Howard League Scotland (HLS) welcomes the opportunity to comment upon the proposals set out in the Management of Offenders (Scotland) Bill.

Part 1: Electronic Monitoring

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

HLS cautiously welcomes the proposed changes to electronic monitoring as a means to (1) directly and assertively reduce Scotland’s troublingly high imprisonment rate and (2) strengthen criminal justice social work and community justice alternatives. We recognize that electronic monitoring has the potential to add an element of control into community supervision that other measures do not have, and this may help to displace a custodial sentence. Hence, people may avoid the disruptive effects of imprisonment, such as loss of housing, employment, social stigma, and erosion of relationships. HLS also welcomes the more strategic integration of monitoring with criminal justice social work, so that tagging is less likely to be a stand-alone option but part of a package of support. Our wariness, however, is rooted in our concerns about criminal justice net-widening and up-tariffing. As we recently wrote, a considerable increase in community sentences over the last decade has not impacted the rate at which Scottish courts give prison sentences (instead it has drastically reduced the use of the fine, a much less intrusive punishment). As such, further developing electronic monitoring (EM) may be part of penal expansion rather than reduction. Moreover, the expansion and refinement of EM poses other potential issues for social justice, desistance and citizenship, which HLS remains apprehensive about.

Fundamental questions and aims of the Bill remain to be clarified. What are the precise underlying penal rationales motivating the expansion of electronic monitoring in Scotland? It is essential to make clear whether this is about: strengthening surveillance in the community, improving criminal justice social work, and/or reducing Scotland’s staggering overuse of imprisonment. It is likely that the government is compelled by all three factors, but the balance that is struck between these priorities will make the difference between a positive or punitive change in Scotland’s penal system. Currently, HLS is concerned that a refined and expanded version of EM is being proposed to increase risk management of individuals who have been convicted, first and foremost. At a time when crime is falling, people in Scotland are less afraid of crime, and evidence suggests that EM does little to improve or increase perceptions of public safety, the justification for extra individual control measures is unclear.

Below we set out more precisely what we see as the most pressing concerns about the current Bill in relation to electronic monitoring.
Electronic monitoring is unlikely to reduce the prison population. Without judicial support and committed political will to seriously reduce the prison population, it is doubtful that the further EM provisions will cause any inherent reduction in the number of people being sent to prison; in fact, this may mark a period of penal expansion. Innovation has often caused up-tariffing and net-widening without reducing number of people imprisoned. In recent years we have seen massive expansion of community orders in Scotland and no decrease in the use of imprisonment. The evidence also asserts that after the initial introduction of a trial of EM in Scotland, only 40% of those who received a tag would in fact have received a custodial sentence, meaning that in the majority of cases EM did not displace a custodial sentence. There is no evidence to suggest that the proposed arrangements in the Bill will address this practice.

Undermining temporary release. In wanting to make prisoner release schemes more robust, we may in fact make them more punitive. Section 7 expands the use of electronic monitoring for those on temporary release (TR). TR is an act of trust that allows the prisoner being intermittently released to experience the personal autonomy and responsibility denied to them in prison. The intention behind the proposed change is to increase the numbers of prisoners receiving TR who otherwise are considered just on or below the threshold of risk. If implemented as intended, this will allow a greater number of prisoners to have a gradual and controlled transition back into the society. However, if tagging is not used as an opportunity to give more people release, but instead becomes a punitive and control supplement to current arrangements, it will undermine TR practices by adding a layer of constant surveillance to what should be a period of liberation (that is often already restricted by curfew). How can those future prisoners who would (under current arrangements) have received temporary release without EM be protected from the infringement of their release by the additional imposition of GPS tagging? HLS worries that rather than expand the number of people on TR – and therefore yield a reduction in the daily average prisoner population – that people on release, who would have received leave anyway, will from now on be more likely to be subject to increasingly onerous tagging that they would not have been prior to the bill being enacted.

There must be a way to monitor and make public the number of people who get TR with and without a tag, and track how that fluctuates in the future, namely: how many additional people are receiving TR? Is the use of EM expanding but the percentage of prisoners being released relatively the same? This information is vital if the veracity and effectiveness of the legislation is to be monitored. Otherwise, the Bill creates another pathway to a more punitive penal system that increasingly limits a person’s experience of temporary release. How can prison and parole officials ensure they are expanding release, allowing a greater number of prisoners temporary leave from the prison, while not limiting the practice of release by making it more restrictive and risk averse in general?

