



The Scottish Parliament
Pàrlamaid na h-Alba

JUSTICE COMMITTEE

AGENDA

12th Meeting, 2018 (Session 5)

Tuesday 24 April 2018

The Committee will meet at 10.00 am in the Mary Fairfax Somerville Room (CR2).

1. **Declaration of interests:** Jenny Gilruth will be invited to declare any relevant interests.
2. **Decision on taking business in private:** The Committee will decide whether to take item 6 in private.
3. **Remand:** The Committee will take evidence from—

Michael Matheson, Cabinet Secretary for Justice, Philip Lamont, Criminal Justice Division, and Kerry Morgan, Community Justice Division, Scottish Government.
4. **Management of Offenders (Scotland) Bill:** The Committee will take evidence on the Bill at Stage 1 from—

Neil Devlin, Bill Team Leader, Community Justice Division, Nigel Graham, Policy Adviser, Criminal Justice Division, and Craig McGuffie, Principal Legal Officer, Directorate for Legal Services, Scottish Government.
5. **Justice Sub-Committee on Policing:** The Committee will consider a report back from the Sub-Committee meeting on 19 April 2018.
6. **Management of Offenders (Scotland) Bill:** The Committee will consider witnesses for its scrutiny of the Bill at Stage 1.

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The papers for this meeting are as follows—

Agenda item 3

Paper by the clerk - remand	J/S5/18/12/1
Private paper - remand	J/S5/18/12/2 (P)

[Evidence received on the use of remand in Scotland](#)

Agenda item 4

Paper by the clerk - Management of Offenders (Scotland) Bill	J/S5/18/12/3
SPICe Briefing - Management of Offenders (Scotland) Bill	J/S5/18/12/4
Private paper 1 - Management of Offenders (Scotland) Bill	J/S5/18/12/5 (P)

[Management of Offenders \(Scotland\) Bill and accompanying documents](#)

[Written submissions received on the Bill](#)

Agenda item 5

Paper by the clerk - Justice Sub-Committee on Policing	J/S5/18/12/6
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Agenda item 6

Private paper 2 - Management of Offenders (Scotland) Bill	J/S5/18/12/7 (P)
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Justice Committee

12th Meeting, 2018 (Session 5), Tuesday 24 April 2018

Remand

Note by the clerk

Introduction

1. At its meeting on [19 December 2017](#), the Committee agreed to hold a round-table evidence session on remand, in order to explore issues around the use of remand in Scotland as well as the experience of prisoners held on remand. The round-table evidence session took place on [16 January 2018](#). The Committee heard from the Crown Office and Procurator Fiscal Service, HM Chief Inspector of Prisons for Scotland, the Scottish Prison Service, and the Scottish Working Group on Women's Offending.
2. After that session, the Committee agreed to do further work on remand.

Justice Committee consideration

3. At its meeting on [6 February](#), the Committee heard from Community Justice Scotland, the Convention of Scottish Local Authorities (COSLA), Safeguarding Communities – Reducing Offending (Sacro), and Social Work Scotland. This evidence session explored issues around the reasons for remanding a person into custody; the information available to the court to inform its decision on remand; and the availability of alternatives to remand, such as bail supervision, across Scotland.
4. At its meeting on [13 March](#), the Committee took evidence from Sheriff Gordon Liddle, President of the Sheriffs' Association, and then from the Edinburgh Bar Association, the Law Society of Scotland, and Professor Neil Hutton from the University of Strathclyde. These evidence sessions focused on the decision-making process around bail and remand, as well as the availability of data on the reasons for individuals not being granted bail.
5. At its meeting on [20 March](#), the Committee took further evidence from the Scottish Prison Service, alongside representatives of East Ayrshire Advocacy Service (working at HMP Kilmarnock), Families Outside, and CrossReach who manage the family visitor centre at HMP YOI Polmont. The focus of the session was on the experiences of prisoners held on remand.
6. At its meeting on [27 March](#), the Committee heard from Apex Scotland, Circle Scotland, Shine, Tayside Council on Alcohol and Turning Point Scotland. The focus of the session was the role of third sector in providing and supporting alternatives to remand, the availability and benefits of alternatives to remand, and existing examples of good practice.
7. All written submissions received to date can be found on the Committee's [remand webpage](#).

8. On 17 April, the Committee visited [Circle](#) to learn more about the work they undertake with prisoners and those on remand in custody.
9. At its meeting on 24 April, the Committee will hear from the Cabinet Secretary for Justice and Scottish Government officials. The Committee intends to agree its report on remand in May.

Justice Committee

12th Meeting, 2018 (Session 5), Tuesday 24 April 2018

Management of Offenders (Scotland) Bill

Note by the clerk

Introduction

1. The [Management of Offenders \(Scotland\) Bill](#) was introduced on 22 February 2018. It is a Scottish Government Bill. The Bill makes provision in three discrete areas, linked by a common theme of the management of offenders:
 - electronic monitoring of offenders: drawing together various legal provisions on monitoring into a single source and making some updates to the law;
 - disclosure of convictions: making substantial amendment to the Rehabilitation of Offenders Act 1974, the general approach being to ease the requirement to disclose convictions (for instance by, in general, shortening the period during which a prior conviction must be disclosed)
 - Parole Board for Scotland: a small number of reforms concerning the membership and administration of the Board.
2. The Committee will be taking evidence on the Bill throughout April and May and intends to report to Parliament on the general principles of the Bill by the end of June. The Stage 1 debate is likely to take place in the Chamber in mid-September. Should the Parliament agree to the general principles of the Bill at Stage 1, the Committee is likely to consider amendments to the Bill at Stage 2 later in the autumn.
3. The first set of witnesses the Committee will be hearing from, on 24 April, are the Scottish Government Bill Team; the group of officials responsible for assisting the Cabinet Secretary for Justice in formulating the policy and drafting of the Bill and in steering it through the Parliamentary process. During this session, the Committee is likely to focus its questioning on what the Bill does, and on why particular drafting or policy approaches were chosen.
4. Further witnesses on the Bill have yet to be decided but will be notified on future Committee agendas. They are likely to include professionals working in the criminal justice sector, third sector organisations and charities working with victims and offenders, and academic experts, as well as the Cabinet Secretary for Justice.




