I would like to take this opportunity to write to you with some further information, following my appearance before you to give evidence on the Management of Offenders Bill on 15 January 2019.

Law Society – Unlawfully at Large Offence

Firstly, you asked me for my response to the written submission that the Law Society recently made to the Justice Committee. They have set out some concerns about the creation of a new offence of being unlawfully at large and I have now had an opportunity to consider their submission. The Law Society caution that the creation of a new offence will not, in and of itself, address the full range of the Inspectorates recommendations in relation to Home Detention Curfew (HDC). I would agree with that view, which is why, as I outlined to you in the evidence session, this step is not being taken in isolation but it is just one of a number of actions that the Scottish Government, Police Scotland and the Scottish Prison Service have made in response to the 37 recommendations made by the Inspectorates.

All 37 recommendations were accepted in full. The creation of a new offence was one of those recommendations and I do believe the creation this offence will strengthen the powers that the Police have to apprehend those who are unlawfully at large. It will also open up the option of an additional criminal penalty being imposed where an offender is unlawfully at large.

The second strand of their letter refers to the technical creation of an offence and rightly notes that the notification of an offender that they have been recalled to prison becomes vital if that offender is to be charged with the offence of being unlawfully at large. This is an issue that we have been considering in formulating the new offence and we are mindful of ensuring that the new offence will flow from an offender being aware of the notice of recall and failing to comply with that notice.

The Law Society also note concerns with police powers to enter premises to effect an arrest of a person who is unlawfully at large. We intend to address this concern via a Stage 2 amendment in the Bill which will clarify the existing warrant procedure in section 40A of the Prisons (Scotland) Act 1989. Section 40A enables a warrant to be applied for to arrest a person who is unlawfully at large – we intend to clarify that the warrant is to be sought by the police and that the warrant may also authorise entry to, and search of, premises.

General Data Protection Regulations (GDPR)

A further issue that was raised during the evidence session was the issue of the implications of the General Data Protection Regulations (GDPR) on the operation of the electronic monitoring service. The processing of personal data for the purpose of the execution of criminal penalties including the safeguarding against and the
prevention of threats to public security is not covered by the GDPR. That form of data processing is covered instead by the EU Law Enforcement Directive as implemented by the Data Protection Act 2018.

We are satisfied that the current arrangements for the processing of data for the purposes of electronic monitoring comply with data protection law. The creation of a power in section 9 of the Bill to enable the Scottish Ministers to make provision via subordinate legislation for the collection and use of personal data obtained via electronic monitoring will strengthen this position further.

Where data protection requests are received by the service provider (for example the Police undertaking an investigation into an offence), they are forwarded to the Scottish Government’s EM Contract & Service Delivery Manager for consideration of the relevant exemption to determine whether the data can be provided.

I am not aware of the specifics of the case to which you referred and which was raised with you at the Wise Group. If you are able to provide details though I am happy to investigate further. In general terms, a third sector service provider would not be entitled to data about monitored individuals using the prevention or detection of crime exemptions. Equally, details about an individual’s health details would be sensitive personal data and colleagues in the NHS will have their own requirements to safeguard patients’ information. Again in general terms, where a monitored individual is in the care of health professionals, that information is passed, with the individual’s consent, back to G4S to verify, in order that it can be provided to the monitoring authority (SPS or Courts) so that they can consider any breach reports in that context.

Further Research on Home Detention Curfew

As the Inspectorates outlined in their reports, it would be helpful to have a greater amount of research available looking at the benefits of HDC. The development of the service to date has been informed by the empirical evidence that is available but to help consolidate that evidence, I have asked my officials in Justice Analytical Service to undertake a literature review of electronic monitoring more generally but also of HDC to draw that evidence together into one place. That work is now underway. My intention is that this will be published prior to the Inspectorates doing their follow-up in May 2019.

I am also asking my officials, through the procurement of the new electronic monitoring contract, (which is taking place currently for a new contractual period starting from 1 April 2020), to see whether there is also greater qualitative information we can make available through the contract. This would capture more about the experience of being on electronic monitoring from the perspective of both the monitored individual and those with whom they share a household. This will give us the opportunity to explore whether there are particular issues with regard to gender which we need to reflect in the development of the service.

It may also be worth pointing out the current position with Community Assessment Reports, which have to be done prior to electronic monitoring being put in place. The views of those in the household about having the monitored person in the household
are at present taken into account in that report. If a person does not want an individual to return to the household they can decline consent and the monitored individual will only be told by social work that the household has been found unsuitable to undertake monitoring. Consent to have a monitored individual in the household can also be withdrawn at any time by the householder and they have a direct line to G4S placed in the household which would enable them to do so.

HDC Risk assessment and management

The Committee asked a number of questions about risk assessment and management in relation to the HDC processes, it might be helpful if I set out a bit of further information to help your consideration of these issues. The Inspectorates, in their reports in October 2018, made a number of recommendations which were related in some way to risk assessment for HDC. All 37 recommendations that were made by the Inspectorates were accepted immediately and action was taken on a significant number as soon as the recommendations were received. Some of these recommendations require longer-term pieces of work which are also underway. I have set out some further details below.

In terms of risk management, a number of immediate actions were taken, for example:

- Police Scotland strengthened the governance of activity to apprehend individuals who are unlawfully at large. These individuals are now discussed at each Local Area Commander’s daily tactical briefings, ensuring clear tasking and supervision arrangements are in place.
- Police Scotland and SPS undertook urgent work to improve information sharing. In June, a Working Group was established to review and improve information sharing and communication processes in relation to HDC. As a result, a process is now in place so that information on individuals released on HDC - and those subject to recall to custody - is shared and acted on in real time. This means that efforts can be focused on identifying and apprehending individuals who are unlawfully at large.
- Actions were taken to strengthen cross-border arrangements where individuals are released to addresses in England and Wales, particularly in relation to notification of release and revocation of HDC licences. Police Scotland and SPS established single points of contact in all 43 police forces in England and Wales and have developed clear processes to alert those forces and HM Prisons and Probation Service to release on HDC to a curfew address in their area and any revocation of those licences. As a further safeguard, Police Scotland are also informed and confirm that the relevant information is logged on the Police National Computer.

