Management of Offenders (Scotland) Bill

Policy Memorandum

Introduction

1. As required under Rule 9.3.3 of the Parliament's Standing Orders, this Policy Memorandum is published to accompany the Management of Offenders (Scotland) Bill ("the Bill") introduced in the Scottish Parliament on 22 February 2018.

2. The following other accompanying documents are published separately:

- Explanatory Notes (SP Bill 27-EN);
- a Financial Memorandum (SP Bill 27-FM);
- statements on legislative competence by the Presiding Officer and the Scottish Government (SP Bill 27–LC).

3. This Policy Memorandum has been prepared by the Scottish Government to set out the policy behind the Bill. It does not form part of the Bill and has not been endorsed by the Parliament.

Policy Objectives of the Bill

4. The Management of Offenders (Scotland) Bill 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.

5. The Bill has four Parts: the substantive provisions are contained within Parts 1, 2 and 3, whilst Part 4 contains some standard ancillary and final matters. Part 1 expands and streamlines the uses of Electronic Monitoring; Part 2 modernises and improves the Rehabilitation of Offenders

Act 1974 ("the 1974 Act"); and Part 3 delivers some of the aims of the Parole Reform Programme to clarify the role of the Parole Board.

6. The expansion of electronic monitoring supports the broader community justice policies of preventing and reducing reoffending by increasing the options available to manage and monitor offenders in the community, and to further protect public safety. The introduction of new technologies, such as Global Positioning System (GPS) technology, presents opportunities to improve the effectiveness of electronic monitoring, for example through the use of exclusion or inclusion zones that will offer victims significant reassurance and respite.

7. The 1974 Act reforms 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.

8. These progressive reforms will help unlock untapped potential in Scotland's people, helping them move on more quickly from their offending behaviour to assist the economy, improve their life chances, and help reduce reoffending rates.

9. The Parole reforms aim to simplify and modernise processes, and support consistency of approach in relation to parole matters and the Parole Board for Scotland.

10. Details of the three areas provided for within the Bill are contained below.

Part 1 of the Bill (Sections 1-16 and Schedule 1) - Electronic Monitoring Etc.

11. Electronic monitoring was first piloted in Scotland in 1998 before being rolled out nationally in 2002 as a Restriction of Liberty Order (RLO) imposed by the courts. Since 2002 confidence has grown in the technology used and understanding has developed as to how electronic monitoring could be used more widely. It is now used to monitor a number of different community disposals as well as being included as a licence condition on release from prison.

12. That notwithstanding, 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.

13. The Scottish Government believes that electronic monitoring can have a greater role to play in supporting our 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.

14. To that end an expert working group was established in 2013 to consider how electronic monitoring could be better used within the criminal justice system in Scotland. The report of that Group was published in September 2016 and concluded that they wished to see a more extensive, more consistent and more strategic use of electronic monitoring. The more strategic use envisaged by the Group has three aspects:

- to use electronic monitoring in more integrated ways, alongside a range of supportive measures, to help prevent and reduce further offending and promote desistance among people with convictions;
- to enhance the protection and security of victims of crime in ways that other community interventions are unable to do; and
- by offering a greater degree of control in the community, to make the use of electronic monitoring more appealing to sheriffs as an alternative to custody. A number of the recommendations of the working group do not require legislation and are being taken forward separately, laying the foundations for the implementation of the provision contained within this Bill.

15. A public consultation (Electronic Monitoring in Scotland - A Consultation on Proposals for Legislation) focused on the legislative changes required to fully realise the vision of the Working Group was held between March and May 2017. A total of 63 responses were received to this consultation, and an analysis of those responses was published in September 2017. The details of those responses are discussed in more depth in relation to the specific provisions discussed below.

16. The underlying intention of the provisions in this Part of the Bill is to provide one overarching set of principles for the imposition of electronic

monitoring, drawing together the common threads in the pre-existing electronic monitoring legislation. The use of electronic monitoring in Scotland has grown up organically over a number of years, and the separate sets of rules lack the clarity that such an over-arching set of rules can provide.

Specific provisions

Sections 1 to 4 – Monitoring in criminal proceedings

Policy objectives

17. These four sections of the Bill relate to the use of electronic monitoring by the courts in criminal proceedings. The policy objective of these provisions is to set out the nature and purpose of electronic monitoring, and the circumstances under which a court may require a person to be subject to monitoring.

Key information

18. The Bill sets out the position that when a court requires an individual to be subject to electronic monitoring, that requirement is for the purpose of monitoring the individuals compliance with both an underlying order and with the obligations in relation to the monitoring itself (these obligations are discussed in more detail below in relation to sections 12 to 14 of the Bill).

19. Additionally, the Bill further defines the nature of any electronic requirement in relation to the underlying order so as to specify that the electronic monitoring requirement is to last for as long as the underlying order (other than in circumstances where it is varied or revoked) and requires the consent of the offender where that consent is required for the underlying order. The intention of these provisions is to ensure as far as practical that the electronic monitoring requirement mirrors the order to which it is attached.

20. At present, legislation permits the use of electronic monitoring as part of certain specific court disposals:

- in relation to an RLO made under section 245A of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”);

- in relation to a requirement restricting movements by virtue of section 234C(1) of the above Act (relating to a drug treatment and testing order (DTTO)); and
- in relation to a restricted movement requirement imposed by virtue of section 227ZC(7)(d) of the above Act (relating to a community payback order (CPO)).

21. Section 3 of the Bill brings together these uses of electronic monitoring in one consolidated list. In addition, it expands on the ways in which electronic monitoring can be used in relation to a CPO and adds an additional disposal in relation to which electronic monitoring was not previously available.

22. Under the terms of the current legislation, a CPO can include any of the nine conditions specified under section 227A of the 1995 Act. These conditions do not include a restricted movement requirement which at present can only be imposed as part of a CPO following breach of the original order. The Bill gives effect to the recommendation of the Working Group that courts should have the option of imposing a restricted movement requirement as part of a CPO at the initial point of sentence.

23. Section 3 of the Bill also expands the use of electronic monitoring to include sexual offence prevention orders (SOPOs) and sexual harm prevention orders (SHPOs) - which will replace SOPOs when they are implemented as part of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 (“the 2016 Act”).

24. A SOPO/SHPO allows the court (either at its own instance on or the application of the Chief Constable) to impose conditions on an offender either prohibiting them, or requiring them, to do something described in the order. Such conditions must be necessary and proportionate to protect the public from serious sexual harm from the offender. The Bill gives effect to the recommendation of the Working Group that a SOPO/SHPO would be strengthened with the ability to use electronic monitoring as a condition.

25. The Bill also provides a power for the Scottish Ministers to amend or vary the list of disposals in relation to which electronic monitoring can be imposed. This power is designed to ensure that the more extensive and strategic uses of electronic monitoring envisioned by the Working Group is not hampered by the adoption of a fixed and inflexible list of disposals.

26. The approach taken by the Bill in relation to this power restricts the variation of the list in two ways: by limiting entries to proceedings in criminal courts; and by entries to things which relate either to an individual's whereabouts or to their consumption of alcohol, drugs or other substances.

Alternative approaches

27. Rather than providing a set of overarching principles for the imposition of electronic monitoring along with a consolidated list of disposals, consideration was given to amending each of the existing sets of rules which govern the current use of electronic monitoring. This would have required amendments to the 1995 Act, the Mental Health (Care and Treatment) (Scotland) Act 2003 ("the 2003 Act") and the 2016 Act.

28. This approach would not have allowed for the streamlining of the rules governing the use of electronic monitoring proposed by the Bill, nor would it have provided the clarity that a general over-arching rule provides. It would also have required for further sets of rules to be implemented in the event of electronic monitoring being expanded into any other orders.

Consultation

29. The Consultation, Electronic Monitoring in Scotland - A Consultation on Proposals for Legislation, sought views on the next steps in taking forward primary legislation to extend the use of electronic monitoring in Scotland in support of broader community justice policy. In relation to the extending of the use of electronic monitoring in criminal proceedings, the consultation posed a number of questions seeking views on the use of electronic monitoring in a number of specific circumstances.

30. In relation to CPOs, the consultation noted that the current legal framework which allowed a person to be subject to a community sentence to have both electronic monitoring and a support package in place required two disposals from the court: an RLO and a CPO. It further noted that an RLO cannot extend beyond 12 months whereas a CPO can be imposed for up to three years; a position which could be rectified if electronic monitoring could form part of a CPO when that order was initially imposed, and not as part of a separate order.

31. 52 (83%) respondents provided a view on whether electronic monitoring should be an optional requirement of a CPO when initially imposed, with 46 (88%) agreeing with the proposal. The main reasons

expressed for this view were that this had the potential to reduce reoffending and support rehabilitation; it could strengthen the CPO and open up its benefits to a wider spectrum of people; and would bring more cohesion to what was perceived to be a currently inefficient and disjointed system.

32. The consultation also sought views on whether the SOPO regime should be amended so that compliance with a SOPO can be electronically monitored. The consultation noted that electronic monitoring could only be imposed in relation to a SOPO where the court is satisfied that it is necessary for the purpose of protecting the public, or any particular members of the public, from serious sexual harm from the person.

33. 52 respondents provided a view on whether electronic monitoring should be permitted as a condition of a SOPO, with 50 (96%) agreeing with the proposal. Many considered that this would bring strength to SOPOs and add value, for example by providing the public and victims with more confidence, and increasing the chances of offenders complying with their orders.

Summary

34. The policy intention behind these four provisions is to provide clarity to courts, practitioners and offenders alike as to when and how electronic monitoring can be imposed by the court. The creation of a single clear set of stand-alone rules covering the use of electronic monitoring in criminal proceedings, drawing together the common threads in the existing legislation, achieves this aim. In addition, these provisions are designed to ensure that electronic monitoring is applied fairly by the courts through the creation of an obligation to explain the purpose and effect of that monitoring, and the requirement to seek the individual's consent to its imposition, where appropriate.

35. Finally, these sections are designed to enable the Scottish Ministers to expand the use of electronic monitoring in order to respond either to changes in the court's powers or changes in technology. The provision of a power to modify the list of disposals meets this policy intention by giving the

Scottish Ministers the power to allow courts to impose electronic monitoring in new and varied circumstances.

Sections 5 to 7 – Monitoring on release on licence

Policy objectives

36. These three sections of the Bill relate to the use of electronic monitoring by the Scottish Ministers in connection with the release of an individual from imprisonment or detention on licence. The policy objective of these provisions is to set out the circumstances under which the Scottish Ministers may require a person to submit to monitoring.

Key information

37. In line with the provision relating to court proceedings, the Bill sets out the position that when the Scottish Ministers require an individual to be subject to electronic monitoring, that requirement is for the purpose of monitoring the individuals compliance with both an underlying condition and with the obligations in relation to the monitoring itself (these obligations are discussed in more detail below in relation to sections 12 to 14 of the Bill).

38. The Bill further defines the nature of any electronic requirement in relation to the underlying licence condition so as to specify that the electronic monitoring requirement is to last for as long as the underlying licence condition (other than in circumstances where it is varied or revoked) and requires the recommendation of the Parole Board for Scotland where that recommendation is required before particular conditions can be imposed. As with the provisions for court disposals, the intention of these provisions is to ensure as far as practical that the electronic monitoring requirement mirrors the licence condition to which it is attached.

39. At present, legislation permits the use of electronic monitoring in relation to the following licence conditions:

- a curfew condition as provided for in section 12AA(1)(B) of the Prisoners and Criminal Proceedings (Scotland) Act 1993 (“the 1993 Act”);
- conditions under section 12(1) of the above Act (relating to release on licence under Part 1 of that Act where sentencing is on or after 1 October 1993); and

- conditions under section 22(6) of the Prisons (Scotland) Act 1989 (relating to release on licence regarding certain sentences where sentencing is before 1 October 1993).

40. Section 7 of the Bill brings together these uses of electronic monitoring in one consolidated list. In addition, it enables the use of electronic monitoring in relation to conditions relating to temporary release in accordance with rules made under section 39 of the Prisons (Scotland) Act 1989.

41. Currently prisoners can be released from prison on temporary release under the following categories set out in rule 136 of the Prisons and Young Offenders Institutions (Scotland) Rules 2011: 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.

42. It was the view of the Working Group that the temporary release of a prisoner under the Prison Rules could be reinforced by the use of electronic monitoring. The Working Group agreed that for those prisoners who are on the margins of acceptable risk, introducing the use of electronic monitoring for the purpose of temporary release might provide additional options for prison Governors to test those individuals while maintaining public safety.

