

Evidence submission to the Scottish Parliament Justice Committee regarding the Management of Offenders (Scotland) Bill

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

Overall, we support the proposal to advance uses of electronic monitoring (EM) as an alternative to custody to seek to reduce Scotland's high prison population rate. There is international evidence from European countries to demonstrate that, as a form of punishment, EM can be less harmful and costly than custody (Andersen and Andersen, 2014; Esdorf and Sandlie, 2014; Graham and Mclvor, 2015, 2016, 2017a; Boone et al., 2016, 2017; Hucklesby et al., 2016; De Vos and Gilbert, 2017). We support the policy intention of the Bill's provisions to enable more consistent, integrated and strategic uses of electronic monitoring in Scotland. It is recognised that the proposals in Part 1 of the Bill broadly correspond to several of the recommendations of the expert working group on electronic monitoring (2016) and the Scottish and international evidence review (Graham and Mclvor, 2015ⁱ) commissioned by that group.

We welcome the provisions within the Bill to allow for more involvement of criminal justice social workers with electronic monitoring and the prospect of more integration of uses of EM with supervision and access to other services, interventions or supports – compared to current stand-alone uses solely involving a private monitoring company. In European countries such as the Netherlands, Sweden, Norway and Denmark, electronic monitoring is led by the probation service (public service), with an emphasis on the goal of reintegration, and there are high levels of compliance with EM and order completion rates observed in these countries (see Graham and Mclvor, 2015, 2017a; Boone et al., 2016, 2017; Kystad Øster and Franco Caiado, 2018). Our research indicates that there is moderate support among Scottish criminal justice professionals for more integrated uses of EM with supervision and support, especially for the purposes of supporting rehabilitation, desistance and reintegration processes ([Mclvor and Graham, 2016ⁱⁱ](#)). More detailed guidance about integration of EM within community justice, particularly regarding the involvement of criminal justice social work, would be welcome.

We agree with Mike Nellis (2018: 1) that electronic monitoring should not be promoted or developed strategically in isolation from wider strategies to the use of imprisonment and that 'EM will only be used wisely and well if other proven penal strategies – sentencing strategies and supervision practices in particular – are coherently devised, adequately resourced and effectively implemented.' The policy intentions of this Bill to promote increased uses of EM in the community to try to reduce Scotland's high prison population rate are constructive in principle; the implications in practice must be understood in context as having the capacity to influence and be influenced by other factors.

2. The Scottish Government wishes for 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 is expected that Part 1 of this Bill, if passed, will enable electronic monitoring to play a greater role within the Scottish criminal justice system. The extent of its expansion will remain contingent on uptake and implementation by decision-making authorities (judiciary and courts, Scottish Prison Service, Parole Board for Scotland) and criminal justice social workers. Localism and professional views of EM are currently influential on sentencing patterns and differential levels of use of EM across Scotland, meaning that EM is used regularly in some areas and rarely in others and this difference cannot be explained on the grounds of population or court load (Graham and Mclvor, 2017b; see also G4S, 2018 electronic monitoring statistics). In 2017, the rate of restriction of liberty orders imposed by sheriffs in Glasgow (n= 676) was 339% higher than that of their Edinburgh counterparts (n= 199).

As with all penal measures and reforms, there is a need to closely watch the potential for net-widening and up-tariffing, for example, if a consequence of the Bill and subsequent availability of new EM technologies and modalities in future is found to result in electronic monitoring being imposed in cases where it otherwise would not have been imposed. There is a clear ongoing need to collect data to help analyse whether increased uses of electronic monitoring in Scotland can be directly associated with reduced uses of custody, that is, used in its place, or whether both are simply used the same or more. We would welcome the collection and availability of more detailed statistics and other forms of research on the uses of EM in courts, community justice, prisons and parole, as well as on rates of breach, revocation and recall of electronically monitored orders and licences. There is an enduring need to observe the principle of proportionality and adhere to European ethical standards (Nellis, 2013, 2015) in future uses of EM in Scotland, as punitive and disproportionate uses of EM in some other jurisdictions have proven counter-productive (see Graham and McIvor, 2015).

