

# ELECTRONIC MONITORING OF OFFENDERS IN THE ADMINISTRATION OF CRIMINAL JUSTICE

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## I. INTRODUCTION

The commission of criminal offences has conventionally been responded to by the criminal justice system with the imposition of punishment in the form of a term of imprisonment, which may be accompanied by a pecuniary fine.<sup>1</sup> Contemporary criminal justice includes non-custodial<sup>2</sup> sanctions for the commission of less serious offences, such as community service orders, probation, restitution, restraining orders and so forth.<sup>3</sup> Criminal justice systems have in recent decades benefited from the technological developments in the use of electronic devices as a criminal justice measure to monitor the activities of offenders, both pre-trial and post-conviction.<sup>4</sup> Electronic monitoring (hereinafter referred to as EM) of offenders is already used in England and many European countries such as Sweden, the Netherlands, Belgium, France, Germany, Italy, Portugal, Switzerland and Spain.<sup>5</sup>

This method of surveillance, often referred to as ‘electronic tagging’, is a mechanism by which the authorities can monitor the location of an offender without recourse to incarceration.<sup>6</sup> This is particularly useful at the pre-trial stage to ensure that the accused remains within the jurisdiction of the courts and also serves to ensure that the accused avoids the environs of the victim and complainant. At the post-conviction stage the trial court may impose a non-custodial (community) sentence, and the Minister for Justice, Equality and Law Reform may order the early or temporary release of an offender subject to certain conditions including the surveillance of an offender.<sup>7</sup> EM is the technological means of ensuring compliance with ‘restraint of movement’ orders which hitherto was impractical.<sup>8</sup>

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<sup>1</sup> In *Conroy v. A.G.* [1965] I.R. 411 at 441 (S.C.) the Supreme Court *per* Walsh J. distinguished ‘primary punishment *i.e.* a term of imprisonment or pecuniary fine, from ‘secondary punishment’ *i.e.* the withdrawal of a privilege, with primary punishment determining the seriousness of an offence.

<sup>2</sup> See O’Malley, T., *Sentencing Law and Practice* (2<sup>nd</sup> ed., Dublin, 2006), Chapters, 20, 22, 23, 24, 25, 26 and 27.

<sup>3</sup> See O’Malley, T., “Community-Based Sanctions and Social Control” (1993) 11 *Irish Law Times*, 201.

<sup>4</sup> See Payne, B.K. and Gainey, R.R., “The Electronic Monitoring of Offenders Released from Jail or Prison: Safety, Control, and Comparisons to the Incarceration Experience” (2004) 84(4) *The Prison Journal*, 413.

<sup>5</sup> Haverkamp, R., Mayer, M. and Lévy, R., “Electronic Monitoring in Europe” (2004) 12(1) *European Journal of Crime, Criminal Law and Criminal Justice*, 36 at 36 referring to the European workshop entitled ‘Will Electronic Monitoring Have a Future in Europe?’ Friburg, June 13-15, 2002 at which presentations were made by representatives from these countries on the use of electronic monitoring.

<sup>6</sup> See Richardson, F., “Electronic Tagging of Offenders: Trials in England” (1999) 38(2) *The Howard Journal*, 158.

<sup>7</sup> Criminal Justice Act, 2006, s.108; Criminal Justice (Temporary Release of Prisoners) Act 2003, s.1; Criminal Justice Act 1960, s.2.

<sup>8</sup> See Ball, R.A. and Lilly, J.R., “A Theoretical Examination of Home Incarceration” (1986) 50 *Federal Probation*, 17 at 19-20.

## II. ELECTRONIC MONITORING TECHNOLOGY

Monitoring devices using radio signals were first established in the United States in 1919 by the U.S. Army Signal Corps to track aircraft and ships.<sup>9</sup> The use of electronic devices for monitoring individuals was introduced in the 1960's by Dr. Ralph Schwitzgebel, a Harvard University psychologist.<sup>10</sup> Commercially available EM equipment was only made available from the 1980's and the first court order imposing EM was made in 1984 in the U.S. to enforce house arrest.<sup>11</sup>

A device is worn by the offender (usually in the form of an ankle or wrist bracelet) to monitor his location and compliance with a curfew order. A monitoring relay unit placed in the offenders home is linked by phone line to a central monitoring centre, usually a private security firm contracted by the authorities. The EM device is activated once the offender strays beyond the permitted distance from the monitoring relay unit. This device does not necessarily track the offenders' location at any given time (like a homing device) but will indicate if the offender is at the place he should be, when he should be, in accordance with the order issued by a court.<sup>12</sup>