43. The Working Group further suggested that for those in custody, electronic monitoring could be utilised on some occasions for work placement and home leave and had the potential to increase the number of prisoners who progress to less secure conditions, providing them with the confidence to live successfully, supporting rehabilitation and the eventual re-integration into the community.

44. Section 7 of the Bill further provides that electronic monitoring can be used with regard to conditions relating to release from imprisonment or detention which arise on the basis prescribed in regulations made by the Scottish Ministers. The conditions listed in section 7(1) or prescribed by the Scottish Ministers under section 7(1)(e) are restricted to conditions concerning the individual's whereabouts or their consumption of alcohol, drugs or other substances.

Alternative approaches

45. Again, consideration was given to the option of amending each of the existing sets of rules which govern the current use of electronic monitoring in relation to licence conditions. For these purposes this would have required amendments to the 1989 Act and the 1993 Act.

46. As noted above, this approach would not have allowed for the streamlining of the rules governing the use of electronic monitoring proposed by the Bill, nor would it have provided the clarity that a general over-arching rule provides.

Consultation

47. The Consultation, Electronic Monitoring in Scotland - A Consultation on Proposals for Legislation, sought views on whether electronic monitoring should be permitted as a condition of temporary release. Fifty-five respondents commented on this proposal, with 52 (96%) of them agreeing.

48. The main benefits were identified as: preparing the offender for liberation; facilitating day-to-day opportunities for the offender to maintain community networks; to test readiness for leaving custody; and to engender greater confidence in the risk management of the offender.

49. A common view was that offenders should be assessed on an individual basis in terms of risk, circumstance, and readiness to comply prior to being able to benefit from any such scheme.

Summary

50. These three provisions are designed to provide clarity to all relevant parties as to when and how electronic monitoring can be imposed by the Scottish Ministers on the early release of a prisoner on licence. This is achieved by the creation of a single set of rules for the use of electronic monitoring for the purposes of parole, home detention curfew and temporary release. The policy intention is to ensure fairness to the offender and this is achieved by obliging the Scottish Ministers to explain the purpose and effect of electronic monitoring to the offender and by retaining the oversight of the Parole Board in imposing electronic monitoring where appropriate.

51. The policy intention is to ensure that the use of electronic monitoring can be expanded where new powers of release are created or different

circumstances arise where electronic monitoring could be beneficial. This is achieved by empowering the Scottish Ministers to prescribe the types of conditions to which electronic monitoring may apply.

Sections 8 to 9 – devices, use and information

Policy objectives

52. These two provisions deal with the specification of approved devices and the use of those devices and the information obtained through monitoring. The policy objective is 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.

Key information

53. Scotland currently only uses radio frequency (RF) technology to monitor compliance. RF has proven to be an effective technology to monitor when an individual enters or leaves as specific address, either as part of a curfew or - much less frequently - where an exclusion zone has been set up (typically to protect a victim, be that an individual or a business).

54. The Working Group considered the potential of two emerging electronic monitoring technologies - satellite tracking using GPS and transdermal alcohol monitoring - noting that they presented opportunities to use electronic monitoring in different ways and at different points in the criminal justice system.

55. The Group indicated that the technology in itself should not dictate how and in what circumstances electronic monitoring should be used. That notwithstanding, they also indicated their view that RF technology had not been used as flexibly or as creatively as it could have been.

56. The Group viewed GPS technology as offering new possibilities for monitoring movement in general (rather than presence in a single place as is the case with RF monitoring). This could include the creation and oversight of exclusion and inclusion zones of variable size to both restrict movement and offer greater degrees of protection to victims of crime than are usually available in existing community supervision. The Working Group further noted that transdermal alcohol monitoring could support and

enforce prohibitions on alcohol by acting as a deterrent during the period of monitoring.

57. The Bill empowers the Scottish Ministers to approve, by regulation, the devices which are to be used for the purpose of either monitoring an individual's whereabouts or detecting whether they have consumed alcohol, drugs or other substances. It is intended that this power will be used to specify the RF technology currently used on the basis that this has proven to be effective for the purpose of monitoring an individual's compliance with a curfew order - it is not the intention that GPS technology will replace RF technology in this role. By providing this regulation making power, the intention is also to enable the future approval of other developing technologies.

58. Section 9 of the Bill provides the Scottish Ministers with regulation making powers in relation to the use of approved devices in relation to the monitoring of either a court disposal or a licence condition, and the use of information obtained through the monitoring of an offender by means of such devices.

59. A number of non-exhaustive examples of what regulations made under these powers may do are also provided. In relation to the device for instance, regulations may provide for how a device should be used or worn by an offender, or circumstances in which a particular device is, or is not, to be used. In relation to the information, regulations may provide for what information may or may not be gathered at particular times or in particular circumstances, may allow or restrict the sharing or use of such information, and may fix periods during which such information should be retained or after which such information should be destroyed.

60. At present, the information relating to the whereabouts of individuals subject to electronic monitoring is held by the electronic monitoring contractor on behalf of the Scottish Ministers. The introduction of GPS technology will increase the amount (and to an extent the nature) of information collected. The Working Group recommended new information sharing protocols and data retention schedules should be drawn up to take account of this.

Consultation

61. The consultation Electronic Monitoring in Scotland - A Consultation on Proposals for Legislation sought views on exploiting the opportunities afforded by new technologies. The consultation noted that the introduction of GPS technology would allow for the monitoring of movement over a wider area, rather than the monitoring of presence at a single location (as is the case with the presently used RF technology).

62. All of the 56 respondents (89%) who provided a view agreed that the Scottish Government should introduce legislation to permit the use of GPS technology for electronic monitoring. The main reason given for this view was to improve victim and public safety.

63. The consultation also sought views on the use of alcohol monitoring technology (either through the use of transdermal monitoring or through the use of a device mounted breathalyser) as part of an electronic monitoring programme. The consultation noted the Scottish Government's intention to: run a demonstration project to determine how alcohol monitoring might be used effectively and at which points within the Scottish Justice setting; and to bring forward the required enabling legislation.

64. Of the 53 respondents (84%) who provided a view, 48 (91%) agreed that alcohol monitoring should be permitted as part of an electronic monitoring programme. The two key reasons for this view were that there were clear links between alcohol use and offending behaviour; and alcohol monitoring has the potential, within a wider package of support, to help offenders build control over their own misuse of alcohol.

65. A recurring view was however expressed that more development work is required in terms of research, defining objectives, and design of robust and tamper-proof equipment before alcohol monitoring can be used.

Summary

66. The Scottish Government is keen to explore the opportunities present by new and future technologies to strengthen the electronic monitoring regime. This intention is met by the creation of a power that will enable new and developing technologies (beyond those already envisaged such as GPS) to be utilised as and when they evolve.

67. The Scottish Government is, however, 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.

Sections 10 to 11 – monitoring and designation

Policy objectives

68. These two sections are concerned with the arrangements that need to be put in place for an electronic monitoring system to operate. The policy objective is to place a number of obligations on the Scottish Ministers and the courts respectively in relation to the operation of the proposed electronic monitoring regime.

69. The Scottish Minsters will be obliged to:

- make contractual or other arrangements for the monitoring of offenders under the relevant court disposals or licence conditions;
- notify the Scottish Courts and Tribunal Service of the identity of the person or persons who may be designated by the courts as being responsible for the electronic monitoring of individuals sentenced by the courts; and
- when requiring an individual to submit to electronic monitoring in connection with their release on licence, designate a person so notified as the person responsible for the electronic monitoring of the individual, and notify the designated person and the individual of the designation and of the details of the monitoring.

70. In turn, when requiring an individual to be subject to electronic monitoring, the courts will be obliged to:

- designate a person so notified as the person responsible for the electronic monitoring of the individual;
- notify the designated person and the individual of the designation and of the details of the monitoring.

Key information

71. Section 245C of the 1995 Act currently empowers the Scottish Ministers to make contractual arrangements for the remote monitoring of compliance with RLOs, and these powers are also applied for the purposes of monitoring compliance with the other criminal law scenarios in which electronic monitoring can currently be applied.

72. The Bill reframes this power as an obligation on the Scottish Ministers to make such arrangements and to keep the Scottish Courts and Tribunal Service informed of those arrangements.

73. The Bill further provides that different arrangements may be made for different purposes, including arrangements of temporary or local effect. The purpose behind this provision is to further enable the establishment of demonstration projects, such as that exploring the potential uses of transdermal alcohol monitoring proposed by the Working Group and recommended by respondents to the consultation.

74. In relation to these provisions, the designated person's responsibility is solely to monitor the individual's compliance with the electronic monitoring requirement and the associated requirement of the underlying disposal or licence condition. The Bill also makes clear the intention that the designated person's responsibility for monitoring the offender is suspended if the underlying order or condition is suspended, and ends when the underlying order or condition ends.

Alternative approaches

75. Consideration was given to maintaining the power in section 245C and continuing to cross-reference to this power in relation to each use of electronic monitoring. This approach was viewed as being unnecessarily cumbersome, and lacking in the clarity and consistency that an over-arching power could provide.

Summary

76. The policy intention is to clarify the responsibility for electronic monitoring in Scotland and continue the contractual arrangements under which electronic monitoring is currently delivered. Section 10 of the Bill makes it clear that the Scottish Ministers are responsible for the electronic monitoring of offenders in Scotland and that this can be delivered via contractual arrangements.

77. The policy intention is further to clarify who is tasked with the day to day monitoring of an offender who is subject to electronic monitoring. This is achieved by the creation of a system whereby a person is designated either by the court or by the Scottish Ministers to attend to the monitoring of the offender.

Sections 12 to 14 – obligations and compliance

Policy objectives

78. These three provisions outline the obligations which an individual is placed under and sets out a number of rules in relation to any breach of those obligations. The policy intention is to create a single set of standalone provisions covering compliance with the obligations associated with electronic monitoring.

Key information

79. The obligations set out in these sections are the counterpart to those placed on the Scottish Ministers and the courts. Any individual who is made subject to electronic monitoring will be obliged to wear an approved device (or, as appropriate use that device in some other way) in line with instructions given to them by the designated person. They are further obliged not to tamper with or intentionally damage the device.

80. Section 13 of the Bill provides that if an individual breaches the obligations placed on him specific to electronic monitoring, they will be deemed to have breached the underlying order or licence condition. The intention behind this provision is to enable enforcement action to be taken under the terms of the underlying order or licence condition without the need to have electronic monitoring specified as a bespoke requirement of that underlying order or licence condition.

81. A number of different enforcement procedures exist across the different underlying orders. Breach of a SOPO/SHPO amounts to an offence, but breach of a CPO, DTTO or RLO does not. As such the Bill makes clear that breach of the electronic monitoring obligations does not in and of itself constitute an offence.

82. The Bill replicates existing rules in relation to documentary evidence at breach hearings, updated and recast where necessary in order to reflect the specifics of the relevant type of monitoring.

Summary

83. As with other sections, the driving policy intention behind these provisions is to provide clarity for offenders and those tasked with imposing and delivering electronic monitoring as to what is required of an offender who is subject to electronic monitoring. Section 12 of the Bill achieves this by providing a clear set of obligations which clearly describe what is required of an offender who is subject to electronic monitoring.

84. Section 13 of the Bill achieves this policy intention by clarifying the processes which are engaged when the section 12 obligations have been breached. The policy intention to provide a set of stand-alone rules for electronic monitoring which are capable of general application across the various forms of electronic monitoring is achieved in section 13 by keeping electronic monitoring as a separate requirement on an offender. The breach of this separate requirement then triggers the underlying breach procedures applicable to the associated court disposal or associated licence conditions.

Sections 15 to 16 - SSI procedure and schedule 1

Policy objectives & key information

85. Under the terms of section 15, regulations made under Part 1 of the Bill may make different provisions for different purposes, including provision of temporary and local effect. As noted above, The Scottish Government is keen to introduce new technologies such a GPS technology and trans-dermal alcohol monitoring. The policy intention of this provision is to enable pilot or demonstration projects to test out such new technologies before any new form of electronic monitoring is rolled out more widely.

86. Paragraph 1 of schedule 1 makes the necessary amendments to the 1995 Act to allow for the imposition of a restricted movement requirement as part of a CPO at the initial point of sentence, along with a number of necessary consequential changes. The policy intention behind this is to enable the court to impose a movement restriction on an offender alongside various other behavioural requirements when imposing a community sentence. At present the court can only impose a restricted movement requirement as part of a CPO when the CPO has been breached. If the court wishes to impose a movement restriction as part of the initial community sentence it must impose a restriction of liberty order alongside the CPO.

