Justice Committee
Management of Offenders (Scotland) Bill
Written submission from Scottish Women’s Aid

About
Scottish Women’s Aid (“SWA”) is the lead organisation in Scotland working towards the prevention of domestic abuse and plays a vital role in campaigning and lobbying for effective responses to domestic abuse. We are the umbrella organisation for 36 local Women’s Aid organisations across Scotland; they provide practical and emotional support to women, children and young people who experience domestic abuse. The services offered by our members include crisis intervention, advocacy, counselling, outreach and follow-on support and temporary refuge accommodation.

Background
SWA welcomes the opportunity to comment on the important issues raised in this Bill and we have set out our observations below.

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

We note that the aim of Part 1 of the Bill is to provide a unified set of rules on electronic monitoring in two situations: (a) at a disposal, and (b) when an offender serving a custodial sentence is released on license.

The proposals in the Bill pose a dilemma for us.

Extending the use of electronic monitoring (“EM”) as a condition that can routinely be attached to a Community Payback Order (“CPO”) is certainly attractive and presents advantages where perpetrators of domestic abuse are sentenced to a CPO. Section 4 of the Bill also appears to create the opportunity for a court to impose EM as a condition of release on bail.

EM and particularly use of GPS technologies may help to ensure that perpetrators of domestic abuse serving sentences in the community, released on bail, or on Home Detention Curfew, adhere to the terms and restrictions imposed, thereby improving protection of women, children and young people who have experienced domestic abuse.

On the other hand, there are considerable concerns around the use of CPO and release on bail as opposed to custodial sentences or remand pending trial. As we said in our response to the Scottish Government’s 2013 consultation on the use of electronic monitoring “The use of electronic monitoring (“EM”) to facilitate releasing offenders into the community as a pre or post alternative to remand in custody, should operate, in addition to “addressing offenders’ needs”, to both protect the community, specifically the victims of crimes perpetrated by those offenders, and deliver justice for victims.”
The safety and security of individual victims of crime must be the critical considerations when assessing suitability for release on EM, particularly in relation to dangerous and persistent offenders, such as perpetrators of domestic abuse and sexual offences.

In our response to the 2015 Scottish Government consultation paper on short-term sentences, we referred to the findings of a 2015 process evaluation into the impact of the presumption against short sentences, which also discusses CPOs in some detail. That paper highlighted a number of worrying issues and concerning practices around risk assessment and decisions around the imposition of CPOs and the conditions attached to the CPOs. Responses to breaches of CPOs were poor and inconsistent. In addition, the fact that further offences committed by offenders while subject to a CPO do not constitute an automatic breach of the Order is unacceptable, given the high occurrence of repeat offending by domestic abuse perpetrators.

Any extension to the use of CPO and EM should be based on the following:

- Better information provided to the Scottish Prison Service ("SPS") on the nature of the index offence so that they are aware of the potential threat that an offender poses to a specific victim(s) in relation to domestic abuse, sexual offences, HBV and stalking.
- Mandatory, appropriate risk assessment of prisoners and offenders by the SPS before both any release on HDC and the imposition of a CPO by the courts, which also considers the conditions that must be attached to ensure compliance and victim safety. This must include taking into account the views and safety concerns of victims along with intelligence on the offence and offender’s history of offending from CJSW, the police and those supporting victims of crime, including court advocacy organisations. The most commonly used assessment in relation to perpetrators is the Spousal Assault Risk Assessment Guide ("SARA") which has certain limitations; the risk assessment tools used in assessing risk around suitability for referral to the Caledonian Programme, or the DASH risk assessment may also be helpful. We would welcome discussion on, and consideration of, the best method of considering risk in this context and the most appropriate and relevant models that could be applied, including those mentioned above.
- Documenting the views of victims before any release and disposal
- Victims must receive clear information on the terms of the release, sentence and EM, in addition to a clear pathway for alerting the police and CJSW to breaches. (This notification may already be a duty on both SPS and courts to ensure Scotland’s compliance with Article 6 of the EU Directive establishing minimum standards on the rights, support and protection of victims of crime.)
- Robust monitoring of offenders and swift and appropriate responses to breaches. Where an offender poses a risk to a specific victim(s) in relation to domestic abuse, sexual offences, HBV and stalking, police must be informed that the offender has been released on a CPO and the conditions attached.

1 Evaluation of Community Payback Orders, Criminal Justice Social Work Reports and the Presumption Against Short Sentences; 2015; http://www.gov.scot/Publications/2015/03/3800
Further, both the police and social work should be automatically informed of any breach and would become involved at an appropriately early stage. (This notification may have already become a duty on both SPS and courts to ensure Scotland’s compliance with Article 6 of the EU Directive establishing minimum standards on the rights, support and protection of victims of crime.\(^3\))

- CJSW and those SPS personnel making release decisions receive training on the dynamics of domestic abuse, the changes in law under the new Domestic Abuse (Scotland) Act 2018, and the various risk assessment models.

We note that sections 5 and 16 provide for pilots and demonstration projects before any extension to EM is rolled out. The Scottish Government has been in discussion with SWA around creating such pilots and we look forward to working closely with them on this matter before the proposals under this Bill are taken further.

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?

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.

Subject to the caveats above, we would comment as follows:

Section 1 - The fact that the court must explain the purpose of EM to the perpetrator is positive and will ensure that perpetrators have no doubt as to the impact of the conditions and the consequences of breach.