The system for monitoring offenders falls into two categories. The 'passive system' requires offenders to wear devices periodically checked by the monitoring relay unit to ensure they are where they're supposed to be. The offender's identity may be verified either by a password, an electronic device worn by the offender, or biometric identification such as a fingerprint or retinal scan. The passive system is mostly effective for detention purposes. Alternatively, the 'active system' provides continuous information to the authorities as to whether the offender remains within a specified range and alerts the authorities if the offender deviates from the area he is restricted to. Using the active system, the device worn by the offender continuously emits a radio signal and a corresponding device in the offenders home relays this signal to a central monitoring station usually provided by a private security company. Active systems may also be used to restrict the offenders' access to specified individuals, such as victims (and potentially witnesses), who could be provided with similar devices that would detect the offender if he comes within the proscribed range.

## III. SUITABLE OFFENDERS FOR ELECTRONIC MONITORING

There are three stages in the criminal justice process at which EM may be used. At pre-trial stage, EM may be a condition of bail *i.e.* that the suspect will not commit further offences, nor tamper with witnesses and that he will appear at trial.<sup>13</sup> EM may also be used at

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<sup>9</sup> See Russell, K., "Electronic Monitoring Equipment" (1989) 4 *Yearbook of Law Computers and Technology*, 139.

<sup>10</sup> Dr. Ralph Schwitzgebel, Science Committee on Psychological Experimentation, Harvard University, developed the first device to be worn by an individual to monitor their position, with a signal being sent to a missile-tracking unit; see Note, "Anthropotelemetry: Dr. Schwitzgebel's Machine" (1966) 80 *Harvard Law Review*, 403.

<sup>11</sup> See Timko, F., "Electronic Monitoring – How it All Began: Conversations with Love and Goss" (1986) 27 *Journal of Probation and Parole*, 15.

<sup>12</sup> See Home Office, *Crime, Justice and Protecting the Public: The Government's Proposals for Legislation*, Cm. 965 (London, HMSO, 1990), at para.420 stating: "It is not the intention to keep people at home for most of the day. The aim is to enable them to work, to attend training courses or probation centres, to carry out community service or receive treatment for drug abuse. Curfews could be helpful in reducing some forms of crime, thefts of and from cars, pub brawls and other types of disorder. A Curfew order could be used to keep offenders away from particular places, such as shopping centres or pubs, or to keep them at home in the evenings or at weekends."

<sup>13</sup> The use of EM at this stage of the criminal process is not considered punishment but rather surveillance of an offender. The 'passive system' of EM would be used at this stage.

the sentencing stage of the criminal proceedings, as an alternative to imprisonment, by restricting the liberty of the offender to specified locations (a condition of a non-custodial sentence) - EM is used in this context as a mode of punishment. EM may also be used to enhance the possibility for the temporary or early release (phased) of offenders back into the community.

The use of EM has the potential to offer a cost-effective alternative to imprisonment (diversion scheme) for offenders deemed suitable for participation in the scheme *i.e.* who do not pose a real risk of re-offending to the public. The use of EM is typically confined to less serious offences, such as public order offences,<sup>14</sup> in conjunction with ASBOs<sup>15</sup> and the early or temporary release of prisoners. A possible contentious issue regarding the introduction of EM is whether the offender will have to contribute (or indeed pay) for the cost of this option as an alternative to incarceration. Perhaps this could be justified as the offender can remain in the community, continue his employment, retain family ties *etc.* – but would this extend to all community-based sanctions where the offender is required to contribute to these ‘correctional costs’? This would raise contentious issues such as equality and social justice (or perhaps injustice) for offenders who cannot afford to pay because of low incomes, unemployment, family maintenance responsibilities *etc.*

In consideration of the nature and function of EM the following criteria would be essential for determining the suitability of an offender for participation in the scheme: the offender should have a fixed abode; a telephone line is available or can be installed; the offender consents to participation in the curfew scheme and to comply with the conditions of the order imposed by the court; adults and family sharing the domicile of the offender must consent; no pattern of violence by the offender; no recorded of sexual offences; the Probation Service should set up a diary (as part of the court order) with the offender to account for time the offender needs for occupations outside the home. Consequently, violent offenders, serious sex offenders, and offenders convicted for offences involving domestic violence or child protection issues should be excluded from the scheme.

