Justice Committee

Management of Offenders (Scotland) Bill

Centre for Youth and Criminal Justice

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

Yes, overall the Centre for Youth and Criminal Justice (CYCJ) are supportive of the changes proposed by Part 1 of the Bill. There are some points, however, which would benefit from clarity, or further consideration.

The proposed Bill appears to provide flexibility in the use of electronic monitoring (EM), and looks to the future, enabling the inclusion of new technologies as these become available. It also increases the parameters within which EM can be utilised to maximise its effective implementation across the justice system, from the point of conviction. The opportunity to reduce the number of separate community disposals imposed by the court through inclusion of EM as part of a Community Payback Order (CPO) is an extremely positive step. However, by enabling the extension of the period of EM beyond 12 months, there is a possibility that the current limit for a Restricted Liberty Order (RLO), when run in tandem with other CPO requirements to their completion, may become unsupportive of rehabilitation and take on a solely punitive element. This may occur where there are no changes to the number of days or the hours of restriction, and evidenced positive changes in attitudes and behaviours appear to go unrecognised.

The views of the Expert Working Group highlight a goal-orientated and person-centred approach, which encourages positive reinforcement for individuals as they evidence shifts and reduction in the attitudes, behaviours and level of harm associated with their offending behaviour. A person-centred and goal-oriented approach may also improve motivation, as progress is recognised and has concrete, positive implications, just as the reverse is also true where non-compliance has concrete, negative implications. Where EM is a condition of a CPO, this would enable supervising officers to make such decisions without having to return to court. Where it has been deemed appropriate, regular court reviews of the CPO would allow the court to maintain an overview of progress, and allow judges to acknowledge positive engagement by the individual.

In relation to GPS technology, compliance with data protection and subsequent general data protection regulations, it would be useful to make clearer:

- what information will be used for the purposes of monitoring,
- who will have access to the information,
- the period of time for which it will be held, and
- the point at which it will be destroyed.

Clarification regarding access to the more detailed information available through GPS monitoring, by the range of agencies who may be supervising or involved in
supervising individuals such as social work, police, Multi Agency Public Protection Arrangements (MAPPA) and health, would be helpful. This is particularly relevant as the preference for GPS may be more likely to be used in situations where there is concern regarding imminence, severity and likelihood of further offending, and where more restrictive risk management procedures are sought. An example may be the information that could be provided by the use of GPS as opposed to RF EM. GPS in certain circumstances could offer an opportunity to identify earlier any patterns of behaviour that may suggest an individual’s compliance is superficial by complying with avoidance of any restricted zones or sticking to specific curfews but they may be accessing other geographical areas that would raise concern in relation to possible victim contact which RF monitoring is not sophisticated enough to do. GPS monitoring could provide real-time mapping of an individual’s movements which identify when they are actually seeking to circumvent such restrictions. The appearance of compliance with existing conditions may mask more subversive and deviant patterns, which those supervising the individual (such as justice social work or Police Scotland) may be able to discern due to local knowledge if they are permitted access to the wider data, and not just compliance or breach information. How much GPS information is available to the statutory agencies supervising an individual, and how this is balanced against human rights, data protection and public protection, is not obvious. How will the more invasive use of EM, particularly GPS, be scrutinised to ensure it is appropriate and proportionate to the risk of harm posed by aspects of an individual’s behaviour?

Within the proposed Bill, there is clear demarcation, in relation to seeking consent, between those individuals who may be subject to Community Disposals from court, and those who may be subject to EM following custody. Whilst acknowledging that this strongly relates to assessed risks and required risk practice measures, we are concerned that the lack of choice in imposition of EM in certain situations, such as post-custody licence conditions, may not be in accordance with human rights. Whilst acknowledging that public protection is paramount, and recognising the additional safeguards for risk management, the ability of EM to contribute a person centred approach, which is proportionate and relative to the individual, is crucial. Evidence highlights that where individuals feel that they have been treated fairly and listened to, whilst not necessarily agreeing with decisions, engagement and compliance are improved.

Within the proposed Bill, it may have been prudent to include a means of ensuring that the views of those with whom the individual subject to EM will reside, and what role agencies will have in providing support to them. Families Outside (March, 2016) research highlights the impact of supportive and involved families in reducing re-offending by 39%. Given that reduction in offending is a crucial aspect, it perhaps warrants a stronger reflection within any updated guidance to ensure that best practice considers this evidence.

