Justice Committee

Management of Offenders (Scotland) Bill

Supplementary written submission from Police Scotland

Home Detention Curfew – offence of remaining unlawfully at large

1. Purpose

1.1 This briefing paper is to provide a view on proposals to create a new offence of remaining unlawfully at large and some of the practical implications surrounding this.

2. Background

2.1 The tragic killing of Craig McClelland and the recent conviction of his attacker, James Wright, has brought the operational effectiveness of HDCs to the fore.

2.2 The Cabinet Secretary for Justice asked both HM Inspector of Prisons and HM Inspector of Constabulary to review the circumstances of the case and the wider management of Home Detention Curfews.

2.3 The inspectorate conducted their review and a recommendation was made (Recommendation 3) that “Scottish Government in consultation with criminal justice partners and key stakeholders should consider introducing a statutory offence where an offender who breaches his/her home detention curfew licence conditions remains ‘unlawfully at large’ for a designated period of time.”

2.4 In England and Wales, section 12 of the Criminal Justice and Courts Act 2015 amended the Crime (Sentences) Act 1997 and the Criminal Justice Act 2003 to create a new offence of remaining unlawfully at large following a recall to custody where the offender has not without reasonable excuse taken all necessary steps to return to Prison.

2.5 This legislation would primarily appear to have been brought in to address a shortfall in English Legislation where a subject who is unlawfully at large and outside the UK could not be subject to a European Arrest Warrant as no domestic warrant existed. The introduction of the offence allowed police to apply for a domestic warrant that would allow for an EAW.

2.6 The secondary effect of legislation is that the potential for an additional sentence (up to 2 years if taken on indictment or 12 months if tried summarily) may have a deterrent effect for those prisoners released on licence (including home detention curfew) from reoffending or breaching the conditions of licence. There are many studies which support the view that criminals do respond to incentives and that longer sentences do deter crime. [The General Deterrent Effect of Longer Sentences, Donald E Lewis – 1986]
2.7 However, it is important to note that section 40A of the Prisons (Scotland) Act 1989 allows officers in Scotland to approach a Justice to obtain a domestic warrant for being unlawfully at large.

2.8 The new offence does not create any additional powers of arrest or entry. In England and Wales, Police officers have powers of search and entry under the Police and Criminal Evidence Act 1984, section 17 (cb). In Scotland, we just have the power of arrest, but no legislated power of search and entry.

3. Practical Issues

3.1 Between 18 June 2018 and 30 November 2018 there have been a total of 51 persons who have had their HDC Licence revoked and recalled to prison. This causes officers time diverted from other tasks to trace and return the subject to prison. Whilst the extent of any deterrent cannot be measured without proper academic research it is probably safe to say that an offence for remaining unlawfully at large may have deterred some of these from breaching their conditions and becoming unlawfully at large.

3.2 For each of the individuals who went unlawfully at large, if an offence was in place, this would mean an additional submission of an SPR to COPFS for the offence. A policy decision would have to be made by Police Scotland if we returned the subject to prison on the recall and subsequently reported the matter to COPFS for summons, or if we treated the offence as the priority and submitted the SPR as a custody case and presented the individual to court to initiate proceedings prior to their return to prison. In the case of a warrant being issued, the warrant would take precedence.

3.3 The submission of an SPR could also be a trigger to obtain a domestic warrant for the arrest of the person. This falls into a tried and tested process that is easily understood by officers. Existing powers under s40A would appear to have never been invoked and Police Scotland are consulting with COPFS to establish what that procedure and warrant would look like. The s40A procedure may require officers to have belief amounting to certainty that a person is within specific premises to obtain a warrant – This would not necessarily be the case for a new offence.

3.4 The submission of an SPR may have evidential requirements in terms of certified copies of the recall notice and potential witnesses from the Scottish Prison Service and the Electronic monitoring company. These witnesses would be required to attend court to give evidence in the event of a not guilty plea being tendered and a trial date being set.

3.5 Whilst the number of SPR’s submitted for this offence would be a low number over a year, the evidential requirements to prove the case may lead to additional court churn and impact on both COPFS and SCTS capacity to process the case.

3.6 Presently, one potential line of enquiry not open to officers in tracing those who are unlawfully at large is that they cannot apply for Communications data to assist in tracing them as it does not fall into the serious crime threshold. The
introduction of an offence which is capable of being sentenced to a term of 12 months or more imprisonment would potentially open up this line of enquiry to facilitate the prompt return to prison of the individual.

4. Additional Considerations

4.1 The primary shortfall in existing Scottish Legislation is the lack of power of search and entry when tracing an individual who is unlawfully at large. This means that for offenders who remain unlawfully at large Police officers in England and Wales have more powers to trace and return the subject to prison than officers in Scotland.

4.2 The powers of arrest contained within section 40 of the Prisons (Scotland) Act 1989 would benefit from being extended to allow constables powers of search and entry similar to those provided to constables in England and Wales. The extension should only apply to police officers as in Scotland, the existing legislation specifically extends the power of arrest to Prison Officers as well.

4.3 An additional identified shortfall in current legislation is where a subject is clearly breaching the conditions of their licence and is discovered by police, there are no powers given to officers to detain that person until the Prison makes a decision as to whether or not to revoke the licence. Consideration to giving powers to police similar to those under s28 of the Criminal Procedure (Scotland) Act 1995 (Bail Reviews) who assist in closing that gap.

4.4 The addition of an offence of remaining unlawfully at large alone would not address any of the issues surrounding power of entry and search or for cases where a subject is found in breach of the conditions of their licence.

4.5 Clear guidance would be needed in terms of powers of arrest as any new offence would take its powers of arrest from section 1 of the Criminal Justice (Scotland) Act 2016 and officers would need to know whether they were arresting a person using powers conferred in section 1 of the Criminal Justice (Scotland) Act or section 40 of the Prisons (Scotland) Act.

4.6 The average time to complete a normal SPR is assessed at 120 minutes (Audit Scotland Report - 2015) at a cost of £48.34 per SPR. Using the figure of 51 referred to above of recall data, extrapolating gives an additional cost of £5916.81 per annum on police costs simply completing the report. This is a small amount in the grand scheme of things, but does relate to 244 hours (30.5 days a year) spent compiling additional reports.

5. Recommendations

5.1 The introduction of a new offence, whilst not necessary for the obtaining of a domestic warrant may help act as a deterrent to those subject to release on licence from Prison and assist in a subject’s reintegration into the community.

5.2 Existing powers of arrest are strengthened for Constables to allow a power of search and entry similar to officers in England and Wales.
5.3 Additional powers to deal with those found clearly breaching their curfew are given to police officers to allow subjects to be detained pending a review by the Prison Service in terms of revocation.

5.4 The existing power to obtain a warrant be clarified as it is unusually written in that officers may approach a Justice to obtain a warrant to present the individual before a sheriff to determine if the subject should be returned to prison.

5.5 Any legislation for a new offence considers evidential requirements and considers the use of statements of uncontroversial evidence.

6. Conclusion

6.1 Police Scotland supports the introduction of a new offence of remaining unlawfully at large, supported by other legislative changes to assist in the management of those who breach the conditions of their licence.