

Steering from the centre: The Scottish Police Authority and police governance in Scotland

Dr Ali Malik
ali_malik@hotmail.co.uk
Twitter: @DrAliMalik_

Summary: This briefing presents key findings from independently funded doctoral research on police governance in Scotland following reform in 2012. The briefing discusses key issues identified by the research and sets out recommendations aimed at strengthening the SPA's legitimacy, increasing stakeholder and public confidence, and enhancing the capacity of the Authority to implement robust governance and accountability mechanisms.

The SPA was envisioned by its architects as an apolitical arms-length body aimed at providing national strategic oversight and accountability of the single police service. It was envisaged that Board Members, *appointed* rather than elected, on the basis of specific skills, expertise and competencies, would provide the capacity and capability that the previous local police authorities lacked, and strengthen overall police governance.

Although the SPA has continued to evolve and develop, the Authority has faced challenges both in terms of internal organisation, and the ability to effectively hold the police to account. This research identifies a range of factors that have arguably impeded the role of the SPA. These include gaps in terms of knowledge and skills, differing interpretations of the Authority's role, purpose and statutory powers, as well as external pressures and impositions that undermined the autonomy of the Authority, particularly in its formative years.

A joint policy engagement protocol with Police Scotland, and more recently, the delivery of the 10-year strategy *Policing 2026* has created avenues for the SPA to proactively influence and scrutinise policing policies. Going forward, in order to ensure effective governance of transformation and robust accountability of operational policing, it is recommended that the SPA should strengthen its own knowledge-base by proactively engaging with external stakeholders, clarify and emphasise its role in delivering public accountability of the police, and establish sufficient autonomy to adequately position itself as a buffer between local and centrally elected representatives, and the police.

Introduction

This briefing is based on doctoral research that examined the role of the Scottish Police Authority in managing and delivering police governance and accountability following the centralisation of Scotland's eight legacy forces in April 2013, under the Police and Fire Reform (Scotland) Act 2012. The full study is entitled *Democracy and epistocracy reconciled? The Scottish Police Authority and police governance in Scotland after 2012*. The research was undertaken at the University of Edinburgh, School of Law between 2013 and 2017.

The study draws on a range of qualitative data including semi-structured interviews with board members and executive officers of the SPA, a former Minister, opposition MSPs, an HMICS representative, a civil servant and senior police officers, including a Deputy Chief Constable. The interviews took place during March 2015 and May 2016. Further documentary analysis drew on hearings conducted by the Justice Committee and the Justice Subcommittee on Policing, inspection reviews and reports by Audit Scotland and HMICS, a review of a select number of SPA meetings and the SPA Chair's governance review submitted to the Parliament in March 2016. Full ethical approval for the project was obtained from the University of Edinburgh School of Law.

Context

Recognising the SPA's design as a body of experts, and its central role in the new police governance landscape, the project developed an original conceptual and analytical framework drawing on the literature on epistocracy (see Malik, 2016), accountability in public administration (Bovens, 2010), and principles of democratic governance (Jones, Newburn and Smith, 1996). The key components of the analytical framework are *Broad Composition*, *Power*, *Autonomy* and *Deliberation*, discussed below.

- **Broad Composition:** The SPA is composed of members appointed on the basis of specific skills and competencies (rather than elected representatives). In this respect, it represents an institutional epistocracy. The notion of epistocracy is useful in conceptualising knowledge-based governance arrangements and it speaks to the SPA's overall design (Malik, 2016).

An epistocracy lays claim to legitimacy not only through the knowledge credentials of its membership, but also through its capacity to interpret and draw on external knowledge and evidence. While direct forms of democratic control carry an underlying risk of majoritarianism and partisanship, a knowledge-based governance arrangement can objectively assess policing policies and offer external insights in a non-partisan sense.

External knowledge and evidence is particularly important in the context of police governance, as the police also lay strong claims to professionalism and occupational expertise, which often serves a shield against external oversight and scrutiny (Lustgarten, 1986; Jones, 2008; Scott, 2011). For example, this may be manifested in the way the police control the information that is presented to external scrutiny bodies, often setting the agenda for what is to be discussed and debated at a public meeting (Harkin, 2015).

In order to scrutinise, challenge, and counterbalance police expertise, it is important that a knowledge-based governance body that has no direct electoral legitimacy, can counterbalance police expertise and provide assurance to local and central elected representatives that policing policies are subject to robust scrutiny, and not based on self-referential expertise. Since there is no objective knowledge that serves as a pre-requisite for police governance, it is important that members reflect a broad range of skills and competencies. Further, it is important that they have the capacity to draw on external knowledge and evidence. A sufficiently broad composition also ensures that members represent the demographic make-up of broader society.