A point of clarity may be required as to who the designated person is for the purposes of monitoring the EM, in whatever form. Does this relate to the service overseeing the EM technology specifically, or does this relate to the justice worker, or is it a combination of both?
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?

Whilst the proposed Bill as stated does increase opportunity for flexibility in the use of EM following conviction, and allows for the development of other types of EM, the legislation is not enough to support the creative and aspirational change directed by the Scottish Government in how we respond to offending behaviour. The proposed legislative changes do not provide the detail of the human impact EM may have upon an individual’s involvement in offending behaviour, and the impact EM can have when used creatively rather than in a prescribed manner, which has been the dominant position to date. The legislative changes create the parameters for flexible thinking, but do not provide the detail of what this may look like in practice.

Alongside the legislative changes, a robust scaffolding to support learning and encourage developments of all professionals across the justice system in understanding the application of EM across a wider range of disposals wherever it could meaningfully be used to disrupt offending behaviour and support rehabilitation and as appropriate reintegration to the community. There is a risk that without the creative support to use knowledge from research, there will be little change.

Research highlights –

- The effectiveness of electronically monitored punishment must be understood as contingent and complex.
- EM is more effective when integrated with the use of other supervision and supports.
- There is emerging evidence to support the increased use of ‘away from’ restrictions and/or bilateral EM as part of a multi-faceted approach to protect victims of violent crime and sexual crime.
- Flexibility and graduated changes to EM orders can be used to motivate compliance.
- One size does not fit all: the use of EM should be tailored in response to the diversity and vulnerability of monitored people.

The use of new EM technology must not be permitted to be used in a risk averse fashion, or inappropriately used to support excessive restrictions in the name of public protection. It must be meaningfully used, within risk practice, to support an individual’s rehabilitation and reintegration as appropriate to them and their wider family and systems, as well as for public protection. Updating the existing EM Guidance and supporting its application and understanding is required to scaffold the necessary learning, until it becomes embedded across systems and practice. Further action may also include the Scottish Sentencing Council developing guidance regarding the use of EM within sentencing, including emphasis on the principle of proportionality.

How will support be provided to those individuals who will be affected? Following the implementation of the legislation, how will the impact of the changes be scrutinised as to their effectiveness, and what will be measured as effectiveness, given
processes of desistance from crime are more than just reducing recidivism? This is also crucial as the available technology develops to ensure adherence to human rights and to further ensure that the ethos and principles underpinning the legislation are being upheld.

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.

The use of EM as part of bail conditions is an aspect of the legislation which appears to be a missed opportunity. As bail supervision assessments are currently undertaken when supervised bail is deemed appropriate, this could be extended to include the consideration of EM as an appropriate additional measure available to the bail supervision scheme. Alongside the use of EM for bail would be a necessity to ensure the availability of appropriate supports, given the research which shows an individual’s ability to adhere and engage is improved through additional supports. Any support provided should be proportionate and should be dependent on the individual, in order to avoid unnecessary intrusion into their right to privacy, and to limit demands on services to ensure support is targeted where it is most needed. This may be particularly relevant for children and young adults who require additional support to adhere to and understand the justice processes and implications of failing to comply with imposed conditions.

The use of EM as part of bail conditions may also provide an opportunity to avoid remand situations, particularly in those cases where the additional use of EM could contribute to risk management, where without it the choice would be for remand. Conversely, where individuals are involved in breach of bail for minor offences which do not pose any physical harm to the public, the use of EM may provide a level of disruption to the offending behaviours due to the increased monitoring and support provided whilst remaining in the community, as opposed to the use of remand.

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?

Overall CYCJ support Part 2 of the Bill, and having advocated for change in this area for a significant period of time, we welcome measures to remove the unnecessary disclosure of convictions and to more appropriately balance the public’s right to protection and the right of people with convictions to move on with their lives (see for example Lightowler et al., 2014).