Increased numbers of breaches and recalls to prison. Creating a more restrictive and tightly monitored period of temporary release and parole could have ramifications for recall to the prison. Those on parole who enter certain areas or are out after curfew may be returned to prison. When the breach is being decided on technically by a company this is more likely. The extension of tagging in the
community must not be used to further entrench a punitive logic but to support more inclusionary approach to punishment. Alternatively, when a social worker is responsible they can assess the breach. They are more likely to use their professional discretion to judge the seriousness of the breach in relation to the general character and level of compliance by the supervisee.\textsuperscript{vii} If EM is but one tactic in an integrated programme of community supervision and surveillance, however, then the severity of punishment for breaching EM should remain in question. If a person who is tagged is generally succeeding in meeting the broader demands of supervision and desistance, we need to seriously consider if breach of EM curfews and exclusion areas should automatically cause a recall to prison.

**Electronic monitoring has no inherent rehabilitative capacities.** There is very little evidence that supports the claims that EM is in itself an effective form of desistance,\textsuperscript{ix} and the addition of EM has not been found to increase completion rates of community orders in Scotland.\textsuperscript{x} Allowing EM to be used more strategically by incorporating it with CPOs (and not just after a breach of a CPO) and potentially increasing the demand for skilled assessments from social workers – who can advise the judiciary on the suitability of a tag as well as supervise people being electronically monitored – are beneficial developments. However, this may also mean that those given a community sentence with electronic monitoring are in fact tagged for much longer than they would have been if just given a stand-alone RLO. Extending the imposition of monitoring (in tandem with a CPO) from a maximum of 12 months to three years seems excessive and not fully justified by risk levels. The legislation that supports electronic monitoring should always be guided by proportionality.

**To achieve desistance, electronic monitoring should rarely be used in isolation.** Forms of monitoring that best support reduced reoffending are those that are deployed in tandem with other forms of supervision.\textsuperscript{xii} Key to developing and improving EM is that equal attention and financial support are given to expanding community justice options. Changes to EM should not be made without fully costing and planning for these essential supportive forms of community engagement. This should not be restricted to forms of supervision, such as criminal justice social work, vital as these are, but include a portfolio of support services that could be much better financed and expanded, including mentoring programmes, such as Shine, New Routes and Moving On, for example.

Like in Scandinavia, the use of electronic monitoring in Scotland should be used to support social work and social justice goals, such as desistance, reintegration, improving family relationships, addressing addiction and building social capital, such as gaining employment, training and education. Section 3 of the Bill does propose expanding electronic monitoring so that it can be used alongside CPOs. However, this broader ambition is difficult to realise in practice if Scotland continues to emulate the English commercial model of tagging.

**The problems of a privatised penal system.** If Scotland aspires to be closer in practice to the Scandinavian models of criminal justice, we should not continue to follow the UK example of privatised provision of EM.\textsuperscript{xii} Where it is not outsourced electronic monitoring is better integrated with probation/social work services. G4S, and contractors like them, have no social work skills or expertise in providing care
and support to people, they are unable to help people in distress. It has already been argued that until tagging is fully integrated into criminal justice social work the potential for the sensible, innovative and helpful use of EM will be limited. Instead, we are set to give more money to private enterprises to conduct surveillance, when the publically provided services of criminal justice social work and community based interventions – that offer an interpersonal relationship, provide guidance, supervision, and counselling – are increasingly overshadowed by technological innovations in community punishment.

**Undermining citizenship, reintegration and rehabilitation through the creation of exclusion zones.** While RLOs are already available and provide a sensible way to restrict access to small areas, say the home of someone who has been the victim of domestic violence, HLS is particularly concerned about the proposed creation of large exclusion zones. It has been proposed that these could range "from a house, to specific street patterns, to a neighbourhood, to a whole city. GPS also allows more than one exclusion zone to be set. Using GPS technology to set exclusion zones can help create safe spaces for victims of crime", according to the Scottish government. We worry that a desire for effective and cheaper forms of criminal justice and community protection are superseding more ethical and social concerns about citizenship and reintegration. When people are denied access to large areas of public space, like city centres, it sends a clear statement that they do not belong here, that they do not deserve equal membership of Scottish society. When we block people from full social and civic association we degrade their citizenship as we make people criminal for moving through public spaces. We also blur the lines between the community and the prison. We strongly resist any suggestion that cities and neighbourhoods should be carved up into permitted territories and no-go zones. This has the long-term potential to create a community justice culture of security and exclusion in Scotland, rather than a culture of reintegration and social inclusion.

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?

Yes, it will. However, the matters we raise above make clear that precautions must be taken to ensure that electronic monitoring has a positive rather than punitive impact. What is the underlying role EM is intended to play in Scotland’s future penal landscape? Its expansion will be more successful if it challenges *institutional problems*: low levels of temporary leave from prison; the disjointed relationship between tagging and CJSW; and the courts troublingly high use of custodial sentences. Alternatively, EM’s expansion could have an exclusionary and punitive impact on community justice if it mainly targets *individual problems*: increasing surveillance and control of convicted people, resulting in net-widening and up-tariffing; and excluding individuals from large areas of public, commercial and cultural space, such as the city centres. If EM largely targets the institutional limitations of Scotland’s current penal system, however, it will be more likely to challenge the existing punitive patterns in Scotland’s penal system. That should be the central priority underlying this policy development.
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.

