Justice Committee
Management of Offenders (Scotland) Bill

Written submission from the Criminal Justice Voluntary Sector Forum

The Criminal Justice Voluntary Sector Forum (CJVSF) welcomes the opportunity to provide evidence to the Justice Committee’s scrutiny of the proposed Management of Offenders (Scotland) Bill. Our submission has been developed through discussions with our members, drawing on their experiences of working with people in justice system, their families and victims of crime who may be affected by the proposed Bill.

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

CJVSF members support the extension of electronic monitoring (EM) throughout the justice system to support and strengthen community justice sentences. As was noted in the final report of the Working Group on Electronic Monitoring, EM has the potential to address many issues in the Scottish justice system when it is utilised alongside appropriate support services delivered by statutory and third sector organisations and is based on the needs and suitability of the individual (and their families, where relevant) before the court. EM also has considerable potential to reduce the number of people sentenced to short prison terms that are often harmful to individuals and their families and do little to address the causes of offending behaviour. As such, CJVSF members support the extension of EM to include new technologies, such as GPS tagging, and their application to a wider range of potential disposals, when used as part of a complete package of support for individuals.

CJVSF members, however, were of the opinion that the current version of the Bill could do more to support this aspiration and that at present there were several areas for concern in the proposed legislation.

A major concern for CJVSF members was the use of language in the Bill and in particular the use of the term “offender”. The use of this term as a catch all for those in the justice system carries a severe risk of stigmatisation for those it is applied to. The term also fails to accurately reflect the situation of those who have yet to be convicted of an offence, as would be the case for those placed on remand or supervised bail, or for those who are released from prison on licence. Moreover, the use of the term “offender” in the title of the Bill is wholly inappropriate given the stated intentions for Part 2 of the legislation which provides for the reductions to disclosure periods for certain convictions. The above is particularly disappointing given the positive steps taken by all parties when developing the Community Justice (Scotland) Act 2016 and the National Strategy for Community Justice, when a conscious decision was made to move away from the term “offender” towards

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“individuals” or “people with convictions”. As such CJVSF members would welcome a review of both the title of the Bill and the language used throughout.

A further concern voiced by CJVSF members was that the Bill at present grants too much discretion to Scottish Ministers to determine the use, scope, and types of EM to be made available in future, making little substantive legislative provision as to how this will be done and reserves instead the right for Scottish Ministers to change and expand EM through later, secondary legislation. Whilst understanding the complexity of the issues involved and the need to ensure flexibility for the future, CJVSF members felt that this granted too broad a discretion to Scottish Ministers. EM is an invasive means of managing individuals that involves a considerable restriction of liberty and loss of privacy for those being monitored. It also raises potential issues around “net-widening” by exposing individuals to further criminalisation through breach proceedings. EM can also have a considerable psychological impact on the individual subject to it and may create additional difficulties and strains for their family and cohabitees.² As such, any future extension of EM beyond what is included in the proposed Bill needs to be based on a thorough consideration of available evidence and with proper and robust scrutiny to balance the competing interests involved, including an approach based on human rights. CJVSF members felt that Part 1 of the Bill does not strike an appropriate balance in relation to those concerns. As such, CJVSF members would welcome fresh consideration of how best to allow the future development of EM in the justice system in the Bill.

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

CJVSF members felt that the Bill alone will not ensure that EM will play a greater role within the criminal justice system but welcomed the extension of new EM technologies to a wider range of disposals. Members felt more will be required to reassure Sheriffs and the general public as to the appropriateness of EM conditions.

**Support for individuals subject to EM** – As stated in our response to Question 1 above, CJVSF members considered EM only to be an effective component of a disposal when it is based on the needs of the individual subject to the disposal and it is joined with significant and appropriate support services delivered in partnership by statutory and third sector organisations. Provision of this support needs to be guaranteed to ensure that EM is used to its full potential; without it, confidence in disposals utilising EM and their effectiveness can only be limited. To be effective the Bill needs to be coupled with an increase in the support available to community justice services provided by both the statutory sector and third sector locally; this is especially so given that the extension of EM and the upcoming introduction of the presumption against short term sentences will likely add considerable strain to already limited local community justice resources. This will have a considerable impact on the third sector and members did not believe that this has been effectively

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addressed by the Financial Memorandum accompanying the Bill. CJVSF members would therefore welcome a more thorough consideration of the potential impact of an extension of EM on current services and on the third sector.

**Inconsistency of support across Scotland** – There are, at present, considerable geographic differences that exist across Scotland as to the use and availability of support services for those individuals subject to disposals in which EM is an element. Provision of support services also varies considerably across Scotland depending on local community justice partnerships and Criminal Justice Social Work (CJSW) departments. This “postcode lottery” for support needs to be addressed before EM can be used effectively and fairly. As such there needs to be consideration given to how services are commissioned across Scotland, with an emphasis placed on adopting a strategic approach to commissioning and the adopting a whole systems approach.