3. Do you have any views on any specific aspects of Part 1?

Using EM within Community Payback Orders (CPO): We support the proposed introduction of the option of a restricted movement requirement within the community payback order, in addition to the nine existing options of requirements. It engenders the prospect of uses of EM becoming more integrated with supervision and the goals of supervision, where those requirements are co-imposed. This should also reduce instances where the judiciary concurrently impose both a restriction of liberty order (RLO) (stand-alone EM) and a CPO. Yet, further consideration of the intensity and severity of uses of electronic monitoring within community sentencing is warranted (see De Vos and Gilbert, 2017). In other European countries, electronic monitoring as a court order (community sentence) is typically imposed for an average of approximately 5 months (Kylstad Øster and Franco Caiado, 2018). Currently in Scotland, a restriction of liberty order can be imposed for up to a maximum of 12 months. In 2017, the average length of an RLO was 3-4 months (G4S, 2018). A community payback order can be imposed for up to a maximum of 36 months. In 2016-2017, the average length of a supervision requirement, for example, within a CPO was 15.5 months (Scottish Government, 2018). The potential that some individuals may be subject to EM for years by virtue of the length of their CPO would represent a significant increase in the duration of EM compared to current uses (months) and might conceivably be experienced as punitive and constituting a higher intensity of punishment. We recommend consideration be given to setting a maximum time limit on the use of restricted movement requirement within a CPO, prohibiting it from being imposed for more than a maximum of, for example, 12 months, on the grounds of proportionality. Alternatively, an obligation may be created that, where a restricted movement requirement is imposed, a CPO review hearing must occur within a set period of time during the order to review this requirement and assess whether the EM regime and conditions can be altered (e.g., the restriction of liberty in the regime is lessened as a way of seeking to motivate and reward compliance, or alterations if needed for developments such as gaining employment) or removed from the order in recognition of compliance (see McIvor and Graham, 2016ⁱⁱⁱ) or in response to identified adverse effects on people and changing circumstances (e.g., changes in health and wellbeing; family and capacity to engage in parental responsibilities).

GPS technology: We support the provision in the Bill to allow the introduction of GPS electronic monitoring technology in Scotland. We agree with the Policy Memorandum for the Bill in its statement of intention that GPS should not replace existing radio frequency (RF) tagging. Our research indicates that there is moderate support among Scottish criminal justice practitioners and decision-makers for the introduction of GPS monitoring technology, particularly where this is used for the purposes of reducing risk of re-offending and promoting victim safety, alongside current uses of RF EM (McIvor and Graham, 2016). GPS is currently used alongside RF electronic monitoring in European countries such as Austria, Belgium, Finland, France, Ireland, Norway, Portugal and Switzerland.

GPS electronic monitoring involves the generation of large amounts of data, and it is imperative that, if introduced in Scotland, access to and uses of this information will strictly adhere to privacy principles

and data protection laws. Regardless of the EM technology, modality, and model or choice of service provision, the Scottish Government should continue to own EM data and be responsible for decisions authorising access to it. If GPS electronic monitoring is to be introduced, more detailed parameters will be needed about the use of 'exclusion zone' restrictions, as these should be tailored and *proportionate*, balancing consideration of risks with due regard for human rights and civil liberties. Reports of GPS EM potentially being used to exclude some monitored people from 'entire cities' are concerning (e.g., in the Scotsman, Green, 2018), as we would expect there to be exceptionally compelling reasons to justify authorities imposing exclusion and control of this magnitude, alongside efforts to reduce displacement of the issues the EM sanction seeks to reduce.

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?

We support the move to reduce the unnecessary disclosure of convictions and agree that the proposed reforms which include reducing periods of disclosure for many disposals and extending legal protections for people with convictions is a positive move in the right direction which has potential to encourage a more appropriate balance between public protection and the rights of a person with convictions to move on with their life. We also question whether the proposed reforms go far enough for reasons we elaborate below.

While employment has been generally associated with desistance (for a review see Weaver, 2015^{iv}), it is also true that there are many and varied obstacles to people with convictions accessing and sustaining employment, among which is the stigma of a criminal record and associated vetting and disclosure practices. Evidence indicates that anticipated stigma and the repeated encountering of obstacles to obtaining employment can increase risk of reoffending and undermine desistance (Farrall, 2002; LeBel, 2012; Winnick and Bodkin, 2008). The challenges faced by people with convictions in attempting to find work have also been highlighted in studies on the attitudes towards employing people with convictions, as well as from interviews with people on parole (Cherney and Fitzgerald 2016; Graffam, Schinkfield and Hardcastle 2008; Lageson et al., 2015; Uggen, Manza and Behrens, 2004). Underpinning much of the uncertainty around the recruitment of people with convictions is the lack of clarity as to when past convictions come to be of little or no value in the prediction of criminality, when taking into account information that is self-disclosed or revealed through formal mechanisms of disclosure. It is this uncertainty that 'Time to Redemption' studies seek to address. Time to Redemption studies empirically investigate the period of time when people with convictions can statistically be considered as exhibiting the same risk of reconviction as people with no convictions. The key question that these studies seek to answer is this: How many years of non-offending does it take for a person with convictions to resemble a person without convictions in terms of his or her probability of offending? Key to this is establishing that the base-line risk level of a non-convicted person is not zero because they have a certain probability of offending (Soothill and Francis, 2009). Non-convicted persons are those who have never been convicted, which is different to saying that they have never committed an offence. Moreover, the absence of convictions does not preclude the potential to commit a crime and acquire a conviction in the future (e.g. Soothill, Ackerley and Francis, 2004; Soothill and Francis, 2009). Taken together, these studies estimate that in general after an average of 7-10 years without a new arrest or conviction, a person's criminal record essentially loses its predictive value (Blumstein and Nakamura, 2009; Bushway, et al., 2011; Kurlychek et al., 2006; 2007; Soothill and Francis, 2009; for a detailed review of this research, see [Weaver, 2018^v](#)). This raises questions as to why some sentences remain enduringly excluded, unspent, ostensibly for the purposes of public protection even where the evidence would suggest that the individual's risk is statistically no longer predictive of future criminality or put differently, where that risk reflects that of the non-convicted population.

