



29/07/2015

## **Submission to the Law and Order Select Committee on the Electronic Monitoring of Offenders Legislation Bill**

### **Introduction**

1. This submission, focusing on the electronic monitoring of offenders, has been prepared by Ruby King and Lauren Syc from the Wellington Community Justice Project.
2. The purpose of the Electronic Monitoring of Offenders Legislation Bill (the Bill) is intended to widen the scope of electronic monitoring technology in parole and sentencing to include instances of sentences of intensive supervision and release from an imprisonment sentence of two years or fewer. The main motivation for the introduction of this broader application and use of electronic monitoring devices is to deter breach of sentencing/release conditions with the aim of quashing antisocial behaviour in the interests of public and personal safety.<sup>1</sup>
3. This submission intends to analyse the effectiveness of the Bill in achieving its aims of increasing public safety and deterring offenders from breaching conditions. We aim to do this by examining the practical effectiveness of the proposed legislative changes, and discussing some ethical considerations like privacy we believe should be fundamental to any legislative change.
4. The Wellington Community Justice Project (WCJP) ([www.wellingtoncjp.org](http://www.wellingtoncjp.org)) is a student-led organisation at Victoria University of Wellington. The project, formed in 2010, has twin aims: to improve access to justice and legal services in the community; and to provide law students with an opportunity to gain practical experience. It pursues these goals by establishing community-based volunteer projects and working with other organisations that have similar goals.

---

<sup>1</sup> Electronic Monitoring of Offenders Legislation Bill 2015 (18-1) (explanatory note) at 1.

5. The research for this submission was carried out by students Lauren Sye (LLB/BA) and Ruby King (LLB/BA) as part of volunteer work for the project. We would also like to acknowledge the assistance of Professor John Pratt, Professor Mike Nellis and Dr Hannah Graham.
6. Overall we think the Bill proposes some promising provisions which could ultimately have a beneficial impact both on the rehabilitation of offenders and deterrence of conditional breaches while simultaneously improving the outlook for public safety. We do however believe that the Bill's effectiveness will be restricted due to its limited aims of deterrence and public safety, as ethical and practical criminal justice concerns are not included. Therefore we support the Bill to the extent that it extends the scope of a useful sentencing and parole mechanism judicial and correctional bodies can use, but we believe amendments are necessary.

### **A: Practical considerations of electronic monitoring**

7. Electronic monitoring is effective in achieving the two aims outlined in the Bill, deterring offenders from breaching their release conditions and increasing the safety of the public.<sup>2</sup> Research from the United States, suggests that the use of GPS monitoring 'significantly reduces the likelihood of technical violations, re-offending, and absconding for this population of offenders'.<sup>3</sup> Furthermore, studies of the use of GPS monitoring in Scandinavian countries have come back with largely positive results.<sup>4</sup>
8. We believe that GPS surveillance increases the enforceability of sentencing/release conditions. It allows self-surveillance of the offender, as opposed to intensive supervision by a corrections officer. Having GPS monitoring constantly with the offender allows for more consistency and accuracy in determining an offender's patterns of behaviour. This heavily increases the likelihood of being reprimanded for condition breaches, thus drastically decreasing the incentive to do so.
9. Although GPS is highly likely to increase compliance, there will always be exceptions. This is evident in the tragic, recent case of the murder of Blessie Gotingco in Auckland.<sup>5</sup> However we strongly argue that one exceptional case does not detract from the evidence of the practical effectiveness of GPS monitoring. Furthermore, the extension of electronic monitoring specific to this Bill applies to offenders who have been sentenced to imprisonment of two years or less, who

---

<sup>2</sup> Explanatory Note at 1.

<sup>3</sup> K Padgett, Bales W and Blomberg T (2006) "Under Surveillance: An Empirical Test of the Effectiveness and Consequences of Electronic Monitoring" 5 CPP 61 at 70.

<sup>4</sup> Marianne Kylstad Øster and Tore Rokkan "Curfew as a means, not as an end – Electronic Monitoring in Norway (2012) 2 EuroVista 90 at 95.