87. Paragraph 2 amends the 1995 Act to provide that where the court makes an offender subject to a listed order - an RLO, a CPO (except in relation to a CPO imposed for default in payment of a fine) or a DTTO - in the knowledge they are already subject to another of those listed orders, the clerk of court must inform the person responsible for monitoring the offender's compliance with the existing order (so far as that person's identity can be reasonably ascertained) as well as the local authority in which the offender resides.

88. This amendment specifically addresses an issues identified by a significant case review undertaken on behalf of the Fife Child Protection Committee which noted that whilst under the current legislation, the clerk of court is placed under such an obligation where multiple orders where imposed at the same time, there is no such corresponding obligation where just one of the orders is in force and a new order is subsequently imposed.

89. The policy intention is that by informing local authorities that an individual is subject to multiple orders social work professionals will be able to factor in consideration of the requirements of both orders into how they provide support to that individual.

90. Paragraph 3 amends the 1995 Act to specify that before imposing or varying a restricted movement requirement as part of a CPO, or an RLO, the report that the court is required to consider must be written, and must include information on the suitability of what is proposed.

91. This amendment also arises from a recommendation of the serious case review that it should be made explicitly clear in legislation that any variation of the address of an individual made subject to an RLO may only be granted following receipt of a written report that contains a risk assessment of the proposed new address. These provisions have also been replicated in relation to CPOs in line with the expansion of the restricted movement requirement.

92. The policy intention is to ensure that the information within the report, which may be particularly relevant in providing services or risk assessments, is easily transferable from one social work officer or jurisdiction to another.

93. Part 2 of schedule 1 removes the existing statutory provisions on electronic monitoring thereby assisting the creation of one set of stand-alone rules on electronic monitoring which apply across the various forms of electronic monitoring.

Part 2 of the bill (sections 17 to 35 and schedule 2) – disclosure of convictions

94. 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[1]. 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.

95. 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.

Operation of the 1974 Act

96. The 1974 Act provides for a system of protection to individuals with previous convictions[2] not to have to disclose their convictions in certain circumstances. Without the 1974 Act, the common law position would require people to answer, truthfully, any questions about their offending history. So the 1974 Act is an important piece of legislation that offers legal protection to individuals with previous convictions.

97. Under the existing terms of the 1974 Act, subject to certain exclusions and exceptions provided for in secondary legislation made

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[1] Source: Scottish Government: Justice Analytical Services, 2013.

[2] Although alternatives to prosecution are not a conviction as they are not imposed in a court, references to convictions in this document includes alternatives to prosecutions unless otherwise stated.

under the 1974 Act, anyone who has been convicted of a criminal offence and sentenced to custody for a period of 30 months or less can be regarded as rehabilitated after a specified period has expired, provided he or she receives no further convictions. A person can also become rehabilitated after receiving an alternative to prosecution (AtP), such as a fiscal warning or a fiscal fine.

98. After the specified rehabilitation period has passed, the original conviction is considered to be spent.

99. The rehabilitation period (i.e. the period before a conviction is spent) depends on the disposal imposed in respect of the conviction. The rehabilitation period applicable to particular disposals is set out in section 5[3] of the 1974 Act with the rules set out in section 6[4] being used to ascertain the rehabilitation period applicable where the individual has more than one sentence in respect of a conviction, or more than one conviction. The rehabilitation period applicable to an AtP is set out in schedule 3[5] of the 1974 Act.

100. The general rule is that, once a conviction is spent, that individual does not have to reveal it and cannot be prejudiced by it. This means that if a person's convictions are all spent and they are asked, for example, on a job application form, at a job interview or on a home insurance form whether they have a criminal record, they do not have to reveal or admit its existence. Moreover, even if such information is disclosed, this information could not be relied on, so, for example an employer cannot refuse to employ someone or dismiss someone because of a spent conviction and an insurance company cannot increase premiums on the basis of a spent conviction.

101. The system described above relates to what is called the system of basic disclosure. There is also a system of higher level disclosure to which this Bill makes no direct changes. This higher level disclosure system exists to reflect the fact that there are some categories of employment and proceedings which require greater scrutiny of an individual's background.

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[3] http://www.legislation.gov.uk/ukpga/1974/53/section/5#extent-S
[4] http://www.legislation.gov.uk/ukpga/1974/53/section/6?view=extent
[5] http://www.legislation.gov.uk/ukpga/1974/53/schedule/3

102. As mentioned above, the 1974 Act provides an order making power to exclude or modify the application of the protections conferred by the 1974 Act. This has been exercised to specify the types of employment and proceedings that are excluded from the Act and therefore where disclosure of certain spent convictions is required through higher level disclosure. The current order in force is the Rehabilitation of Offenders Act 1974 (Exclusion & Exceptions) (Scotland) Order 2013[6], as amended, ("the 2013 Order"), which outlines the exclusions and exceptions under the 1974 Act.

103. As noted above, no changes arise to this higher level disclosure system through this Bill and therefore no amendments are made to that Order.

104. The 1974 Act governs the responsibilities of individuals. It does not directly govern the system of disclosure by the state through the issuing of disclosure certificates. This is provided for in the Police Act 1997. However, that Act makes use of the rehabilitation periods contained in the 1974 Act in determining the content of disclosure certificates. Once a conviction is spent, it can no longer appear on a basic disclosure. Therefore the changes contained in this Bill affect both the responsibilities of individuals to self-disclose and what will be included on disclosure certificates issued by the state.

105. The 1974 Act was enacted following the report of a committee chaired by Lord Gardiner "Living it Down – the Problem of Old Convictions (1972)"[7]. The policy aim was to enable the reintegration to the community of persons who, despite previous convictions, had not been reconvicted of any serious offence for a particular period.

106. The 1974 Act sought to achieve this policy aim through the establishment of certain legal protections for people with convictions. These "protections" took the form of legal authority to enable persons, in certain circumstances to withhold information about previous convictions when asked. It further prevents such information from being used against a person with spent convictions. The protections can be thought of as a legal

[6] http://www.legislation.gov.uk/ssi/2013/50/contents/made
[7] https://2bquk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2015/01/LivingItDown.pdf

shield for a person so that conviction information cannot be used against them in any circumstances.

107. These protections do not apply to everyone with a conviction. For example, they do not currently apply to anyone receiving a custodial sentence exceeding 30 months under the current operation of the 1974 Act. For those individuals receiving a sentence of more than 30 months, their conviction never becomes spent which means it should be self-disclosed for life and it will always be included in a basic disclosure certificate.

Specific provisions

108. The provisions of the Bill insofar as relating to the rehabilitation of offenders can be split into three broad topics. These are:

- Less disclosure - reducing the period of time someone with a previous conviction has to disclose it;
- Extension of legal protections for individuals with a previous conviction not to have to disclose - providing for the application of the 1974 Act to individuals who receive custodial sentences exceeding 30 months and up to 48 months; and
- Accessibility of the legislation - improving the use of terminology within the 1974 Act, changing the operation of certain rules and improving the lay out of the 1974 Act including removing redundant provisions.

Less disclosure - reducing the period of time someone with a previous conviction has to disclose it

109. The National Strategy for Community Justice[8] firmly supports the view that people with convictions can turn their lives around, and recognises that to do so they often need opportunities and support. It is also known that employment is one of the essential components for an individual's reintegration back into society. However, employers are often apprehensive about employing someone with a previous conviction and as such, many people face difficulties in having to disclose a previous conviction when looking for a job.

[8] http://www.gov.scot/Publications/2016/11/5600/1

110. As part of the decision making process for revising the disclosure periods the Scottish Government were mindful of the fact that any changes that should be made need to be reasonable, proportionate and must take into account that disclosure is a consequence of the offence and is not and should not be used as a further punishment for committing an offence.

111. Where a person commits a criminal offence, our police, prosecutors and courts have a range of options available to them to deal with the offending behaviour. However, the 1974 Act is not intended as a means of punishing people for their offending behaviour, rather it is about how information about their offending behaviour is considered as part of the individual's future life once they have served their sentence.

112. The consequences of having to disclose previous criminal activity for unduly long periods of time can be severe. It is viewed by many stakeholders and those affected by the legislation to be detrimental to people's ability to gain employment; attend university or college; volunteer, obtain certain licences, secure an apprenticeship or even get insurance or a bank account; etc.

113. Reforms of the disclosure periods should be seen as a social justice issue as well as a criminal justice issue. Therefore, with disclosure periods set at an appropriate level, reform of the 1974 Act will be an aid to tackling inequality and prevent those already marginalised in our society becoming more marginalised due to a lack of employment opportunities which may result in them remaining involved with the criminal justice system.

Overview of changes to disclosure periods

114. Table A details the current rehabilitation periods for certain sentences and the new disclosure periods proposed in this Bill. These apply to when a person is convicted when they are aged 18 or older. For under 18s, the disclosure period is halved (this is the current approach contained in the 1974 Act and no change to this existing policy is being made in this Bill).

Table A		
Disposal	Current 1974 Act rehabilitation period	New 1974 Act disclosure period as proposed in this Bill
Custodial sentences		
60 months	Always disclose	Always disclose

48 months	Always disclose	10 years
36 months[9]	Always disclose	9 years
24 months	10 years	6 years
12 months	10 years	3 years
6 months	7 years	2½ years
Non-custodial sentences		
A financial penalty e.g. fine, compensation order	5 years	1 year
CPO, DTTO and RLO	5 years	12 months or length of order, whichever is the longer
Absolute discharge	6 months	Zero[10]
Admonishment	5 years	Zero
Bond of caution	1 year or length of order, whichever is the longer	6 months, or length of order, whichever is the longer
Adjournment/Deferral after conviction	No disclosure as not treated as a sentence under this Act	Until relevant sentence[11] given
Mental Health Orders	5 years or length of order plus 2 years, whichever the longer	Hospital Direction: not a sentence for the purposes of this Act therefore no disclosure Guardianship Order: Zero Assessment/Treatment Order: Length of order Interim Compulsion Order: Length of order

[9] This Bill proposes for the first time that custodial sentences exceeding 30 months and up to 48 months will have a disclosure period. Currently, any sentence exceeding 30 months is an excluded sentence and as such, disclosure is always required. That will change so that sentences exceeding 30 months but not exceeding 48 months will have a disclosure period. The policy behind this change is discussed later on in this Policy Memorandum.

[10] Disposals with a zero disclosure period are spent immediately.

[11] A "relevant sentence" is any sentence other than an adjournment or deferral, (or, where applicable, a further adjournment or deferral) imposed on the person in respect of the conviction.

		Compulsion Order: Length of order but can make an application to the Mental Health Tribunal for Scotland for disclosure to end after 12 months Compulsion Order with Restriction Order: Length of order
Ancillary Orders[12]	Length of order	Length of order[13]
Any other sentence not mentioned in section 5 or in new provisions inserted into the 1974 Act by the Bill	5 years	1 year
Children's hearing		
Discharge	6 months	Zero
Compulsory supervision order	12 months or length of the order, whichever is the longer	Zero
Alternatives to prosecution		
Category 1 AtPs[14]	Zero	Zero
Category 2 AtPs[15]	3 months	3 months

[12] Examples of "ancillary orders" are, non-harassment order, supervision and treatment orders, football banning order, antisocial behaviour order, exclusion from licensed premises order, confiscation order, serious crime prevention order and an order disqualifying someone from driving.
[13] If no date given for the order to end then the disclosure period will be two years.
[14] 'Category 1' AtPs are warnings given by a constable or a procurator fiscal and fixed penalty notices given under section 129 of the Antisocial Behaviour etc. (Scotland) Act 2004.
[15] 'Category 2' AtPs are other types of non-court based disposals available to the police and prosecutors. They are fiscal fines, fiscal compensation orders, fiscal work orders and fiscal activity/treatment orders and a notice to comply with a restoration order.

115. In respect of under 18s receiving a custodial sentence, it is only the "buffer period" that is halved for under 18s in order to determine the appropriate disclosure period. That is because the disclosure periods for custodial sentences will be based on the length of sentence plus an additional "buffer period' with the halving policy operating on the buffer period. For example, the disclosure period for a two year custodial sentence will be two years plus a "buffer period" of four years which will give an overall disclosure period of six years. If the person was under 18 at the date of conviction then the "buffer period" is halved. Therefore, the disclosure period for a two year custodial sentence will be two years plus a "buffer period" of two years which will give an overall disclosure period of four years.