We believe that:

- reducing the period of disclosure for many disposals, and
- extending the legal protections for individuals with a previous conviction contributes to this aim, albeit as detailed below such incremental legislative changes inherently limit the ability to fully achieve this aim.
Notwithstanding, we support Part 2 of the Bill because this will have important implications for a large proportion of people, with over one-third of the adult male population and one-tenth of the adult female population in Scotland likely to have at least one criminal conviction and the provisions related to custodial sentences will affect the overwhelming majority of those subject to such measures (97% of people receiving a custodial sentence in 2015/16). For children and young people, Police Scotland data indicates that 23,726 young people aged 8-17 committed an offence in 2012/2013, with the changes proposed in the Bill likely to affect young people who have their offence dealt with through the Children’s Hearings System (in 2016/2017, 2995 children aged 8-17 were referred to the Children’s Reporter on offence grounds) and through the adult court system (in 2015/16 2,203 12-18 year olds were prosecuted in court), who will benefit from shorter (or indeed no) disclosure periods (CYCJ, 2018; Scottish Government, 2017).

It is widely recognised that criminal records can adversely affect access to employment, education, training, volunteering opportunities, housing, insurance and travel for visas (House of Commons Justice Committee, 2017). Many of these factors are recognised as critical in reducing reoffending, supporting reintegration and promoting desistance and therefore the provisions under the Bill should have beneficial impacts including in helping people to “move on” with their lives (CYCJ, 2017). These provisions are cognisant of the fact disclosure is a consequence of the offence and is not and should not be used as a further punishment for committing an offence (albeit this remains all too often the case). The proposals should also have a beneficial effect of meaning fewer people, for shorter timeframes require to go through the often traumatic, stigmatising and embarrassing process of disclosing past convictions (Thomson et al., 2016).

For children, the wide ranging and particularly destructive effect of childhood criminal records has been well established and therefore efforts to reduce the need to disclose and timeframes for doing so are welcomed (see for example House of Commons Justice Committee, 2017; Carlile, 2014; Sands, 2016). The proposed changes are also supported by the facts that we know that the offences committed by young people tend to be of lower-level and involvement in offending short-term; the recognised interface between vulnerability, need and risk, particularly for young people involved in more serious or persistent offending, with the overrepresentation of care experienced young people and care leavers in the justice system highlighted; the disadvantages young people may already face in gaining employment and other opportunities, having often experienced school exclusion, poorer educational outcome and lack of previous employment, training or experience, which can be exacerbated by having to disclose their previous conviction and/or for lengthy time periods; and the imperative importance of allowing children to move on with their lives quickly (CYCJ 2016; Smith et al, 2014; Broderick et al., 2013). We particularly welcome the continuing provisions to at least half disclosure periods for those aged under 18 at the date of their conviction, which we believe is supported by the evidence provided above; in keeping with GIRFEC and the UNCRC; and the recognition that young people should be treated differently to adults, in light of their different developmental needs (CYCJ, 2015).

CYCJ welcome the proposed changes to enable the discharge of the referral or the child being made subject to a compulsory supervision order to have no disclosure
period but would welcome clarification on whether the acceptance or establishment of the grounds of an offence would still be treated as a conviction. This is an important change as the majority of young people involved in offending who enter formal systems will have their offending behaviour dealt with via the Children’s Hearings System but currently this leaves these young people carrying a conviction often well into adulthood (Lightowler et al., 2014). Such changes are also cognisant with the fact that the Children’s Hearings System is a welfare-based, child-centred, non-punitive system, through which intervention should ultimately improve the life of the child, which current disclosure provisions appear at odds with (SCRA, 2017). Furthermore, it is recognised that although the costs of offence grounds for referral being accepted or established at a Hearing are high i.e. the gaining of a criminal record, this is often poorly understood by children, their families, professionals and the adults involved in the Hearing System and frequently without the child having access to legal representation, advocacy and knowledge on their rights and the resources available to them (Who Cares? Scotland, 2017). The proposed changes, and we hope grounds not being treated as a conviction, would therefore be welcomed.