<sup>5</sup> Patrice Dougan and Jared Savage "Tony Robertson's dark past revealed: man who murdered and raped Blessie Gotingco also child sex offender" *The New Zealand Herald* (online ed. New Zealand 28 July 2015).

will likely have committed less serious offences or have mitigating factors lessening their sentences.

10. Another practical concern that needs to be taken into account is the prison population in New Zealand. New Zealand has a rate of imprisonment that is much higher, per capita, than many other OECD countries with 192 prisoners per 100,000 total population in 2013, compared to 130 in Australia and 148 in England.<sup>6</sup> This is an important factor to consider when changing penal legislation. We fear with such strict surveillance, prison populations may increase, not because further crimes have been committed, but because offenders have breached their sentence/release conditions. While breach of these conditions should be punishable and something to be deterred, re-incarceration may be undesirable, especially as such offenders have not committed further crimes. Instead, we believe other punishments for conditional breach may be considered, these could include community service. Furthermore, due to the aforementioned concerns regarding rise of incarceration rates, emphasis should be placed on the current legislative 'high risk test.'<sup>7</sup> Effective and thoughtful use of this test would avoid unnecessary rises in prison populations; ensuring only offenders who pose a very high risk to the community are recalled to prison.

11. In sum, evidence from other jurisdictions indicates GPS monitoring of offenders appears to achieve the Bill's aims of public safety and ensuring compliance with sentencing/release conditions. It is a practical step and embraces new effective technologies. As we argue throughout the submission however, we believe other practical and ethical concerns should be considered in addition to the Bill's limited aims.

## **B: Ethical considerations**

12. The arguments for the use of electronic monitoring in New Zealand must not be focussed solely on financial and practical matters. There are important ethical considerations that must also be taken into account. As stated by Nellis; "the decision to adopt surveillance technology, to augment or replace human surveillance is never morally neutral, and should never be regarded as merely a technical or financial matter."<sup>8</sup> While the matter of public safety is of utmost importance, civil liberties and human rights of offenders must also be considered.

---

<sup>6</sup> Roy Walmsley *World Prison Population List* (10<sup>th</sup> ed. International Centre for Prison Studies, London, 2013) at 6.

<sup>7</sup> New Zealand Parole Board *Recall* <<http://www.paroleboard.govt.nz/about-us/release-and-recall.html>>

<sup>8</sup> Mike Nellis *Standards and Ethics in Electronic Monitoring* (Council of Europe, June 2015) at 12.

13. In our opinion, the most important of these ethical considerations is the potential for breaches of privacy. Our concern arises as a result of the vague wording of Clause 10 of the Bill.<sup>9</sup> This clause sets out the purposes for which the information obtained through electronic monitoring may be used.<sup>10</sup> We believe that in order for the extension of the use of electronic monitoring to be as ethically sound as possible, the Bill must be more specific and prescriptive in the limitation of situations in which the information gathered could be used and distributed.
14. We are concerned that information regarding the whereabouts and movements of offenders (who under the status quo would not have been subject to electronic surveillance) is now at risk of being distributed to third parties due to inadequate safeguards included in Clause 10. In our view, this would amount to a breach of the offender's privacy. What we therefore propose is that the wording of Clause 10 be re-examined to more definitively specify that the purposes for which the information can be used are exhaustive. For this reason we submit, instead of the phrase “may be”, the words “can only be used” would achieve this aim and completely rule out the possibility that the information could be applied to an alternative cause.<sup>11</sup>
15. This idea is supported in the recommendations to the Council of Europe regarding the ethics of electronic monitoring. It states that “data collected in the course of the use of electronic monitoring shall be subject to specific regulation based on the relevant international standards regarding storage, use and sharing of data”; “particular attention shall be paid to regulating strictly the use and sharing of such data in the framework of criminal investigations and proceedings”, and “a system of effective sanctions shall be put in place in case of careless or intentional misuse or handling of such data”.<sup>12</sup>
16. A further issue regarding the ethics of electronic monitoring is the replacement of valuable human interaction with technology. We can see the positives offered by a period of electronic monitoring as targeted by the Bill, as it causes less strain on the Correctional system, an extremely reliable and reasonably un-invasive method of keeping track of offenders in the interests of their own and public safety and the idea of self-regulating deterrence. What we believe the Bill fails to address is the issues pertaining to a greater reliance on impersonal methods of control, and how that can negatively impact upon the offender and the community.
17. It is reasonable to say that the offenders whom the Bill is targeting are often from lower socio-economic groups and offend because of a lack of satisfaction in their relationship with

---

<sup>9</sup> Electronic Monitoring of Offenders Legislation Bill 2015 (18-1), cl 10.

