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Dear Margaret,

COVID-19 justice matters and policing

Thank you for your correspondence of 26 and 31 March 2020 in which you asked a number of questions relating to justice and policing in light of the emergency situation caused by the Covid-19 pandemic.

In order to provide as full a response as possible I attach detail against each of the questions posed. I hope this is helpful in providing further clarity on the present position.

I would like to take this opportunity to thank you and your fellow members on the Justice Committee for your support and joint working at these unprecedented times. Going forward, I am committed to ensuring the Justice Committee is kept informed of progress made on a range of justice matters over the coming weeks.

Finally, I wish to express my immense gratitude for all of those working across the country to maintain public safety and sustain Scotland's system of justice during these very challenging times.



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Questions on the UK Government's Coronavirus Bill and the Scottish Government's Legislative Consent Memorandum

1. What assessment has the Scottish Government made, or will be making, of the equalities, human rights and community impacts in relation to any new restrictions included the UK Government's Coronavirus Bill and the new justice and policing powers, Have relevant bodies, such as the Scottish Human Rights Commission, been consulted?

All of the recent UK and Scottish legislation has been assessed for compliance with the Convention Rights set out in the Human Rights Act 1998. The requirement for legislation to be consistent with these rights is a fundamental feature of the devolution settlement and is written in to the Scotland Act 1998. For its part, the UK Government has informed the UK Parliament that, in its view, the UK Coronavirus legislation is compatible with these rights.

The Scottish Government has been in dialogue with the Scottish Human Rights Commission in relation to the legislation and has been liaising also with the Equality and Human Rights Commission. I recently spoke to the SHRC on 31 March on a variety of justice matters.

An Equality Impact Assessment (EQIA) was conducted for the Scottish bill, to identify possible implications for people with protected characteristics. There were a number of Justice policy measures included in the bill covering a range of areas. These are temporary measures to respond to the current pandemic. As such they do not represent new Scottish Government policy and the EQIA has been proportionate to that. Impact assessment is an iterative process, and the EQIA will be kept under active review.

Careful consideration has also been given to potential impacts on wider communities and engagement is continuing proactively with community representatives. Assessment of wider human rights implications, including in relation to economic, social and cultural rights, is being undertaken as part of our overall management of the response to the current emergency. Similar ongoing evaluation of potential equality and community impacts is also being undertaken as the situation evolves and we will continue to engage proactively with human rights and equality stakeholders and community representatives.

The Scottish Government welcomes the high-quality commentary and analysis produced by the National Human Rights Institutions, civil society, academia, professional institutions and others in response to both UK and Scottish legislative proposals, and is particularly grateful for speed with which expert commentators have been able to respond in challenging circumstances.

2. [We have also asked this question of SCTS] What impact will the Bill have on the work of the courts (including civil courts and tribunals) in Scotland. Most of the provisions on courts and tribunals in the Coronavirus Bill do not extend to Scotland, but in the Chamber on 24 March, the Lord Advocate alluded to some impacts for courts, trials and, in turn, the police service. Could you please provide some details?

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The Committee will be aware of the very significant changes that have been announced by SCTS since your letter was written. SCTS will be able to respond in detail, but the changes amount to a cessation of non-essential business whilst allowing critical matters to be dealt with as safely as possible. The Coronavirus (Scotland) Bill, which was passed by Parliament on Wednesday 1 April will assist by allowing more business to be conducted without face-to-face contact by, for example, allowing greater use of electronic signatures. With specific reference to the UK legislation, that Act has measures that will be available to Scottish Ministers to facilitate the work of the Mental Health Tribunal in Scotland.

The Committee has also subsequently written regarding the potential for further legislation as a result of the withdrawal of the provisions in the Bill relating to the conduct of trials on indictment. I have made clear that we will now work urgently with the judiciary, legal profession, political parties and organisations representing victims with a view to seeking to maintain, so far as possible, an effective justice system. I will respond separately to the Committee regarding engagement in those discussions.

3. The powers in Schedule 20 paragraph 45 (2) state that all offences prosecuted in a Scottish court are triable only summarily and carry a 12 month maximum sentence or a fine not exceeding level 5 (£5000). The maximum sentence would therefore be subject to the presumption against short sentences. What guidance is being offered as to whether the presumption will still apply in these circumstances?

In relation to the powers in Schedule 20 paragraph 45 (2), the presumption against short sentences will still apply and no specific guidance is planned in relation to this. Indeed it would not be appropriate for the Government to seek to offer guidance to the judiciary in that regard. The presumption is not a ban and custody may be used if a court has decided that alternatives are not appropriate. Reasons for using a custodial sentence would have to be recorded.

4. Has the Scottish Government given Police Scotland any guidance on how to interpret the term “reasonable grounds to suspect” in relation to new police powers to detain an individual who is “potentially infectious” in Clause 49/Schedule 20 of the UK Government’s Coronavirus Bill? If not, does the Scottish Government intend to issue such guidance, and if so, when will it be available?