**Victims and EM** – CJVSF members also felt that the Bill currently fails to adequately consider victims of crime and what can be done to support them in relation to EM. As the supporting documents to the Bill state, EM could represent an opportunity to reassure victims as to the security of community justice sentences and could also provide an opportunity to support victims through that process. CJVSF members would like to see further consideration of how the Bill could be used to support victims of crime.

**Clear guidelines on sentencing and the use of EM** – In addition to the above, clear sentencing guidelines and clear guidelines on use of EM for all those involved in the legal system, alongside a clear understanding of what support needs to be made available, would support the increased use of EM in the justice system. This would need to be reinforced by a clear public communications and media approach to help support awareness and confidence in the technology. Most importantly there needs to be a case by case approach as to how EM will be implemented and who is eligible.

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

CJVSF members had a number of proposed changes to Part 1 of the proposed legislation:

**Further Expansion of EM to Supervised Bail and Structured Deferred Sentences** – CJVSF members welcome the extension of new forms of EM, such as GPS technology, to include the new disposals contained within Part 1 of the act but would like to see this further strengthened by the inclusion of supported bail services in the legislation. Following recent Justice Committee evidence sessions on the use of remand in Scotland and the key role played by the third sector in delivering

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alternatives to remand identified therein, CJVSF members felt that there was a clear case to be made for allowing the use of EM as a component of supported bail services. This would increase the use of alternatives to remand by addressing many of the administrative concerns that seem to be driving such high levels of remand in Scotland. CJVSF members went further in suggesting that supported bail services, including an EM component where appropriate, should be the default situation prior to trial unless it could be demonstrated that the individual before the court posed a risk of harm to the public. The third sector is well placed to provide that support, alongside low-level supervision where appropriate.

CJVSF members also considered that EM could be an appropriate condition of Structured Deferred Sentences and would therefore welcome the further extension of EM to these disposals.

The need for support services to be enshrined in legislation – Whilst supporting the extension of EM to a greater range of disposals, CJVSF members felt that the act did not do enough to address the need for support services to be made available to individuals subject to EM before it can be considered part of an effective disposal. CJVSF members felt that it was of fundamental importance for this to be addressed in the legislation and were concerned that, while welcoming its inclusion in the supporting documents to the Bill, not including provision for it in the legislation risked it being lost in practice.

CJVSF members suggested that one way of ensuring the proper consideration of support needs in the process would be the introduction of a requirement under the Bill that before EM be included as part of a disposal that a report be submitted to the court outlining the suitability of the individual for EM and the support available to be put in place for the duration of that disposal. This could be included as a “requirement when disposing of a case” under section 1 of the Bill. This would ensure that a person-centred approach to the imposition of EM is adopted and would increase the likelihood of appropriate support services being put in place. Such a report could be submitted by CJWSW as part of the information it already supplies when a pre-sentence report is required and this could be extended to other disposals. A comparable arrangement could be established in relation to individuals being released on licence subject to EM. While this would undoubtedly have resource implications, CJVSF members felt that this would be justified by the need to ensure that EM is used appropriately and effectively, which in turn would help to achieve the best possible outcomes for those subject to EM and to boost the confidence Sheriffs and the general public in EM and community justice sentences.

Monitoring and breach of EM conditions – CJVSF members also noted concerns around the monitoring and breach provisions in sections 10, 11, 12, and 13 of the Bill. The current Bill only provides that Scottish Ministers will determine in future who will be able to monitor EM compliance and that the court must appoint an individual responsible as part of the disposal. CJVSF members felt that it would be highly inappropriate for an individual from a third sector organisation that is providing a support service to be responsible for monitoring compliance with EM conditions. CJVSF members were equally clear, however, that those responsible for monitoring compliance with EM conditions and for instigating breach procedures must have an understanding of the individual case that they are monitoring. At present, section 13
of the proposed legislation states that a breach of EM conditions constitutes a breach of the disposal and this appears to be a strict liability condition, triggering a breach process regardless of the individual circumstances of the case. For some disposals, a breach of the order constitutes a further criminal offence.

In some instances, such as those where a movement restriction has been imposed as part of the disposal to protect the victims of crime (e.g. in cases relating to domestic abuse or stalking), a strict and swift response to a breach of EM conditions will be necessary. In other instances, however, there will be no risk to the public and there needs to be a clear provision for the review of any breach of EM conditions before proceedings relating to the breach of a disposal are instigated. Individuals in contact with the justice system may live chaotic lives and many require considerable additional support needs to ensure compliance with orders. Learning around desistance suggests that disengagement from criminal behaviour is rarely a linear path and that individuals may go through periods of “relapse” before stopping all offending behaviour. Any system of EM must be able to deal with this and those responsible for monitoring compliance with EM should undertake to establish whether the breach of the conditions is sufficient to warrant referring the case back for breach of the order.

