



Law Society  
of Scotland

# Stage 1 Briefing

## Management of Offenders (Scotland) Bill

5 February 2019



## 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.

In providing these comments, our Criminal Law Committee hope that these will assist the Scottish Parliament's scrutiny in relation to the Stage 1 Debate on the Management of Offenders (Scotland) Bill (the Bill) scheduled for 7 February 2019.

We support the general principles of the Bill in relation to electronic monitoring, disclosure of convictions and modernising the processes of the Parole Board for Scotland.

We address the issues around the future use of electronic monitoring which we recognise has major potential but emphasise that its use needs to maintain a balance between the public protection and the risk involved in releasing an offender on remand. Much rests of assessment of risk which needs to be informed by the relevant information and subject to effective scrutiny.

We also deal with the intention to introduce a new offence of "unlawfully remaining at large". While we do not support this proposal, we need to see the detail of the offence to understand how it would work in practice.

## General

---

The Bill covers three main policy areas of:

- Expanding the use and provision of the electronic monitoring of offenders
- Amending and modernising the provisions relating to disclosure of convictions set by the Rehabilitation of Offenders Act 1974 (1974 Act)

- Modernising processes in relation to the Parole Board for Scotland<sup>1</sup>

## Electronic Monitoring

---

In general, we support the Scottish Government in its policy objectives under Part 1 of the Bill<sup>2</sup> of expanding and streamlining the use of electronic monitoring as:

“electronic monitoring can have a greater role to play in supporting its vision for a safer, fairer and more inclusive nation in which those who have been victims of crime can feel safer and more reassured, and those with a history of offending can be supported to be active and responsible contributors to their communities.”<sup>3</sup>

Maintaining public safety is essential in whatever way that electronic monitoring is intended to be used.

The Bill promotes an awareness of the potential effects of electronic monitoring and allows consideration of the available options that it provides to manage offenders. These include as at present to locate an offender. Future opportunities would allow the following to be considered:

## Alcohol/drug compliance

Electronic monitoring can allow a means to monitor offenders’ taking of alcohol, drugs or other substances. That is an important advance. However, consideration would need to be given to what the sanctions would be for non-compliance by offenders. Not abiding with a location requirement as compared with an alcohol/drug requirement should be different. Compliance with location requirements are ‘black and white’ whereas an alcohol/drug order may not require or expect complete abstinence at the outset and could be dangerous for the offender to withdraw immediately.

The purpose of such an order would be to assist in eliminating the offending behaviour associated with the drug/alcohol abuse. To achieve successfully, this can be a lengthy approach and will vary from person to

<sup>1</sup> Paragraph 4 of the Stage 1 Report on the Management of Offenders (Scotland) Bill  
<https://digitalpublications.parliament.scot/Committees/Report/J/2019/1/31/Stage-1-Report-on-the-Management-of-Offenders--Scotland--Bill#Overview-of-the-Bill>

<sup>2</sup> [https://www.parliament.scot/S5\\_Bills/Management%20of%20Offenders%20\(Scotland\)%20Bill/SPBill27S052018.pdf](https://www.parliament.scot/S5_Bills/Management%20of%20Offenders%20(Scotland)%20Bill/SPBill27S052018.pdf) as introduced

<sup>3</sup> Paragraph 28 of the Stage 1 Report on the Management of Offenders (Scotland) Bill  
<https://digitalpublications.parliament.scot/Committees/Report/J/2019/1/31/Stage-1-Report-on-the-Management-of-Offenders--Scotland--Bill#Overview-of-the-Bill>

person.<sup>4</sup> How accurate the information provided by means of electronic monitoring would be, is another question to consider with regard to its use. Robust evidence-based advance testing of that technology would need to be produced, complying fully with modern scientific standards. It would need to be assessed as fit for operation across Scotland. Appropriate evaluation and monitoring safeguards would also need to be in place.

Allowing for technological advances is covered by the proposed use of secondary (Regulation) powers to be made under section 15(2) of the Bill.<sup>5</sup> Providing necessary flexibility for such developments within the Bill allows a measure of future-proofing. It is a sensible approach.<sup>6</sup> Where any decisions<sup>7</sup> are made regarding making any such additions or changes, we urge that these must be well publicised and support the policy commitment outlined in paragraph 4 of the Bill's Policy Memorandum<sup>8</sup>:

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

## Use in relation to remand

We support the Scottish Government's commitment to reduce the inappropriate use of remand.<sup>9</sup>

Electronic monitoring for remand would provide a cheaper and more efficient method of monitoring rather than imprisonment. Imprisonment takes away from a potential offender the opportunity to continue in employment and maintain their family relationships.

