



Law Society  
of Scotland

# Call for further written evidence

## Management of Offenders (Scotland) Bill

17 December 2018



## Introduction

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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 Justice Committee's request for further written evidence in relation to the Management of Offenders (Scotland) Bill (Bill) relating to the consideration of the creation of a new offence of "unlawfully remaining at large". The Committee is interested in:

- how any new offence might work in practice
- what powers would be need
- what legislative change would be required
- what resource implications this would have.

Please see the following observations.

## Background

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The Bill <sup>1</sup> as introduced is set out in three parts:

- Part one deals with electronic monitoring
- Part two deals with disclosure of conditions
- Part three deals with The Parole Board for Scotland

The Bill does not presently contain any provisions dealing with an offence of "unlawfully remaining at large" after a prisoner is recalled to prison. What has highlighted this issue and discussion about creating such an offence was the high-profile case of the murder in 2017 of Craig McClelland by James Wright when James Wright was unlawfully at large.

<sup>1</sup> [http://www.parliament.scot/S5\\_Bills/Management%20of%20Offenders%20\(Scotland\)%20Bill/SPBill27S052018.pdf](http://www.parliament.scot/S5_Bills/Management%20of%20Offenders%20(Scotland)%20Bill/SPBill27S052018.pdf)

On 13 February 2017, James Wright was released early from his sentence and was placed on a Home Detention Curfew (HDC), involving the use of an electronic tag. He breached that curfew which was revoked 11 days later. He remained unlawfully at large for nearly six months, during which time this murder was committed.<sup>2</sup> In response to this murder and the concerns that it presented to public safety, the Cabinet Secretary for Justice set up a review in accordance with Section 7(2)(d) of the Prisons (Scotland) Act 1989. Its terms of reference included:

“an investigation to involve an independent assessment of the processes that the Scottish Prison Service operate when considering applications for HDC to provide assurance for Ministers, the Parliament and the public”<sup>3</sup>

A coterminous further review was set out in terms of section 74(1) of the Police and Fire Reform (Scotland) Act 2012 where the HM Inspector of Constabulary (HMICS) in Scotland (HMICS) was asked to provide an independent assessment of Police Scotland’s response to a breach of HDC. Its remit was set out at paragraph 11 which was to:

“provide assurance on whether the police response to the revocation of HDC is proportionate and operating effectively and efficiently within Police Scotland, as well as assessing the capacity for continuous improvement”<sup>4</sup>

This was the first time that HMICS had scrutinised this specific aspect of policing in Scotland. Both Reviews have now reported:

- HMICS Independent assessment of Police Scotland’s response to a breach of Home Detention Curfew (HDC)<sup>5</sup>
- Report on the review of the arrangements for Home detention curfew within the Scottish Prison Service.<sup>6</sup>

Both reviews made a series of recommendations involving a range of the criminal justice agencies and also a range of topics relating to this case. What is essential to these reviews is that lessons are learned from the circumstances of the murder which raised quite naturally significant public safety issues. Many of the recommendations relate to installing better systems relating to data exchange where such resources are a matter and lie within the control respectively of the Scottish Prison Service and Police Scotland. One immediate result of these reviews was that the Cabinet Secretary for Justice announced that offenders convicted of crimes involving violence or knives will generally no longer be able to serve part of their

<sup>2</sup> <http://www.scotland-judiciary.org.uk/8/1997/HMA-v-James-Wright>

<sup>3</sup> <https://www.prisonsspectoratescotland.gov.uk/publications/review-arrangements-home-detention-curfew>

<sup>4</sup> <https://www.hmics.scot/sites/default/files/publications/HMICS20180628TOR.pdf>

<sup>5</sup> <https://www.hmics.scot/publications/hmics-independent-assessment-police-scotland%E2%80%99s-response-breach-home-detention-curfew>

<sup>6</sup> [https://www.prisonsspectoratescotland.gov.uk/sites/default/files/publication\\_files/Report%20on%20the%20Review%20of%20the%20Arrangements%20for%20Home%20Detention%20Curfew%20within%20the%20SPS.pdf](https://www.prisonsspectoratescotland.gov.uk/sites/default/files/publication_files/Report%20on%20the%20Review%20of%20the%20Arrangements%20for%20Home%20Detention%20Curfew%20within%20the%20SPS.pdf)

sentence at home on an electronic tag curfew. Consideration was also to be given to creating a new offence of “being unlawfully at large”. This Call for further written evidence has been promoted by that consideration and the recommendation of:

“introducing a statutory offence where an offender who breaches his/her home detention curfew licence conditions remains ‘unlawfully at large’ for a designated period of time.”<sup>7</sup>

The following comments relate directly to the issue of creating a new offence.