116. Further details of each of the proposed changes to disclosure periods are set out below.

Custodial sentences

117. Within Scotland's criminal justice system, a hierarchy exists in terms of how criminal activity can be dealt with. For less serious offending behaviour, a range of alternatives to prosecution (AtPs) can be utilised by the police and prosecutors. For example, prosecutors have powers to offer fiscal fines of up to £300 as a non-court disposal to deal with less serious offences.

118. For more serious offending behaviour, prosecutions will be taken forward where sufficient evidence exists and it is in the public interest to prosecute. If a person is found guilty, a range of sentencing options will generally be available for the court. Depending on the offence committed, these options will generally fall into non-custodial sentences where the court imposes a sentence such as a CPO or a fine and custodial sentences where the court imposes a requirement on a person to spend a period of time in custody.

119. Some offences, such as murder, require a specific sentence to be imposed, (life imprisonment), but most offences will provide a substantial degree of discretion to the court to make a sentencing decision on the basis of the facts and circumstances of an individual case.

120. In developing the proposed reforms for reducing the length of a disclosure period, the Scottish Government has been guided by the overarching principles that:

- AtPs are generally used for the least serious type of criminal activity,
- non-custodial sentences will be used by the court for more serious types of criminal activity, and
- custodial sentences will be used for the most serious type of criminal activity or where previous attempts at using other non-custodial sentences have not been successful, (e.g. the person is a prolific offender).

121. For the most serious type of criminal activity, the court, in its sentencing decision has made a determination that, alongside reasons of punishment, retribution and deterrence, society requires protection for a period of time from the person who has committed the offence. Further, the court may consider the only option available to it is to hand out a custodial sentence to a person who chooses not to comply with a previous sentence and as such, needs a more severe punishment or that it is considered that society needs "relief" from the person's prolific offending behaviour.

122. Therefore, in developing the reforms in this Bill, the Scottish Government has, for the vast majority of disposals, sought to ensure the proposals mean that:

- the length of disclosure periods will be longer for non-custodial sentences as compared to AtPs, and
- the length of disclosure periods will be longer for custodial sentences as compared to non-custodial disposals and AtPs.

123. However, the proposed reforms mean there may be some circumstances in which a non-custodial sentence could have a slightly longer disclosure period than a short custodial sentence due to the length of the order associated with the non-custodial disposal. There will also be some circumstances where a category 2 AtP will have a longer disclosure period than a court disposal, (e.g. absolute discharge and admonishment). This is because, although the person has been convicted of the offence, the court has decided that no further punishment is necessary in imposing an absolute discharge or admonishment. This may be because it is the

person's first offence or because of the minor nature of the offending behaviour.

124. It was clear from discussions with stakeholders, feedback to the discussion paper[16] and associated[17] events[18] as well as considering the responses to the consultation paper[19] that most who engaged in these processes considered that the disclosure periods for custodial sentences were too long and failed to take account of the general increases in average custodial sentence lengths since the 1974 Act was enacted.

125. The proposals set out in the Scottish Government's consultation paper for reforming the disclosure periods for custodial sentences were as set out in the table B below.

Table B: Disclosure periods for custodial sentences		
Sentence length	Disclosure periods (applies from date of conviction)	Disclosure periods if under 18 on date of conviction
Up to 12 months	Length of sentence plus two years	Length of sentence plus one year
Over 12 months & up to 30 months	Length of sentence plus four years	Length of sentence plus two years
Over 30 months & up to 48 months	Length of sentence plus six years	Length of sentence plus three years
Over 48 months	Always disclosed	Always disclosed

126. Respondents offered a range of views for the proposals relating to custodial sentences in the consultation paper.

127. 48% of respondents agreed with the proposals to reduce disclosure periods for custodial sentences. 33% agreed with some proposals but not others (thus 81% offered support for at least some of the proposals), while the remaining 18% disagreed.

[16] http://www.gov.scot/Publications/2014/04/5167
[17] http://www.gov.scot/Publications/2014/04/2819
[18] http://www.gov.scot/Publications/2014/04/7017
[19] http://www.gov.scot/Publications/2015/10/3324

128. Respondents who agreed with the proposals generally regarded them as “reasonable” and “proportionate”. There were, however, some others in this group who queried the proportionality of the reformed disclosure periods. The six year disclosure period added to the sentence for sentences of between 30 and 48 months was specifically highlighted by some as being “excessive” and the extent to which they offered any real opportunity for support with “rehabilitation”.

129. While respondents most frequently said that the proposals were easy to understand, there were some who thought that having three sub-divisions for sentences was too complicated.

130. Those disagreeing with the proposals, (wholly or partly), generally favoured further reductions in the proposed periods or reiterated their wish to see more individuals brought within the scope of the Act i.e. more people able to benefit from legal protections not to have to disclose.

131. As a result of these responses, the Scottish Government considered whether it would be appropriate to revise its policy thinking around what the most suitable disclosure periods should be. However, after further consideration, the Government is proposing the disclosure periods for custodial sentences should be as consulted upon.

132. These changes represent the most far-reaching reforms to the 1974 Act since it was enacted and will reduce disclosure significantly for the vast majority of people receiving a custodial sentence, (97% of people receiving a custodial sentence in 2015/16 will be subject to less disclosure with the proposals in this Bill[20]).

133. As Table B indicates, the custodial sentence bands proposed in this Bill are:

- 0 to 12 months;
- over 12 months and up to 30 months;
- over 30 months and up to 48 months; and
- over 48 months.

[20] Source: Scottish Government: Justice Analytical Services, 2017.

134. The Scottish Government consider that it is appropriate for the first sentence band to run from 0 to 12 months. The Government believe this approach is appropriate due to its general approach on discouraging the use of short term sentences including its announcement[21] of adjusting the presumption against short sentences from three months to 12 months. Further, the Government consider that disclosure for sentences up to 12 months should broadly be in line with disclosure for the CPO.

135. A 12 month custodial sentence is the jurisdictional limit for our summary courts. It represents a significant cut-off in respect of seriousness of a case as any case likely to merit a sentence longer than 12 months will be prosecuted in front of a jury.

136. The Scottish Government believes the disclosure period associated with this sentence band should be the length of sentence plus two years. Such a proposal ensures custodial sentences of 12 months have a disclosure period proportionate to the disclosure period that can be given for CPOs, (i.e. up to three years), which it considers would be appropriate given the broad equivalence between a sentence of up to 12 months and use of a CPO as a disposal.

137. The approach taken for the next sentence band (over 12 months and up to 30 months) reflects the more serious nature of the offence committed in order to (a) require prosecution in front of a jury and (b) lead to a longer sentence. An additional two years is added to the "buffer period" so that the overall buffer period for sentences of 12 months to 30 months is four years.

138. Currently in Scotland, any custodial sentence exceeding six months but not exceeding 30 months has a disclosure period of 10 years. Noting that part of our package of reform is to increase the legal protections of the Act to apply to sentences up to and including 48 months the Scottish Government considered it appropriate to maintain this overall policy that no disclosure period for any individual sentence should ever exceed 10 years.

139. In order to achieve this, it means the last sentence band of over 30 months and up to and including 48 months should have a buffer period of six years so that the maximum disclosure period is never any longer than

[21] https://news.gov.scot/news/programme-for-government-1

10 years, (i.e. for a four year sentence, the disclosure period is length of sentence (four years) plus six years, which equals 10 years).

140. Those convicted of an offence when under 18 at the date of conviction and who receive a custodial sentence will benefit from the general changes made to the disclosure periods in this Bill. However, due to the way disclosure periods for custodial sentences will be calculated under a reformed 1974 Act, (i.e. length of sentence plus a buffer period rather than a set disclosure period associated with a sentence band), it has been necessary to consider how the Scottish Government could maintain the current practice of halving the disclosure period for those individuals.

141. The Scottish Government consider that the most sensible and straightforward way to do this is for the "buffer period" to be halved if the person was under 18 at the date of conviction. Therefore, the general reforms to disclosure periods will apply to under 18s directly along with the existing halving of the 'buffer period' if someone is convicted when they are aged under 18 also applying.

Non-custodial sentences
Financial penalties e.g. fines, compensation orders
142. Criminal fines are one of the most common disposals used in Scottish courts and, when used as the only disposal, are often reserved for less serious crimes.

143. It was clear from the consultation responses that most were in favour of reducing the disclosure periods for non-custodial sentences, (59% in favour), which included the proposal to reduce the disclosure period for a fine from five years to 12 months. While some respondents welcomed the reduction in disclosure periods for fines, others thought the proposed time period for this type of penalty would still be too long even at 12 months.

144. After considering the views from the consultation paper the Scottish Government thinks that reducing the disclosure period for a fine from five years to 12 months is sensible and appropriate. It believes this is justified based on the less serious nature of the type of offences committed where a fine is deemed appropriate and in line with the progressive nature of the overall reforms contained in the Bill.

145. This is a significant change and will benefit half of those convicted of an offence every year in Scotland[22].

146. A compensation order is an order for the convicted person to pay money to the victims of their crime. A compensation order can be imposed as the sole sentence or in conjunction with most other disposals and can be used for most offences. As compensation orders are a financial penalty and enforcement under the 1995 Act is similar to that of a fine, it seems sensible and appropriate for the disclosure period for a compensation order to be the same as a fine.

Community Payback Order

147. CPOs are available to the court under section 227A[23] of the 1995 Act. They can be given for any offence punishable by imprisonment, and in a limited form, to offences punishable by a fine.

148. A CPO is an order that imposes one or more of a range of requirements on the convicted person. These requirements can include unpaid work, undertaking programmes to address their offending behaviour, compensation, mental health treatment, participating in a drug or alcohol treatment programme and residing at a particular address.

149. Where a CPO only consists of an unpaid work activity, there is no requirement for supervision to be included. However, if the CPO contains any other requirements, the court must impose a supervision requirement.

150. An 'unpaid work or other activity requirement' can only be imposed on a person who is aged 16 or over. The requirement can be imposed for between 20 and 300 hours.

151. As previously mentioned, 59% of respondents agreed with the proposals to reduce disclosure periods for non-custodial sentences. The current disclosure period for a CPO is 5 years and the proposal in the consultation paper was for a disclosure period of the length of order plus 12 months. However, there was support from some respondents for CPOs having a shorter disclosure period than proposed in the consultation paper.

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[22] http://www.gov.scot/Topics/Statistics/Browse/Crime-Justice/Justicebrief
[23] http://www.legislation.gov.uk/ukpga/1995/46/section/227A

152. Most respondents suggested that the disclosure period should be set at the length of the CPO, while there was a specific suggestion for a disclosure period of '12 months from the date of sentencing or the duration of the order, whichever is longer'. Respondents argued that this would allow individuals to benefit more fully from the rehabilitation work done within CPOs.

153. On reflection and considering the views of respondents, the proposal in this Bill has been adjusted from that consulted upon to reflect the feedback offered.

154. In so doing however and noting the disclosure period for a fine being reduced in this Bill to period of 12 months (or 6 months if the individual was under 18 at the date of conviction), the Scottish Government want to ensure its proposals for CPOs are broadly in line, (i.e. that the disclosure period for a CPO could not have a shorter disclosure period than the disclosure period for a fine).

155. The Bill provides that the disclosure period for a CPO set out is 12 months from the date of conviction, (or 6 months if under 18 at date of conviction), or the length of the Order, (whichever is the longer). Where a CPO consists only of unpaid work, then the disclosure period is the length of the order if the work is to be carried out for longer than 12 months, (or longer than 6 months if under 18 at date of conviction). However, if the unpaid work lasts for less than 12 months, (or less than 6 months if under 18 at date of conviction), then the disclosure period will be 12 months from the date of conviction or 6 months from date of conviction if under 18 at date of conviction.

156. All other CPOs include a supervision requirement which lasts for a specified period and this will be the length of the disclosure period (again, unless the supervision period lasts for less than 12 months, (or less than 6 months if under 18 at date of conviction), when the disclosure period will be 12 months or 6 months if under 18 at date of conviction.

Drug Testing & Treatment Order

157. A DTTO is available to the Court when a person is convicted of an offence other than one for which the punishment is fixed by law. The policy that lies behind the availability of the DTTO as a disposal is to help people to reduce their drug misuse and the crimes they may have committed because of it.

158. Given DTTOs are a form a community penalty and in line with the Scottish Government's approach on CPOs, the Bill provides for the disclosure period to be 12 months from the date of conviction, (6 months if under 18 at date of conviction), or the length of the order, (whichever is the longer).

