

POLICY NOTE

THE MANAGEMENT OF OFFENDERS (SCOTLAND) ACT 2019 (COMMENCEMENT NO. 6 AND SAVING PROVISIONS) REGULATIONS 2022

SSI 2022/94 (C. 7)

The above instrument was made in exercise of the powers conferred by section 63(2) of the Management of Offenders (Scotland) Act 2019 (“the 2019 Act”).

Summary

The above Regulations commence further provisions of the 2019 Act. These allow for

- a continuation of existing forms of electronic monitoring but under a new legislative regime
- three new policy uses of electronic monitoring: electronic monitoring of bail, electronic monitoring of a Community Payback Order (CPO) at first disposal and electronic monitoring of temporary release licence.

These uses are already contained in the list of disposals and uses of licences set out sections 3 and 7 of the 2019 Act but the Regulations will allow them to be used from the appointed day.

These Regulations contain savings provisions that allow for the transition of arrangements from the appointed day, preserving the law for orders given prior to the appointed day as described below. The changes are being brought in, in support of a policy of widening use of electronic monitoring providing an opportunity for more community based alternatives within the justice system.

Policy Objective

The policy objective is to bring further provisions of Part 1 and the remainder of schedule 1 of the 2019 Act into force. Part 1 of the 2019 Act introduces a new regime for the electronic monitoring (“EM”) of court disposals and licence conditions.

There are various sections of the 2019 Act that are partially or fully coming into force on 17 May 2022 (“the appointed day”). This includes sections 1 and 5 which provide new powers for the courts and Scottish Ministers to require a person on whom certain court orders have been made or who is to be released on licence, to submit to electronic monitoring. The purpose of this monitoring is to monitor that person’s compliance with any orders or requirements a court makes, or conditions the Scottish Ministers impose, in relation to the person who is subject of the order or requirement’s whereabouts.

Electronic monitoring requirements with court orders

Section 1 of the 2019 Act allows the court to require a person to submit to electronic monitoring when making a disposal of a type listed in section 3 of the 2019 Act.

At this time, section 1 of the 2019 Act is only being commenced in relation to restriction of liberty orders (“RLO”); restricted movement requirements (“RMR”) imposed or varied, in relation to a drug treatment and testing orders (“DTTO”) or imposed or varied in relation to

community payback orders (“CPO”); and the imposition of bail conditions under section 24(1) of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) or the variation of such conditions under various sections of the 1995 Act. The other disposals at section 3 covering sexual offences orders and supervised release orders are subject to ongoing policy discussion about the arrangements needed to operationalise them and will be commenced at a later date.

The saving provisions save the law as it applied before the appointed day on electronic monitoring in relation to RLOs, DTTOs and CPOs imposed before the appointed day until those orders expire. If these existing orders are varied by the court before their expiry, any requirement for electronic monitoring will remain subject to the law as it applied before the appointed day. Such orders imposed on or after the appointed day will be subject to the new law on electronic monitoring contained in the 2019 Act. The purpose of this approach is to enable existing sentences to run their course under the existing law without the need for a complex process of converting existing EM requirements to requirements imposed under the new law.

There are no saving provisions required for the commencement of EM as part of bail. All new bail cases and variations to existing conditions from the appointed day will be under the new law. The approach to commencement allows bail reviews to consider electronic monitoring as part of bail (subject to existing statutory provisions around the suitability of bail). In order to put electronic monitoring in place, the court would need to vary an existing bail requirement (so in practice, for example to add a movement restriction requirement or curfew). It will not be possible to impose electronic monitoring unless such a change were made at the same time.

Electronic monitoring requirements with licence conditions

Section 5 of the 2019 Act allows the Scottish Ministers to require a person to submit to electronic monitoring when imposing conditions in connection with release of a person on licence. The specific licence conditions to which electronic monitoring can be added are curfew conditions when a person is released from custody on home detention curfew, licence conditions imposed on release from custody on parole, and conditions imposed on temporary release of a person from custody.

These Regulations preserve the law as it applies before the appointed day for parole licences imposed prior to the appointed day. Conditions of parole licences imposed on or after the appointed day will be subject to the new law in the 2019 Act. When varying a parole licence imposed before the appointed day it will be possible for a condition subject to the electronic monitoring legislation in force before the appointed day (section 40 of the Criminal Justice (Scotland) Act 2003) to be switched to being subject to electronic monitoring under the 2019 Act. It will also be possible to vary such licences so as to add a condition which can be made subject to electronic monitoring under the 2019 Act.

These Regulations will enable the imposition of electronic monitoring requirements for temporary release licences granted under the Prison Rules after the appointed day. There are no saving provisions required for this use as it is a new policy use.

These changes have no effect in relation to a curfew condition imposed as part of a home detention curfew licence by the Scottish Ministers prior to the appointed day. The electronic monitoring of compliance with curfew condition imposed as part of a home detention curfew

licence is a requirement under the law as it applies before the appointed day. Curfew conditions imposed prior to the appointed day will therefore remain in force and will continue to be subject to the existing law on electronic monitoring. Curfew conditions imposed or varied after the appointed day will be subject to the new law in the 2019 Act. The electronic monitoring of such a condition will therefore be at the discretion of the Scottish Ministers.

Other provisions to be commenced

These regulations also commence the provisions in part 1 of the 2019 Act concerning arrangements to be made by the Scottish Ministers for the electronic monitoring system, the designation of persons to do monitoring and standard obligations to be put on individuals made subject to an electronic monitoring requirement under sections 1 or 5 of the 2019 Act (“a monitored person”). They also commence provision concerning the sufficiency and admissibility of the documentary evidence produced by a device which electronically monitors a monitored person in proceedings concerning a breach by that person of a court order or requirement imposed by the courts, or licence condition imposed by the Scottish Ministers, concerning the monitored person’s whereabouts.

Subject to the saving provisions described above, the regulations also commence the remainder of schedule 1 of the 2019 Act and the amendments it makes to (and in some cases repeal of) legislation concerning the existing law on electronic monitoring.

Consultation

Consultation was undertaken for the Bill work leading to the Management of Offenders (Scotland) Act 2019, including the subsequent consultation for inclusion of EM as part of bail. Wider consultation with regards the individual disposals and licences being commenced has been undertaken, with robust planning and regular partnership working with Justice System partners having been undertaken to understand system readiness for commencement. The Justice Committee undertook a review of bail/remand and made recommendation to consider use of electronic monitoring of bail published on 24 June 2018.

Impact Assessment

Extensive impact assessments were undertaken in the lead up to the introduction of the Bill leading to the Management of Offenders (Scotland) Act 2019; including the various new uses.

The amendments and savings set out in this policy note do not change the underpinning law of bail, and are saving the existing law for disposals and licences imposed prior to the appointed day. Electronic monitoring is already a well-established feature of the justice system in Scotland with existing information sharing governance and practice designed to ensure protected characteristics are taken into account in the service. Those aspects of the service are not changing as a result of these new sections commencing. Notwithstanding that, officials have updated their Data Protection and Impact Assessments and equality impact assessments and those inform the requirements within the national contract for the service provider.

Scottish Government
Justice Directorate

15 March 2022