## Creation of any new offence

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### Position in England and Wales

They already have created offences to cover similar circumstances involving a recall of a prisoner who remains “unlawfully at large”. These can be found at section 12 of the Criminal Justice and Courts Act 2015<sup>8</sup>. It is worth considering what their provisions include as the creation of any Scottish offence, if required, would presumably require to mirror such provisions. These provisions include:

- Where an offender is recalled to prison under section 32<sup>9</sup> of the Crime (Sentences) Act 1997, they must have been notified of the recall orally or in writing and while unlawfully at large failed, without reasonable excuse, to take all necessary steps to return to prison as soon as possible.<sup>10</sup>
- Notification<sup>11</sup> is deemed to have been given where written notice of the recall has been delivered to an appropriate address<sup>12</sup> and the period specified in the notice has elapsed.
- Notification of the recall is also deemed to have been provided where:

(a) the person’s licence requires the person to keep in touch in accordance with any instructions given by an officer of a provider of probation services

(b) the person has failed to comply with such an instruction

<sup>7</sup> <https://www.hmics.scot/publications/hmics-independent-assessment-police-scotland%E2%80%99s-response-breach-home-detention-curfew>

<sup>8</sup> <http://www.legislation.gov.uk/ukpga/2015/2/section/12/enacted>

<sup>9</sup> Recall of life prisoners <http://www.legislation.gov.uk/ukpga/1997/43/section/32>

<sup>10</sup> Section 32ZA (1) of the Crime (Sentences) Act 1997

<sup>11</sup> Section 32ZA (2) of the Crime (Sentences) Act 1997

<sup>12</sup> Which is then further defined in subsection (3)

(c) the person has not complied with such an instruction for at least 6 months.<sup>13</sup>

- Subsection (5) deals with the range of sentence to be imposed for breach of the section
- Similar provisions refer to a recall under section 254<sup>14</sup> or 255<sup>15</sup> of the Criminal Justice Act 2003.

What reasonable excuse is will be a matter for the prisoner to adduce but only where the prosecution has established a case to answer which would need to demonstrate that recall has been received and ignored by the prisoner.

## Position in Scotland

Section 17 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 (1993 Act) deals currently with the circumstances relating to the revocation of a licence. Were the creation of any new offence to be considered, presumably amendment would be needed to this section which deals with issues under subparagraph (2) as to revocation. It would require substantial amendment by means of primary legislation which presumably lies within the scope of the current Bill if considered necessary.

## Considerations as to the creation of any new offence

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If any new offence is to be created, there must be a need for such an offence. We are not satisfied that such a need has been demonstrated adequately for Scotland though as indicated above, we note that England and Wales have such legislation. We have no knowledge as to the statistics of those convicted of the relevant offences which might be interesting. We do note the need for statistics to be obtained in relation to Scotland as to failure to comply with any recall notice and more crucially, where notice of recall has been received and ignored by the prisoner.

At the outset, it seems to have that both reviews were very extensive in their remit and covered a range of aspects which were crucial to avoiding a recurrence of a serious incident such as this murder in similar circumstances. We endorse the comments of HMICS's Gill Imery in offering condolences to Mr McClelland's family when she recognised that:

<sup>13</sup> Section 32ZA (4) of the Crime (Sentences) Act 1997

<sup>14</sup> Recall of licence <http://www.legislation.gov.uk/ukpga/2003/44/section/254>

<sup>15</sup> Early release <http://www.legislation.gov.uk/ukpga/2003/44/section/255>

"Effective data exchange between the two organisations [Police Scotland and Scottish Prison Service] is fundamental to the successful management of offenders. The processes around home detention curfew, revocations and cancellation of revocation notices require to be significantly improved." (Our emphasis)

Our underlining indicates the crucial point. What seems to have been the principal issue in this case arose from a systemic failure of communication across the criminal justice sector. There is no suggestion that the creation of any new offences would have prevented an offender who "remains unlawfully at large" from committing a further offence. The only outcome from any new legislation would be that they would remain in prison for longer as inevitably a conviction would result in the imposition of a sentence that would include a further term of custody. In sentencing, any judge would need to consider:

- the punishment of the offender
- the reduction of crime (deterrence),
- reform and rehabilitation of offenders
- the protection of the public
- the making of reparation by offenders to persons affected by their offences

Certainly, there may be an argument that other breaches of effective court orders such as bail (failure to comply with bail conditions or to turn up for court diets) attracts an additional offence.<sup>16</sup> However releasing someone on bail or indeed on licence involves a risk assessment for the decision maker. Improving that decision-making process and analysis of risk seems to be fundamental to creating a safer system for the public. That would not involve the creation of any new offences as is being considered.

That endorses the recommendation that:

"Scottish Government in consultation with criminal justice partners and key stakeholders should 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"<sup>17</sup> (Our emphasis)

Were such an offence to be created, key to the drafting of relevant legislation would be fairness and transparency for the offender by ensuring clarity of the legislation.