We however have some concerns that we believe could be addressed in the proposed legislation. We believe it would be beneficial for disclosure periods to be halved for those who were aged under 18 at the time of the offence, rather than at the time of conviction. We are aware that there can be significant system delays between the time of offence and the time of conviction and deem it unjust for some children to be unfairly penalised and excluded from such protections as a result. We also consider that given the emerging evidence on brain development and maturity, as well as the recognition in legislation that some young people, namely young people who are looked after and care leavers, require additional support up to the age of 26 via the Children and Young People (Scotland) Act 2014, valid arguments exist for considering the extension of such provisions to young adults (McEwan, 2017). Furthermore, given that some of the proposed disclosure periods are not as simple as being halved good quality information, that is well communicated about such changes is essential (as discussed further below). We also deem there could be a potential anomaly in the legislation regarding community-based disposals and custodial sentences up to 12 months for young people aged under 18, meaning a custodial sentence could be considered spent more quickly than a community order.

While we appreciate the scope of the changes proposed in this Bill are limited (including relating to devolved powers; basic disclosures rather than higher-level disclosures; and afford no protection to those with unspent convictions), it is impossible to look at the proposed changes in isolation because they are inherently effected by the wider system of disclosure of convictions. Arguably, if the Scottish Government wanted to achieve a more appropriate balance between the right of the
public to be protected and the rights of individuals with convictions they should include:

- A specific and holistic focus on the system of disclosure for under 18s in Scotland as has been undertaken elsewhere (see for example House of Commons Justice Committee, 2017). This should devote consideration to how the entire system of disclosure could be made more child-friendly and compliant with the UNCRC (see for example Sands, 2016).
- Reviewing the processes for, and information contained, within higher-level disclosures to promote compliance with the ECHR and UNCRC.
- Introducing process for reviewing convictions that under the above proposals will never become spent.
- Exploring other options for adopting a more nuanced approach to the disclosure of criminal records, that takes into account of factors such as the nature and severity of the offence; context of the offence; age; time since offence was committed (drawing on time to redemption research—see Weaver, 2018); engagement with services; progress in terms of risk and rehabilitation; and nature of the job/opportunity.

While the PVG review may address some of the above factors, we deem holistic, rather than piecemeal review and legislative change to be essential.

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?

We welcome the change of terminology from “rehabilitation period” to “disclosure period” and from “rehabilitated person” to “protected person” in recognition of the wider factors involved in rehabilitation. We deem that this change of language conveys important messages and has implications in reducing stigma and discrimination. We deem the legislation could also go further to support this aim, and that of helping people to move on from previous behaviours, in avoiding the terminology of “offenders”, which would also be more in keeping with the changes in language used in Scotland. Achieving these aims will however require more than legislative change. It may be that the proposed Bill and wider changes provide a timely window of opportunity to devote some real focus as to how stigma and discrimination against people with convictions can be addressed and cultural and attitudinal change can be supported.

While we appreciate a level of complexity in balancing the often-competing demands placed on the system is unavoidable, at the current time the disclosure system is extremely difficult for individuals with convictions to understand the system and processes surrounding disclosure, as well as their rights (Thomson et al., 2016). Knowing what information you are required to disclose and what will be disclosed about you, as well as for how long, is fundamentally a right. While provisions are in place for individuals to make subject access requests and GDPR implementation will enable individuals to get this free of charge, such information does not make clear whether convictions are spent, unspent or protected (Disclosure Scotland, 2018). As a result, individuals are left in a situation where they have a criminal record that
effects almost every part of their life but are unclear about what they need to disclose, with detrimental consequences. Similar issues, uncertainty and anxieties are often evident for education providers and employers, as well as for practitioners supporting individuals with convictions and members of the public overall (Thomson et al., 2016). Currently there are significant inconsistencies in respect of the available information, guidance and support in respect of disclosure and any change to legislation needs to be accompanied with accessible information and guidance. Consistently available training, support and guidance to understand the system, rights and requirements in respect of disclosure to people with convictions, practitioners supporting these individuals and opportunity providers is critical and the proposed changes may provide a useful opportunity to reconsider what is available in respect of existing measures.

Fundamentally, the changes in the proposed legislation cannot be seen in isolation from those governing the wider system of disclosure and as detailed above, more overarching review and change to the system that governs the disclosure of criminal records is needed if the system is to be made more intelligible, clear and coherent.

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

Nothing further to add.

7. In relation to Part 3 of the Bill we have no comments at this time.

Centre for Youth and Criminal Justice
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