In terms of risk assessment, the Inspectorates recommended that we consider development of national policy on risk factors that assess not only the eligibility of an offender for release on home detention curfew but his/her suitability for release based on a presumption of refusal where the conviction that the person has been sentenced for relates to violence, possession of an offensive weapon or having known links to serious organised crime. This change was introduced immediately and those presumptions were written into the HDC guidance in October 2018.
The Inspectorates also recommended that the guidance document (which describes in detail the HDC service) required extensive review in order to provide those charged with undertaking the assessment to release prisoners on HDC with more assistance in relation to the potential weight and importance that should be placed on previous offences, addictions issues and behaviour whilst in custody, etc. It was also recommended that the assessment process be reviewed to ensure that it can satisfy the assertion within the guidance that: “… a robust assessment process has been developed …”

The immediate response to the recommendations resulted in an initial review of and update to the guidance and a number of changes relevant to risk assessment were made as follows:

- A presumption was introduced whereby individuals whose offence involves violence or knife crime will not, in normal circumstances, receive HDC. We introduced a presumption against HDC for individuals who have known links to serious and organised crime.
- Richer information through Police intelligence is now being shared with SPS to inform decisions about HDC release;
- SPS have added an additional level of assurance to the HDC assessment process. Governors in Charge now receive recommendations and will decide on HDC release, applying consistent criteria.

In terms of the medium/longer term work that will take place, the multi-partner HDC guidance and governance group will, prior to the Inspectorate returning in May, examine whether any of the presumptions should become statutory exclusions. They will also determine what if any criteria can be develop assist the judgements about how best to weight the additional information that is now available as part of the assessment process.

Case Management

Some additional work to which I alluded and of which you may wish to be aware, is being taken forward by the Scottish Prison Service, through the Multi-Agency Case Management Steering Group, (MACMSG), chaired by SPS’ Director of Strategy & Innovation. The Group’s purpose is to provide strategic direction in relation to a comprehensive review of case management. A key aim of the SPS Strategy Framework for Offender Case Management is that the SPS appropriately assesses the needs and risks of all individuals in their care in accordance with Scotland’s Framework for Risk Assessment, Management and Evaluation (FRAME).

They are looking at identification and assessment of risk presented by prisoners not subject to post-release supervision, i.e. most short-term prisoners with the exception of those convicted of a sexual offence. On 20 October 2017 it was agreed that a working group should be formed to review the current position and present recommendations to the MACMSG and the working group was subsequently established in December 2017 with membership from SPS, Risk Management Authority and Social Work Scotland.
The following scope and remit for the group was agreed by the MACMSG:

- Clearly define ‘Risk’ for short-term individuals;
- Review which tools and methods of Risk Assessment are available;
- Recommend suitability of Risk Assessment tools/methods for the target group;
- Outline the potential impacts for SPS and Partners in relation to completion of Risk Assessment for short-term individuals; and
- Ensure recommendations support the associated review of Integrated Case Management (ICM) Guidance.

To date, the working group has:

- Gathered and analysed data for people in custody serving short-term sentence by; type, length and age profile;
- Agreed that the definition of ‘Risk’ should be consistent with Chapter 3 of FRAME: [https://www.rma.scot/wp-content/uploads/2018/02/FRAME_policy.pdf](https://www.rma.scot/wp-content/uploads/2018/02/FRAME_policy.pdf);
- Reviewed available Risk Assessment tools including; LSCMI Initial Assessment, LSIR Screening Version and the Police Practice Model;
- Recommended to the MACMSG (March 2018) that LSIR Screening Version is the most suitable tool for the target group;
- Present a proposed Risk Flow Diagram to the MACMSG;
- Following MACMSG agreement; carried out live and virtual target group testing of LSIR Screening Version consistent with the Risk Flow Diagram.

The findings of testing will be presented at the next MACMSG. This will be scheduled late February or early March, date yet to be confirmed with membership. The MACMSG will then advise on recommendations from the working group surrounding further scoping work required in relation to financial and resource implications for SPS and partners. These findings will be presented to the MACMSG ahead of being considered by SPS Executive Management Group, with all relevant outcomes being reflected in the ongoing review of ICM Guidance.

The working group and MACMSG recognise that Risk Assessment for individuals serving short-term sentences is a complex undertaking that requires significant collaboration with other partners. Put into context; there are currently over 3300 individuals serving less than 4 years across the SPS Estate. There are circa 1200 people in custody who would meet the requirement for LSIR Screening Version as per the Flow Diagram. Following assessment, a suitable plan would be agreed for the individual, which could include intervention work. It is important that proper testing and consideration of this work is completed and owing to the complexities associated with the further scoping, it is expected that the final recommendations of the Working Group will be outwith Stage 3 of the passage of the Bill.

Finally, I would like to reassure the Committee that I am of the view that the management of risk in the system needs to ensure robust but also proportionate management of risk, across the long and short-term sentenced cohorts. Risk cannot be eliminated from the system completely, only managed, and almost all those in
custody will be released at some point. The changes that were made in response to
the Inspectorate reports strengthen the HDC system in the ways that the
Inspectorates recommended and they will return in May to assess progress on the
work completed to date and the work that is ongoing.

I hope that this information is helpful to the Committee.

Humza Yousaf
Cabinet Secretary for Justice
21 January 2019