CJVSF members would therefore welcome greater clarity on how breach proceedings will work in practice, who will be responsible for monitoring EM conditions and what scope there will be for review before breach proceedings are initiated.

Data Generated from EM – Similarly CJVSF members were concerned around the collection, use, and retention of data generated through EM under the proposed legislation. Section 9 of the Bill grants a wide discretion to Scottish Ministers and it is unclear who will have access to information, how long it will be retained and what use can be made of it, as well as who will own the data. CJVSF would welcome clarification and scrutiny on this point.

Drug and Alcohol Monitoring – CJVSF members also expressed significant concerns about the expansion of EM to include monitoring of alcohol and drug ingestion. CJVSF members were not convinced that sufficient evidence exists to support the wholesale introduction of alcohol and drug testing through EM. Members felt that such an approach could be inconsistent with recovery based approaches and may be an inappropriate means of addressing underlying behaviours in what are relapsing chronic conditions that increase the likelihood of a number breaches during the course of a disposal. CJVSF members would once again stress the importance of considering the circumstances and need of the individual to be subject to EM before it is included as a condition of a disposal. There were also concerns that including alcohol restrictions for those without addiction issues was unduly punitive and risked increasing criminalisation if alcohol monitoring is used as a default response to offending behaviour. CJVSF members acknowledged that alcohol consumption may be a factor in the commission of many crimes but did not see electronic monitoring as a suitable method to address what is a broader societal and cultural issue.
4. **Overall, do you support Part 2 of the Bill?** The Scottish Government’s view is that it will provide a more appropriate balance between the public’s right to protection and a former offender’s right to “move on” with their life, by, overall, reducing the legal need for disclosure. Do you agree?

CJVSF members welcomed the general movement of Part 2 of the Bill towards a greater opportunity for people with convictions to move on with their lives. Members supported the revisions of disclosure periods and remarked that it was also a positive step to bring the Scottish system in line with the English and Welsh disclosure periods.

The Bill could, however, go even further towards reforming the disclosure of previous criminal convictions beyond lowering the time periods for disclosure of specific offences. Members felt that a further positive change would be to remove the potential of disclosure of previous convictions at the initial job application stage by prohibiting employers from asking about previous criminal convictions until after a successful candidate had been selected (e.g. at the stage of considering references). This would go a considerable way towards addressing the substantial stigma posed by having a criminal conviction by asking employers to consider the applicant before them on the basis of their merits before considering whether or not a criminal conviction is relevant to their employment. CJVSF members would therefore welcome consideration of how best to further reform the disclosure of previous convictions by ensuring employers cannot request information on criminal convictions at the initial stage of recruitment.

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

CJVSF members welcomed the consolidation of the law that the changes to disclosure in Part 2 represent. The Bill itself, however, is unlikely to provide clarity or to make the law more coherent or intelligible as the provisions are complicated, often highly technical and refer across a number of pieces of legislation. It is therefore important to ensure that easily accessible and understandable guidance is produced alongside the changes to ensure that individuals with previous convictions, employers, and those assisting them to find employment are able to know any changes that the Bill contains. Training will also be required to ensure that those working with people subject to the new disclosure arrangements are clear about when disclosure is needed.

More will also need to be done to ensure that inappropriate disclosure requests are not made by employers and other decision makers and to take them to task for using spent or irrelevant convictions to inform their decisions. CJVSF members would therefore welcome clearer reference in the legislation to the penalties that organisations should face for its breach.

CJVSF members also welcomed the movement away from the use of the term “rehabilitation” under the old legislation and the confusion and detrimental effects this may have caused. CJVSF members would state again, however, their concerns
about the use of the term “offender” throughout the Bill and the accompanying guidance (please see answer to Q.1 above).

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

CJVSF members observed that there appeared to be some inconsistency as regards the change of disclosure procedures when individuals reach the age of 18. At present the Youth Justice system continues to deal with individuals up until the age of 21; as such individuals may be processed through the Youth justice system but still be subject to disclosure processes applicable to adults. CJVSF members felt that this situation should be resolved.

CJVSF members were also concerned about the effect of technology on the disclosure of criminal convictions. The internet, which of course did not exist when the 1974 Act was introduced, has considerably increased the ability of people to discover whether or not an individual before them has a criminal conviction, outside of the proper disclosure processes. Today a quick internet search can uncover news stories and social media posts that detail an individual’s past conviction, greatly increasing the potential of bias in decision making processes. These concerns are particularly pertinent given the recent European and UK court decisions on the “right to be forgotten” and internet search providers. CJVSF members would therefore welcome consideration of how provision can be made to ensure that information relating to spent convictions does not appear on the internet and how the disclosure system in Scotland can facilitate the removal of spent convictions from the internet.

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

CJVSF members had no further comments and would refer the Justice Committee to our previous submission on Parole Reform (available here).

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

CJVSF members had no further comments and would refer the Justice Committee to our previous submission on Parole Reform (available here).

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