We are of the view that while the proposed reforms are to be welcomed, they are limited in scope. The reforms pertain principally to basic disclosure: they make no direct changes to the higher level disclosure system concerning standard or enhanced disclosures which means that there are no protections for people with unspent convictions, although we acknowledge that a PVG review is underway. Nonetheless, there is concern that an excessively wide and complex disclosure system undermines prospects for reintegration and contradicts the Rehabilitation of Offenders Act 1974 (ROA) and as such, it is difficult to discuss the implications of the proposed reforms in isolation when their effects are shaped or undermined by this complex system of disclosure. This is reflected in our proposals below.

Continental Europe disclose only recent, unspent convictions; the UK and common law countries allow for the disclosure of all convictions, cautions and police records in certain contexts and situations, such as Standard and Enhanced Disclosure in Scotland. The UK system raises a number of questions about justice (Larrauri Pijoan 2014a) such as why, when some old convictions can be spent under the ROA, are they subject to disclosure when applying for a wide range of employment positions? Why are arrests, cautions and soft information disclosable when they are, by definition, judicially unproven? Indeed, a series of judicial challenges have been raised resulting in some of contemporary, albeit minor, modifications to the system (e.g. Baldwin, 2012; Grace, 2014). We would argue that a holistic rather than piecemeal review of the system is required. We also question the rationale for treating individual non-excluded sentences running consecutively as a single term so that it results in these sentences being treated as if they were excluded sentences where they amount to a period of 48 months (s.19). We would contend that this is both unnecessary and unduly punitive, as it does not reflect concerns surrounding public protection, as indicated by the severity of the individual sentences. We propose the review of a) processes for and information contained (including soft information) in higher level disclosures, so as to promote compliance with the ECHR b) further review of legislation and policy that allows that some convictions/sentences will never be spent c) consideration of alternative measures that will allow a more rights informed and nuanced approach to the disclosure of criminal histories (detailed under question 6 below).

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 agree that replacing 'rehabilitation period' with 'disclosure period' is more precise, although we would contend that there is potential for confusion between disclosure periods under the ROA and disclosures under the wider disclosure system not least where there is a need to disclose convictions under higher level disclosure systems beyond the 'disclosure period' set out in the ROA. We also agree that 'protected person' is preferable to 'rehabilitated person' a) because it is possible for someone to be rehabilitated prior to the end of the disclosure period (or otherwise) b) the term 'rehabilitated' or the implication that they are not as implied by 'rehabilitation periods' might convey that they pose a risk of re-offending beyond the period of time that they are likely to be at risk of re-offending c) processes of rehabilitation include a range of interacting factors beyond the mere passage of time, which is not itself, however, insignificant, as Time to Redemption studies show. It might also be worth noting under this discussion of terms that is the preference of the [Scottish Government](#) to avoid the pejorative term 'offender' and to use 'people with convictions'.

The Act and explanatory notes are not particularly easy to follow or interpret for employers, people with convictions and relevant professionals supporting them. The disclosure system is also difficult for these groups to understand and navigate. There are significant inconsistencies in the available information and guidance and as such, clarity would be enhanced if proposed changes to the legislation were accompanied with accessible information and guidance. Part of the complexity, for example, resides in the fact that there are rules in place which determine when one conviction can extend the disclosure period of another and when a succession of consecutive individual sentences

that are not themselves excluded, become excluded when treated as a single term. Our proposals below might enable a more intelligible, clear and coherent system.

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

We question the need to have any excluded sentences or unspent convictions (which is a significant departure from European practices) and, as part of that, whether the different levels of disclosure are then necessary. In what follows, we outline some alternative measures for consideration.