Section 2 - Paragraph 20 of the Bill’s accompanying Explanatory Notes state that “Section 2(2) - provides that an electronic monitoring requirement lasts for as long as an offender is subject to the related disposal. It further provides that a court may vary or revoke an electronic monitoring requirement when the related disposal is being varied or revoked.” Consideration of the risk to the victim(s) must be built into any court process for amending or revoking disposals.

Section 4 - Other criminal disposals for consideration might include a non-harassment order, particularly given the provisions of the new Domestic Abuse (Scotland) Act 2018.

Section 5 - deals with EM requirements in relation to the imposition of conditions on release from prison on license and we would reiterate our comments above in relation to the inclusion of an appropriate risk assessment process.

Section 7 – Women and children experiencing domestic abuse must be made aware that the perpetrator has been granted temporary release (not currently practiced).

Sections 8 and 9 – GPS would useful in determining whether the abuser is adhering to the monitoring conditions. As we have said above, the success or otherwise of additional technologies depends upon the application of appropriate conditions; a robust and swift response to any breach from the person responsible for carrying out the monitoring; robust and quick responses to breached from the police to preserve victim safety, coupled with a similar response from the courts or SPS in dealing with breaches.

GPS does not deliver all aspects of safety, nor monitoring of a perpetrator’s behaviour, that are necessary to achieve a positive, protective outcome for women and children. The following realities must be foregrounded as expanded use of technology is considered:

- GPS does not detect contacts attempted via other means, such as telephone, email, social media, text messages, or “chance” encounters outside monitored areas.
- An extensive piece of research from the USA on the use of GPS Monitoring Technologies and domestic abuse, where the monitoring was used pre-trial, identified that victims may be made anxious by seeing the abuser moving freely about in settings outside the exclusion zone(s), and studies have indicated that they were concerned that abusers would be able to manipulate the technology or subvert its capacities and undermine programme rules and restrictions.
- Measuring recidivism through re-arrest may miss incidents in which offenders perpetrated abuse but the offending behaviour was not reported or detected, a particularly common problem in domestic abuse cases.
- Again, the research paper referred to above noted that victims were given false expectations or understandings of the programme’s actual capabilities and practices, which led to frustration, loss of confidence in the system, disappointment, fear, a false sense of security, and in the worst-case scenario, the victim’s safety being seriously compromised.

Given what women using our local Women’s Aid services tell us about the rates of re-offending by abusers who are released on bail, SWA would support the further exploration with the Scottish Government and criminal justice partners of the possible use of GPS as a condition of bail to monitor special bail conditions. Evaluation of potential pilots should reflect victims’ assessment of their own and their children’s safety. Clearly, use of GPS for monitoring should not be considered an alternative to remanding persistent and dangerous perpetrators.

Section 13- To be a credible deterrent, breach of the EM condition must be an automatic criminal offence.

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4 GPS Monitoring Technologies and Domestic Violence: An Evaluation Study Author: Edna Erez, LL.B., Ph.D., Peter R. Ibarra, Ph.D., William D. Bales, Ph.D., Oren M. Gur, M.S. Document No.: 238910; US Department of Justice; June 2012
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?

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?

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

It is important that those convicted of offences involving domestic abuse, stalking, and sexual offences are restricted in their ability to access vulnerable women and children and that women, children and young people are protected from harm. There must be a balance between the resettlement of offenders and the protection of the public.

We note that the Bill seeks to change the disclosure periods in force before convictions are regarded as spent and therefore do not need to be declared. This is in relation to “basic disclosure” and our concerns would focus on the disclosure of spent convictions in relation to “Higher Level disclosures.” This refers to Standard and Enhanced disclosures and the Protecting Vulnerable Groups (“PVG”) Scheme concerning more sensitive employment or proceedings, and the offences in Schedules 8A and 8B of the Police Act 1997.

There are no direct changes proposed by the Bill in relation to the higher level disclosure system and also the proposals are not intended to impact on access to, or the provision of, information on previous convictions available to Police Scotland, the COPFS and courts.

However, the proposals under the Bill to reduce the time periods before an offence is regarded as spent could be an issue in relation to disclosable offences under Schedule 8B. If, under the Bill, offences become spent after a much shorter period, it would allow perpetrators of offences relevant to domestic abuse, stalking and forced marriage to apply at a much earlier stage to the sheriff to have offences listed under Schedule “protected” and thus, not disclosable. Clarification of this issue is needed.

Offences affected would be breach of the peace; Communication Act 2003 offences; non harassment order under the 1995 Act and breach of a non-harassment order under the 1997 Act; breach of a domestic abuse interdict with a power of arrest granted under the Domestic Abuse (Scotland) Act 2011 and breach of a forced marriage protection order under the 2011 Act.

A final point is that while the majority of offences most often committed in relation to domestic abuse appear to be contained in these lists as disclosable when spent in relation to higher level disclosures, there are certain relevant offences not on the list that should be added for the protection of women, children and young people experiencing domestic abuse. These are the domestic abuse aggravator, created by section one of the Abusive Behaviour and Sexual Offences (Scotland) Act 2016 that...
applies where the offence involves abuse of a partner or ex-partner and offences under section 2 of the same Act related to “Disclosure, or threatening to disclose, an intimate photograph or film.”

Scottish Women’s Aid
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