- **Power:** Power can manifest in two significant ways; formal power, enshrined in law; and informal power, or influence that is subject to negotiation (Zimmerling, 2005).

The SPA derives its authority from statutory powers enshrined in the 2012 Act (s.2(1)). However, both Police Scotland and the SPA are separate corporate organisations with complex lines of responsibility and accountability. While the SPA has formal powers to hold the chief constable to account, the governance arrangement is anything but hierarchical.

In the absence of a hierarchical relationship, it is crucial that the boundaries of informal influence are negotiated to ensure that a knowledge-based police governance arrangement such as the SPA has sufficient influence to:

- a) request information from the police
- b) debate and challenge that information, drawing on its own, and external expertise, and
- c) decide consequences or sanctions or provide redress which may even be a reversal of contentious policies (Jones et al., 1996: 192).

In the absence of formal powers of sanctions, powers to allocate funding and resources could potentially be used as a bargaining tool for changes in policing policy and practice. Given that the police rely on public consent, the risk of negative publicity can also tilt power relations in favour of those charged with holding the police to account.

- **Autonomy:** Arms-length governance bodies have delegated powers based on their expertise in the fields where political actors may lack the necessary competence. However, if experts are deemed as partisan, a crisis of legitimacy can occur (Rosenvallon, 2011).

Jones et al., have placed distribution of power as an important democratic principle arguing that “many criticisms of the arrangements for police governance have identified the concentration of power in some sense as *the problem*” (1996: 192, their own emphasis). Previous tripartite arrangements were routinely criticised for being lop-sided in favour of central government and chief constables, with local police authorities often providing the rubberstamp on key issues (Scott and Wilkie, 2001). It is essential that a knowledge based-governance arrangement does not serve narrow partisan or party-political interests.

In addition to being non-partisan, police governance arrangements also need to be sufficiently independent of the police itself. There is an established concept of regulatory capture in corporate governance that highlights how private firms often ‘capture’ the regulatory agencies, leading to ineffective governance and accountability and a loss of public trust (Carpenter and Moss, 2014: 1-22).

The effectiveness and legitimacy of a knowledge-based governance arrangement rests on sufficient autonomy within the confines of its delegated powers. The notion of autonomy can manifest in impartiality, objectivity, and distance from the police, and political actors. The SPA is ideally situated to act as a buffer between the central government, local government and the police, if it has sufficient autonomy. However, if it is perceived to be too close to the police, or serving central government interests at the expense of local government, or the public, then its legitimacy and purpose may come into question.

- **Deliberation:** Deliberation, in the context of accountability, refers to ongoing “dialectical activity, requiring officials to answer, explain and justify” (Mulgan, 2000: 569). Deliberative principles encourage open discussion and debate about matters of public interest, enabling scrutiny of operational policies on a *proactive* basis while policies are being considered, and through *retrospective* questioning. Proactive scrutiny, in particular, can allow the SPA to influence policing policies by drawing on expert evidence and knowledge at an early stage, allowing the SPA to govern through persuasion rather than having to coerce.

Deliberative principles also add a crucial democratic dimension to a knowledge-based governance arrangement (Malik, 2016). There is a growing body of research that has shown empirically that ‘mini-publics’ and ‘citizen’s juries’ can be an effective form of engaging with the public on specific policy issues (Escobar, 2014a, 2014b; Roberts and Escobar, 2014). Such forums of deliberation should encourage inclusion of disadvantaged groups and silent voices (Loader and Walker, 2007: 223). Deliberation with external stakeholders can also strengthen the knowledge-base of the SPA, and provide a democratic check against its own claims to expertise.

The ‘epistocratic and deliberative’ approach to police governance, underpinned by the above characteristics provides a novel and holistic way of thinking about how knowledge-based governance can be institutionalised and applied in practice. Key findings emerging from the analysis of the SPA in relation to the above framework are outlined below.

Key Findings

SPA’s knowledge, skills and competencies

- The knowledge composition of the SPA has continued to evolve since its first members were appointed in 2012. For example, a snapshot taken in March 2016 shows that members’ expertise and skills included background in Audit, Finance, IT, and HR, experience of local government, public sector and policing, management, work in the voluntary sectors, communications and media, and complaints handling. More recently, new members have been appointed to the Board, bringing in additional expertise in accounting, business transformation, change management, and cyber security.

