



Law Society
of Scotland

Scottish Government Justice Committee Call for Evidence

Management of Offenders (Scotland) Bill

20 April 2018



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Criminal Law committee welcomes the opportunity to consider and respond to the call for evidence in relation to the Management of Offenders (Scotland) Bill (the Bill) as introduced on 22 February 2018. We note that the Bill covers three main policy areas of:

- electronic monitoring of offenders by expanding its use and provision
- amending and modernising the provisions relating to disclosure of convictions
- revising the organisation and functions of the Parole Board for Scotland

The committee has the following comments to put forward for consideration:

Electronic monitoring

1. Overall, do you support Part 1 of the Bill concerning the electronic monitoring of offenders?

We fully support the policy objectives set out in Part 1 of the Bill of expanding and streamlining electronic monitoring. This increases the options available to manage offenders as well as providing opportunities for those suspected of offending who may be eligible for remand. That is in line with the government's commitment to reducing the inappropriate use of remand as stated in Electronic Monitoring in Scotland Working Group Final Report:

‘... we are committed to reducing the inappropriate use of remand, providing £1.5m of funding to local authorities over the past two years to improve the provision of bail support services for women.’¹

We refer to our earlier responses to the Justice Committee in connection with their work on the topic of remand². There will still be a need to ensure that public safety is maintained where electronic monitoring is imposed, be it as part of a sentence or as part of remand.

We endorse the enhanced use that technology can and does bring to the development of electronic monitoring. Electronic monitoring is recognised and has been accepted as a fact of life by many offenders. It is cheaper and in many ways, is more efficient than imprisonment as it allows for offenders, if relevant, to maintain their work, home and family life; all of which can be taken away by a sentence of imprisonment or by being placed on remand.

There are, of course, current limitations such as the requirement to have an address, but as technology advances there may of course be other ways in which electronic monitoring may be possible. The Electronic Monitoring in Scotland Working Group Final Report³ recognised that there are various types involving the use of radio frequency (RF) technology as well as the emerging technologies such as satellite tracking using the Global Positioning System (GPS) and trans-dermal alcohol monitoring (TAM). Future proofing and allowing for further technological development strategically in this Bill to meet judicial, penal and social work goals makes sense. With the government’s commitment to extending the presumption against short sentences to twelve months⁴, this will clearly support the possible expansion of the use of electronic monitoring as envisaged in the Bill.

We note that clause 3(2) of the Bill seeks to extend the list of disposals where electronic monitoring may be considered. That includes when initially the imposition of a Community Payback Order is being considered. (Section 227A (2) (j) of the Criminal Procedure (Scotland) Act is presumably intended to be the new provision). The introduction of CPOs was to offer the judiciary a menu from which appropriate sentences for offenders can be selected. Introducing electronic monitoring as a possible requirement to be imposed on an offender whether alone or combined with other measures such as supervision seems to be a good approach. This tie in with the overall policy intentions of clarification, simplification and consolidation as set out in paragraph 16 of the Bill’s Policy Memorandum where:

‘[providing] one overarching set of principles for the imposition of electronic monitoring, drawing together the common threads in the pre-existing electronic monitoring legislation. The use of electronic monitoring in Scotland has grown up organically over a number of years, and the separate sets of rules lack the clarity that such an over-arching set of rules can provide’.

¹ (<http://www.gov.scot/Resource/0050/00506734.pdf>)

² http://www.parliament.scot/S5_JusticeCommittee/Inquiries/Remand-LSS.pdf http://www.parliament.scot/S5_JusticeCommittee/Inquiries/R-LSSsupplementary.pdf

³ (<http://www.gov.scot/Resource/0050/00506734.pdf>)

⁴ <http://www.scottishlegal.com/2017/09/06/presumption-against-short-sentences-extension-welcomed/>

We note any additions to the measures would be as proposed subject to secondary regulations under section 15(2) of the Bill. Providing flexibility for future developments is, as recognised above, a sensible approach as long as any additions or changes are well published and support the policy commitment outlined in paragraph 4 of the Policy Memorandum:

‘to transform the way in which Scotland deals with offenders, ensuring that Scotland’s justice retains its focus on prevention and rehabilitation...’

2. The Scottish Government wishes electronic monitoring to play a greater role within the criminal justice system. Will the reforms in Part 1 of the Bill help enable this? If not, what further changes (legislative or non-legislative) are required?