In wanting to directly address the size of the prison population, EM could be used as a means to immediately reduce the staggering number of people being held on remand. Currently, 15% of the Scottish prison population are being held on remand without conviction. This seriously and egregiously undermines the presumption of innocence and is at least as disruptive to people’s lives as a short sentence. EM alone however will not provide a fix for this most concerning penal practice. An expansion of bail supervision arrangements that provide pre-trial stability would need to be given priority, with EM only used to support as part of a suite of support that keep people out of the prison until they have been convicted and sentenced.

In the policy memorandum it is written that ‘the policy intention is to ensure that the data protection rights of the offender are respected’, this is troublingly vague. With GDPR reframing future organisational behaviour around privacy, what are the precise data protection implications of expanded EM, including GPS? A GPS tag, especially one that also does transdermal alcohol monitoring, would generate a huge quantity of extremely sensitive data about someone – far more than a radio frequency tag and quite possibly transmitted in a less secure way. How do we know G4S has the capacity to store this data in a way that protects a monitored person’s rights and complies with the law? G4S already has a litany of serious errors in their recent history; how they manage this data should be treated with the utmost of concern.

Part 2: Disclosure of Convictions

1. 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?

Following research evidence on crime rates, aging and reoffending, we assert that the Bill does not go far enough to reduce the punitive impact of disclosure for certain groups of people after they have left prison. The proposed changes are a welcome recognition that the Rehabilitation of Offenders Act has unduly long “rehabilitation” periods and the changes will limit disclosure in important ways; however, HLS feels the proposed changes are still far too cautious and do not fully remove the barriers to employment discrimination faced by people with a conviction. That some convictions can never become spent, no matter how much time has passed since the conviction, seems counterintuitive to the aims of reintegration and social justice.

The amendments still allow for disclosure of spent convictions. HLS is concerned that these amendments only apply to basic disclosure. If a job requires a standard, enhanced or PVG disclosure application, then spent convictions can still be disclosed. This means that in Scotland a conviction is potentially never spent as,
in certain circumstances and depending on the offence, spent convictions remain always available for prospective employers. This undermines the fundamental aims proposed in the Bill: that the discrimination experienced by people with a criminal conviction should be drastically reduced. For many people that simply will not be the case as their record is never really sealed.

This Bill allows the continued demand for lifelong disclosure. Should this Bill pass into legislation, the upper threshold for a conviction that cannot be spent will increase from 30 months to 48 months. This means that for those who have served the longest periods of imprisonment will still be subject to stigma, labelling and potential job market exclusion, no matter how they have conducted themselves in the intervening years. If someone is safe enough to be returned to society, if they have served their prison time, why must they be subject to a lifelong unspent conviction? This also conflicts with the rich body of evidence that shows that reoffending drastically reduces as someone ages. Further, it is widely estimated that after a period of 7 to 10 years a person who has not reoffended will have the same offending potential as someone who has never offended. In practice, people who have served over 48 months are already subject to licence conditions once they are released, ostensibly aimed at supporting rehabilitation, reducing reoffending and maintaining public protection. Maintaining lifelong disclosure seems purely punitive as it brings no added public protection after a certain number of years has passed. Instead it will feed into the hopelessness, frustration and anger that a number of prisoners already feel about their prospects of getting post prison employment.

Moreover, as sentences have gotten considerably longer since 1974, and Scotland has Europe’s largest population of life sentence prisoners, it means that Scotland will likely have one of the largest cohorts of people who will forever have to disclose their past conviction/s. In addition, evidence also tells us that employers tend to be biased against hiring people with convictions; therefore this aspect of the legislation continues to expose certain groups to employment discrimination. What is the purpose of keeping a group of people subject to lifelong disclosure? Answering this question in relation to the existing evidence reveals this particular tenet of the legislation is difficult to justify.

The government admit that disclosure measures “operate differently (and more stringently)” for long-term prisoners. We suggest that this decision is likely rooted less in evidence-based findings and is instead the product of a more visceral assessment, in which anxieties about long-term prisoners being a more serious public safety threat are allowed to prevail. Following McGuinness et al (2013), HLS suggest that there is not an inherent “balance” or trade-off between public safety and hiring people with convictions, as the question suggests. Hiring people with a criminal record does not inherently pose danger to the employer, colleagues or the public. In fact, securing employment is proven to be an important protective factor against re-offending. Therefore, reducing the barriers people with convictions have to overcome in getting work will contribute to increased public safety.