Restriction of Liberty Order

159. An RLO is available to the court where a person is convicted of an offence punishable by imprisonment and requires an offender to be:

- restricted to a specific place for a maximum period of 12 hours per day for up to a maximum of 12 months;
- and/or restricted from a specified place or places for 24 hours a day for up to 12 months.

160. They are a form of community sentence imposed by the court as an option in cases where they might otherwise be thinking of a prison sentence or another community penalty that would impose substantial demands on the offender.

161. In line with the Scottish Government's proposed approach for CPOs, its policy intention is that the disclosure period for a RLO will be 12 months from the date of conviction or the length of the order, (whichever is the longer). The disclosure period will be six months or the length of the order, (whichever is the longer) if the person was under 18 at the date of conviction.

Absolute discharge

162. An absolute discharge is available as a disposal to the court and is used when the court consider that while a person has been convicted of a offence, the facts and circumstances of the case do not merit any form of punishment. In summary cases, an absolute discharge is not recorded as a conviction. However, for some purposes, for example if the person is convicted of another crime in the future, it may appear as a previous conviction when the court is considering sentencing. Reasons for an absolute discharge vary and can include because the crime was very minor, the offender was previously of good character or the offender is very young or old.

163. Notwithstanding the above, in the definition of a conviction under section 1(4) of the 1974 Act an absolute discharge is treated as a

conviction for the purposes of the 1974 Act. There is good reason for this; namely it is to allow the person in question to become a 'protected person' in respect of that conviction and as such, the conviction will become spent.

164. The current disclosure period for an absolute discharge is six months from the date of conviction. As such penalties are given for very low level offending, the person receives no punishment or sentence and in line with the overall reductions in disclosure periods, the Bill proposes that the disclosure period should be reduced from six months to nil. This means any person receiving an absolute discharge will not be required to disclose it at any point.

Admonishment

165. An admonishment is available to the court as a disposal and is a warning to a person convicted of an offence not to commit another crime, but no punishment is given alongside this warning. However, the offence is recorded as a conviction on centrally held state records, (i.e. the Criminal History System).

166. The current disclosure period for an admonishment is five years. The proposal in the consultation paper was for admonishment to have a disclosure period of six months. However, a number of respondents indicated that given the nature of an admonishment, they commented that they would like to see admonishments having no disclosure period.

167. After considering the views of respondents and considering the issue, the Scottish Government think it is appropriate for a person being admonished not being required to disclose it at any point and so it will have a nil disclosure period.

Disposals from a children's hearing on offence grounds

168. Although the 2015 consultation did not include proposals for how disposals from children's hearings on offence grounds should be treated, proposal are included within this Bill.

169. Section 3 of the 1974 Act provides that, where a child is referred to a children's hearing on grounds that the child committed an offence, the acceptance or establishment of that ground is a conviction for the purposes of the 1974 Act and the disposal by the hearing is a sentence.

170. The 1974 Act provides for two different disclosure periods for a child or young person that has been referred to a children's hearing. These are:

- a discharge of the hearing carries a six month disclosure period; and
- a compulsory supervision order imposed on the child carries a disclosure period of either one year or a period equal to the length of the order, whichever is the longer.

171. In line with the Scottish Government's general policy to reduce the need for disclosure and noting that the higher level disclosure regime allows for the appropriate disclosure of certain disposals from children's hearings of offence grounds, the Government think it is appropriate to treat referrals to children's hearings in the same way as admonishments and an absolute discharge under the 1974 Act and therefore the Bill proposes the disclosure period should be nil, (i.e. spent immediately).

Bond of caution

172. A "bond of caution" is available to the court as a disposal. It is a sum of money lodged with the court by the person who has been convicted, as security of their being of "good behaviour" for a certain stated period. For a sheriff, the maximum period is one year and for a Justice of the Peace, the maximum period is six months. The maximum amount that can be applied by a sheriff is £10,000 and the maximum amount that can be applied by a JP is £2,500. If the individual is of good behaviour for the specified period, the money is returned and the sentence has been served.

173. The current disclosure period for a bond a caution is 12 months, or the length of the order whichever is the longer. However, in keeping the overall progressive reforms to the disclosure periods the Scottish Government think it is appropriate to reduce the period of time a person should be required to disclosure this disposal. This is especially so, seeing that if the person commits a further offence they will forfeit their bond and a fresh disposal will be imposed carrying with it a new disclosure period.

174. Therefore, the Scottish Government's policy intention is that the disclosure period for a bond of caution to keep the peace or be of good behaviour should be six months or length of order, (whichever is the longer) and three months or length of order, (whichever is the longer) if the individual was under 18 at the date of conviction.

Mental Health Orders

175. There are a number of mental health disposals available to a Scottish court which can be imposed on conviction and fall within the meaning of the 1974 Act. The disclosure period provided for by the 1974 Act for these orders is discussed below.

Assessment Orders and Treatment Orders

176. Assessment orders can be applied for by a prosecutor, by the Scottish Ministers or by the court of its own volition. Such orders can be imposed both pre-conviction, but also post-conviction. For the purposes of this Bill, the provisions only relate to where such orders are imposed post-conviction.

177. Treatment orders can be made on application by a prosecutor, by the Scottish Ministers or by the court. Again, such orders can be imposed both pre-conviction, but also post-conviction and again for the purposes of this Bill, the provisions only relate to where such orders are imposed post-conviction.

178. The Scottish Government considers it to be appropriate and necessary that orders given after conviction but prior to a final disposal being made by the court, the conviction should be disclosed until the person is sentenced, at which point, it will be the final disposal that governs the disclosure period. Therefore, the Government believes the disclosure period for an assessment order and a treatment order should be the length of the order. However, once the individual is given the final disposal, (e.g. compulsion order, compulsion order with restriction or a custodial sentence), it will be that disposal that will determine the disclosure period for the offence and it will run from the date of conviction.

Interim Compulsion Order

179. Interim compulsion orders can be made where a person has been convicted of an offence punishable by imprisonment (other than one for which the sentence is fixed by law). This is necessary where the court needs more information about the person's health to inform the future sentencing decision of the court. The court will impose such an order on the advice of two doctors and after the examination it is stated the individual needs to go to hospital for further examination. An interim compulsion order is distinguishable from an assessment order in that it is renewable, consequently allowing the lengthy assessment that may be

required of people who have committed serious offences and/or appear to pose considerable risk.

180. As an interim compulsion order is granted in order to assess an individual's mental health prior to sentencing, the Scottish Government think it is necessary and appropriate to have a disclosure period that runs from the length of the order. This is similar, but not the same as, deferring a sentence. Therefore, an interim compulsion order will run until the person is given the final disposal by the court. The disclosure period will then be determined by that final disposal and will run from the date of the conviction.

Hospital Directions

181. Section 59A of the 1995 Act allows the court when sentencing a person who is convicted on indictment of an offence punishable by imprisonment to make a hospital direction authorising removal of a person to hospital, detention of a person in hospital and the giving of medical treatment. This must be done in addition to a sentence of imprisonment imposed in the case.

182. If the medical conditions for making the order no longer exist, the person can be returned to the institution (prison) in which they may have been detained, but for the existence of the order.

183. As the hospital direction is given in addition to a custodial sentence and relates to the place of a person's detention (hospital rather than prison) it is considered appropriate for any conviction resulting in such an order to be disclosed in line with the custodial sentence given. This is provided for in the Bill through removing a hospital direction from the definition of sentence. It should be noted that the custodial sentence given for the offence will of course carry its own disclosure period.

Guardianship Order

184. The Bill provides for guardianship orders which are given on conviction, (although they can also be sought in the civil courts), because the court considers them to be the only means by which to safeguard the welfare of the person subject to the order.

185. Guardianship orders can be given with certain other orders under the 1995 Act, (e.g. non-harassment orders). Where another order is imposed,

the general rule in the 1974 Act will apply so that if another order is given with the guardianship order, the conviction will be disclosed in accordance with the period that attaches to that other order.

186. However, and in relation to the treatment of guardianship orders under the 1974 Act, the Scottish Government think it appropriate for the disclosure period of a guardianship order to be zero, (i.e. they will be spent immediately). This reflects that they are imposed as a safeguarding measure for the individual's welfare.

187. As noted above, any other orders imposed alongside the guardianship order will carry a disclosure period associated with that order.

Compulsion order (CO) and compulsion order with a restriction order (CORO)

188. A CO can be made by the court in a case where a person is convicted in either the High Court or the Sheriff Court and the offence for which they are convicted is punishable with imprisonment. In addition, a person can be made subject to a CO (under section 57(2)(a) of the 1995 Act) where following an examination of facts the Court is satisfied that the person has done the act or omission constituting the offence and there are no grounds for acquittal. In this scenario, the finding of the court would be a "conviction" for the purposes of the 1974 Act. The court must be satisfied that the person has a mental disorder and that medical treatment which would be likely to prevent the mental disorder worsening or alleviate any of the symptoms or effects of the disorder is available for the individual.

189. The court must also be satisfied that if the person were not provided with such medical treatment there would be a significant risk to the health, safety or welfare of the person convicted or to the safety of any other person and that the making of the CO is necessary. COs can be made by a court to authorise the detention of a person in hospital and/or the giving medical treatment to the convicted person.

190. A CO can be made on its own or it can be made with a restriction order. A compulsion order made with a restriction order is referred to as a CORO. Where it is made on its own, a CO will authorise the measures detailed in it for an initial period of six months. The order can be extended for a further six month period and then annually thereafter provided that the conditions for making it continue to be met.

191. A CORO is an order which the court can make under section 59 of the 1995 Act where it considers that to do so is necessary for the protection of the public from serious harm. In addition, a person can be made subject to a CORO under section 57(2)(b) where following an examination of facts the Court is satisfied that the person has done the act or omission constituting the offence and there are no grounds for acquittal. As above, the finding of the Court would be a "conviction" for the purposes of the 1974 Act. The court must be satisfied that the person has a mental disorder and that on a balance of probabilities, the risk to the safety of the public would be high if the person was at liberty. It enables the court to make the person subject to restrictions set out in part 10 of the 2003 Act. This is without limit of time.

Compulsion order policy

192. The Scottish Government has considered carefully the nature of a CO. While it can be imposed in respect of the risks posed by the convicted person to the health, safety and welfare of other people, it can also be imposed in respect of the risks the convicted person poses to themselves. In some cases, such risks may exist for both the public and the person themselves.

193. When a criminal court imposes a CO, it will expire after six months unless:

- the responsible medical officer (RMO) applies to the Mental Health Tribunal for Scotland under section 149 of the 2003 Act to extend the CO and the Tribunal agrees to this under section 167(1) of the 2003 Act, or
- the RMO makes an application under section 158 of the 2003 Act to extend and vary the CO and the Tribunal decides, under section 167(2) of the 2003 Act, to extend the CO for six months (whether they vary it or not).

194. The CO can thereafter be extended for 12 months at a time.

195. It should be noted that there is no limitation on the number of extensions, providing that the person continues to meet the conditions for being subject to the order. It is therefore possible for a CO to be extended for many years on the basis of the risks a convicted person poses to themselves and/or to the public.

196. The Bill proposes the disclosure period for a CO is the length of the order. However, the provisions also include a power for a review to be sought for the need for on-going disclosure where someone is subject to a CO. This is explained further below.

197. The Mental Health Tribunal for Scotland, ("the Tribunal"), is an independent body established by section 21 and schedule 2 of the 2003 Act). It currently has responsibility for making and reviewing decisions relating to the care and treatment of persons in Scotland with mental disorders. As part of its functions, it is charged with decisions which require assessment of risk. For example, under section 193 of the 2003 Act, the Tribunal can revoke a restriction order if it is not satisfied that it is necessary in order to protect any other person from serious harm.

198. It is therefore considered that as the Tribunal is familiar with risk assessment it would be an appropriate body to assess a person's on-going requirement to disclose a previous conviction when a compulsion order is imposed by a court as a result of the individual being convicted of an offence.

199. The Bill proposes that once a person (the patient) has been subject to a CO for a period of 12 months, they (or their listed person), can make an application to the Tribunal, to request that the disclosure period in respect of that CO can be brought to an end.

200. The onus will be on the patient to make the application and if they do not do so, disclosure requirements will continue for the length of the order. If an application is made, the Tribunal shall allow the patient, the patient's named person, any guardian of the patient, any welfare attorney of the patient, the mental health officer, the patient's responsible medical officer, the patient's primary carer, any curator ad litem appointed in respect of the patient by the Tribunal and any other person appearing to the Tribunal to have an interest in the application to make oral or written representations and to lead or produce evidence.