Justice Committee

12th Meeting, 2018 (Session 5), Tuesday 24 April 2018

Management of Offenders (Scotland) Bill

Introduction

The Scottish Government introduced the [Management of Offenders \(Scotland\) Bill](#) in the Parliament on 22 February 2018.¹ The [policy memorandum](#) states that it:²

“brings forward a number of reforms designed to deliver on the Scottish Government’s commitment to continue to transform the way in which Scotland deals with offenders, ensuring that Scotland’s justice retains its focus on prevention and rehabilitation, whilst enhancing support for victims”. (para 4)

It seeks to make changes in relation to:

- the electronic monitoring of offenders in the community – extending the potential for monitoring; both in terms of what other measures it can be combined with and the use of new technologies
- the disclosure of convictions – reducing the length of time most people with convictions have to disclose them (eg when applying for work) and extending the range of sentences covered by rules limiting the need to disclose
- the Parole Board for Scotland – various reforms relating to the composition, appointment, functions and governance of the Parole Board

Electronic Monitoring

Background

The use of electronic monitoring within the Scottish criminal justice system was first piloted in 1998. Following this, in 2002, it became available nationally in the form of Restriction of Liberty Orders (RLOs) – a type of community sentence in which the

¹ Management of Offenders (Scotland) Bill [as introduced] Session 5 (2018). SP Bill 27. Edinburgh: Scottish Parliament. (2018). Retrieved from [http://www.parliament.scot/Management%20of%20Offenders%20\(Scotland\)%20Bill/SPBill27S052018.pdf](http://www.parliament.scot/Management%20of%20Offenders%20(Scotland)%20Bill/SPBill27S052018.pdf).

² Management of Offenders (Scotland) Bill: Policy Memorandum Session 5 (2018). SP Bill 27-PM. Edinburgh: Scottish Parliament. (2018). Retrieved from [http://www.parliament.scot/Management%20of%20Offenders%20\(Scotland\)%20Bill/SPBill27PMS052018Rev.pdf](http://www.parliament.scot/Management%20of%20Offenders%20(Scotland)%20Bill/SPBill27PMS052018Rev.pdf).

movements of the individual are subject to restrictions (normally by means of a curfew).

In addition to RLOs, electronic monitoring is now used to monitor restrictions on movement imposed in connection with a number of other community sentences:

- restrictions imposed as part of Drug Treatment and Testing Orders (DTTOs)
- restrictions imposed for breach of Community Payback Orders (CPOs)³

Electronic monitoring is also used to monitor compliance with restrictions on movement forming part of relevant conditions of release from custodial sentences:

- where a prisoner serves part of a custodial sentence in the community under Home Detention Curfew (HDC) licence conditions
- as a possible licence condition imposed by the Parole Board for Scotland where it grants early release from a custodial sentence

The policy memorandum, published along with the Bill, notes that:

“whether used in the context of either a community sentence or as a licence condition, electronic monitoring is still largely used as a standalone measure to enforce a home confinement curfew, typically of 12 hours between 7pm and 7am”. (para 12)

Electronic monitoring in Scotland is currently limited to the use of radio frequency technology. This employs a base unit along with an electronic tag on the individual’s ankle. It is normally used to monitor compliance with a curfew. The base unit is installed at the address where the individual must stay during the curfew (as detailed in the order). Radio frequency technology can also be used to monitor compliance with an order excluding a person from somewhere (eg from entering a particular address). The need to install base units covering the excluded area(s) imposes practical limits on wider exclusion zones.

The electronic monitoring service is currently provided by the private company G4S, under contract to the Scottish Government. The 2016 report of an Electronic Monitoring Working Group noted that:⁴

“Since its introduction in 2002, the model of service delivery for electronic monitoring in Scotland has remained relatively static. A private service provider is contracted nationally, by the Scottish Government, to provide the monitoring equipment and to install that equipment in line with specified time periods. The service provider then monitors compliance with curfew times set by the Court,

³ At present, a court is not able to impose restrictions on movement (with electronic monitoring of compliance) as part of the original CPO. It is, however, possible for a person to be sentenced to both an RLO and a CPO. This does allow for the possibility of electronic monitoring (under the RLO) running alongside measures aimed at addressing underlying causes of behaviour (under the CPO). The [financial memorandum](#) (para 11) published along with the Bill indicates that there are approximately 1,000 such cases each year.

⁴ Electronic Monitoring Working Group. (2016) Electronic Monitoring in Scotland: Final Report. Retrieved from <http://www.gov.scot/Publications/2016/10/8620>.

Children’s Hearing System, Parole Board for Scotland or the Scottish Prison Service (SPS), reports non-compliance to the issuing authority within set timescales and removes the equipment on the date specified by the issuing authority. The service provider’s compliance with the contract is monitored by the Scottish Government.” (p 29)

The vast majority of electronic monitoring cases in Scotland are accounted for by RLOs and HDCs. Statistics produced by G4S indicate that, during 2017, there were: 3,112 new RLOs; and 1,432 new HDCs.⁵

Electronic monitoring can also be used in connection with disposals from the Children’s Hearings System. Movement restriction conditions may be imposed which include arrangements for monitoring compliance. Where used, this is always in conjunction with a package of support for the child. In this respect, the approach differs from the current use of electronic monitoring in the adult criminal justice system. The above statistics produced by G4S indicate that, during 2017, 31 movement restriction conditions were made.

Case for reform

Consideration of the further development of electronic monitoring has been ongoing for a number of years. Following a Scottish Government [consultation in 2013](#),⁶ an Electronic Monitoring Working Group was established. Its final [report](#) was published in 2016.⁷

A further Scottish Government [consultation in 2017](#) sought views on proposals for legislation.⁸ It noted that the proposals reflected the findings and recommendations of the Working Group.

The Working Group report noted that electronic monitoring was being delivered to a high standard within the parameters set for it. However, it also reported considerable geographical variation in the use of electronic monitoring and, in most instances, a lack of integration with other criminal justice interventions. With regard to integration, the Working Group report stated that electronic monitoring is:

“a versatile form of control which can be imposed either as punishment or to support rehabilitative purposes. The use of EM [electronic monitoring] as a standalone punishment should remain a legitimate sentencing option. However, in its various forms EM should now become integrated with measures with a proven track record of preventing and reducing further offending which assist individuals to desist from crime. Some research evidence shows that EM has a crime

⁵ G4S. (2018) Statistical Bulletin 1st January 2017 – 31st December 2017: Electronic Monitoring to the Criminal and Youth Justice Systems in Scotland. Retrieved from <http://www.gov.scot/Resource/0053/00530120.pdf>.