<sup>10</sup> Electronic Monitoring of Offenders Legislation Bill 2015 (18-1), cl 10.

<sup>11</sup> Electronic Monitoring of Offenders Legislation Bill 2015 (18-1), cl 10.

<sup>12</sup> Nellis *Standards and Ethics in Electronic Monitoring*, above n 7, at 65.

domestic society, welfare and politics. This idea can be extrapolated from the fact that the highest recorded level of crime in both 2013 and 2014 across all regions of New Zealand was in the Counties/Manukau Policing District,<sup>13</sup> which also has the highest percentage per capita of its citizens living in a state of deprivation.<sup>14</sup> This is a key issue here as “low SES [Socio-economic Status] and its correlates, such as lower education, poverty, and poor health, ultimately affect our society as a whole. Society benefits from an increased focus on the foundations of socioeconomic inequalities and efforts to reduce the deep gaps in socioeconomic status currently observed in the United States and abroad.”<sup>15</sup>

18. In order to positively rehabilitate and reintegrate offenders back into society we believe that the laying of a firm foundation of trust, confidence and compassion between the offender and their community is necessary. Rehabilitation is important for offenders generally but particularly for those who have ‘fallen by the wayside’ and need particular attention afforded to them to foster a positive attitude towards their communities.
19. We think electronic monitoring could be construed by an offender who is dissatisfied with their personal-community relationship as a “top down” approach, with anti-social behaviour being met with a uniform reaction of control without a personalised understanding of their situation. We believe that while it has practical and financial advantages, there will be some situations where having a device attached to your body will be more harmful to the offenders due to this lack of personal involvement in their rehabilitation process and contact with those who are concerned in their transition back into society.
20. There could be an issue of ‘labelling’ involved here, where the attachment of a monitoring device could constantly remind an offender of the stigma associated with criminal offending and thus reinforce their self-perception of the worth they can contribute to society. We see the possibility that having a device attached to their body at all times will make the offender more visibly associated with their past offences and may struggle to find legitimate employment for instance, or to be treated differently due to this obvious association with the criminal justice system. This does not lend itself well to aims of reintegration.

## **D: Further suggestions regarding the bill**

---

<sup>13</sup> *A Summary of Recorded and Resolved Offence Statistics* (Police National Headquarters, New Zealand Crime Statistics 2014, April 2015) at 6.

<sup>14</sup> David Mare, Peter Mawson and Jason Timmins *Deprivation in New Zealand : Regional Patterns and Changes* (New Zealand Treasury, Working Paper 01/09, December 2001) at 12

<sup>15</sup> ‘Violence and Socio-economic Status’ (2015) American Psychological Association

21. The stance taken in the Bill sees electronic monitoring used for solely risk management purposes, which may potentially lead to electronic monitoring being used almost solely in terms of its capacity to inform risk management in the intensive supervision of offenders. This aligns with the Department of Corrections' heavy focus on risk management, through the use of a Risk-Need-Responsivity model of offender and assessment rehabilitation.<sup>16</sup> We believe that, while risk management is important, this narrow focus limits the effectiveness of the Bill in regards to wider aims of punishment that are fundamental to New Zealand's criminal justice system.
22. The form of electric monitoring proposed in this Bill is stand-alone electric monitoring with the threat of imprisonment for non-compliance. This means the offender is subject to electric monitoring simply to ensure that they do not breach conditions. This is therefore very much a risk-management based approach. One cannot expect electric monitoring alone to be constructive, especially taking into account the research into the reasons why offenders stop offending.<sup>17</sup>
23. We believe electronic monitoring alone is not enough to reduce recidivism and promote re-integration into the community. Mere prevention of breaching conditions, due to electronic monitoring will not achieve the fundamental changes necessary for long term rehabilitation. The Bill needs to consider scholarship pertaining to the complex factors relating to how and why offenders stop offending, as a dominant focus on risk is not enough to reduce re-offending, nor successfully promote desistance and community reintegration.
24. We therefore suggest, that electric monitoring be paired with other, more intensive forms of community rehabilitation. Examples of these can be seen in other jurisdictions, particularly Scandinavian countries. In Norway, electronic monitoring is "well integrated into the overall offender management programme."<sup>18</sup> It is paired with a heavy focus on 'individually adjusted supervision,' including further measures such as sound knowledge of the offender, tight supervision, mandatory motivational and crime prevention programmes and other such measures, often specific to the offender.<sup>19</sup> Having evaluated the pilot scheme, the Correctional Services Department concluded that such an incorporation of electronic monitoring was positive and effective.<sup>20</sup>