Electronic monitoring can never be a ‘goal in itself’ but always a ‘way to reach other goals’ such as changing behaviour and protecting victims. For success, as the Bill recognises, the offender must consent and be willing to cooperate but this practice is already well development as part of the requirements before a Community Payback Order can be imposed.

The issue of electronic monitoring is primarily for the judiciary, though awareness of its potential should also fall within the ambit of the criminal defence solicitor for realistic consideration within the plea in mitigation. To achieve a greater role within the criminal justice system, as envisaged, any change will require an increase in the judicial awareness of its use. It is not just about legislation bringing in the changes. Judicial awareness falls within the scope of the Judicial Institute for Scotland which is responsible for developing judicial training. With the presumption against short sentences to increase and the use of electronic monitoring lying mainly within the disposals from the summary courts, training would need to be provided on its increased scope, use and potential benefits. The concept of electronic monitoring is not new for judges; it is the expansion of its use that would need to be highlighted as the purpose and use of electronic monitoring will no doubt already form part of any judicial induction programme. The issues will also be covered in the Judicial Institute Jury Manual⁵.

We would question if electronic monitoring is to extend beyond the sheriff court to include the JP courts. JPs do already have power to impose CPOs although the range of requirements that may be imposed by them is more restricted.

The Scottish Sentencing Council’s responsibilities⁶ include preparing sentencing guidelines for the courts as well as publishing information about sentences handed down by the courts. There may be a role to develop guidance on the use of electronic monitoring.

⁵ <http://www.scotland-judiciary.org.uk/Upload/Documents/JuryManualJune2017.pdf>

⁶ <https://www.scottishsentencingcouncil.org.uk/about-us/aims-and-accountability/>

3. Do you have any views on any specific aspects of Part 1? – for instance, revisions to the list of circumstances in which electronic monitoring may be imposed or the creation of a power to enable future monitoring devices to contain GPS technology or technology that can measure alcohol or drug ingestion.

We refer to our answer to Question 1. Much will depend upon the advances that are made in developing monitoring technology. It is essential that any extension into monitoring that measures an offender's alcohol or drug ingestion is based upon rigorous and robust evidence-based advance testing of the technology prior to the government's approval. It has to ensure that it complies fully with modern scientific standards and is fit for operation across Scotland.

Likewise, there must be full scrutiny and independent evaluation of the monitoring system, whether operating by use of RF or GPS technology, once it is in place. In respect of alcohol and drug testing, there must be a check mechanism that guard against the risk of 'false positives'. The reliability of the monitoring technology must also be subject to regular review and must take cognisance of any improved technology.

We note the terms of paragraph 73 of the Policy Memorandum which sets out the purpose of section 10(3) of the Bill which states that 'different arrangements may be made for different purposes'. The basis of this provision is to allow for the establishment of demonstration projects which we assume envisages the use of pilot projects. Perhaps the word 'pilot' rather than 'demonstration' would make this clear. While this provision may add necessary flexibility for future proofing, it should be tied into appropriate evaluation and monitoring safeguards, however best that should be achieved.

Disclosure of convictions

4. Overall, do you support Part 2 of the Bill? The Scottish Government's view is that it will provide a more appropriate balance between the public's right to protection and a former offender's right to "move on" with their life, by, overall, reducing the legal need for disclosure. Do you agree?

Part 2 of the Bill includes sections 17 to 35 that seek to modernise and improve the Rehabilitation of Offenders Act 1974 (the 1974 Act). The 1974 Act provides certain rules governing whether people with convictions are required to advise others about these convictions.

There is little doubt that the 1974 Act is both complex and has proved difficult for the public to understand. We would support the policy intentions⁷ regarding Part 2 of the Bill to clarify the legislation so that it is capable of being understood by the public as to any requirement to disclose a conviction.

The 1974 Act provides for a system of protection to individuals with previous convictions not to have to disclose their convictions in certain circumstances. Without the 1974 Act, position would require people to answer, truthfully, any questions about their offending history. Though the Policy Memorandum refers to basic and higher level disclosure⁸, there are, in fact, different forms of disclosure which include basic, standard, enhanced and the Protecting Vulnerable Groups (PVG) Scheme. What the Bill does is to change the periods for certain convictions to be treated as spent.

The Bill is designed only to affect basic disclosure rather than higher disclosure to which more stringent requirements will continue to apply. We tend to agree that this is appropriate since disclosure of convictions may well restrict the ability to obtain a job and to access college or university education.

