Justice Committee

Management of Offenders (Scotland) Bill

Written submission from the Information Commissioner's Office

1. The Information Commissioner welcomes the opportunity to respond to the Justice Committee’s call for views on the Management of Offenders (Scotland) Bill (the Bill).

2. The Commissioner has responsibility for promoting and enforcing the Data Protection Act 1998 and the Privacy and Electronic Communications Regulations 2003, as well as the Freedom of Information Act 2000, the Environmental Information Regulations 2004 which apply to reserved matters in Scotland.

3. The Commissioner is independent of government and upholds information rights in the public interest, promoting openness by public bodies and data privacy for individuals. The Commissioner does this by providing guidance to individuals and organisations, solving problems where she can, and taking appropriate action where the law is broken.

4. From 25 May 2018, the Commissioner will be responsible for monitoring and enforcing the General Data Protection Regulation (the GDPR) and a new UK Data Protection Act, which is currently being debated by the UK Parliament. Our response aims to ensure compliance with the data protection regime which will exist from 25 May.

5. This response is focussed on Part 1 of the Bill as the proposed electronic monitoring provisions have more significant implications for individuals and the protection of their rights to protection of their personal data and privacy.

6. The Commissioner also generally welcomes Part 2 of the Bill in updating the disclosure periods for criminal convictions. The requirement for individuals to disclose any convictions should be limited to what is relevant and necessary to be known by an employer or other interested party.

Sections 2 and 6 – Particular rules regarding disposals and conditions

7. The Commissioner welcomes the recurring references within the Bill to the proportionality of the monitoring imposed on offenders.

8. The Committee should be satisfied that the general arrangements for the various disposals make it clear when an offender can agree or disagree to a particular disposal.

9. The Committee should also be satisfied that the requirements are regularly reviewed for the continuing necessity and proportionality of the monitoring.
Section 9 – Use of devices and information

10. Section 9 permits the Scottish Ministers to make regulations about the further use of devices and the information recorded by them. The processing of personal data by the Scottish Ministers for the executing of criminal penalties or the safeguarding against or prevention of threats to public security, is governed by the Law Enforcement Directive (EU 2016/680). The Directive will be transposed into UK law by Part 3 of the Data Protection Bill currently proceeding through the UK Parliament when it is enacted and commenced. The regulations that Scottish Ministers may make under section 9 of the Bill must be compatible with Part 3 of the Data Protection Bill.

11. In particular, the further use of information obtained through monitoring must only be processed for another law enforcement purpose as authorised by law (including regulations under this section), and that the processing is necessary and proportionate to that purpose.

12. The Commissioner welcomes that the examples given in section 9 include whether monitoring should be restricted to particular times or circumstances. Continuous monitoring may not be appropriate and proportionate in every case and so would not always be justified.

13. The Bill could be clarified to ensure that when an individual is monitored only in certain times or circumstances, any personal information obtained through the monitoring device outside those times or circumstances is not to be further used without a clear and lawful reason for doing so. The Scottish Ministers could also consider much shorter retention and destruction periods for information which does not relate to the primary purpose of the monitoring.

14. Sub-section (5) allows for regulations to set periods for retention and destruction of the information obtained through monitoring. This could be amended to include establishing criteria which would assist in determining when personal information is no longer required and can be deleted.

Section 10 – Arrangements for the monitoring system

15. Section 10(1) of the Bill requires the Scottish Ministers to “make contractual or other arrangements” to monitor an offender by an electronic monitoring device.

16. Where Ministers procure a third party to be a designated person to undertake the monitoring, the third party will likely be acting as a data processor. Clause 59(5) of the Data Protection Bill requires the processing of personal data by a processor (in this case the designated provider) to be “governed by a contract in writing”.

---

17. Ministers must ensure written contracts are in place with any data processor and that those contracts include all the elements required by the Data Protection Bill when enacted and commenced.

**Section 15 – Procedure for making regulations**

18. Section 9 of the Bill allows Ministers to make regulations about the use of approved devices and the use of information obtained through monitoring. Given these regulations will often relate to the processing of personal data, and as encouraged by Article 28(2) of the Law Enforcement Directive, the Commissioner believes she should be a statutory consultee whenever Ministers make, amend or revoke regulations under section 9.

**Information for the offender**

19. The Commissioner welcomes the Bill’s requirements to provide certain information to the offender, including the purpose of the monitoring requirements and the consequences of failing to comply or attempting to damage the device.

20. Clause 52(1) of the Data Protection Bill requires a data controller to take reasonable steps to ensure that any information provided to an individual about the processing of their personal information is concise, intelligible and in an easily accessible form, using clear and plain language.

21. The Commissioner believes the Bill would be strengthened by including a requirement these steps are taken when providing information to an offender about the monitoring requirements.

**Data protection by design and default**

22. Chapter 4 of Part 3 to the UK Data Protection Bill will, when enacted and commenced, impose several obligations on data controllers, including undertaking a data protection impact assessment (DPIA) where a type of processing is likely to result in a high risk to the rights and freedoms of individuals. The DPIA should assess the risks and any mitigating measures in order to address those risks.

23. We note the Scottish Government published a first iteration of its DPIA in February 2018. This should be revised when the legislation is finalised and also as further details about the particular devices are known, and as processes are put in place.

24. Should a DPIA identify that the processing of personal data would result in a high risk to the rights and freedoms of individuals (in the absence of measures

---

to mitigate the risk), the data controller must consult the Commissioner prior to the processing. Failure to do so would be a breach of data protection law.

We trust these comments assist the Committee in its consideration of the Bill. The Commissioner would be happy to provide further information if requested.

Dr Ken Macdonald
Head of ICO Regions
23 April 2018