---

<sup>16</sup> Dr Carolina C. Lukkien and Dr Peter W Johnston "An evidence-base for reducing re-offending" 1 (2013) *The New Zealand Corrections Journal* 3 at 7.

<sup>17</sup> Anthea Hucklesby "Understanding Offenders' Compliance: A Case Study of Electronically Monitored Curfew Orders" (2009) 36 *Cardiff J. Law & Soc.* 248 at 264.

<sup>18</sup> Øster and Rokkan, above n 4, at 91.

<sup>19</sup> Øster and Rokkan, above n 4, at 92.

<sup>20</sup> Øster and Rokkan, above n 4, at 92.

25. Electronic monitoring in New Zealand for offenders sentenced to intensive supervision or released from a sentence of 2 years or less should therefore focus less heavily on risk management, and incorporate ideals of reduction of recidivism and overall community re-integration. By pairing electronic monitoring with supplementary measures, such as building relationships of respect and trust and individualised programmes, rehabilitation becomes a more realistic possibility. While risk management is an important consideration, a more broad focus encompassing effective rehabilitation of offenders will ultimately offer a more long-term solution to reducing recidivism in offenders.
26. Overall, we believe that while electronic monitoring of offenders is one effective option in ensuring compliance with release conditions, using electronic monitoring alone is unlikely to achieve the core aim of parole release or intensive supervision, which is to reintegrate offenders into the community as positive contributing citizens. The Bill provides a somewhat superficial solution to full rehabilitation and re-integration of offenders. For a more effective solution, electronic monitoring would need to be incorporated with further, more expansive and inclusive rehabilitation initiatives.

## **E: Conclusion**

27. In conclusion, we support the Bill insofar as it has potential to provide a practical method of ensuring compliance with sentencing/parole conditions. We do however see some issues with both the privacy concerns related to the practical administration of electronic monitoring, and a lack of consideration of wider ethical concerns at stake here such as reintegrating offenders into society.
28. We see a heightened risk of reintroduction to correctional facilities as a result of a more intensive and constant system of GPS tracking which detects breaches accurately and instantaneously. This may have an unforeseen "floodgate" effect on the prison population, causing increased incarceration not for repeat offending but for breach of sentencing/parole conditions. Furthermore we believe focusing solely on practical matters does not allow for a holistic analysis of all pertinent aims of the criminal justice system such as reintegration, rehabilitation and reduction of recidivism.
29. From an ethical standpoint, we see serious issues with the potential for breach of privacy due to a lack of constraints on the use of collected information and the negative impacts that a lack of contact with the system can have on the offender during the process of reintegration. We therefore suggest that more definitive wording be used to reduce the possibility of unlawful

distribution of collected data to reduce the possibility of rights infringement. Further to this we consider the clear inclusion of workable sanctions for breaches of these rights apart from the possibility of being recalled to prison would be an effective method of safeguarding privacy.

30. Rather than being a standalone measure focusing on risk management, we suggest electronic monitoring be more cohesively integrated into a comprehensive system of rehabilitative aims for offenders sentenced to intensive supervision or released from a prison term of 2 years or less.
31. In sum, we would support this Bill with the minor alterations advised.