⁶ Scottish Government. (2013) Development of Electronic Monitoring in Scotland: A Consultation on the Future Direction of the Electronic Monitoring Service. Retrieved from <http://www.gov.scot/Publications/2013/09/7937>.

⁷ Electronic Monitoring Working Group. (2016) Electronic Monitoring in Scotland: Final Report. Retrieved from <http://www.gov.scot/Publications/2016/10/8620>.

⁸ Scottish Government. (2017) Electronic Monitoring in Scotland: A Consultation on Proposals for Legislation. Retrieved from <http://www.gov.scot/Publications/2017/03/6021>.

reduction effect in itself, for the duration of the monitoring period, but that if longer term desistance is required it must be combined with measures which help individuals to change their behaviour.” (p 4-5)

It recommended that:

“For EM to be used most effectively, its use should be considered in line with the overarching goals for each monitored person and tailored to reflect the needs, risk and circumstances of that individual.

Where longer term desistance is the ultimate goal, EM should be set within a wider package of support provided by statutory bodies with Third Sector involvement.

To determine what ‘support’ may comprise of, how it is best delivered and, as far as possible, the associated resource implications, the Working Group recommends that a demonstration project is undertaken.” (p 34)

As well as seeking to encourage better use of existing radio frequency technology, the Working Group report considered the potential of satellite tracking using the Global Positioning System (GPS) and of transdermal alcohol monitoring. It recommended the use of GPS technology along with further work on how transdermal alcohol monitoring might be used within the justice system.

The Scottish Government’s 2017 consultation stated that:

“We are committed to making electronic monitoring more person-centred and better integrated with other community justice interventions: tailored to the needs, risk and circumstances of the individual whilst supporting public protection and the protection of victims.

In considering the recommendations of the Electronic Monitoring Expert Working Group we will continue to work with partners to ensure the voice of those in the justice system and victims of crime are reflected in the new electronic monitoring strategy. Moving from viewing electronic monitoring purely as a form of punishment or control to one which also seeks to support the rehabilitation of the individual will require partners to work more closely together to both prevent and reduce further offending and to support public protection.

In addition to this consultation and impending legislative changes, some of the recommendations from the Working Group do not require legislation and can be taken forward separately, laying the foundations for the implementation of the new legislative proposals.” (p 9)

The Bill would allow the Scottish Minister to put in place arrangements for electronic monitoring which are temporary and/or of local effect. The policy memorandum notes that this would facilitate the establishment of pilot/demonstration projects exploring new possibilities for electronic monitoring.

Criminal proceedings

The Bill seeks to provide an over-arching set of rules for the imposition of electronic monitoring – both in relation to those situations where it can already be used and for a range of additional circumstances.

The Working Group report envisaged the use of movement restrictions, coupled with electronic monitoring, in a range of circumstances (eg as an alternative option to both fines and short prison sentences).⁹ It argued that, depending on factors such as the seriousness of the offence and the risk posed by the individual, it should be possible to use electronic monitoring at different levels of intensity and for different durations. Thus, in relation to fines, it suggested that electronic monitoring might be considered as a fine on time (rather than income) which could be used as a standalone measure.

With regard to the use of electronic monitoring as part of an order made by a criminal court, the Bill provides that it may be used in relation to the following disposals:

- Restriction of Liberty Orders (RLOs) – continuing current use of electronic monitoring
- Drug Treatment and Testing Orders (DTTOs) – continuing current use of electronic monitoring
- Community Payback Orders (CPOs) – expanding current use of electronic monitoring, which is limited to restrictions on movement imposed for breach of a CPO, to allow a court to include such a requirement with electronic monitoring as part of the original CPO
- Sexual Offence Prevention Orders (SOPOs) and Sexual Harm Prevention Orders (SHPOs)¹⁰ – expanding current use of electronic monitoring to such orders

The Bill states that electronic monitoring may relate to provisions of a disposal concerning the:

- location of an offender
- taking of alcohol or drugs by an offender

The latter reflects the possibility of future monitoring being expanded to use technology such as transdermal alcohol monitoring.¹¹

The Scottish Ministers would, by way of regulations, be able to alter the above list of disposals in relation to which electronic monitoring can be used. This could include expanding the list.

⁹ Electronic Monitoring Working Group. (2016) Electronic Monitoring in Scotland: Final Report. Retrieved from <http://www.gov.scot/Publications/2016/10/8620>.

¹⁰ SHPOs will replace SOPOs once relevant provisions of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 are brought into force.

¹¹ This is considered below under the heading of Technology.

The Working Group report recommended the extension of electronic monitoring “as an alternative to remand and support to pre-trial conditions” (p 40). The disposals listed in the Bill do not cover electronic monitoring as a condition of bail. As indicated above, the Scottish Ministers would have a power to expand that list. The Scottish Government’s position is that this could be used to allow electronic monitoring as a condition of bail.¹² It may, however, be noted that relevant provisions of the Bill refer to things done in respect of “an offender” (section 4(2)). Thus, any potential for using the power in relation to pre-trial bail (ie prior to conviction) might benefit from clarification.

Custodial sentences

Provisions in the Bill, relating to release on licence from a custodial sentence, also seek to provide an over-arching set of rules for the imposition of electronic monitoring in such situations.

In relation to community reintegration following a custodial sentence, the Working Group report stated that:¹³

“There is widespread stakeholder support for the use of electronic monitoring to support community re-integration following prison. (...)

Increasing the number of individuals released on licence with EM [electronic monitoring], and ensuring support is available to them, presents a unique opportunity to aid prisoner reintegration while maintaining an element of control.

In addition, there may be opportunities for EM to support prisoner reintegration prior to an individual being released. For example, EM could be used to enable an individual to attend a housing appointment to secure accommodation or to register with a GP prior to their liberation date.