The Committee refers to Clause 49/Schedule 20 of the UK Government’s Coronavirus Act. However, I believe that the Committee means Clause 28/Schedule 21. My answer, therefore, reflects this.

In determining whether, or not, a person is infectious the police will have regard to the definition of a “Potentially Infectious Person” which is provided in Schedule 21 Part 2 of the Act.

On the matter of guidance, the Scottish Government has issued wide ranging general guidance on Covid-19. I attach a link for the Committee’s reference.

<https://www.gov.scot/collections/coronavirus-covid-19-guidance/>

However, it is for the Chief Constable to determine Police Scotland’s operational approach to exercising the powers in Schedule 21, and to develop operational guidance as he considers relevant and appropriate in the circumstances.

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In dealing with each case, an officer will use their judgement based on the given circumstances at the time and in line with the legislation described above. In all cases, officers will act with integrity at all times and treat a person with dignity, fairness and respect.

5. Has the Scottish Government given Police Scotland any guidance on how it should approach the powers in Schedule 21 of the UK Government's Coronavirus Bill which provides powers to Scottish Ministers to prohibit a number of activities and which will be enforced by, amongst others, the police? If not, does the Scottish Government intend to issue such guidance, and if so, when will it be available? Could you please clarify the "others" are, referred to in Schedule 21?

Guidance on Coronavirus (Covid-19) – Staying at Home and Away from Others – Social Distancing is publically available on the Scottish Government's website.

<https://www.gov.scot/publications/coronavirus-covid-19-staying-at-home-and-away-from-others-social-distancing/>

It is for the Chief Constable to determine the operational approach that police officers should take in exercising the powers in Schedule 21 of the UK Government's Coronavirus Act 2020 and also in the Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020, which came into force on 25 and 26 March 2020 respectively.

Police Scotland have produced operational guidance on the proportionate application of these powers for dissemination to constables along with proactive communications and social media highlighting that, even in these exceptional times, their approach to policing will remain governed by consent, with "soft enforcement" as the default setting.

Police officers (and in some rare cases other persons designated by the local authority) may exercise the following powers when they encounter a person who is outside of their residence and who does not provide a reasonable excuse, and where it is necessary and proportionate:

- direct that person to return to the place where they live;
- give the person concerned reasonable instructions on the way in which, or the route by which, the person in question is to return to their home;
- use reasonable force in the exercise of the power remove that person to the place where they live (power reserved only to a constable).

They also have the power to instruct adults to take steps to stop their children breaking these rules. And, where they encounter three or more people are gathered they may direct the gathering to disperse.

With regard to "others," the Act defines Powers Relating to Potentially Infectious Persons, reproduced below:-

1(1) Parts 2 to 5 of this Schedule—

- (a) confer powers on public health officers, constables and immigration officers in England, Wales, Scotland and Northern Ireland, and
- (b) make related provision.

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The rest of the section in the Act is about testing and removing people to testing centres and keeping them there. It should be noted that only constables and immigration officers have powers of reasonable force in order to enforce this, not Public Health Officers.

More general/longer-term questions

1. *Given your statement in the Chamber on 24 March, would you provide further details on your plans for the early release of prisoners from their sentences given the current situation? What assessments will be made and will that include a risk assessment?*

As you will be aware, the Coronavirus Bill, as passed, contains provisions which would permit the release of certain prisoners in response to the effects coronavirus is having or is likely to have, on a prison or prisons generally, for the purpose of protecting:

- (a) the security and good order of any prison to which the regulations relate, or
- (b) the health, safety or welfare of prisoners, or those working, in any such prison,

Further details about the policy considerations and the legislative mechanism can be found in the Policy Memorandum and details of the potential impacts of these provisions can be found in the Financial Memorandum. No decisions have been taken as to whether the release powers contained within these provisions will be used and I can assure the Committee that any release under these provisions would be subject to an appropriate level of risk assessment.

2. *Will the Scottish Government ensure that any new coercive powers will be limited to specific offences or defined situations and not be general in nature?*

The new powers will be limited to the offences set out in the Coronavirus Act 2020 and in the Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020.

The Regulations create a new offence making it unlawful for anyone to leave the place where they live without a reasonable excuse (and provides a wide- ranging and non-exhaustive list of reasonable excuses as possible defences to this offence).

The Regulations also provide police constables with the power to issue a Fixed Penalty Notice to anyone over 16, if the constable has reason to believe an offence has been committed under the Regulations.

The Act will be reviewed every 6 months and fall after 2 years. However, a UK Minister (and in some cases a Minister of the Devolved Administrations) may make regulations to extend some of the provisions of the Act beyond the two year time period (for a maximum of 6 months).

The Regulations will be reviewed every 21 days, with the first point of review being on 16 April, and will fall after 6 months.