201. The test that the Tribunal must consider is whether it is satisfied that, without the provision of medical treatment of the kind mentioned in section 139(4)(b) of the 2003 Act to the patient, there would be a significant risk to the safety of other persons. Where the Tribunal is so satisfied, it must refuse the application to bring the person's disclosure requirement to an end.

202. If the Tribunal does not consider that this test is met, they are required to make the determination that disclosure of the CO is not required any longer. This does not necessarily mean the conviction will no longer be disclosable, because this will depend on factors such as whether any other disposal was given which still necessitates disclosure. If however the person is not subject to any other court orders imposed in respect of this conviction or another conviction, disclosure will cease, (i.e. the conviction will become spent and the person will be a protected person).

203. Once the Tribunal makes its determination, it will be empowered to share the outcome of its decision with Disclosure Scotland, but only where a request is received, by the Tribunal, from Disclosure Scotland as a result of a disclosure application being made.

204. After a person (the patient) has made an application, if their application is not successful, then they are entitled to make a further application after a period of 12 months has elapsed from that determination. This ensures that an ongoing review can take place, if so wanted by the person subject of the CO.

Compulsion order with a restriction order policy
205. The disclosure period for a CORO will be the length of the order.

206. The reason for this approach is that the restriction element of the order is only imposed if the court takes the view that it is necessary for the protection of the public from serious harm and therefore it is considered that there is sufficient correlation between the conviction and the risk the individual poses to justify disclosure.

207. However, under section 193(5) of the 2003 Act, the restriction element of a CORO can be revoked if the risk of serious harm falls away. If the restriction order is revoked, the CO can, in some cases, still be left in place which raises the question of disclosure of this remaining element.

208. If the CO order remains in place, section 198 of the 2003 Act provides that Part 9 of the 2003 Act applies to the CO as if it were a relevant compulsion order made on the day on which the order revoking the restriction order has effect. Therefore, the Scottish Government's policy position is for any remaining CO element of a CORO to be capable

of being treated in the same way as a CO made as a standalone order under the 1995 Act.

209. As noted above, this means that if the RO element of a CORO is revoked, the policy intent is that disclosure continues to be necessary for the length of the order subject to the operation of the review mechanism by the person subject to the CO.

210. The Scottish Government consider it to be appropriate that where a CORO becomes a CO, then consideration by the Tribunal should be available 12 months after the restriction order is revoked.

211. The reason for that is this builds in a small safeguarding window where disclosure continues to be necessary after someone's risk has diminished to the extent the restriction order element is no longer necessary. A person will know that moving from a CORO to a CO means that disclosure is no longer open-ended and instead subject to review (if they so wish) at the 12 month point once a CORO becomes a CO.

212. These provisions have been discussed with the Mental Health Tribunal for Scotland.

Adjournments and deferrals

213. When a person is convicted of an offence and the case is adjourned or deferred, that conviction will not currently be included in a basic disclosure certificate by Disclosure Scotland. The conviction will only be disclosed when the person receives a final disposal for that offence, (e.g. eventually admonished or given a court fine etc.).

214. However, it is considered to be appropriate that a person's offending is disclosed from the point they are convicted, as opposed to the point of sentence, to ensure there is no gap in disclosure information. This is particularly the case where significant time may have elapsed before the person is eventually given a "relevant sentence".

215. Therefore, the Bill ensures that adjournments and deferrals will be treated as a sentence under the 1974 Act and the disclosure period will run until the person is given a "relevant sentence". The disclosure period for the conviction will then be based on the "relevant sentence" given, (e.g. the disclosure period will be 12 months from date of conviction if given a court

fine and over 18 at date of conviction). This approach ensures there is no period in time after conviction but before sentence where disclosure does not take place.

Alternatives to Prosecution (AtPs)

216. No changes are being made to the disclosure periods for AtPs. Unlike the rest of the disclosure periods in the 1974 Act, disclosure periods for AtPs were only included in the legislation relatively recently (through the Criminal Justice and Licensing (Scotland) Act 2010 ("the 2010 Act"). As such, it is considered they are not in need of reform in the same way as the other disclosure periods in the 1974 Act.

217. This means the current provisions will continue to operate. That is, AtPs being split into two categories where category 1 AtPs that are spent immediately and category 2 AtPs are spent after the "relevant period" which is three months beginning on the day the AtP is given.

218. Therefore, those spent immediately are warnings given in respect of an offence by a constable or a fiscal warning or a fixed penalty under the Antisocial Behaviour etc. (Scotland) Act 2004. Those spent after three months are fiscal fines, fiscal compensation orders, fiscal work orders and fiscal activity/treatment orders and a notice to comply with a restoration order.

219. When AtPs were incorporated in the 1974 Act through the 2010 Act, no regulation making power was taken to adjust disclosure periods by secondary legislation. This is in contrast to the order-making power contained in the 1974 Act relating to disposals from convictions. The Bill creates a power to allow the Scottish Ministers to modify the disclosure periods for AtPs and to add or remove AtPs by secondary legislation. This is subject to affirmative procedure.

Ancillary Orders

220. For the purposes of this policy memorandum, ancillary orders are orders which are provided for in new section (2D) of the 1974 Act, as inserted by section 19 of the Bill. Such orders are given by a court, at the point of sentencing an individual often instead of, or in addition to a sentence. Some examples of these types of orders include non-harassment orders, football banning orders, supervision and treatment orders and orders which prohibit persons from keeping certain types of animals.

221. The 1974 Act currently provides for certain court orders through the operation of a general provision set out in section 5(8) of the 1974 Act:

> "Where in respect of a conviction an order was made imposing on the person convicted any disqualification, disability, prohibition or other penalty, the rehabilitation period applicable to the sentence shall be a period beginning with the date of conviction and ending on the date on which the disqualification, disability, prohibition or penalty (as the case may be) ceases or ceased to have effect."

222. However, what is meant by a "disqualification, disability, prohibition or other penalty" has been difficult to interpret and does not, in all cases, reflect the wide range of orders now available to the courts. As such, when someone is given an order by the Court that is not specifically provided for in the 1974 Act, it is not always apparent to users of the legislation whether the order would fall under the definition set out in the current section 5(8) or whether it should fall under the default disclosure period of five years (as specified in Table A of section 5 of the 1974 Act).

223. To reflect the fact there is now a wider range of ancillary orders available to the courts today than was the case when the 1974 Act was developed and to provide clarity, the Bill includes provision, set out at section 19(2), which amends the 1974 Act to capture this new range of orders.

224. Notwithstanding this change in the way the 1974 Act is laid out, it should be noted there is no policy change to the general position relating to the length of disclosure period from that which applies under the 1974 Act currently. Disclosure is currently required under the 1974 Act and will continue to be required, as proposed in this Bill, for the length of the ancillary order where the order contains provision which enables determination of the date on which the conditions in the order cease to have effect. If an order under the new section 5(2D) is imposed indefinitely, including for life, then section 5(2E)(a)(ii) will apply with the effect that it is to be disclosed until revocation or until the person is deceased.

225. In the case of any other order the disclosure period will be two years from the date of conviction with this disclosure period being set out in the proposed new section 5(2E)(b) of the 1974 Act. This is considered

necessary in the case of orders where it is not possible to determine the date on which the conditions cease to have effect.

Extension of the legal protections not to have to disclose - providing for the application of the 1974 act to individuals who receive sentences exceeding 30 months and up to 48 months

226. Section 5(1) of the 1974 Act sets out the sentences that are always required to be disclosed, (i.e. they are excluded sentences for the purposes of the protections under section 4 of the 1974 Act).

227. These excluded sentences currently include life sentences and any custodial sentence that exceeds 30 months.

228. As a result of the 30 month sentence upper limit, the custodial sentence bands currently provided for in the 1974 Act (Table A of section 5 of the Bill) for which disclosure periods are available do not exceed 30 months. This means that anyone who receives a custodial sentence greater than 30 months will always have to self-disclose this conviction, if asked. For example, they are required to self-disclose this conviction to any potential employer or insurance company and the conviction will always be disclosed under a basic disclosure by Disclosure Scotland[24].

229. Feedback from the discussion paper in 2013[25] suggested that the current 30 month sentence level beyond which a person always has to self-disclose their previous convictions was set at too low a sentence level. While a person receiving a sentence exceeding 30 months will have committed a relatively serious offence and/or may well likely have a list of other previous convictions, it was noted that the current system always requires self-disclosure for the rest of that person's life because such sentences are out with the scope of the protections under section 4 of the 1974 Act and that this was disproportionate.

230. As part of the Scottish Government's analysis, it looked at the trends in sentencing[26] since the 1974 Act was introduced to understand the

[24] https://www.mygov.scot/about-disclosure-scotland/
[25] http://www.gov.scot/Publications/2014/04/5167
[26] Chapter 1 of consultation paper.

increase in the number of people having to disclose their convictions for longer as well as the increased number of people having to disclose their convictions for the rest of their lives because their sentence was 30 months or more. It was clear from its analysis that since the 1974 Act was introduced average custodial sentence lengths have risen quite significantly.

231. Therefore, the effect this general increase in the average length of sentences has had means more people, when considered as a proportion of those receiving custodial sentences, are having to disclose their past offending behaviour for the rest of their lives.

232. As such, the proposal in the consultation paper was to increase the scope of the 1974 Act from 30 months to 48 months. In other words, for people receiving sentences of between 30 months and 48 months to, at some point, receive what is in effect a legal shield under the 1974 Act not to have to self-disclose.

233. The Scottish Government consider that this increase reflects the thrust of the feedback and is suitable because a sentence of 48 months represents the point at which a prisoner will become what is called a long-term prisoner under the 1993 Act. All sentences less than 48 months result in a prisoner being what is known as a short-term prisoner.

234. Further, this categorising of prisoners into short-term and long-term is important as different rules apply to the two types. For example, all long-term prisoners have licence conditions imposed as part of their early release from custody whereas short-term prisoners, with some exceptions, generally do not. These different rules reflect that different considerations apply to protecting public safety as sentence lengths become longer.

235. With this in mind, the Scottish Government believes that extending the scope of the legal protections under the 1974 Act to the point when a prisoner is classed as a long-term prisoner is appropriate given that this is the point when other rules focused on protecting public safety operate differently (and more stringently) for such prisoners.

236. 89% of consultation respondents supported the principle of extending the scope of the 1974 Act. Respondents welcomed extending the scope so more people can reach a point when they no longer have to disclose and

felt it was a positive step towards helping individuals move away from previous criminal behaviour. 76% of those who supported extending the scope of the legislation agreed with the specific proposal for the scope to be extended to 48 months, (i.e. all those with sentences up to 48 months would come within the scope of the Act).

237. The Scottish Government believe that increasing the scope of the Act from 30 to 48 months will help more individuals move away from their previous criminal activity and make a meaningful contribution to society. It will create a disclosure system which more accurately reflects current sentencing trends in Scotland while still ensuring people with a relevant interest will be aware of a person's relatively recent criminal past where that is appropriate.

238. The Bill provides that an excluded sentence for the purpose of the 1974 Act will be a sentence exceeding 48 months in length. As a result of this change, a new custodial band disclosure period is created (30 months to 48 months) with a disclosure period of six years plus sentence length. This is discussed in greater detail under the custodial sentences disclosure periods heading.

Accessibility of the legislation - improving the use of terminology within the 1974 Act, changing the operation of certain rules and improving the lay out of the 1974 Act including removing redundant provisions.

Improvements in the use of terminology

239. Currently the 1974 Act refers to persons no longer required to disclose a conviction as being “a rehabilitated person”. This concept, although clearly well-intentioned, has led to some confusion about the operation of the 1974 Act.

240. In particular, it is thought by some employers if they are receiving information on an application form or a basic disclosure revealing a conviction, that suggests the person is in some way not “rehabilitated” and therefore cannot be employed. This misunderstands the operation of the 1974 Act where if disclosure does occur, it is merely to ensure that employers make decisions based on the full range of relevant information.

241. In addition, the mistaken concept of someone only ever being "rehabilitated" (i.e. suitable for employment in the mind of an employer) if a conviction is spent is also used elsewhere within the 1974 Act. There was evidence of damaging consequences of this approach received as feedback to the discussion paper and consultation paper.

242. An example of this is that the period for which a person is required to disclose their conviction is the "rehabilitation period" under the 1974 Act, after which the conviction becomes spent.

243. So these phrases have been widely misinterpreted and are used throughout the 1974 Act.

244. 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.

245. Within this context, it is proposed to use this Bill to adjust the language used to help reduce the likelihood of misunderstandings as to what is meant by the concepts used in the 1974 Act.