The home assessment visit, undertaken by CJSW [criminal justice social work] before a person is released on HDC ensures that the proposed accommodation is suitable, that specific risk factors have been assessed and that family members are content to have the individual under curfew at that address. This home assessment visit also provides a unique opportunity to engage with the prisoners family members prior to the individual’s release.” (p 41)

The Bill allows for the use of electronic monitoring:

- where a prisoner serves part of a custodial sentence in the community under Home Detention Curfew (HDC) licence conditions – continuing current use of electronic monitoring
- as a possible licence condition imposed by the Parole Board for Scotland where it grants early release from a custodial sentence – continuing current use of electronic monitoring
- as a possible licence condition of temporary release from a custodial sentence – expanding current use of electronic monitoring

¹² Communication between the author and Scottish Government officials (April 2018).

¹³ Electronic Monitoring Working Group. (2016) Electronic Monitoring in Scotland: Final Report. Retrieved from <http://www.gov.scot/Publications/2016/10/8620>.

The policy memorandum indicates that prison rules currently allow for temporary release in the following circumstances:

“home leave; unescorted day leave; unescorted day release for compassionate reasons; temporary release for work; and unescorted release for health reasons. Home leave and unescorted release for health reasons can be granted for a period of seven days while the other forms of temporary release are only for one day.” (para 41)

The Scottish Ministers would, by way of regulations, be able to prescribe additional types of release conditions which can be electronically monitored.

As it does for criminal proceedings, the Bill states that electronic monitoring may relate to licence conditions concerning the:

- location of an offender
- taking of alcohol or drugs by an offender

The Working Group report also considered the use of electronic monitoring within the prison estate, stating that:

“EM offers the opportunity to enhance public confidence in the management of those individuals who are progressing through the prison system.

For those prisoners who are on the margins of acceptable risk, introducing the use of EM within the prison estate may provide additional options for prison managers to test those individuals while maintaining public safety. This approach has the potential to increase the number of prisoners who progress to less secure conditions and provide them with the confidence to live successfully, supporting rehabilitation and the eventual integration back into the community.” (p 48-49)

In this respect, the potential uses outlined by the Working Group are not wholly covered by the options currently listed in the Bill. As noted above, the Scottish Ministers would have a power to expand that list.

Technology

As noted earlier, electronic monitoring in Scotland is currently limited to the use of radio frequency technology (employing a base unit along with an electronic tag on the individual). The Working Group report recommended the continued use of such technology in electronic monitoring.¹⁴

The Working Group report also considered the potential of satellite tracking using the Global Positioning System (GPS) and of transdermal alcohol monitoring. In relation to GPS, it stated:

“GPS technology enables the monitoring of movement over a wide area rather than the monitoring of presence at a single location. It is widely available and used throughout Europe – although nowhere on a large scale – to monitor an

¹⁴ Electronic Monitoring Working Group. (2016) Electronic Monitoring in Scotland: Final Report. Retrieved from <http://www.gov.scot/Publications/2016/10/8620>.

individual's compliance with specific requirements set by the courts, probation services or the prison service. GPS works, in conjunction with the mobile phone network, to monitor the movements of individuals, rather than their location at a single place." (p 22)

It noted that transdermal alcohol monitoring "uses ankle bracelets to detect the presence of alcohol when it is sweated out through the skin (transdermally)" (p 25).

The Working Group report recommended that:

"GPS technology should be introduced to the electronic monitoring service in Scotland. The Working Group recommends that the use of GPS is not predicated by crime type. GPS technology is versatile and decisions on its use should be made as part of an individually tailored approach, including where it can aid wider public and victim safety and where it can be used supportively to strengthen the monitored person's desistance.

Transdermal alcohol monitoring technology is effective at remotely detecting the presence of alcohol and its use within a Scottish setting should be explored further. Work should, therefore, be undertaken to determine how alcohol monitoring might be used effectively and at which points within the Scottish Justice System. This work could take the form of a demonstration project." (p 26)

It also recommended that:

"a clear framework be put in place to ensure that the control and processing of data collected as a result of electronic monitoring is appropriate and that such data is only used for the purpose for which it was intended". (p 51)

The policy memorandum indicates that the Bill seeks to:

"facilitate the use of new technologies for electronic monitoring (such as GPS technology or transdermal alcohol monitoring) and to regulate both how devices used for electronic monitoring, and the information gathered by those devices, can be used" (para 52).

The Bill would allow the Scottish Ministers to provide for various issues by way of regulations. These include the:

- types of devices which may be used for electronic monitoring
- types of information which may be gathered
- use of information obtained through electronic monitoring

In relation to data protection, the policy memorandum says that the Scottish Government is:

"conscious of the increased collection of data which will accompany the increased monitoring of offenders and the policy intention is to ensure that the data protection rights of the offender are respected. This is achieved by the creation of a regulation making power enabling the Scottish Ministers to set out rules for the use of devices and the information obtained through those devices. The Scottish

Ministers will be able to use that power to ensure that data is collected, retained, used and destroyed in accordance with the data protection rights of the offender.” (para 67)

Compliance and enforcement

The Bill includes provisions relating to the obligations placed on the offender being monitored and how any breach will be dealt with. For example, it provides that the:

- offender must obey instructions on how a monitoring device is to be worn
- contravention of such instructions is a breach of the relevant disposal (eg of the CPO under which the offender is subject to electronic monitoring), thus allowing a court to use the breach procedures relating to that disposal

The Working Group report included consideration of what the consequence of non-compliance should be and how the person being monitored might be supported so as to make compliance more likely.¹⁵ It noted that:

“EM [electronic monitoring] technologies can be used to encourage compliance with the requirements of an order, and the data generated used to inform and enable enforcement decisions in the event of violations. Violations always require a response but, dependent on the nature of the non-compliance, enforcement need not mean the imposition of more punitive measures.” (p 35)

It went on to say that:

“Supporting individuals to comply with electronic monitoring conditions is critical to reducing further offending in the longer term. Some instances of non-compliance should be seen as an opportunity to work more closely with the monitored person, recognising individual life circumstances and preventing every potential non-compliance instance being returned to decision makers. How compliance is best supported should be explored as part of the aforementioned demonstration project.

In partnership with individuals, agencies and organisations including the Judiciary, Police Scotland, SPS [Scottish Prison Service], the Parole Board for Scotland, Criminal Justice Social Work, victims, the Third Sector and the service provider, response levels to non-compliance should be defined, agreed and set out in a Response Framework. This Response Framework will also be fundamental in determining how GPS technology should be incorporated into an individual’s order or licence conditions.” (p 38)

It recommended that two reporting options for non-compliance should be developed, allowing a court to impose more or less stringent reporting requirements.

