and lacking in wider governance competencies to sufficiently hold the police to account⁵.

Weak financial governance

In 2012, following a joint audit and inspection of all eight local police authorities, Audit Scotland and HMICS reported that whilst the local police forces were playing an active role in community planning and delivering on local outcomes, local police authorities were ‘not effective in their role of influencing local policing and partnership

¹ This submission draws on my doctoral study entitled ‘Democracy and epistocracy reconciled? Police governance in Scotland after 2012’. The study was carried out at the University of Edinburgh between 2013 – 2017 and drew on interviews with a cross-section of stakeholders involved in Scottish policing and police governance landscape including a former Minister.
priorities and then monitoring development and delivery\textsuperscript{6}. In particular, the lack of oversight over the way police funding was contributing towards local and central priorities provided a strong rationale for simplifying financial oversight of the police through a centralised governance body.

**National policing requirements**

Under the previous arrangements, there was no statutory requirement for the local police authorities to consider national policing priorities such as counter terrorism, cybercrime and organised crime. The strongest call for a national strategic body came in 2009 following the HMICS Independent Review that recommended that ‘Scottish Ministers should bring forward draft legislation to impose a statutory duty on chief constables and police authorities to take Scotland’s national policing capacity and capability; its national resilience to catastrophic events or strategic threats from criminality; and the reduction of the costs that arise from unnecessary duplication of services into account in all decision-making’\textsuperscript{7}.

**Expertise, skills, and capacities**

Most local police authorities were perceived to have ‘limited dedicated professional support to carry out their functions effectively’\textsuperscript{8}. In 2008, it was recommended by the then Justice Committee that appointment of independent members in an advisory capacity ‘could contribute professional skills and expertise, professional support and analytical capacity’\textsuperscript{9}, enabling the local police authorities to scrutinise the performance of their police forces effectively. Concerns regarding the lack of expertise and capacity were particularly raised in respect of the reliance of local police authority members on the local police forces to provide information that was crucial for the analysis of police performance\textsuperscript{10}. An inspection of the Strathclyde Police Authority, that maintained the largest police force in the country also found that members had ‘limited training, varying levels of understanding of their roles and responsibilities and a generally passive, rather than influencing, approach to information from the force’\textsuperscript{11}.

While reduction in Scotland’s devolved budget following the UK government spending review\textsuperscript{12} and recommendations made by the Christie Commission\textsuperscript{13} became the catalyst for police reform in Scotland, one of the strongest rationales for the creation of the SPA was to strengthen overall police governance.

**The SPA and police governance after 2012**

Events since the 2012 Act came into effect have highlighted that the SPA has not adequately resolved the weaknesses in police governance that existed prior to police

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\textsuperscript{6} See note 3  
\textsuperscript{7} See note 4 (pg. 52, para 8.3)  
\textsuperscript{9} See note 8 (para. 351-353)  
\textsuperscript{10} See note 8 (para. 352)  
\textsuperscript{11} See note 5 (2011, p.6)  
reform. On key issues of national concern such as stop and search and armed policing the SPA was mostly reactive, and the public accountability of the police was led by the Scottish Parliament, and the Scottish press. On issues of local concern, such as closure of front counter provision, withdrawal of traffic warden support, raids on Edinburgh’s previously tolerated sex-saunas, the SPA did not proactively intervene on behalf of the local authorities. In terms of financial oversight, in the 2016/17 Audit of the SPA, Audit Scotland highlighted instances of ‘poor governance’ and ‘poor use of public money’.

In light of the criticisms of the local police authorities, the SPA was envisioned by its architects to bring greater expertise and professional governance skills. However, five years since the reform, the SPA continues to lack the expertise and capacity to objectively assess and scrutinise the information provided by the police. Just like the previous local police authorities, the SPA is reliant on the police to provide information which can form the basis of scrutiny. To date the SPA itself has not developed a framework or any set of criteria against which it will hold policing to account. Police Scotland have been in the process of developing their own performance framework, albeit SPA members have had opportunities to comment on drafts at regular intervals. In order to establish a clear accountability relationship, the SPA should have developed its own framework based on clear criteria and measurable outcomes setting forth information requirements from the police to assist the Authority in its governance and accountability role. On key operational policy decisions such as armed policing and Tasers, the SPA has been deferential to police expertise, rather than drawing on external evidence and knowledge to objectively assess each policy and providing assurance of robust scrutiny. The SPA’s public board meetings continue to be dominated by presentations by the police and most operational policing decisions are submitted ‘for information’ or ‘for noting’ rather than for scrutiny or deliberation.

Prior to reform, the official policy discourse highlighted the weaknesses of the local police authorities, rather than shortcomings of specific individuals. Since the 2012 Act, the criticisms of the SPA and current police governance arrangements have been laid at individuals rather than focusing on structural and organisational weaknesses and legal ambiguities. In cognisance of the remit of the Justice Committee, I focus on the latter below.