246. Once a conviction is spent, it is no longer disclosable. So the Bill makes changes so that "rehabilitation period" becomes "disclosure period". A conviction is either disclosable or not disclosable. And a person is no longer is referred to as a "rehabilitated person", instead the term "protected person" is used to denote those who will be protected by the 1974 Act and thus do not have to disclose their conviction.

247. This change also seeks to bring a realism to the effect of the 1974 Act. While including the concept of "rehabilitated person" may well have been seen as the aspiration of the legislation, it cannot be said to, of itself, create rehabilitation for a particular person. Rather, the 1974 Act and the disclosure scheme provided within is intended to create a climate in which it is possible to be rehabilitated and these changes in terminology are

intended to assist with that aim rather than potentially undermining it (as has been the case on occasion with the current terminology used).

Changing the operation of certain rules

248. The 1974 Act is challenging to understand. This is clear from users of the legislation and the discussion paper and consultation paper feedback.

249. The range of different disclosure periods, and their application in cases of multiple sentences or subsequent convictions, means that individuals with previous convictions and those who try to advise them find it difficult to understand what rules apply to them. Equally, employers are often uncertain as to the operation of the rules with many not fully understanding the 1974 Act provisions, and perhaps even fewer handling their recruitment process in the wider 'spirit' of the 1974 Act as a result.

250. One of the most difficult aspects of the 1974 Act is the structure of the rules due to the length and nature of the descriptions within each rule. The combination of definitions, exemptions and conditions that are set out across the legislation and the number of cross references, mean it can be hard to ascertain the effect of the rules under the 1974 Act.

251. This complexity 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.

252. 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.

Excluded sentence rule

253. The general rule currently set out in section 1(1)[27] of the 1974 Act is that where an individual has been convicted of an offence, or offences, and none of the sentences passed in respect of that offence are excluded for the purposes of the 1974 Act, the individual shall be treated as

[27] http://www.legislation.gov.uk/ukpga/1974/53/section/1?view=extent

rehabilitated, once the rehabilitation period has passed and their conviction shall be treated as spent. This is subject to conditions and exceptions.

254. One of these conditions is that during the rehabilitation period applicable to the first conviction, the person has not had imposed on them, in respect of a subsequent conviction, a sentence which is excluded from rehabilitation under the 1974 Act. This condition is contained at section 1(1)(b) of the 1974 Act and the effect is that if a person does not satisfy this condition, then neither the conviction attracting the excluded sentence, nor the first conviction, can become spent.

255. Therefore, currently under the 1974 Act, if a person is convicted of an offence and receives a sentence which is not excluded but, during the disclosure period for that conviction, is convicted again and receives a sentence which is excluded, then neither conviction ever becomes spent and are required to be disclosed for the rest of that person's life.

256. However, if a person receives an excluded sentence after the disclosure period for a previous conviction has expired, this will have no effect on the previous conviction, (i.e. that previous conviction will remain spent). Moreover, if a person receives a further conviction, which is not excluded, after they receive a sentence which is excluded, the subsequent conviction will become spent after the associated disclosure period has expired.

257. Therefore, it is considered appropriate that it is only "excluded sentences" that should always be required to be self-disclosed (subject to the rules under the 1974 Act). As such, the Scottish Government's policy intention is for this 'excluded sentence rule' to be removed from the 1974 Act.

258. The purpose of this policy change will mean that when a person gets a further conviction before the disclosure period for the prior conviction becomes spent and the sentence they receive is excluded, then the prior conviction will be able to become spent in accordance with the disclosure period for that sentence.

259. An example of how this will work is as follows.

260. A person is convicted of a breach of the peace and is a given a fine. The disclosure period for this sentence will be 12 months (if the proposal in this Bill is approved).

261. After six months, the person is convicted of a far more serious offence and receives a five year prison sentence. Currently, as the second sentence is an excluded sentence and the disclosure period is still running for the first conviction, then both convictions will always be required to be disclosed for the rest of that person's life.

262. If and when the change proposed by the Bill comes into force, the fine will become spent after 12 months and it will only be the five year prison sentence that will always be required to be disclosed as it will be an excluded sentence.

Other rules in the 1974 Act

263. In some cases where more than one sentence is imposed for an offence, the disclosure period applicable to a conviction cannot be calculated simply by reference to section 5 of the Act. This is because of some additional complexity arising, (e.g. more than one conviction etc.). In these circumstances, section 6 of the 1974 Act provides for how the appropriate disclosure periods should be calculated.

264. Although the Scottish Government is not proposing to change how these rules operate in this Bill, it is proposing to update the language where appropriate to take account of the change in the 'excluded sentence rule', to ensure breaching an order will apply to a CPO, DTTO and an RLO and to reflect the change in the definition of an 'ancillary order'. The intention is to make the rules easier to understand and bring the references to specific disposals within the rules up to date. The only new rule created is the rule in new section 6(4A) which is required to provide a rule for the treatment of adjournments and deferrals.

New section 6(4A) rule

265. Currently, when someone is convicted of an offence and the case is adjourned or deferred that conviction will not be included in a basic disclosure certificate by Disclosure Scotland. The conviction will only be disclosed when the person is actually sentenced, (i.e. given a 'relevant sentence'), for that offence, (e.g. eventually admonished or given a court fine etc.).

266. It is considered that it is appropriate that offending behaviour is disclosed from the point that a person is convicted, rather than there being a gap caused by having to wait for a final disposal to be given. The proposed change will ensure that adjournment and deferrals will be treated as a sentence under the 1974 Act and the disclosure period will run until the person is given a "relevant sentence". The disclosure period will then be based on the "relevant sentence" given, (e.g. 12 months from date of conviction if given a court fine and over 18 at date of conviction).

267. However, the person whose case was adjourned or deferred may eventually receive a sentence which has no disclosure period attached, (e.g. given an absolute discharge or admonished), even if they have been convicted again during the period of adjournment or deferral.

268. The rule in section 6(4) can extend the disclosure period of another conviction where one is longer than the other. Therefore, it is necessary and appropriate to create a new rule in section 6 to deal with a situation, where during the adjournment or deferral a person receives a further conviction which has a disclosure period, but the "relevant sentence" they are eventually given for the first offence has no disclosure period and is spent immediately.

269. The new rule under section 6(4A) will ensure the rule to extend disclosure periods under section 6(4) will not apply to situations where a case was adjourned or deferred, the person gets a further conviction during that period, and are then given a sentence with no disclosure period for the first offence.

Alternative approaches

Approach in England and Wales

270. In 1999, the Better Regulation Taskforce recommended the UK Government review the rehabilitation periods under the 1974 Act. As a result, a fundamental review of the 1974 Act was undertaken in 2001/02 by the UK Government. The Home Office-led review concluded that the 1974 Act was not achieving the right balance between resettlement of offenders

and protection of the public. The recommendations were published in the review report, Breaking the Circle[28], in July 2002.

271. The *Breaking the Circle* report set out proposals for a scheme that the authors of the report indicated would offer a more effective balance between the competing demands of protection and rehabilitation into the community. In the circumstances where the risk of further offending by a person was low, it was recommended the requirement to disclose should be significantly reduced, and the disclosure periods simplified and shortened.

272. At the time, the report was generally welcomed by consultees, and the recommendations largely accepted in principle by the UK Government[29]. However, legislation to take forward reforms of the Act was not brought forward at that time either by the then UK Government or the then Scottish Executive.

273. It wasn't until 2014 in England & Wales where changes to the 1974 Act were commenced through reforms by the UK Government under section 139 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012[30], ("the 2012 Act"). The overall approach of the UK Government was to reduce the length of disclosure periods, extend the scope of the protections under the Act to include custodial sentences of up to 48 months, (i.e. increase protections from 30 months to 48 months) and to ensure all convictions would be capable to extending the disclosure period of a previous conviction.

274. 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. The justification for the Scottish Government's approach is explained in each of the relevant parts of this policy memorandum.

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28 http://webarchive.nationalarchives.gov.uk/+/http:/www.homeoffice.gov.uk/documents/breaking-the-circle?view=Binary

29 http://webarchive.nationalarchives.gov.uk/20031220224300/http://www.homeoffice.gov.uk/docs/roaresponse.pdf

30 http://www.legislation.gov.uk/ukpga/2012/10/part/3/chapter/8

275. The Scottish Government also considered the recommendations set out in in Breaking the Circle. Many of the proposals and policy concepts contained in the Bill can be found within that report.

276. 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.

277. This difficultly in developing optimum disclosure periods can be seen by looking at the differences between the recommendations set out in *Breaking the Circle*, which were mostly accepted by stakeholders, consultees, the UK Government and the then Scottish Executive in 2003, and the eventual changes made by the UK Government under the 2012 Act in 2014.

278. It is also clear that different countries take different approaches to the disclosure of previous offending behaviour. It is considered the proposals set out in this Bill create a system that is appropriate for Scotland and ensures they fit in with the Scottish Government's strategy to improve the effective rehabilitation and re-integration of people who have committed offences.

Consultation

279. The 1974 Act has now been on the statute book for over 40 years. Over many years, it has been subject to criticism as being over-complicated, poorly understood and, consequently, not properly applied in practice. In addition, it has been said to be increasingly out of step with prosecution practice, sentencing law and contemporary sentencing practice in Scotland.

280. Access to employment is crucial for individuals with a previous conviction to be able to move on with their lives and put their past offending behind them. As such, suitable access to employment can also contribute towards a reduction in the rate of re-offending. However, the blanket rejection of those individuals with a previous conviction by many employers, sometimes due to not understanding the operation of the 1974 Act, is a substantial impediment to that process. This approach is

replicated in other areas key to successful resettlement, including the provision of education, housing, banking facilities and insurance.

281. Within this context, the Scottish Government published a discussion paper[31] on the 1974 Act and ran stakeholder engagement events to explain how the legislation operates and to gather evidence and views to help consider what changes may be required to modernise and improve the legislation. Analysis of the feedback received to the Scottish Government's discussion paper[32] and analysis of the engagement[33] events[34] held as part of consideration of the discussion paper were published on the Scottish Government's web pages.

282. It was clear from the feedback to the discussion paper and engagement events that those involved considered that the 1974 Act does not get the balance right between protecting the public and enabling those people who have engaged in previous criminal activity to move on with their lives.

283. In response, the Scottish Government published a consultation paper in May 2015[35] setting out specific proposals to allow more people who have engaged in 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.

284. The consultation closed on 12 August 2015 and the responses were published on 16 October 2015[36]. The analysis of the consultation responses was published on 22 December of 2015[37]. Details of specific consultation views relating to policy proposals are contained in the relevant parts of this Policy Memorandum.

285. More generally, regardless of how the respondents answered specific questions, the comments received indicated that most respondents were sympathetic to reform in this area. Respondents who indicated agreement

[31] http://www.gov.scot/Publications/2013/08/6133
[32] http://www.gov.scot/Publications/2014/04/5167
[33] http://www.gov.scot/Publications/2014/04/2819
[34] http://www.gov.scot/Publications/2014/04/7017
[35] http://www.gov.scot/Publications/2015/05/5592
[36] http://www.gov.scot/Publications/2015/10/3324
[37] http://www.gov.scot/Publications/2015/12/1435

welcomed the proposed reforms as a positive step, but nevertheless often also argued for reforms to go further than had been proposed in the consultation. And some respondents who disagreed with the proposals often did so because they too wished to see reforms go further than proposed (e.g. ranging from extending the scope of the legislation beyond what was proposed and further reducing specific disclosure periods by more than proposed).

286. As mentioned above, in 2014 the UK Government reformed the operation of the 1974 Act in England and Wales under the 2012 Act. As a result, many stakeholders and members of the general public believe there is a strong argument that people who have engaged in previous criminal activity living in Scotland are currently disadvantaged compared with people with similar backgrounds in England and Wales.

Part 3 of the Bill (sections 36 - 45) – the parole board for Scotland

Overview

287. Part 3 of the Bill partially delivers the manifesto commitment to:

> "improve the effective rehabilitation and reintegration of people who have committed offences and complete the implementation of the parole reform project to modernise and improve support for the vital work of the Parole Board."

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

Specific provisions

Sections 36 – 39 - changes to the composition, appointment and reappointment terms of parole board members

289. The Scottish Government proposes to remove the requirement for the Parole Board membership to include a Lord Commissioner of Justiciary and a registered medical practitioner who is a psychiatrist. 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.

