

Freedom of movement and the rule of law in Scotland – Nicola's Aberdeen lockdown

Description

Yesterday, I was due to meet a few folk from Aberdeen and go for a walk around the eastern fringes of the Cairngorms National Park. With the outbreak of Covid-19 in the Granite City, that was clearly not sensible and we have re-arranged for a later date. The aborted trip, however, prompted me to take a detailed look at Nicola Sturgeon's announcement about the Aberdeen lockdown and the restrictions that have been imposed. Together they raise significant issues about how the Scottish Government is muddling legal restrictions with what is merely guidance and how people's ability to exercise access rights is being restricted outside any due legal process ([see here](#)). Given that further lockdowns could be imposed anywhere, this has implications for everyone living in Scotland.

Nicola Sturgeon's announcement of the Aberdeen lockdown ([see here](#)) commenced with her stating that it had reluctantly *been agreed to re-impose some restrictions on the Aberdeen City area* and *I want to set out what those restrictions are*. She then went on to say: *But firstly our travel guidance to people in Aberdeen from today is that you may not travel more than five miles for leisure or recreational purposes*; *Secondly, from today people from Aberdeen should not go into each others houses*; and finally that some businesses would be closed down and legal regulations introduced to enforce this.

While in describing the three measures Nicola Sturgeon was clear about what was law and what guidance or advice, she introduced all three as new *restrictions*. The implication was that all three were of equal weight. They are not. Only the third measure, the closure of pubs and restaurants, has legal status. It has been enshrined in the Health Protection (Coronavirus, Restrictions) (Aberdeen City) Regulations 2020 ([see here](#)) and can be enforced by the police.

The other legal rules for the residents of the City of Aberdeen are the same as those for everyone else living in or visiting Scotland. They are contained in the Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations Scotland 2020 ([see here](#)). These have now been amended nine times, mainly as a result of lockdown being relaxed, and most of the provisions put in place at the start of the corona crisis, including those restricting people's movements, have now been deleted.

Legally, therefore, there is nothing to prevent residents of Aberdeen from leaving the city for any purpose, whether something harmless like a walk in the countryside, or something potentially very harmful, such as going down to Glasgow for a pub crawl. The legal rules about meeting other people in their houses is the same as for the rest of Scotland, no more than three different households can meet each other indoors.

There appears no legal justification for why the law, as contained in the Aberdeen Restrictions Regulations, should not match Nicola Sturgeon's three measures much more than it does. For a long time the Scotland-wide Restrictions Regulations prevented people leaving their homes without a reasonable excuse or meeting others. A version of that could have been re-introduced for Aberdeen, as

has been done for Leicester down in England. There, the Regulations introduced for the city at the beginning of July, make it an offence for residents to be away overnight except for specified reasons (interestingly there is no restriction on travel for the day for outdoor recreation) and to meet more than one person from a separate household indoors.

Why does the mismatch between law and guidance matter for outdoor recreation?

First, it's creating increasing confusion about the role of the police:

Police Scotland said there would be additional patrols in Aberdeen. Deputy Chief Constable Will Kerr added: "Our officers will continue to explain the legislation and guidance but, for the minority who may choose to breach the regulations and risk the health of others, we will not hesitate to take enforcement action where appropriate."

The business of the police is to enforce the law, not to explain guidance. Legally people in Aberdeen are free to travel out of the city and go for a walk or indeed go on holiday. It would be wrong, not to say intimidatory, for the Police to start stopping cars and start asking people "do you understand the First Minister's advice on travel?". What the police should have properly been doing was going up to all the people queuing for bars (see below), explaining that under the Restriction Regulations anyone queuing to enter premises legally must keep 2 metres apart, and that stating that anyone who didn't space out immediately would be issued with a Fixed Penalty Notice.

Second, the lack of clarity about the difference between law and guidance has encouraged what can only be described mob rule. In places that has resulted in people having their car tyres slashed for daring to go for a walk in the countryside. Nicola Sturgeon has, inadvertently, created her own private enforcement agency who see their role in life as enforcing her guidance as strictly as any law. People I know in Aberdeen at present are staying put not because of the police but because of how other members of the public might take matters into their own hands.

Third, by conflating different types of guidance and the law, the Scottish Government has confused what is essential for preventing the spread of Covid-19, with what is not. A prime example of this has been the Scottish Government advisory five mile travel "restriction", which formerly applied to the whole of Scotland and has been "re-imposed" on people living in Aberdeen. This treats people traveling on public transport in exactly the same way as traveling alone in a car. The risks are totally different and, as Parkswatch has long argued, when going by car or bike, it's what you do at the end of your journey that matters..

Fourth, it is easier to challenge legal regulations than guidance through the Courts. Under Human Rights law legal restrictions to people's civil liberties need to be justified and proportionate. That is arguably why the Scottish Government never repealed our access legislation. They would have been open to legal challenge on the basis that there was almost no risk of catching or spreading the virus by walking in the countryside. Effectively they got round this, however, by issuing guidance to people not to travel more than five miles for outdoor recreation and then allowing people to take the law into their own hands and block off parking places.

All these factors resulted in completely unnecessary and unjustifiable restrictions on people's ability to enjoy outdoor recreation during the lockdown and are now doing so again in Aberdeen. I have absolutely no desire to see anyone from Aberdeen at present and believe some increased restrictions on contact between people were completely justifiable. But I would absolutely defend the right of the people I was going to meet for a walk to go to the same places alone or in their household group.

The Scottish Government needs to target what matters but instead the immediate response of Nicola Sturgeon to the Covid-19 outbreak has been to target outdoor recreation. This is not justifiable but is very hard to challenge because it is being outwith normal legal processes.

I was wondering about the reasons for this when I read these two letters in the Herald yesterday:

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WHERE was Police Scotland last week when huge crowds were witnessed outside Soul Bar on

Arguably, targeting outdoor recreation has been a useful means to distract people from the failures of the Scottish Government to halt the spread of Covid-19, as recently demonstrated in Aberdeen by the failure the police to enforce the law on queuing. It also distracts people from the fact that the government has carefully avoided introducing any new measures that target the much greater risks posed by working practices in the oil industry.

For a broader analysis of the risks of Nicola Sturgeon's word being taken as law, I would commend (Declaration - I have been writing for Source on Care Homes):

[Robin McAlpine: The foundations of Scotland's democracy have crumbled and you should worry](#)

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Category

1. Access rights

Tags

1. access rights
2. outdoor recreation
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