We would also refer to our role as the regulatory authority for our members as solicitors where solicitors are required to undergo standard disclosure (as with enhanced disclosure) that requires higher level checks. That includes checks as to 'fitness and properness' where every person who practises as a solicitor in Scotland must maintain the standards of honesty, integrity and professionalism that the public and other members of the profession expect. A person cannot be admitted as a solicitor unless they are deemed to be a 'fit and proper person to be a solicitor'. That is in the role as the role as regulator not as an employer.

5. Do you agree with the Scottish Government that other reforms in Part 2 will make the law on disclosure of convictions more intelligible, clear and coherent?

The 1974 Act is not straightforward. The proposed amendments to the 1974 Act included in the Bill, while a distinct improvement and welcomed, still use legal jargon such as the use of the terms '*admonition*' and '*absolute discharge*'. These terms are readily understood by lawyers but should be clarified for the general public and not require or need interpretation of them. We therefore question if the terminology of Part 2 and in particular, Table A, is actually as 'user-friendly' as it should and could be. There may be scope for guidance perhaps with a glossary to be produced to support Part 2 and assist the public to identify exactly what their conviction is. Thereafter they can understand what disclosure of the conviction is required.

The distinction between forms of disclosure, is not made apparent from the terms of the Bill. This rather presumes, on behalf of the public, a degree of understanding of the difference. Perhaps this too could be set out more clearly or included within guidance and/or glossary.

⁷ Paragraph 108 of the Policy Memorandum

⁸ Paragraph 100 and 101

We would include observations on Table 5A (section 20):

Road traffic: Many of those referred to in paragraph 94 of the Policy Memorandum as having one conviction may well have been convicted of a minor road traffic matter where they were unable to accept a fixed penalty offer of a set fine and penalty points being imposed on their licence within the set timescales.

There would be merit in making the disclosure requirements clear as we would suggest that the reference to *'an order for endorsement made by a court in relation to an offence mentioned in schedule 2 of the Road Traffic Offenders Act'* is not readily understood since (1) it refers to another statute which contains common road traffic offences and (2) endorsement which we would suggest can also be seen as legal jargon as above.

Thereafter, given the expressed policy intentions at paragraph 95 of the Policy Memorandum that seek to achieve *'an appropriate balance between the rights of people not to disclose their previous offending behaviour and to move on with their lives and ensuring the rights of the public to be protected are effectively maintained'*, should consideration not be given to reducing the period of disclosure in respect of road traffic endorsements from five years?

Road traffic convictions may and do affect employment prospects. There seems to be a disparity in relation to the reduction of periods of disclosure in respect of other sentences such as fines but no consideration as to road traffic. Why is the disclosure period for a Drug Testing and Treatment Order for only the duration of the order (given the nature of the conduct that may have led to the sentence being imposed) while a minor speeding lasts for five years.

Custodial sentences: We would suggest that the table should include a reference to custodial sentences exceeding 48 months for completeness even though there is no change being made.

We do recognise that the broad thrust of the Bill is towards reducing the need for disclosure and to ensure that any such legislation addresses all the relevant sentences which are imposed by courts. There is inevitably a need for the Bill to include a high level of detail given how complex and the range of sentencing options exist. As highlighted above, there may be a role here for the Scottish Sentencing Council given its remit.

We welcome sections 25 and 26 of the Bill addressing the cases where the facts disclose the commission of a criminal act by a person suffering from a mental disorder.

6. Do you have any further views on law and policy around disclosure of convictions?

We refer to our answer to question 5. We have no further comments to make.

7. Do you support Part 3 of the Bill, which makes provision for the Parole Board for Scotland, in terms of its membership and appointment system; its functions and requirements in relation to prisoners, its independence, and its administration?

Sections 36-39 of the Bill deal with the changes to the composition, appointment and reappointment of members of the Parole Board. In our response to the Parole Reform in Scotland - A consultation on proposals for legislative change⁹ we supported changes to be made to the membership and appointment system. We understand the policy intentions regarding these processes that seek to bring them in line with other tribunals. That makes practical sense though there may be some who consider that there should still be adherence to the original longer term of office. Five years should allow time to build on the member's expertise and to maintain continuity of such expertise.