290. The Scottish Government also proposes to amend the term of office for Parole Board members to bring them in line with other tribunals. The intention is to change the initial period of office to a five-year term with the potential for automatic reappointment every five years thereafter. This aims to maintain the expertise of members and build on the experience they will have gained over the years. Members will be automatically reappointed unless the member declines reappointment; or the Scottish Minsters accept the recommendation of the chairperson of the Parole Board that it should not occur. The grounds for the chairperson of the Parole Board to make such a recommendation would be that the person has failed to comply with any of their terms and conditions of appointment; or that the Parole Board no longer requires the same number of members to carry out its functions.

291. The Scottish Government also intends that a member should be allowed to apply for a subsequent appointment to the Board if they have resigned their position previously, provided they have not reached the age of 75; or that they have not been removed from office by virtue of a tribunal constituted under paragraph 3 of schedule 2 of the 1993 Act. It is envisaged that this may occur where a members personal circumstances change e.g. they need to take time out to care for someone. The Scottish Government does not think this should bar someone from being appointed in the future provided they have never been dismissed from their appointment or have reached the age of 75. There is always a certain amount of churn in any organisation and it is expected membership will be refreshed in that way.

292. In order to facilitate gender neutrality the Scottish Government intends to amend the 1993 Act to change references to “chairman” to “chairperson”.

Sections 40 – 43 - changes to functions and requirements of the parole board in relation to prisoners

293. Some minor amendments are proposed in relation to the functions and requirements of the Parole Board.

294. Firstly, the Scottish Government proposes to provide a statutory requirement for Parole Board reviews of certain sentences. In the case of a prisoner, whose case has been considered by the Parole Board, and who is serving a relevant determinate sentence (apart from a recalled extended sentence prisoner), it is provided that the prisoner will be entitled to have their sentence reviewed within 12 months of the date of the consideration for initial release; or any further consideration for release where the prisoner's licence has been revoked and they have been returned to prison. This is currently what happens in practice but to provide clarity the Scottish Government proposes to amend the legislation. The prisoner will not be entitled to a review if they have less than 12 months of the sentence to serve or if they have received another sentence of imprisonment and they are not eligible for release from the other sentence until after the 12 month period.

295. Secondly, the Scottish Government proposes to amend section 17 of the 1993 Act to remove the word "immediate" to extend to all directions in respect of the release after recall to prison. For consistency with current practice, this section will be reworded to allow for release "without undue delay". The implications of using the word "immediate", could lead to issues with throughcare arrangements such as adequate housing or medical requirements not being immediately in place at liberation. Changing the wording to "without undue delay" reflects current practice for other released prisoners and gives the person the best chance of settling back into the community with all their social needs in place. It does not mean that a prisoner will be held any longer than necessary or that no-one is released on the day the decision is made by the Parole Board, if appropriate. Consideration would be given to everyone on an individual needs basis. The Scottish Government considers that it could potentially set a prisoner up to fail by releasing them into the community without having appropriate throughcare in place. By helping to resettle the person in the community it could avoid them further reoffending.

296. Thirdly, the Scottish Government intends to amend section 17A of the 1993 Act, in relation to the recall of prisoners released on home detention

curfew, which allow a prisoner to make representations as to their revocation. At the moment, these representations can be made a number of years after the event, when paperwork regarding the circumstances of the revocation may not be available. To address this, the Scottish Government proposes to amend section 17A of the 1993 Act to provide that the representations are made within six months of the person being informed, or later as allowed by the Parole Board on cause shown by the person.

297. Finally, in the case of long-term prisoners due for removal from the UK the Scottish Government proposes to remove the Scottish Ministers from the decision on whether this type of prisoner should be released. Instead it will be the Parole Board who would make the recommendation to the Scottish Minsters on such a decision. Where such a recommendation is made, it will be binding on the Scottish Ministers. Thereafter, when the Scottish Prison Service is directed to release the prisoner they will make arrangements with the Home Office (who are responsible for deportation) to have the prisoner deported.

Sections 44 – 45 - independence and administrative arrangements of the parole board

298. The Scottish Government intends that these provisions will restate the independence of the Parole Board in its decision-making functions. The Scottish Government wants to enshrine in legislation that decisions by the Parole Board continue to be made independently.

299. The provisions in the Bill allow the Scottish Ministers, by regulations, to authorise the Chairperson of the Parole Board to make administrative arrangements for the Board. The Scottish Government wishes to allow the Scottish Ministers to set out in regulations provisions that make administrative arrangements and accountability more transparent and which formalise the management structure. This approach is preferred to the creation of another public body to carry out these functions, which is regarded as disproportionate for the size of the Parole Board and its administration. Staff and accommodation will continue to be provided by the Scottish Ministers.

300. It is intended that the regulations will set out such matters as:

- governance arrangements, for example, the establishment of a management committee (to replace the existing management group) led by the Chairperson of the Parole Board;
- composition of the management committee, for example number and type of members. It is anticipated that this would include the appointment of two non-executive directors to the committee;
- the type and composition of any sub-committees (either new or to replace existing committees). It is expected that any sub-committees will be comprised of existing Parole Board members; and
- the lines of accountability in budgetary and business matters.

Alternative approaches

301. During the consultation process the Senators of the College of Justice suggested that the Parole Board may be a body that could be transferred to the Scottish Tribunals as established by section 1 of the Tribunals (Scotland) Act 2014 ("the 2014 Act").

302. Whilst this may be an approach which is worthy of consideration discussions with the Scottish Courts and Tribunals Service have indicated that they do not have the capacity to take on another tribunal whilst they are in the midst of implementing the 2014 Act.

303. However, the possibility of a transfer in the future has not been ruled out and could still go ahead despite any changes made to the legislation at this time. The proposal would also require more time to give it proper consideration and to think about any potential implications of such a transfer.

Consultation

304. A public consultation on proposals on Parole Reform for Scotland closed on 13 October 2017. Twenty-three responses were received in total, 13% from individuals and 86% from organisations. Responses were received from a range of stakeholders including the public sector (6), local authorities (6) the third sector (6), judiciary (1), legal (1) and interested individuals (3). In addition to the public consultation, discussions with interested stakeholders were also undertaken by the Chief Executive of the Parole Board.

Effects on equal opportunities, human rights, island communities, local government, sustainable development etc.

Equal opportunities

305. It is not anticipated that the provisions in Part 1 of the Bill will have an adverse impact on the equal opportunities of either monitored persons or victims of crime. The expansion of electronic monitoring builds on the options already available to the court and is subject to the same legislation that currently protects equal opportunities. Furthermore, the introduction of new technologies, such as GPS technology, is intended to improve the effectiveness of electronic monitoring, for example through the use of exclusion zones that potentially offer victims significant reassurance and respite.

306. The expansion of electronic monitoring may have a positive impact with regard to equal opportunities in that it will allow people made subject to monitoring to remain in the community, enabling them to maintain contact with their family, and retain housing and employment.

307. Part 2 of the Bill will advance equal opportunities by ensuring that all individuals with a previously conviction will be required self-disclose this conviction for a significantly shorter period and as a result, their conviction will become spent sooner than was previously the case. This should be an aid to tackling inequality and prevent those already marginalised in society becoming more marginalised due to a lack of employment opportunities, which may result in them remaining involved with the criminal justice system.

308. It is clear that access to employment is crucial for individuals with a previous conviction to be able to move on with their lives and put their past offending behind them. However, the blanket rejection of those individuals with a previous conviction by many employers is a substantial impediment to that process. This discriminatory approach is replicated in other areas key to successful resettlement, including the provision of education, housing, banking facilities and insurance. The reforms will modernise and improve the 1974 Act and remove the overly restrictive barriers to people engaging in employment, training and economic activity.

309. All protected characteristics will see a positive impact as a result of the disclosure periods being reduced and reforms making the legislation easier to understand. A further specific positive impact will be seen by individuals who were under 18 at the date of conviction and on individuals who have been referred to a children's hearing on offence grounds. It is believed the creation of an application process to the Mental Health Tribunal for Scotland for those receiving a compulsion order is a positive step and could prevent individuals for disclosing their conviction unnecessarily for long periods of time as a result of a mental health disorder.

310. Part 3 of the Bill will not impact adversely on individuals with protected characteristics. It is recognised however that there are male gendered references in schedule 2 of the 1993 Act. Provisions in the Bill therefore allow for gender neutrality by changing any references to "chairman" to "chairperson" within the schedule.

Human rights

311. The Provisions in Part 1 of the bill are an expansion to the current options for electronic monitoring in Scotland. They have been developed taking account of and addressing any potential ECHR issues and the Scottish Ministers consider that Part 1 and schedule 1 of the Bill are compatible with Convention Rights.

312. The use of electronic monitoring alongside a restriction on the movements of an offender may contribute to a deprivation of the offender's liberty. The Scottish Ministers consider that the use of electronic monitoring in the circumstances specified in the Bill is justified in terms of ECHR Article 5 (Right to liberty and security). The use of electronic monitoring may constitute an interference with the offender's Article 8 rights (Right to respect for private and family life). The Scottish Ministers consider that any such interference is justified in terms of legal certainty, purpose and proportionality.

313. The provisions in Part 2 and schedule 2 of the Bill have been developed in a manner designed to take account of and address any potential human rights issues. The Scottish Ministers consider that the provisions in Part 2 of the Bill are fully compatible with human rights. In particular the provisions of the Bill which would enable an application to be made to the Mental Health Tribunal for Scotland for a determination

regarding disclosure requirements for those subject to compulsion orders have been developed to ensure that the Article 8 rights (Right to respect for private and family life) of individuals subject to such orders are safeguarded. The Tribunal is an independent and impartial, Article 6 ECHR (right to a fair hearing) compliant body and therefore it is considered that the provisions are compatible with the European Convention on Human Rights.

314. The Scottish Ministers are satisfied that the provisions of Part 3 of Bill are compatible with the European Convention on Human Rights.

315. The Parole Board is a Tribunal Non-Departmental Public Body, that is an Article 6 ECHR (right to a fair hearing) compliant body. The Scottish Ministers consider that the provisions in Part 3 of the Bill do not alter this.

316. The provision in the Bill concerning the reappointment of Parole Board members does not give rise to any risk of incompatibility with Article 6 ECHR, as reappointment to the Parole Board would occur automatically unless certain criteria are met. The requirement for the Parole Board to be impartial and independent in exercising relevant functions is not impacted by the provisions in Part 3 of the Bill.

317. In order to meet the requirements of Article 5(4) ECHR (right to contest lawful detention); the Parole Board must be a “court” for the purposes of that provision. By necessary implication, it must therefore be independent and impartial in the exercise of relevant functions. It is considered that the provision in the Bill, with regards to the continued independence of the Parole Board, does not alter the status of the Parole Board, nor does it result in the Parole Board being unable to fulfil the functions of a “court” for the purposes of Article 5 ECHR.

Island communities

318. The Scottish Ministers are satisfied that the Bill has no differential effect upon island or rural communities.

Local government

319. The Scottish Ministers are satisfied that the Bill has no detrimental effect on local authorities.

Sustainable development

320. The Scottish Ministers are satisfied that the Bill has no negative effect on sustainable development. In fact, it is considered that the provisions in Part 2 of the Bill are likely to have a positive impact on sustainable development.

321. Access to employment is crucial for those people who have engaged in previous criminal activity to move on with their lives and put their past offending behind them. As such, suitable access to employment can also contribute towards a reduction in the rate of re-offending. However, the rejection of those individuals who have engaged in previous criminal activity by many employers, sometimes due to not understanding the operation of the 1974 Act, is a substantial impediment to that process. This discriminatory approach is replicated in other areas key to sustainable social and economic development, including the provision of education, housing, banking facilities and insurance.

322. The provisions in Part 2 of the Bill will be an aid to tackling inequality and prevent those already marginalised in our society becoming more marginalised due to a lack of employment opportunities which may result in them remaining involved with the criminal justice system. They will also help to remove overly restrictive barriers to people engaging in employment, training and economic activity as a result of having to disclose previous convictions for excessive periods of time. The Scottish Government considers taking this approach will contribute towards improving and sustaining the social and economic development of Scotland's communities.

323. The potential environmental impact of the Bill has been considered. A pre-screening report confirmed that the Bill does not fall within section 5(4) of the Environmental Assessment (Scotland) Act 2005 and has no impact on the environment and consequently that a full Strategic Environmental Assessment does not need to be undertaken. It is, therefore, exempt for the purposes of section 7 of the Environmental Assessment (Scotland) Act 2005.

This document relates to the Management of Offenders (Scotland) Bill (SP Bill 27) as introduced in the Scottish Parliament on 22 February 2018

Management of Offenders (Scotland) Bill

Policy Memorandum

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