Justice Committee
Post-legislative scrutiny of the Police and Fire Reform (Scotland) Act 2012
Written submission from Dr Pauline McBride

5. Are there any other issues you would like to raise in connection with the operation of the 2012 Act?

The Police and Fire Reform (Scotland) Act 2012 was a missed opportunity to clearly define ‘policing purposes’.

1. A missed opportunity to clearly define ‘policing purposes’

In 2011 the Scottish Government stated that ‘There is currently no formally defined purpose for policing in Scotland’.¹ That document proposed ‘a modern purpose of policing in these terms:

The purpose of policing is to improve the safety and well-being of individuals, families and communities in Scotland.²

1.1 Section 32 of the Police and Fire Reform (Scotland) Act 2012

Section 32 of the Police and Fire Reform (Scotland) Act 2012 appears to reflect the spirit of that proposal. Section 32 provides:

32. Policing principles
The policing principles are—
(a) that the main purpose of policing is to improve the safety and well-being of persons, localities and communities in Scotland, and
(b) that the Police Service, working in collaboration with others where appropriate, should seek to achieve that main purpose by policing in a way which—
   (i) is accessible to, and engaged with, local communities, and
   (ii) promotes measures to prevent crime, harm and disorder.

However section 32 appears to offer a statement about policing principles although section 32 (a) refers to the ‘main purpose’ of policing. Police Scotland appears to have understood the section as a statement about principles.

For example, the Code of Practice on the Exercise by Constables of Powers of Stop and Search of the Person in Scotland makes reference to the policing principles set out in the legislation.³

² ibid Part A para 1.6.
Moreover, under the Data Protection Act 1998 a data controller had to specify the purposes for which it processed personal data. Those purposes could be specified in an entry in the Register of Data Controllers. The current entry for Police Scotland, so far as it relates to ‘policing’ is in these terms:

- Policing - The prevention and detection of crime; apprehension and prosecution of offenders, protection of life and property; maintenance of law and order; rendering assistance to the public in accordance with force policies and procedures; protecting life and property, preserving order, preventing the commission of offences, bringing offenders to justice and any duty or responsibility of the police arising from common or statute law; the safeguarding of national security including but not limited to investigations, the prevention of breaches of national security and assisting with prosecutions resulting from breaches of national security.

The entry makes no reference to the ‘policing principles’ set out in section 32 of the Police and Fire Reform (Scotland) Act 2012. Section 32 is not framed as a statutory duty.

If, however, despite the approach adopted by Police Scotland, the section is intended to make provision for ‘policing purposes’ it does not seem helpful for the legislation, without more, to suggest a distinction between ‘main’ and other policing purposes. Some of the difficulties associated with the notions of ‘core’ and other policing purposes were illustrated in Chief Constable of Humberside v Information Commissioner.4

1.2 Section 20 of the Police and Fire Reform (Scotland) Act 2012

Section 20 sets out the general duties of a police constable as follows:

20 Constables: general duties
(1) It is the duty of a constable—
(a) to prevent and detect crime,
(b) to maintain order,
(c) to protect life and property,
(d) to take such lawful measures, and make such reports to the appropriate prosecutor, as may be needed to bring offenders with all due speed to justice,
(e) where required, to serve and execute a warrant, citation or deliverance issued, or process duly endorsed, by a Lord Commissioner of Justiciary, [sheriff, summary sheriff or justice of the peace] in relation to criminal proceedings, and
(f) to attend court to give evidence.

Section 20 merely sets out general duties. It largely repeats the duties set out in the now repealed Police (Scotland) Act 1967. It is not a comprehensive statement of police duties. Section 20 does not offer a definition of ‘policing purposes’ although the duties set out in this section clearly overlap with the description of policing purposes set out in the entry for Police Scotland in the Register of Data Controllers.

2. Why it is important to have a clear definition of ‘policing purposes’

2.1 The Human Rights regime

Under the human rights regime the collection and retention of data by the police must be in accordance with the law. It is not necessary that the relevant rules justifying interference with the right of privacy should be statutory but the rules must be clear and publicly accessible.\(^5\)

Within the UK, the principal legislation governing the purposes for which the police could process personal data was the Data Protection Act 1998. The legislation did not offer a definition of policing (or any other) purposes but instead provided that personal data could only be processed for purposes that were specified by the data controller. Analogous provisions are set out in the Data Protection Act 2018.

For collection and retention of data by the police to be lawful, having regard to the combined impact of the human rights regime and the data protection regime, it is necessary that the purposes for which the police process data should be clearly set out in published rules. It cannot be the case that the scope and limits of those purposes have to be somehow inferred having regard to the overall common law and legislative framework.