- The credentials of the SPA, as an expert body were accepted by all of the interviewees. Police Scotland senior officers particularly welcomed the fact that the SPA members came from different professional backgrounds, rather than representing party political interests. As one DCC noted, “at least in formulaic terms” the SPA added a professional and expert dimension to the new governance and accountability landscape.
- Due to the pace of reforms, in the first year, members received insufficient training and principally relied on Police Scotland to develop training sessions for them. However, this allowed senior officers to control and present the information they would like to be scrutinised on.
- Despite a range of professional experience and competencies, members’ existing skills and expertise needed to be complemented with additional training, focused on accountability of operational policing.
- In the absence of which, members lacked confidence to raise or address issues of public concern. For instance, on key issues such as stop and search, and deployment of armed officers on routine patrols, the SPA was seen as slow to react.
- Relatedly, the SPA has struggled to establish a performance framework or a set of criteria against which it can hold the chief constable to account. In 2015, one board member described this as a work in progress, while at the time of writing, the framework remains under development:

“that’s still in progress because obviously if you’re holding to account you need to have clarity about what you’re holding to account on, and we’re still working on that”
(Interview: Board Member B, SPA)

- Provision of good information is crucial for effective governance and accountability mechanisms. In his governance review, the Chair of the SPA highlighted that “information flows from Police Scotland have not been sufficient to allow SPA to have all material and data required in a timeous fashion in order to discharge its oversight function effectively” (Flanagan, 2016: 22, para. 81).
- The SPA continues to rely on Police Scotland to present information that forms the basis of scrutiny. To-date, SPA Public Board Meetings and committee meeting agendas are dominated by papers presented by Police Scotland for ‘information’ or for ‘noting’ purposes. Public Board Meetings in particular are dominated by presentations by Police Scotland about operational activities, reminiscent of previous local police authority meetings.
- Further, there is no evidence to suggest that the information provided by the police, particularly on operational matters is scrutinised on the basis of any external evidence or benchmarking.
- This is predominantly because the SPA has not proactively engaged with external stakeholders, academics, or interest groups that may be able to provide evidence on specific issues and strengthen the SPA’s scrutiny function. SIPR funded research on local scrutiny committees has shown that some local scrutiny committees actively invite members of third sector organisations to scrutiny meetings and this approach not only strengthens the knowledge-composition of the committee but it is welcomed by local divisional commanders (Henry, Malik and Aitchison, 2016: 10).

SPA's role and responsibilities

- While the official police reform agenda focused on enhancing national governance, and financial accountability, the analysis shows that less focus was placed on strengthening accountability of operational policing.
- In part, this omission can be linked to a lack of clarity in the police reform legislative framework. The SPA draws its authority from formal powers enshrined in the 2012 Act, however the only explicit reference to 'accountability' is framed as a duty on the SPA to 'hold the chief constable to account for the policing of Scotland'. How the SPA should manage and deliver accountability was largely left to negotiated agreement:

"we didn't want to prescribe too much ... you've got to set out that [legislative] framework in sufficient levels of detail but without being too prescriptive ... it would be about the practice of that" (Interview: Civil Servant)

- The legislation also broadly replicated the language of the Police (Scotland) Act 1967 in relation to police governance and accountability. In this way, reform repeated the vagueness and ambiguities associated with the patchy governance arrangements that preceded it.
- Like its predecessor, the 2012 Act is unclear about how the SPA's powers translate into actual processes and mechanisms of accountability. In practice, this has manifested in weak structures of governance and accountability and a lack of clarity in terms of how the 'new' tripartite relationship should work in practice.
- Further, despite having formal powers to hold the chief constable to account, the SPA lost considerable influence following the 'turf war' between the SPA's first chair and the chief constable over where Police Scotland's corporate functions would be situated.
- Consequently, this further diminished the ability of the SPA to effectively hold the police to account.
- For example, the issues of stop and search and armed policing both resulted in an intense period of political and media scrutiny, with the Justice Sub-Committee on Policing and the Scottish press taking the lead on public accountability of the police. As one board member stated:

"who can blame the Scottish public in thinking this is a waste of time, this body. Because eventually politicians were making statements on these issues, and HMICS were doing something and at the end of the day, the SPA limped into view almost because it had no other option...as soon as it became obvious there was public concern then we should have occupied that territory and said we will look at this objectively and fairly and come to a view"
(Interview: Board Member D, SPA).