19 See note 16
The 2012 Act and police accountability: legal ambiguities

It has been argued that the Scottish police governance discourse has traditionally lacked “any semblance of accountability”\(^\text{20}\). The lead up to the 2012 Act presented an opportunity for the reform team to not only strengthen financial oversight and national governance, but also to ensure that the new governance arrangements incorporate robust mechanisms for accountability of operational policing. This omission is apparent in the ambiguities in the 2012 legislative framework. The only explicit reference to ‘accountability’ in the 2012 Act is framed as a duty on the SPA to ‘hold the chief constable to account for the policing of Scotland’ (s. 2(1)(e)). There was no accompanying guidance on how the SPA would manage and deliver accountability, and much of it was largely left to negotiated agreement. Consequently, during the turf war over control of Police Scotland’s corporate functions, the debate about the SPA’s role and purpose often rested on competing interpretations of the language of the Act itself. For instance, the early negotiations centred around the meanings of “may and shall” (Justice Committee, 2012: Col. 2116)\(^\text{21}\), “prescriptive and permissive” (Col. 2117), and “mandatory and discretionary” powers (Col. 2125). One of the strongest criticisms of the 2012 Act is that it left too much to negotiated agreement. The turf war shaped the new boundaries of influence, in favour of the chief constable. Subsequently, the SPA reframed its broad strategic role as a ‘critical friend’ rather than establishing itself as the primary forum for delivering police accountability.

Where roles and responsibilities are clear, the SPA has not implemented the provisions of the 2012 Act in practice. For instance, it is the SPA’s legislative duty to deliver a strategic police plan at least once every three years (s. 34(8)(a)). According to section 34 (2) of the 2012 Act the strategic police plan:

(a) sets out the main objectives for the Authority and for the policing of Scotland,
(b) explains the reasons for selecting each main objective,
(c) describes what the Authority considers should be done by it or by the Police Service in order to achieve the main objectives,
(d) where reasonably practicable, identifies outcomes by reference to which the achievement of the main objectives may be measured, and
(e) includes any other information connected with the Authority’s functions, or policing, which the Authority considers appropriate.

Instead of establishing a strategic and oversight role over policing by developing a strategic police plan, the SPA became a collaborating partner on the 10-year policing strategy, Policing 2026\(^\text{22}\). The document does not explicitly set out the role of the SPA in ensuring the delivery of agreed objectives and crucially, does not include any measurable outcomes.

**Suggestion for improvement:** Any changes in the 2012 Act should seek to establish a clear accountability relationship between the SPA and Police Scotland with provisions for sanctions and redress. Where roles and responsibilities are clearly set out in legislation, the Justice Committee should ensure that provisions of the 2012 Act are fully implemented in practice.

**The 2012 Act and distribution of power: the tripartite relationship**

The Scottish Government sought to provide a ‘clear separation’ between Scottish Ministers and the police and the creation of the SPA as an arms-length body was perceived to ensure that separation. In practice this has not been the case. The 2012 Act (Schedule 1, section 2) sets out that the Scottish Ministers would be responsible for appointing the SPA chair and board members. The fundamental problem lies therein. Although the appointments of all non-executive board members in Scotland are regulated by the Commissioner for Ethical Standards who sets out a clear code of conduct for the Scottish Ministers and civil servants, ultimately it is the Cabinet Secretary for Justice who will have the final say on all appointments. Further, section 5 of the 2012 Act, allows the Scottish Ministers to give directions to the SPA, however, the direction may not be about a specific operation carried out by the police service (s.5(2)).

In practical terms, the Cabinet Secretary for Justice has formal powers to appoint the SPA’s chair, influence the final composition of the SPA board, as well as power to give directions to the SPA. This involvement may be acceptable and even welcomed in other areas of public administration, but in terms of police accountability there seems to be very little space between the SPA and the Scottish Government that has a vested interest, as it led the reforms that created Police Scotland. Since 2012, concerns have been raised, not least from within the SPA, about Ministerial influence in the way the SPA carries out its role. Due to external impositions, the SPA has not been able to establish its strategic and oversight role effectively. Instead of providing leadership on policing policy and counterbalancing police expertise, it continues to be bypassed on key decisions by the Scottish Government, for instance in relation to the BTP integration.

**Suggestion for improvement:** The Scottish Parliament should have a legislative role in the appointments of the SPA Chair and board members.

**The 2012 Act and the balance between the local and the central**

In addition to enhancing national police governance, one of the stated aims of police reform was to strengthen local policing and local democratic accountability. Under the 2012 Act, the role of the local authorities is to ‘monitor’ and ‘provide feedback’ to the local commander on the performance of local policing (s.45(2)). The local

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24 See note 16
commander is required to involve the local authority in setting the local policing priorities (s.45(1)) and to participate in community planning (s.46).

Since 2012, all thirty-two local authorities have made arrangements for local scrutiny, in the form of local scrutiny committees. A SIPR funded research\(^{26}\) into the local scrutiny committees found that the main point of concern locally is around a lack of *formal* powers, and escalation routes for local authorities to raise concerns regarding centralised policies that impact local service delivery. Furthermore, the 2012 Act does not give any formal powers to the SPA to scrutinise local police commanders, but paradoxically, the Authority does have an oversight role over policing across Scotland. The responsibility to negotiate local policing plans in cognisance of local priorities technically lay with local scrutiny committees and local police commanders. Under the previous arrangements, local police authorities had a chief constable to raise concerns with directly. In the post-2012 governance landscape, there are no formal mechanisms for local authorities to raise concerns regarding resource allocation or national policies that have an adverse impact on local service delivery.

**Suggestion for improvement:** Any changes to the 2012 Act should seek to establish formal mechanisms for local police authorities to raise concerns about national policing decisions through the SPA. The SPA’s role should be enhanced to include formal oversight over local policing.

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\(^{26}\) See note 14 (p.18)