The Scottish Government’s 2017 consultation also noted that the response to non-compliance should be appropriate to the circumstances:¹⁶

¹⁵ Electronic Monitoring Working Group. (2016) Electronic Monitoring in Scotland: Final Report. Retrieved from <http://www.gov.scot/Publications/2016/10/8620>.

“Effective management of compliance is a factor that can be critical to the successful completion of an electronic monitoring curfew period. Some instances of non-compliance should be seen as an opportunity for the individual to understand their responsibilities and to learn something that could help them to progress. Working with the individual and providing a more consistent response to the different causes of non-compliance can enable a graduated and tailored response.

Ensuring that effective structures and criteria are in place to support compliance and manage non-compliance is therefore crucial to contributing to a long term reduction in further offending.

The Working Group recognised that partners will need to work more closely to implement any new approach. This partnership working should ensure a consistent approach to the management of compliance and non-compliance including setting up a response framework. This new response framework will be progressed in 2017.” (p 9)

The Scottish Government has indicated that work on a new response framework is on-going.¹⁷

Disclosure of Convictions

Background

The Rehabilitation of Offenders Act 1974 provides that, following specified periods of time based on the sentence imposed (not the offence) convictions may become spent for certain purposes.¹⁸ Convictions resulting in lengthier custodial sentences (sometimes referred to as excluded sentences) do not become spent. The 1974 Act applies to England and Wales as well as Scotland. However, its subject matter is for the purposes of Scots law devolved to the Scottish Parliament.

The general rule is that people do not have to reveal spent convictions and cannot be prejudiced by them. For example, they do not have to declare spent convictions when applying for work in most areas. Certain types of work (both voluntary and paid) are exempted from these provisions, so that certain spent convictions must be declared when applying for relevant jobs (eg where working with vulnerable groups such as children). These exemptions are intended to strike an appropriate balance between supporting the rehabilitation of people with convictions and public protection.¹⁹

In addition to self-disclosure of previous convictions, processes exist which seek to ensure that information about previous offending behaviour is, where appropriate, made available to potential employers and others. This is done by way of disclosure

¹⁶ Scottish Government. (2017) Electronic Monitoring in Scotland: A Consultation on Proposals for Legislation. Retrieved from <http://www.gov.scot/Publications/2017/03/6021>.

¹⁷ Communication between the author and Scottish Government officials (April 2018).

¹⁸ The rules cover alternatives to prosecution and the children’s hearings system, as well as court convictions.

¹⁹ Types of work in relation to which spent convictions must be disclosed are considered later in this briefing.

checks and the Protecting Vulnerable Groups Scheme, managed by [Disclosure Scotland](#).²⁰ Such disclosure can include information on spent convictions.²¹

The aim of balancing rehabilitation with public protection is also reflected in rules relating to whether a person with a conviction is allowed to do certain types of work. The general legal position is that: (a) the existence of a spent conviction (where a potential employer is aware of it) should not be relied upon as a reason for refusing employment; and (b) the existence of an un-spent conviction is something which a potential employer may wish to have regard to but does not prohibit employment. However, previous convictions (whether spent or not) can create a legal barrier to a person carrying out certain types of work.²²

Until relatively recently, the rules for England and Wales on when a conviction becomes spent were the same as those currently applying in Scotland. However, in relation to England and Wales, the Legal Aid, Sentencing and Punishment of Offenders Act 2012 made various changes. It provided for reductions in the time taken for convictions to become spent (for those sentences which could already become spent) and extended the range of sentences covered. The changes came into force in March 2014.

Part 2 of the Bill seeks to reform the provisions in the 1974 Act in relation to Scotland. The policy memorandum states that the proposed changes will:

“reduce the length of time most people with convictions have to disclose their offending history, bring more people within the scope of the protections not to disclose, and make the regime more transparent and easier to understand” (para 7).

It goes on to say that:

“The Scottish Government’s policy approach in this Bill has many similarities to the reforms enacted in England and Wales, but also some key differences.” (para 274)

Case for reform

The policy memorandum notes that:

“Statistics suggest that over one-third of the adult male population and one-tenth of the adult female population in Scotland are likely to have at least one criminal conviction. The 1974 Act provides certain rules governing whether people with convictions are required to tell others about those convictions. The consequences of having to self-disclose previous offending behaviour for long periods of time and for such information to be included on a basic disclosure certificate can have an on-going impact on people’s ability to gain employment, attend university or college, volunteer, secure an apprenticeship or get insurance or a bank account, etc.

²⁰ Disclosure Scotland. Retrieved from <https://www.mygov.scot/organisations/disclosure-scotland/>.

²¹ Disclosure may also include relevant non-conviction information.

²² Types of work in relation to which convictions can create a legal barrier are considered later in this briefing.

The provisions of this Bill will reform the 1974 Act so that it achieves 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. The provisions are also intended to increase clarity and make the legislation more accessible to those required to understand it.” (paras 94-95)

It also notes that analysis carried out by the Scottish Government on sentencing trends, since the introduction of the rules in the 1974 Act, shows that “average custodial sentence lengths have risen quite significantly” (para 230). And that:

“There is strong evidence to support reducing the amount of disclosure that is required under the current operation of the 1974 Act. While it is more difficult to evidence optimum disclosure periods for specific disposals, the proposals in this Bill have been developed and refined through a process of consultation and dialogue with key stakeholders.” (para 276)

Consideration by the Scottish Government of the possibility of reform in this area has included the publication of a [discussion paper in 2013](#)²³ and a [consultation paper in 2015](#).²⁴ An [analysis of responses](#) to the Scottish Government’s consultation paper (also published in 2015),²⁵ reported that:

“The consultation paper set out specific proposals to allow more people with previous criminal activity to be able to move away from their past offending behaviour and to reduce the length of time most people will have to disclose their previous criminal activity. (...)

Regardless of how the respondents answered the questions, the comments received indicated that most were sympathetic to reform in this area. Respondents who indicated agreement welcomed the reforms as a positive step, but nevertheless often also argued for more substantive reform. Respondents who disagreed with the proposals often did so because they too wished to see more substantive reforms instead, (eg ranging from extending the scope of the legislation beyond what was proposed, further reducing specific rehabilitation periods by more than proposed to replacing the 1974 Act altogether).” (Executive Summary)

Disclosure periods

As already noted, the Bill seeks to reduce the length of time most people with convictions have to disclose them. It also extends the range of custodial sentences covered by the provisions of the 1974 Act.