- In his governance review, the current SPA Chair stated that the SPA was not a watchdog as it had no powers of sanction, "it has to govern essentially through its relationships and influence rather than having a direct ability to instruct" (Flanagan, 2016: 16, para. 69).
- This perception has created a lop-sided relationship, where the SPA despite having formal powers to hold the chief constable to account has been unable to exert influence or to establish an effective accountability relationship.
- This vacuum has allowed other stakeholders to take on an active role in delivering public accountability of the police. In its legacy paper, the Justice Sub-Committee on Policing highlighted that:

"the SPA's recurring failure to properly hold Police Scotland to account, led to the Sub-Committee taking on a much more active role in providing a public forum for debate on the new policing arrangements than had perhaps previously been envisaged. It is essential that such a forum does not disappear, yet it remains to

be seen whether the SPA is yet in a position to take on this role” (Justice Sub-Committee on Policing, Legacy Paper, 2016: 3, para.10)

An arms-length body?

- The official justification for the creation of the SPA was for an arms-length governance body to sit between policing and central government (Scottish Government 2011:13, para. 3.9). A former Minister, confirmed that “we were quite clear that there would have to be a body in-between”.
- However, in the first three years of the reforms, the SPA has been perceived in some quarters as an extension of the Scottish Government, its members acting in part at the behest of Scottish Ministers, rather than governing through expertise and knowledge, their initial claim to legitimacy.
- The strongest perception of a lack of autonomy to implement robust mechanisms of police accountability came from within the SPA board, as shown below.

“I could say that there have been occasions when governments view has been through the civil service quite forcibly put to us as a potential direction on matters”
(Interview: Board Member A, SPA).

“I’m an experienced board member, I have sat on a lot of boards, I have never had more contact with Ministers than in this role so I think that in itself is very interesting”
(Interview: Board Member B, SPA).

“The central government throughout the entire process has been far too heavily involved ... rather than having a separation of duties between government, SPA, police we very much had the government and the police, and the SPA almost as onlookers...”
(Interview: Board Member C, SPA)

“... whilst there is no day-to-day interference with what we are doing, I think there has been a perception and the threat that if we overstep our responsibilities or if we were to upset the chief constable then the Cabinet Secretary would intervene to stop us from whatever it is we were doing, and that perception has had an effect on the ambitions of Police Scotland”
(Interview: Board Member D, SPA).

- While the above comments may not be representative of the whole SPA board, there was a clear perception among some members that the SPA has been slow to develop its approach to police accountability due to external impositions or interference, be it direct or indirect.
- Again, these observations may be linked to the 2012 Act, which confers considerable power on the Cabinet Secretary for Justice. In brief, the Cabinet Secretary appoints the chair, and influences the final composition of the SPA board. The Scottish Ministers also have formal powers to give directions to the SPA, so long as those directions are not related to police operations.
- Members particularly noted that they were expected to emphasise light touch scrutiny, particularly following the controversies surrounding stop and search and armed policing. One member noted that:

“every time we try to bite, the government removes a tooth ... I have been shocked, absolutely shocked at the level of government interaction” (Interview: Board Member C, SPA).

- In his governance review, the Chair of the SPA alluded to the fact that “the SPA has yet to be seen to be sufficiently separate from Government or to fully establish its role and authority” recognising that the linear relationship between the Scottish Government, the SPA and Police Scotland needed to be “fully

understood and followed by all stakeholders to allow the SPA to become more effective and credible in its statutory role” (Flanagan, 2016: 10, para.42).

In light of the findings and the framework outlined above, the following recommendations are put forward:

Suggestions arising from the research

1. Further consideration should be given to the way in which operational information presented by the police is interpreted, analysed and challenged.
2. As well as proactively drawing on the expertise of existing bodies such as HMICS, Audit Scotland and PIRC, the SPA should consider co-opting a broad range of members to its committees.
3. The SPA should establish a clear focus on delivering public accountability of the police. In the post-2012 police governance landscape, the SPA not only has significant formal powers, it also has avenues to exert considerable influence to implement robust accountability of operational policing.
4. The SPA should actively seek to engage with third sector organisations, staff associations, academics, and local community representatives on specific topics to ensure the SPA has a strong evidence base to strengthen its scrutiny function.
5. The SPA should consider proactively engaging with local scrutiny committees and other representative bodies of local committees to sufficiently understand the impact of policing on local communities.
6. The SPA should adequately position itself as a buffer between central government, local government and the police, leading on public accountability of the police on key issues of public concern.
7. It is essential that the SPA is able to operate with sufficient autonomy, within the confines of its delegated powers and with due regard to its own obligations to external stakeholders such as the Scottish Government, the Parliament, HMICS, Audit Scotland, PIRC, and local scrutiny committees.

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