We have considerable concerns about the way that the notification procedures would operate in respect of any such offence. Before any offender could be convicted of any offence, they must be aware that they are in breach which breach would need to be established by corroborated evidence. Exactly how that

<sup>16</sup> Section 27 of the Criminal Procedure (Scotland) Act 1995

<sup>17</sup> Recommendation 2

[https://www.prisonsspectoratescotland.gov.uk/sites/default/files/publication\\_files/Report%20on%20the%20Review%20of%20the%20Arrangements%20for%20Home%20Detention%20Curfew%20within%20the%20SPS.pdf](https://www.prisonsspectoratescotland.gov.uk/sites/default/files/publication_files/Report%20on%20the%20Review%20of%20the%20Arrangements%20for%20Home%20Detention%20Curfew%20within%20the%20SPS.pdf)

notification would be achieved in practice would be highly problematic. We are aware that it seems at present the prisoner who is subject to recall is unaware of the recall or why it is has been made. We note that Recommendation 12<sup>18</sup> is that:

“All prisoners being considered for HDC should be required to provide a contact number, ideally a mobile telephone number, before being released. If a contact number is not available, release on HDC should not be approved until one is provided”.

This even if implemented would have limited success.it is easy to change a contact number. That does seem to establish an effective communication system.

Where revocation is due to non-compliance rather than reoffending, the offender will not know whether or when the licence has been revoked until their actual apprehension. If a new offence is to be created, could an offender commit an offence of “being unlawfully at large” when they are unaware that their supervising officer has recommended revocation of licence.

What about where their Supervising Officer recommends only a warning but the Parole Board decides to revoke? An offender could believe that they are complying with their licence only to be arrested and taken into custody. What is required is for any non-compliance to be more than minimal – perhaps this should be in line with England and Wales which suggest that non-compliance with conditions for a six-month period is required. Notwithstanding, we would recommend that effective notification should still be established.

Making sure that the offender understands that they are in breach, the effective date of any breach, the extent of any breach and the effect of non-compliance with any breach would all require to be covered by any relevant legislation creating an offence if felt that the creation of an offence was justified and merited.

Looking at the question of the creation of any new offence, what seems to be much more crucial is for HDC to deliver on its three key principles of:

**7.2.1** protecting the public at large

**7.2.2** preventing re-offending by the offender

**7.2.3** securing the successful re-integration of the prisoner into the community<sup>19</sup>

<sup>18</sup>

[https://www.prisonsofscotland.gov.uk/sites/default/files/publication\\_files/Report%20on%20the%20Review%20of%20the%20Arrangements%20for%20Home%20Detention%20Curfew%20within%20the%20SPS.pdf](https://www.prisonsofscotland.gov.uk/sites/default/files/publication_files/Report%20on%20the%20Review%20of%20the%20Arrangements%20for%20Home%20Detention%20Curfew%20within%20the%20SPS.pdf)

<sup>19</sup>

[https://www.prisonsofscotland.gov.uk/sites/default/files/publication\\_files/Report%20on%20the%20Review%20of%20the%20Arrangements%20for%20Home%20Detention%20Curfew%20within%20the%20SPS.pdf](https://www.prisonsofscotland.gov.uk/sites/default/files/publication_files/Report%20on%20the%20Review%20of%20the%20Arrangements%20for%20Home%20Detention%20Curfew%20within%20the%20SPS.pdf)

What this requires is consideration of the working of HCD itself and not the creation of a new offence.

A prisoner failing to comply with a recall notice will automatically have the entire period from the issuing of the warrant to their apprehension to the return to custody automatically added to the sentence in terms of the 1993 Act.<sup>20</sup> That should provide their penalty or punishment.

The system if working correctly would require offenders to hand themselves in once they are notified of any breach. But only if effective notification can be established or achieved. Anecdotally, many prisoners fail to do so leaving them “unlawfully at large”. Police Scotland then should obtain a Recall Notice containing the prisoner’s last known address. But we understand that this recall notice never reaches the prisoner. Details are then logged with the warrants system before officers assign one of three “priority categories” which range from Priority A cases (14-days), Priority B cases (21 days) and Priority C cases (28 days).

There are problems within the existing police powers to force entry looking for a prisoner and the inability to monitor those out with their immediate enforcement zone. Part of the Bill considered the extension of electronic monitoring which we discussed in our earlier written evidence where we referred to:

“The Electronic Monitoring in Scotland Working Group Final Report<sup>3</sup> recognis[ing] 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<sup>21</sup>”

We would repeat that greater use of GPS may provide a better method of identifying and locating those who fail to obtemper a recall notice.

## Conclusion

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The offender who fails to comply with a recall notice is a concern for public safety

Creating an offence will not address that other than with a practical effect where when caught they then fall to be sentenced to a further period of custody in addition to serving the remainder of their outstanding sentence. The speedy apprehension of such an offender is crucial again for public safety but success there lies in our view down the line in the effective efficient exchange of information between the Scottish prison Service and Police Scotland and Police Scotland’s enforcement.

<sup>20</sup> Section 17 (5) of the 1993 Act covers both long-term and short-term prisoners on licence.

<sup>21</sup> <https://www.lawscot.org.uk/media/360080/call-for-evidence-management-of-offenders-scotland-bill.pdf>

Were a new offence to be created, there would need to be effective sentencing by the judiciary to reflect the offenders' circumstances and the elements of the offence. But we emphasise that the creation of a new offence does not in our view meet the challenges of this murder which were related to failure of systemic communication and resources.

For further information, please contact

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