The 1974 Act refers to the time taken for a conviction to become spent as the rehabilitation period. In relation to Scotland, the Bill provides for a change of

²³ Scottish Government. (2013) Discussion Paper on the Rehabilitation of Offenders Act 1974. Retrieved from <http://www.gov.scot/Publications/2013/08/6133>.

²⁴ Scottish Government. (2015) Rehabilitation of Offenders Act 1974: Consultation Paper. Retrieved from <http://www.gov.scot/Publications/2015/05/5592>.

²⁵ Scottish Government. (2015) Consultation on the Rehabilitation of Offenders Act 1974: An Analysis of Responses. Retrieved from <http://www.gov.scot/Publications/2015/12/1435>.

terminology, instead referring to the disclosure period. The policy memorandum highlights concerns that current references in the 1974 Act to rehabilitation periods and rehabilitated persons can give the impression that a person with unspent convictions should not be considered for any employment. It notes that:

“The 1974 Act is not intended to provide or suggest that a person is only suitable for employment once their conviction becomes spent. It is not the operation of the 1974 Act which makes a person rehabilitated; it is the actions of the individual themselves to become rehabilitated. By making certain changes to the terminology used in this Bill, it is hoped that where a potential employee discloses a conviction in future to an employer, that can be the start of a dialogue between the potential employee and employer about the suitability of the potential employee rather than an employer automatically rejecting an application.” (para 244)

Table 1 below sets out, for a selection of sentences, the current rehabilitation periods applying in Scotland and in England and Wales. It also sets out the disclosure periods as proposed in the Bill for Scotland. The stated periods relate to people who were 18 or older at the time of conviction.

Table 1: Rehabilitation and Disclosure Periods – aged 18 or over at date of conviction

	Scotland: current	England & Wales: current	Scotland: proposed
Custodial			
more than 4 years	always disclose (excluded sentence)	always disclose (excluded sentence)	always disclose (excluded sentence)
more than 2½ years up to 4 years	always disclose (excluded sentence)	sentence plus 7 years	sentence plus 6 years
more than 1 year up to 2½ years			sentence plus 4 years
more than 6 months up to 2½ years	10 years from conviction	sentence plus 4 years	
1 year or less			sentence plus 2 years
6 months or less	7 years from conviction	sentence plus 2 years	
Non-Custodial			
community order	5 years from conviction	length of order plus 1 year	1 year from conviction or length of order *
fine	5 years from conviction	1 year from conviction	1 year from conviction

* The longer of the two

As can be seen from the table, the proposals for Scotland seek to:

- increase the maximum custodial sentence in relation to which a conviction may become spent from two and a half years to four years (mirroring existing reforms in England and Wales)²⁶
- reduce the time required for a conviction to become spent (in some cases below that provided by existing reforms in England and Wales)
- link the disclosure period for custodial sentences more closely to the length of the particular sentence by including it in the calculation (mirroring existing reforms in England and Wales)
- change some of the sentencing bands used for calculating the disclosure period for custodial sentences

References in the above table to custodial sentences of up to a certain period include that period (eg up to four years includes a sentence of four years).²⁷ Some examples, of the impact the proposals in the Bill would have on the time taken for a conviction resulting in a custodial sentence to become spent in Scotland, are set out below:

- sentence of four years – proposed disclosure period of ten years (not covered by current rehabilitation provisions in Scotland)
- sentence of three years – proposed disclosure period of nine years (not covered by current rehabilitation provisions in Scotland)
- sentence of two years – rehabilitation period of ten years replaced by disclosure period of six years
- sentence of one year – rehabilitation period of ten years replaced by disclosure period of three years
- sentence of six months – rehabilitation period of seven years replaced by disclosure period of two and a half years

Table 2 deals with those under the age of 18, setting out information on rehabilitation/disclosure periods for a selection of court sentences and, in relation to Scotland, disposals from the children's hearings system.

²⁶ In other words, changing the definition of an excluded sentence from custodial sentences in excess of two and a half years to those in excess of four years.

²⁷ Under the provisions of the Bill a custodial sentence of four years would become spent after ten years whilst a sentence of just over that length could not become spent. In explaining the reasoning behind this cut-off point, the policy memorandum (paras 233-235) refers to the existing distinction between short-term prisoners and long-term prisoners. This distinction affects the release arrangements (including post-release supervision) of prisoners. However, it may be noted that (under the provisions of the Prisoners and Criminal Proceedings (Scotland) Act 1993) a short-term prisoner is one who receives a sentence of less than four years. A person receiving a sentence of four years would be categorised as a long-term prisoner.

Table 2: Rehabilitation and Disclosure Periods – aged under 18 at date of conviction

	Scotland: current	England & Wales: current	Scotland: proposed
Custodial			
more than 4 years	always disclose (excluded sentence)	always disclose (excluded sentence)	always disclose (excluded sentence)
more than 2½ years up to 4 years	always disclose (excluded sentence)	sentence plus 3½ years	sentence plus 3 years
more than 1 year up to 2½ years			sentence plus 2 years
more than 6 months up to 2½ years	5 years from conviction	sentence plus 2 years	
1 year or less			sentence plus 1 year
6 months or less	3½ years from conviction	sentence plus 1½ years	
Non-Custodial			
community order	2½ years from conviction	length of order plus 6 months	6 months from conviction or length of order *
fine	2½ years from conviction	6 months from conviction	6 months from conviction
Children's Hearings			
discharge	6 months from disposal		zero (spent immediately)
compulsory supervision order	1 year from disposal or length of order *		zero (spent immediately)

* The longer of the two

The effects of the proposed changes to disclosure periods would not be restricted to sentences (and other disposals) imposed after relevant provisions of the Bill become law. They would also apply to ones imposed prior to commencement, with the proviso that reductions in disclosure periods would not lead to a conviction becoming spent before commencement. Thus, where this would otherwise be the effect, a sentence only becomes spent on the day relevant provisions of the Bill become law.