Sections 40–43 of the Bill deal with the changes to the functions and requirements of the Parole Board in relation to prisoners. We understand the reasoning why these changes are being proposed. We have three observations:

1. It is proposed to amend section 17 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 (1993 Act) to change the reference from *'immediate'* to *'without due delay'* to extend to all directions in respect of release after recall to prison. Paragraph 295 of the Policy Memorandum sets out the basis for this change that concern *'issues with throughcare arrangements such as adequate housing or medical requirements not being immediately in place at liberation'*. We understand that for all practical purposes prisoners are not released immediately following any decision of the Parole Board. However there appears to be no inclusion of any sanction or measure to safeguard the prisoner's position and provide a means of challenge should that period extend beyond any time which the prisoner perceives is reasonable. If the current practices are working well, there seems no immediate reason to make any change.
2. It is proposed to amend section 17A of the 1993 Act in relation to the recall of prisoners released on home detention curfew, which allow a prisoner to make representations as to their revocation. There are currently no time periods with regard to such revocation. It is proposed under section 42 of the Bill that the time period is to be limited to six months from the time that the prisoner is informed unless on cause shown. We are not sure how many actual revocations arise. Six months may be a satisfactory period in which to make representations but evidence should be provided both as to the extent of any problem and such period being reasonable in all the circumstances. Prisoners should be advised of their right to seek review and of the timescale proposed, immediately upon their return to custody.

⁹ https://consult.gov.scot/justice/parole-reform-in-scotland/consultation/view_respondent?uuld=26035173

3. We support section 43 of the Bill with regard to long term prisoners due for removal from the UK. We refer to our response to the Parole Reform in Scotland - A consultation on proposals for legislative change¹⁰ where we agreed with this proposal:

'It is anomalous that the Board's assessment of present risk in the case of a person serving a determinate sentence but liable for deportation is advisory only, when the Board's determination in respect of a life/OLR sentence prisoner is binding. We recognise that the prisoner's status and removal date will ultimately become a matter for determination by the Home Office, but that does not justify Scottish Ministers having the power to direct continued detention in respect of the Scottish sentence'.

Making it clear within the legislation that any such decision which is to be binding regarding any such prisoner requires to be made by the Parole Board and not by Scottish Ministers avoids any prisoner becoming a 'political pawn'. Members are appointed to the Parole Board with appropriate expertise to make decisions

*'to ensure that those prisoners who are no longer regarded as presenting a risk to public safety may serve the remainder of their sentence in the community under the supervision of a social worker.'*¹¹

It is also in the interests of the public as it makes it clear who is making the decisions.

Sections 44 - 45 of the Bill deal with the independence and administrative arrangements of the Parole Board. We refer to our response to the Parole Reform in Scotland - A consultation on proposals for legislative change¹² where we indicated that the recruitment process must be 'open, fair and based upon merit and subject to external scrutiny'. Section 44 of the Bill also sets out the requirement for independence.

Though we understand the reasoning why power to make regulations is proposed to be delegated to the Parole Board itself, we are concerned at the terminology that indicates '*examples of what may (our emphasis) be covered in regulations*' at section 45(2) of the Bill. We prefer the extent of the regulation making powers to be clearly expressed though we do note the safeguard that any such regulations are subject to the parliament's affirmative procedures.

8. Do you have any further views on the role, purpose and functions of the Parole Board?

The Board must retain its directive power in respect of the release or non-release of long-term, extended sentence and life prisoners, based upon the prisoner's perceived risk. Placing a statutory requirement upon the Board to review cases where release is not directed at the twelve month stage is a positive step; the previous ad hoc review system was not easy to understand and in some cases difficult to justify.

¹⁰ https://consult.gov.scot/justice/parole-reform-in-scotland/consultation/view_respondent?uuld=26035173

¹¹ http://www.scottishparoleboard.gov.uk/page/about_the_parole_board

¹² https://consult.gov.scot/justice/parole-reform-in-scotland/consultation/view_respondent?uuld=26035173

We recognise that the Parole Board as referred to in section 45(6) of the Bill (formerly the Parole Board for Scotland) has long held more independence than the Parole Board for England and Wales¹³. Our governance and review practices are perhaps somewhat more robust.

We have noted the recent publicity concerning the release decision in *Worboys*.¹⁴ While it may have been unlikely that a similar situation would have arisen under the Scottish risk assessment system, we wonder whether the Bill may allow for a scrutiny of the decision making process. There may be scope to consider if the Parole Board should open hearings to the public as well as making its decisions available to the public subject to any appropriate redaction. While it has been recognised within the 2001 Parole Board Rules that hearings should take place in private (and while this does allow for more open discussion of the risk issues based upon psychological assessments and prison behaviour), in this era of freedom of information, does the current practice remain appropriate?

We are happy to discuss any aspect further.

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¹³ <https://www.gov.uk/government/organisations/parole-board>

¹⁴ <http://www.bbc.co.uk/news/uk-43568533>