2. 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?
Yes. Currently, the system is complex – a point already raised by prisoners\textsuperscript{xxvii} and likely shared by the many people in Scotland with convictions. Though, as stated above, there is still a disjuncture between telling people that after a stipulated waiting time that their conviction will be spent, while at the same time also allowing those same convictions to always be accessible for the purposes of standard, enhanced and PVG disclosure applications. This could be confusing, frustrating and ultimately counterproductive.

Amending the language of the Act is very welcome. Replacing ‘rehabilitation period’ with ‘disclosure period’ will likely provide greater clarity to employers about the meaning of a spent conviction and how it happens i.e. the passive passing of time rather than someone being assessed as “rehabilitated”.

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

Access to education for people who have been imprisoned or have a criminal record needs to be addressed much more explicitly, particularly if the government is to address the education attainment gap.\textsuperscript{xxviii} Currently, people who undertake third level degrees while in prison in Scotland who later, upon liberation, wish to continue study with those same universities outside the prison have a “restriction marker” added to their student record. As a result, they are not allowed access to their student record or course homepage unless their probation officer asserts that this is ok. Further, people coming out of prison are often not allowed to sign up for further study unless the form is co-signed by their probation officer. This is an extremely ostracising and stigmatising practice that is at variance with the aims of reintegration and serves no function in supporting public safety or reducing risk. Under no circumstance should universities be permitted, or encouraged, to act as an extension of the justice system. Like employers, universities should not be allowed to retract offers to prospective students if they have a criminal record.\textsuperscript{xxix} This kind of open discrimination against people who have been imprisoned and have convictions should be seen as a grievous disregard for equality.

Part 3: Parole Board for Scotland

1. 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?

The time prisoners have to make representations in regards to being recalled to prison should not be so severely reduced. Currently, if a person is recalled to prison they are allowed to make representations about their revocation several years after the fact. The current Bill proposes reducing this to six months as the paperwork regarding recalls may no longer be available. The statute of limitations in Scotland is five years, these same legal rights granted to all citizens should also be granted to prisoners in relation to their recall. Issues of retaining paperwork should be addressed as a matter of administration and data protection, and do not justify limiting any person’s (confined or otherwise) right to appeal.
2. Do you have any further views on the role, purpose and functions of the Parole Board?

The most serious issue faced by the Parole Board is its growing reluctance to grant parole. When it comes to getting parole, prisoners are facing an increasingly cautious Parole Board. In their 2015-16 report, the Parole Board noted that of the 337 life prisoners recommended to them, only 44 were directed for release. Hence, the problem is not that people get parole too easily, but the exact opposite. In 1994 a life sentence prisoner in Scotland had a 29% chance of being released. In 2003 the chance of parole for a life sentence prisoner had dropped to 17%. The latest reports show that only 12% of life sentence prisoners secured release via parole. This means more people are serving longer sentences in Scottish prisons than ever before.xxx HLS does not believe that this reduction in release reflects a substantial increase in misconduct by life sentenced prisoners. Instead, it is likely that the Parole Board had become more risk averse, reflecting changes that have taken places across the criminal justice system.xxxi

Howard League Scotland

HLS is Scotland’s leading independent penal reform advocacy organisation. Established in 1979, it campaigns for just responses to the causes and consequences of crime and works to shape a progressive future for Scotland’s penal system.

Howard League Scotland
20 April 2018

---

1 Howard League Scotland, 28 February 2018, Crime falls, but the prison remains.
7 Lobley and Smith (2000).
11 Lobley and Smith (2000).

Howard League Scotland (forthcoming) *Unlocking Scotland: Remand Prisoners*; though a marginal number of untried prisoners are awaiting deportation, see also Scottish Prison Service, *SPS Prison Population*.


For a brief and useful description of the differences between these different forms of disclosure application, see Weaver, B. (2018) *Time for Redemption? A Review of the Evidence on Disclosure of Criminal Records*, Scottish Centre for Crime and Justice Research, Strathclyde: University of Strathclyde.

A limitation that others have also raised as disproportionate and punitive in previous rounds of consultation: http://www.gov.scot/Publications/2015/10/3324/downloads


Scottish Government (March 2013); Analysis of the impact of employment on re-offending following release from custody, using Propensity Score Matching.


Scottish Government, 2018 *National Improvement Framework and Improvement Plan*

Inside Times, 3 April 2018, ‘I was rejected from university because of my record, now I’m campaigning for fair treatment’

http://www.scottishparoleboard.gov.uk/documents.asp

Howard League Scotland (forthcoming) *Unlocking Scotland: Life Sentence and Long-Term Prisoners*. 