The provisions in the 1974 Act also cover a wide range of other sentences and disposals. These include:

- situations where a person receives an absolute discharge or is admonished by the court
- mental health orders imposed by a court on conviction (eg compulsion orders)
- sentences under legislation relating to the armed services
- alternatives to prosecution

The Bill provides for changes to disclosure periods in relation to some (eg cases where a person is admonished or the court imposes a mental health order) but not others (eg sentences under legislation relating to the armed service and alternatives to prosecution).

The police and/or prosecution may offer various alternatives to prosecution in the courts. For the purposes of the 1974 Act, they fall into two categories:

- current rehabilitation period is zero (spent immediately) – warnings given by a constable or procurator fiscal and fixed penalty notices given under the Antisocial Behaviour etc (Scotland) Act 2004
- current rehabilitation period is three months from the date on which the alternative is given – include fiscal fines, fiscal compensation orders and fiscal work orders

The Bill would retain these as the disclosure periods for alternatives to prosecution. The policy memorandum notes that the current rehabilitation periods for alternatives were only included in the 1974 Act as a result of amendments made by the Criminal Justice and Licensing (Scotland) Act 2010. As such, the Scottish Government does not consider that they are in need of reform.

More detailed information on proposed changes to disclosure periods is set out in the policy memorandum and explanatory notes published along with the Bill. This includes the Scottish Government's reasons for proposing specific disclosure periods.

Impact of subsequent convictions on disclosure

One of the aims of the Bill is to make the rules in the 1974 Act easier to understand. The policy memorandum notes that some of the complexity of the current provisions:

“has led to people over-disclosing on occasion and employers not understanding the rules with the result that the protections the 1974 Act affords to individuals with previous convictions not benefitting people in the way they should.

Consequently this Bill proposes a numbers of changes to the structure and operation of the rules to help improve the accessibility of the legislation to help maximise the benefits the 1974 Act is intended to bring to people with previous convictions.” (paras 251-252)

An area of the current rules which adds to their complexity is the impact of subsequent convictions on the need to disclose earlier convictions (and vice versa). The Bill seeks to make some changes in this area.

Under the current provisions of the 1974 Act, a conviction which can become spent but has not already become so at the time of a subsequent conviction (ie the rehabilitation period is still running), may have the period during which it must be disclosed extended. The rules currently applying to Scotland generally mean that:²⁸

²⁸ The rules are subject to certain additional exceptions set out in the 1974 Act.

- where the subsequent conviction can become spent and was imposed under solemn procedure²⁹ – the remaining period during which the original conviction must be disclosed is, if it is shorter, extended to match that of the subsequent conviction
- where the subsequent conviction cannot become spent (because it resulted in an excluded sentence)³⁰ – both convictions must be disclosed for life

Taking the situation of an adult who is fined and, six months later, is given a custodial sentence following conviction under solemn procedure; if the above rules were applied using the proposed disclosure periods set out in the Bill:

- example 1 (subsequent sentence of two years) – the one year disclosure period for the original offence is generally extended to match that of the subsequent conviction (ie six years from the subsequent conviction)
- example 2 (subsequent sentence of five years) – both convictions must be disclosed for life

In addition, where a subsequent conviction under solemn procedure can become spent, and has a shorter rehabilitation period than that remaining in relation to the original conviction, the rehabilitation period of the subsequent conviction is generally extended to match that of the original conviction:

- example 3 – taking the situation of an adult who is given a custodial sentence of two years and, three years later, is given a fine under solemn procedure; the usual one year disclosure period for the subsequent conviction is extended to match that of the original conviction (ie six years from the original conviction)

The Bill seeks to abolish the rule illustrated by example 2 above. The policy memorandum (see paras 253-262) refers to this as the excluded sentence rule.

The Bill generally retains the rule illustrated by examples 1 and 3 above (subject to some changes to the exceptions).

Public protection: disclosure of spent convictions and prohibited work

As noted earlier, the general rule for a person applying for work (paid or voluntary) is that:

- the person does not have to reveal any spent conviction
- the existence of any spent conviction, where a potential employer is aware of it, should not be held against the applicant

²⁹ Under criminal court procedure, cases are divided into solemn and summary proceedings. Solemn procedure is used for the most serious of criminal cases and may lead to a trial before a judge in the High Court or a sheriff in one of the sheriff courts. Trials under solemn procedure are conducted with a jury.

³⁰ In practice this will, due to limits on summary sentencing powers, be a sentence imposed by a court dealing with a case under solemn procedure.

- the existence of any un-spent conviction is something which a potential employer can have regard to when considering suitability for employment, but is not a legal barrier to appointing the person

There are, however, exceptions aimed at striking an appropriate balance between supporting the rehabilitation of people with convictions and public protection. In such cases, spent convictions may be disclosed. In addition, convictions (whether spent or not) can sometimes create a legal barrier to a person carrying out certain types of work (paid or voluntary).

A formal process of disclosure is managed by Disclosure Scotland (an executive agency of the Scottish Government). It provides the following types of check for employers:

- basic disclosures
- standard disclosures
- enhanced disclosures
- the Protecting Vulnerable Groups (PVG) scheme

A basic disclosure provides information on any unspent convictions only. The other forms of check (sometimes referred to as higher level disclosures) may also include information on spent convictions.³¹ Guidance on what is disclosed is set out on the Scottish Government's website under the heading of [Convictions and Higher Level Disclosures](#).³²

Which type of check is appropriate depends on the work/role the person will be involved in. For example, the PVG scheme seeks to ensure that people whose behaviour makes them unsuitable to work with children or protected adults, cannot do regulated work with these groups.

The PVG scheme differs from the other forms of check in that, once a person is a PVG scheme member, Disclosure Scotland keeps an ongoing check on their suitability to continue working with children or protected adults. It will, if it discovers new information indicating that the person is now unsuitable for such work, tell the employer.

As noted in the policy memorandum (paras 101-103), the Bill does not seek to make any changes to arrangements under which spent convictions (or relevant non-conviction information) are disclosed.

However, the possibility of reforming the system of higher level disclosures is under consideration. For example, in February 2017 the Scottish Government published [Protecting Vulnerable Groups Scheme Review: Terms of Reference](#).³³ It noted that there were over a million members of the PVG scheme. And also, that over 3,000 people were on lists barring them from doing regulated work with children and/or

³¹ They can also include other types of relevant non-conviction information.

³² Scottish Government. Convictions and Higher Level Disclosures. Retrieved from <https://www.mygov.scot/convictions-higher-disclosures/>.