<sup>4</sup> Paragraph 116 of the Stage 1 Report on the Management of Offenders (Scotland) Bill  
<https://digitalpublications.parliament.scot/Committees/Report/J/2019/1/31/Stage-1-Report-on-the-Management-of-Offenders--Scotland--Bill#Overview-of-the-Bill>

While much of the current legislation on fireworks is reserved to Westminster the consultation will help to identify gaps, issues or unintended consequences with the current regulatory framework. The Scottish Government would like to hear any views you have on whether the regulations on how fireworks are used needs to be improved.

[https://www.parliament.scot/S5\\_Bills/Management%20of%20Offenders%20\(Scotland\)%20Bill/SPBill27S052018.pdf](https://www.parliament.scot/S5_Bills/Management%20of%20Offenders%20(Scotland)%20Bill/SPBill27S052018.pdf) as introduced

<sup>6</sup> Call for Evidence Law Society of Scotland dated 20 April 2018 <https://www.lawsot.org.uk/media/360080/call-for-evidence-management-of-offenders-scotland-bill.pdf>

<sup>7</sup> Paragraph 374 of the Stage 1 Report on the Management of Offenders (Scotland) Bill  
<https://digitalpublications.parliament.scot/Committees/Report/J/2019/1/31/Stage-1-Report-on-the-Management-of-Offenders--Scotland--Bill#Overview-of-the-Bill>

<sup>8</sup> [https://www.parliament.scot/S5\\_Bills/Management%20of%20Offenders%20\(Scotland\)%20Bill/SPBill27PMS052018.pdf](https://www.parliament.scot/S5_Bills/Management%20of%20Offenders%20(Scotland)%20Bill/SPBill27PMS052018.pdf)

<sup>9</sup> <http://www.gov.scot?Resource/0050/00506734.pdf>

A provision relating to the use of electronic monitoring on remand is not currently included in the Bill.<sup>10</sup> We, along with others, have provided evidence supportive of the use of electronic monitoring to support release on remand where appropriate.

The Scottish Government has signalled an intention to introduce a pilot project to test its use. Whether that falls within the scope of the Bill is unknown. The Bill concerns offenders which does not include those on bail who have not yet been convicted.

If the use of electronic monitoring is to be extended, the assessment of risk is crucial. But that does not stand alone. Many offenders will require on-going support from the criminal justice system to ensure that they are able to comply with the relevant conditions given their extremely chaotic lifestyles.<sup>11</sup>

## **Offence of “unlawfully remaining at large”**

The Bill when introduced did not contain any provisions with regard to the creation of a new offence of “unlawfully remaining at large.”

This issue featured as a result of the high-profile murder in 2017 of Craig McClelland committed when the accused James Wright was unlawfully at large. James Wright had been released early from his sentence and was placed on Home Detention Curfew involving the use of an electronic tag. Though he breached that curfew which was revoked 11 days later, he remained unlawfully at large for nearly six months, during which time the murder was committed.<sup>12</sup>

We refer to our further written evidence dated 17 December 2018.<sup>13</sup>

The Cabinet Secretary for Justice has indicated his intention to introduce such an offence. The full investigation of the reasons why this murder occurred decided that it was a “systemic failure of communication across the criminal justice sector.” That is being addressed by the implementation of a number of recommendations affecting the police and prison service

The details of exactly how such an offence will work will need to be scrutinised. Principally, the only outcome arising from the creation of any new offence would be that the offenders would remain in prison

<sup>10</sup> Paragraph 101 the Stage 1 Report on the Management of Offenders (Scotland) Bill  
<https://digitalpublications.parliament.scot/Committees/Report/J/2019/1/31/Stage-1-Report-on-the-Management-of-Offenders--Scotland--Bill#Overview-of-the-Bill>

<sup>11</sup> Paragraphs 199 and 200 of the Stage 1 Report on the Management of Offenders (Scotland) Bill  
<https://digitalpublications.parliament.scot/Committees/Report/J/2019/1/31/Stage-1-Report-on-the-Management-of-Offenders--Scotland--Bill#Overview-of-the-Bill>

<sup>12</sup> <http://www.scotland-judiciary.org.uk/8/1997/HMA-v-James+Wright>

<sup>13</sup> <https://www.lawscot.org.uk/media/361537/management-of-offenders-scotland-bill-further-written-evidence-17-december-2018.pdf>

for longer as it would be fully anticipated that a conviction would result in the imposition of a sentence including a further term of custody. It would not have prevented the commission of the murder.