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3. Would you provide details of the Scottish Government's plans to increase the opportunities to pre-record evidence, enable evidence to be given from other locations and expand the use of technology, allowing those in police custody or prison to engage in a wider range of court hearings? Can you provide details of the ability of Police Scotland to allow those in police custody to engage in court hearings?

The Scottish Government is very supportive of the greater use of pre-recorded evidence in criminal cases. As you will be aware, in January we commenced the first phase of implementing the new pre-recorded rule for children giving evidence in some of the most serious cases in the High Court. I agree that the special measure of "Evidence by a Commissioner" could be beneficial in the current challenging circumstances and I consider that the current legislative framework enables Parties calling a vulnerable witness to use that special measure, where appropriate.

You will be aware that the Coronavirus (Scotland) Bill contained provisions which will enable a wider use of technology to support the justice system's response to the coronavirus outbreak. These include allowing electronic signatures and transmission for documents connected with court proceedings, and extending the circumstances in which live linking can be utilised in proceedings. This includes enabling the potential for court hearings to be conducted over video and audio links.

4. Do the Scottish Government/COPFS have any plans to alter the 40-day and 140-day rule for summary and solemn procedure respectively without any case being brought to trial?

As Committee Members will be aware, the Coronavirus (Scotland) Bill, which was passed by Parliament on Wednesday 1 April makes provision to extend by six months the 140 day limit which applies in solemn cases at section 65(4) of the Criminal Procedure (Scotland) Act 1995 and to extend by three months the 40 day limit which applies in summary cases at section 147 of that Act.

5. What steps are being taken by Scotland's Secure Care units for young people in light of the current Covid-19 outbreak? Is it still intended the new National Contract for secure care will commence on 1 April?

All five secure centres are working to maintain a normal service and keep to the daily routine wherever possible. This includes continuing with education and support programmes. They are working with young people to ease their concerns and ensure they are able to stay in contact with their families, where possible.

All of the secure services have robust service continuity and contingency plans in place. These are actively reviewed and updated as new information and guidance becomes available. A guide for the children and young people has been developed by Kibble – and that has been shared across all the secure centres to adopt and adapt as necessary. All 5 centres do have a number of staff absent due to self-isolation. This is an ongoing issue, but the centres advise they are currently able to manage.

Staff have access to PPE and are able to care for the young people in isolation. There have been 6 young people across all the centres who have been in isolation in recent times. All

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these young people have been tested for Coronavirus, with every test to date returning negative.

All five centres are in daily contact with Scottish Government officials. There is a weekly tele-conference with Heads of secure care services, Scottish Government, the Care Inspectorate, Education Scotland and Scotland Excel. This is an opportunity to raise concerns, share ideas and suggestions, discuss new guidance and hear how other services are managing.

Scotland Excel awarded 2 year contracts to the 4 independent secure providers in late March with a start date of 1 April 2020. The contract includes an option to extend the contract for a further 2 years.

On the issue raised in correspondence dated 31 March 2020

Access to PPE

The wellbeing and safety of all those who live and work in our prisons as they respond to this unprecedented operational and public health challenge facing our prisons, is a priority for both this government and the Scottish Prison Service

The prison service have confirmed that both SPS and GeoAmey staff have secured a sufficient level of Personal Protection Equipment to enable them to support these protocols designed to minimise the risk of contamination spread both to staff and people in their care. This equipment is up to date and they are actively working to secure more equipment.

Social Distancing Measures

In order to implement effective social distancing and balance the competing demands of public health and operational stability, the SPS has temporarily suspended a significant number of regime activities, with further imminent measures taking place, in response to the unprecedented challenges facing the prison estate as a result of COVID 19.

These are decisions not made lightly but are necessary in order to ensure that stability and safety is maintained in our prisons and to protect the health of those who live and work in them.

A number of changes to daily regimes within our prisons have been enacted to enable social distancing, these include the suspension on communal dining, all temporary absence, including Home Leave, Work Placements and Escorted Leave being suspended, large group physical activity within gyms being suspended and the suspension of all work parties not deemed as essential services to keep the prison running. It is important to note that SPS will ensure that no one will be financially disadvantaged as a result.

SPS has set up a dedicated family support helpline to enable family members of those in SPS care with advice and support on SPS response to COVID-19.

We are also working closely with SPS to look at alternative arrangements for family contact and they will be put in place as a matter of priority.

Concern for Staff Members' Families

We recognise that this is an anxious and challenging time for those working in our prisons who are working tirelessly to respond to the unprecedented challenges we are all facing

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across the justice system. Both the Scottish Government and the SPS are keeping the staffing impacts of COVID-19 under constant review.

Prison officers and other staff in our prisons have been included in Category 2 of the key worker guidance issued to Local Authorities on 20 March which will allow access to childcare.

The SPS has issued public health guidance to all staff on how to prevent the spread of infection and health and wellbeing guidance on how to self-isolate if they themselves become symptomatic.

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