Reviewing Spent Periods and the Disclosure of Enduringly Unspent Convictions: That some convictions will never become spent contradicts the evidence of Time to Redemption studies. This position is increasingly problematic and, in view of Article 8 of the ECHR, unduly punitive. Enduringly unspent convictions (notwithstanding s.52A(2) of the Protection of Vulnerable Groups (Scotland) Act 2007) imply that the individual is never rehabilitated (or protected), misleadingly conveying that they pose a permanent risk of re-offending. If after 7-10 years, the person's risk of re-offending reflects that of a never convicted person, it follows that disclosure of a conviction that pre-dates this time period likely results in no increased public protection, which raises important questions about the purposes of such disclosure practices. Moreover, barriers to work engendered by attitudes towards people with convictions and disclosure of criminal histories may destabilise efforts to desist and knife off opportunities to sustain desistance, thus ironically undermining public protection. We suggest that reducing the rehabilitation/disclosure periods defined in the 1974 Act is unlikely to increase access to employment and support reintegration, if even spent convictions are disclosed in all positions requiring a standard or enhanced disclosure, given the impacts that disclosures have on employer decision-making. We concur with Larrauri Pijoan (2014) who proposes that spent convictions should be automatically withheld from disclosure in accordance with the 1974 Act, effectively curtailing existing disclosure practices in the U.K., and signifying 'legal rehabilitation' (Stacey, 2014: 17). In principle, the record is then sealed and the person presumed rehabilitated or protected for the purposes of employment. Larrauri Pijoan (2014) further suggests that all convictions should be subject to the possibility of being erased or spent.

Certificates of Rehabilitation or Judicial Rehabilitation, as it is termed in France, are applied for by the individual and issued by the state or judicial authorities in light of evidence that a person has made progress towards desistance (for a more detailed discussion, see Herzog-Evans, 2011; Stacey, 2014). As Stacey (2014) notes, the investigations and considerations informing the issuance of such a certificate and the criteria for granting Judicial Rehabilitation in France are demanding, thorough and based on merit. The certificate would effectively act as a 'letter of recommendation' (Lucken and Ponte, 2008) that can be used by employers as a mechanism for evidencing rehabilitation.

Court Imposed Occupational Disqualification: Larrauri Pijoan (2014a) suggests that disqualification of a person upon conviction from certain occupations could be incorporated into sentencing. This reflects distinct European practices, where rehabilitation and privacy are both viewed as a right, one that places due limits on punishment and its effects. The underpinning principle is that the process of employment exclusion has to be authorised in law, with regard to specific employments, and only in cases where there is a specific occupational disqualification order imposed by a court and not a generic criminal record.

The Production of Guidance: Building on Time to Redemption studies, the guidelines issued by the USA's Equal Employment Opportunity Commission (EEOC 2012) and rulings from the ECtHR^{vi}, practices that best facilitate employers' appropriate decision-making are based on individualised assessments of criminal records consider factors such as the nature of the crime, the time elapsed since it was committed, the disposal of the case, and the nature of the job and therefore relevance of the data to the employment. EEOC guidelines were designed to clarify standards and provide 'best practice' on how employers may check criminal backgrounds without violating prohibitions against employment discrimination under Title VII of the 1964 Civil Rights Act (EEOC 2012). There is some evidence that the

move to more formal, informed and regulated checks has led employers to employ more people with criminal records than they might have previously (Hartstein, Fliegel, Mora and Zuba, 2015; Lageson, et al., 2015).

ⁱ Graham, H., & Mclvor, G. (2015) *Scottish and International Review of the Uses of Electronic Monitoring* report, Stirling: University of Stirling, Scottish Centre for Crime and Justice Research (SCCJR). Available online [here](#).

ⁱⁱ Mclvor, G., & Graham, H. (2016) *Electronic Monitoring in Scotland* research report, Stirling: University of Stirling, SCCJR, and Criminal Justice Programme of the European Commission. Available online [here](#).

ⁱⁱⁱ Mclvor, G., & Graham, H. (2016) *Electronic Monitoring in Scotland* research report, Stirling: University of Stirling, SCCJR, and Criminal Justice Programme of the European Commission. Available online [here](#).

^{iv} Weaver, B. (2015) *Offending and Desistance: The Importance of Social Relations*, London: Routledge.

^v Weaver, B. (2018) *Time for Policy Redemption? A Review of the Evidence on Disclosure of Criminal Records*, Glasgow: University of Strathclyde, Scottish Centre for Crime and Justice Research. Available online [here](#).

^{vi} European Court of Human Rights in *MM v United Kingdom*, cited in Larrauri Pijoan (2014a).