³³ Scottish Government. (2017) The Protecting Vulnerable Groups Scheme Review: Terms of Reference. Retrieved from <http://www.gov.scot/Publications/2017/02/7244>.

vulnerable adults. Since publication of the terms of reference, there has been engagement with stakeholders. A formal consultation paper is expected by summer 2018.

Parole Board for Scotland

Background

The [Parole Board for Scotland](#) is an independent tribunal.³⁴ Its primary role relates to the possible release of a prisoner once that part of the sentence which relates to punishment and deterrence has been served in custody. The Parole Board is tasked with assessing whether the level and nature of any risk a prisoner still presents at that point can be safely managed in the community. It also considers the conditions under which a prisoner may be released.

In the main, its role is limited to prisoners serving long-term (a fixed period of four years or more) and indeterminate custodial sentences.

More information on the role of the Parole Board is set out in a Scottish Government [consultation](#) on parole reform (published in 2017).³⁵ It noted that a parole reform programme had been established to “clarify the role and status of the Parole Board, simplify and modernise processes and support consistency of approach” (p 7).

The consultation sought views on a number of areas where the possibility of legislative change was being considered:

- governance of the Parole Board
- involvement of the Scottish Ministers in the parole process
- tests that the Parole Board apply in determining whether to release
- timescales for subsequent reviews following initial consideration for parole
- way in which information is supplied to the Parole Board
- administrative procedures for considering cases

In 2018, the Scottish Government published an [analysis of responses](#) to the consultation.³⁶

The Bill includes provisions relating to some, but not all, of the issues covered by the consultation.³⁷ The policy memorandum states that:

“The Bill makes amendments to existing legislation relating to the Parole Board for Scotland. This includes amendments to the composition and appointment of

³⁴ Parole Board for Scotland. Retrieved from <http://www.scottishparoleboard.gov.uk/>.

³⁵ Scottish Government. (2017) Parole Reform in Scotland: A Consultation on Proposals for Legislative Change. Retrieved from <http://www.gov.scot/Publications/2017/07/9955>.

³⁶ Scottish Government. (2018) Parole Reform in Scotland: Analysis of Responses. Retrieved from <http://www.gov.scot/Publications/2018/02/3251>.

³⁷ Scottish Government officials have indicated that some of the other issues are matters for Parole Board procedures (which are currently being reviewed), whilst others will be taken forward at an administrative level without the need for legislation.

Parole Board members, to the functions and requirements of the Parole Board and to the role of the Scottish Ministers in certain types of parole cases. The Bill also reinforces the independence of the Parole Board and provides for the administrative arrangements within the Parole Board to be set out in secondary legislation.” (para 288)

Some of the more significant changes proposed in the Bill are outlined below.

Membership and appointment

The Parole Board currently has 30 members. It sits with a minimum of two members when dealing with casework meetings and a minimum of three for oral hearings and tribunals. The latter can be reduced to two in certain circumstances.

The Prisoners and Criminal Proceedings (Scotland) Act 1993 currently provides that overall membership of the Parole Board must include a:

- High Court judge
- psychiatrist
- person with knowledge and experience of the supervision or aftercare of discharged prisoners
- person who has studied the causes of delinquency or the treatment of offenders

The Bill seeks to remove the requirement for the Parole Board to include a High Court judge and a psychiatrist. The policy memorandum argues that:

“As the number of members has grown to meet demand and the skills, knowledge and experience of members has widened, there is less need for members of this type to be a statutory requirement. There are 30 members of the Parole Board including one medical and one judicial member. The judicial member rarely sits and their role can be fulfilled by the legal members of the Board. There are also sufficient members with experience in forensic psychiatry to provide medical expertise to the Board.” (para 289)

The Bill also provides for changes to the duration and renewal of appointment of Parole Board members – moving to five-year term with the potential for automatic reappointment. The policy memorandum states that this will bring the term of office into line with other tribunals and help to maintain the level of expertise within the Parole Board.

Functions regarding prisoners

In relation to the work of the Parole Board, the Bill includes provisions on:

- review of decision not to release or to revoke a release licence – putting into statute current practice by providing that determinate sentence prisoners (with a number of exceptions) are entitled to have the Parole Board review its decision within 12 months

- long-term prisoners subject to deportation – bringing the treatment of such prisoners into line with most other long-term prisoners by providing that it is the Parole Board, rather than the Scottish Ministers, which makes the final decision on whether they should be released on parole³⁸

Independence and governance

The Bill expressly states that the Parole Board will continue to act as an independent tribunal.

It would also allow the Scottish Ministers, by way of regulations, to authorise the chairperson of the Parole Board to make administrative arrangements for the Parole Board (eg in relation to the use of committees).

Frazer McCallum

SPICe Research
18 April 2018

³⁸ The Scottish Ministers would continue to make decisions on whether to release a prisoner on compassionate grounds.

Justice Committee

12th Meeting, 2018 (Session 5), Tuesday 24 April 2018

Feedback from the Justice Sub-Committee on Policing

Note by the clerk

1. The Justice Sub-Committee on Policing met on 19 April 2018 when it took evidence on Police Scotland's review of its custody provision.
2. The Sub-Committee took evidence from Chief Superintendent Garry McEwan, Criminal Justice Services Division, Police Scotland, Calum Steele, General Secretary, Scottish Police Federation, and Lucille Inglis, Chair, Police Staffs Scotland Branch, Unison Scotland.
3. This was to further consider custody issues raised at an evidence session on [7 December 2017](#) and in subsequent written evidence received from the Scottish Police Federation, Police Scotland, UNISON Scotland and the Association of Scottish Police Superintendents.
4. The Sub-Committee heard that whilst the number of people being taken into custody has reduced and there have been improvements to Police Scotland's custody provision there remain a number of custody issues to be resolved.
5. Police officers continue to 'back-fill' vacant police custody and security officer (PCSO) posts and the Sub-Committee heard that this practice will continue until at least November 2018. There were concerns about under-staffing, with some PCSOs working alone in custody centres. The Sub-Committee heard that the proposed number of new staff posts would not ensure that custody centres were fully staffed. Whilst the number of prisoners being transferred long journeys had reduced, it remained a concern, and processing times had increased.
6. The Sub-Committee also considered its forward work programme and agreed to request information on Police Scotland's ICT strategy.