2.2 Prosecutions under the Data Protection Act 1998

The scope and meaning of ‘policing purposes’ is relevant to the purposes for which Police Scotland may lawfully hold personal data. However, the term is also important in the context of prosecutions of police officers under s.55 of the Data Protection Act 1998. Under s.55 it is an offence for a person to knowingly or recklessly obtain, disclose or procure the disclosure of personal data without the consent of the data controller. Several police officers have been prosecuted under s.55. In many cases the complaint alleged that the officers accessed or disclosed personal data for ‘non-policing’ purposes.\(^6\) The use of that term gives rise to difficulty where the term is not clearly defined.

Police Scotland has now published a Data Protection Standard Operating Procedure that makes no reference to ‘policing purposes’.\(^7\) Presumably complaints based on s.55 of the Data Protection Act 1998 (or the analogous provisions set out in the Data Protection Act 2018) will therefore no longer make reference to policing purposes. However, if prosecuting authorities continue to frame complaints that refer to ‘non-policing’ purposes, the term must be somewhere defined.

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6 See for example, Alan Cotton v Chief Constable Of The Police Service Of Scotland S/4100924/16 a decision of the Employment Tribunal. The decision sets out the terms of a criminal complaint against Mr. Cotton under s.55 and narrates that the complaint was deserted since it was accepted that he had a valid policing purpose.
3. The absence of clear rules defining ‘policing purposes’ in Scotland

So far as England and Wales are concerned, the MOPI Code provides a clear definition of policing purposes.\(^8\) Lord Sumption in *R (on the application of Catt) (AP) v Commissioner of Police of the Metropolis* observed that the central concept underlying it [the Code] is the limitation of the handling of “police information” to “police purposes”.\(^9\)

Lord Sumption adds that policing functions are ‘clearly and narrowly defined’ by para 2.2 of the Code. Although Lord Sumption refers to ‘functions’ para 2.2 refers only to ‘purposes’.

The MOPI Code has no direct effect in Scotland and has not been adopted by Police Scotland. It has no counterpart in Scotland. Police Scotland has published various Standard Operating Procedures but none of these appears to address the meaning of ‘policing purposes’.\(^10\)

The entry for Police Scotland in the Register of Data Controllers does contain a description of purposes encompassed under the heading ‘policing’. However the entry is not a ‘rule’. The MOPI Code (and so the definition of policing purposes contained in that Code) has a clear constitutional basis and is framed as a rule. However the terms of an entry in the Register of Data Controllers are of questionable significance. In *Chief Constable of Humberside v Information Commissioner* Lord Justice Carnwath noted that the entry could be amended at any time to reflect the true position as regards the purposes for which the police process personal data.\(^11\) Moreover, once the General Data Protection Regulation takes effect, the notification requirements under the Data Protection Act 1998 will be repealed. The Data Protection Act 2018 makes no provision for notification in a register.

On the face of it therefore, in the context of policing in Scotland, there is no clear rule delimiting the scope of ‘policing purposes’. For the reasons set out earlier, such a rule would appear to be necessary in order to secure compliance with the human rights and data protection regimes.

4. The impact of the Law Enforcement Directive

The overall legal landscape with regard to policing in Europe has been changed by the Law Enforcement Directive. The Directive (which will be implemented by the UK’s Data Protection Act 2018) applies to the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention,

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\(^8\) The Management of Police Information (July 2005) made by the Secretary of State under sections 39 and 39A of the Police Act 1996 and sections 28, 28A, 73 and 73A of the Police Act 1997 (the MOPI Code).


\(^10\) The Information Security Policy (version 1.01 07/02/2014) refers to ‘policing purposes’ but does not define it.

investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security, respecting the specific nature of those activities.\footnote{Recital 11 of the Directive.}

The Directive refers to these purposes as ‘law enforcement purposes’. The Data Protection Act 2018 uses that term but does not define it. The Directive does not restrict policing functions or purposes to those set out in Recital 11. However, it provides specific restrictions (and derogations) for processing for law enforcement purposes.

Police authorities, including Police Scotland, will have to differentiate between processing for law enforcement purposes and other purposes. It will therefore have to be able to clearly specify the range of purposes for which it processes personal data so as to determine whether these purposes are ‘law enforcement purposes’. It must, it is suggested, either abandon use of the term ‘policing purposes’ or somehow determine (and communicate to the public) what is meant by that term and whether it is equivalent to or diverges from ‘law enforcement purposes’. Regardless of which approach it adopts, it is suggested that new rules, whether in the form of statutory provisions or guidance of the kind set out in the MOPI Code, are needed to provide clarity about the purposes for which data is processed by Police Scotland.

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