We would repeat our practical concerns about the way that the notification procedures would operate in respect of any such offence. Before any offender can be convicted of any such offence, they must be aware that they are in breach and that the breach would need to be established by corroborated evidence. Exactly how that notification would be achieved in practice could be highly problematic. There are challenges in how to set up an effective communication system with a person who moves address, changes their contact number and does not have a regular pattern to their lifestyle.

We understand that the Cabinet Secretary for Justice has recognised that he will be "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".<sup>14</sup> We are interested to see these details when introduced.

Any extension of police powers to enter premises to support the police in looking for someone who has not complied with a recall are to be introduced at Stage 2 by way of amendment. We would need to scrutinise such provisions to ensure that they are proportionate in all the circumstances and will work in practice.

In conclusion, we consider that electric monitoring offers many advantages but the need for robust risk assessment by all concerned in the decision-making process is essential. That is needed to maintain the balance between the potential benefits of releasing someone on such an electronic monitoring regime and the requirement to ensure public protection. Importantly, there needs to be transparency and public confidence in the operation of an effective system and in the decision-making process.

## Disclosure of convictions

---

We support the Scottish Government's policy intention to reduce the length of time most people are required to disclose convictions. The 1974 Act is both complex and proves extremely difficult for the public to understand.

We welcome steps to simplify the legislation and increase clarity for those that may be affected by disclosure.

The proposed amendments to the 1974 Act included in the Bill, while an improvement on the current provisions, still use terms such as 'admonition' and 'absolute discharge'. Legal professionals readily understand these terms but we query whether they are fully understood by the public. There is scope to

<sup>14</sup> Paragraph 176 of the Stage 1 Report on the Management of Offenders (Scotland) Bill  
<https://digitalpublications.parliament.scot/Committees/Report/J/2019/1/31/Stage-1-Report-on-the-Management-of-Offenders--Scotland--Bill#Overview-of-the-Bill>

support and promote public understanding through a glossary or definitions section to allow them to understand any such terms in context.

We agree that an appropriate balance has to be struck between the right of society or an employer to know about a person's prior convictions in some circumstances, and the ability of a person with prior convictions to move on with their life without the stigma associated with a criminal conviction.

The role for public awareness campaigns once the Bill comes into effect will be very important. That will require explanation of what is being done, including the development of simple-to-use tools and information products that explain when a person is required to disclose. This could usefully address our earlier concerns about the lack of reference in the Bill to the different forms of disclosure. The Bill only seeks to deal with basic disclosure rather than the higher levels of disclosure which are much more stringent and will continue to apply.

We would also highlight the role of road traffic convictions that 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 given to road traffic offences. 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 conviction lasts for five years?

## Parole Board for Scotland

---

The Scottish Government is currently consulting on “Transforming Parole in Scotland”<sup>15</sup> which consultation closes on 27 March 2019. It is obtaining views on further reforms that will improve the experience of victims in the parole process, increase openness and the transparency of the Parole Board for Scotland and ensure the independence of the Parole Board for Scotland is maintained. Such a consultation is very timely given the adverse publicity in England and Wales of their Parole Board in the case of John Worboys.<sup>16</sup>

Many significant reforms which might be considered in relation to preserving the independence of the Parole Board of Scotland will need to await the outcome of that process.

As a result, the measures in the Bill concerning the Parole Board of Scotland are quite limited.

We generally support the changes proposed in relation to the Parole Board of Scotland's membership and appointment system as set out in sections 36-39 of the Bill. These will bring them into line with the time periods for other tribunal appointments. This makes practical sense irrespective of how the Parole Board for Scotland may be managed in the future.

<sup>15</sup> <https://consult.gov.scot/justice/transforming-parole-in-scotland/>

<sup>16</sup> <https://www.gov.uk/government/organisations/parole-board>

Under the 2001 Parole Board Rules, hearings take place in private and we recognise that this does permit more full and frank discussion of the risk issues posed based on the psychological assessments and prisoner behaviour. Increasing demands for information to be made publicly available and the focus on risk assessment should provide a focus for development or change to be considered in due course after the Transforming Parole consultation concludes.

**. For further information, please contact:**

Gillian Mawdsley

Policy Executive

The Law Society of Scotland

DD: 0131 476 8206

[gillianmawdsley@lawscot.org.uk](mailto:gillianmawdsley@lawscot.org.uk)