#### IV. ADVANTAGES OF ELECTRONIC MONITORING

The principal argument in favour of the introduction of EM as an alternative to imprisonment (diversion programme) is the potential to alleviate prison overcrowding<sup>16</sup> and the administrative costs of imprisonment relative to community-based sanctions. In 2005 the average cost for each prisoner in custody was €90,900, based on the average daily number of prisoners in for that year.<sup>17</sup> Furthermore, the expenditure for community-based sanctions is substantially less than that for custodial sentences.<sup>18</sup> The use of EM also serves to improve the rehabilitation and reintegration of offenders back into the community and to engage in employment, maintain contact with their families, participate in rehabilitation schemes, and so

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<sup>14</sup> Criminal Justice Act 2006, Schedule 3.

<sup>15</sup> See Criminal Justice act 2006, Part 11.

<sup>16</sup> In 2005 there was a total of 2,637 in custody under sentence in Irish Prisons: see Irish Prison Service, *Annual Report* (2005), p.83.

<sup>17</sup> See Irish Prison Service, *Annual Report* (2005), p.68.

<sup>18</sup> See Comptroller and Auditor General, *Report on Value for Money Examination: The Probation and Welfare Service* (Department of Justice, Equality and Law Reform, 2004) p.9 stating: “The suitability of a community-based sanction in the case of an individual offender is a matter for the relevant judge. However, because community-based sanctions are significantly less costly to implement than custodial sentences, the availability of a community-based sanction at the point of sentencing provides a more economic option in suitable cases. For example, based on 2001 spending, it is estimated that implementing community service orders costs about one-third of the cost of implementing the custodial sentences that might otherwise be imposed.”

forth.<sup>19</sup> It will also provide stringent supervision of offenders in addition to that provided by the Probation and Welfare service.

Being subject to refinement and wearing the device may have its own psychological pressures but this will not have the same negative psychological effects associated with imprisonment. Arguably there is less stigmatization (labelling) of an offender subject to an EM order as opposed to a term of imprisonment. Furthermore, offenders deemed suitable for participation, especially first time and young offenders, would be spared the ‘victimisation’ of the prison experience.

Social learning theory is relevant to the success of EM schemes in that participation in the scheme is used to disrupt contacts with individuals with known ‘criminal values’ and ‘criminal skills’ with the expectation that re-offending might decline.<sup>20</sup> This prospect would be augmented if the offender could be directed to ‘pro-social’ peer groups or ‘alternative values or means of gratification’ such as participation in social activities through the rehabilitation process.

EM also offers desirable benefits for certain categories of offenders, where incarceration is deemed inappropriate in the circumstances, namely, pregnant female offenders, disabled offenders, terminally ill offenders, and the elderly.

## V. NEGATIVE ASPECTS OF ELECTRONIC MONITORING

A principal concern with the use of EM is the potential for increased conviction rates and offenders receiving criminal records. Non-custodial sentences such as probation or suspended sentences may have been imposed previously for certain offenders but EM is used at the post-conviction stage of the criminal proceedings.<sup>21</sup> The consequences of this may potentially have a ‘net-widening’ effect in that an increased number of offenders may be convicted and receive a criminal record in order that the court may order EM participation as an alternative to incarceration.<sup>22</sup>

Undoubtedly, some offenders may escape incarceration through participation in EM scheme, and may therefore be given the opportunity to re-offend before the authorities can intervene. This may lead to public perceptions that such offenders are being dealt with too leniently. Furthermore, if offenders breach the court order without being returned to court, because of the failure of private security companies to follow up on violations, this will undermine the rationale for the introduction of the scheme.

Participation on EM programmes may have a negative impact on an offender compelled to remain in a situation that ‘reinforces criminal values or skills’ with a ‘prison-like’ culture. Indeed, this reintegration of an offender with other criminals would gradually diminish the prospects of post-EM gains. While the potential for rehabilitation of offenders placed on EM scheme is to be welcomed, what must also be considered is that certain family home situations may in fact be ‘a haven for further criminal activity’. With the Probation and

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<sup>19</sup> Lilly, J.R., Ball, R.A., Curry, G.D. and McMullen, J., “Electronic Monitoring of the Drunk Driver: A Seven-Year Study of the Home Confinement Alternative” (1993) 39(4) *Crime and Delinquency*, 462 at 479 write: “...the restriction to home and job with only a few hours each week for necessary functions, such as shopping and other errands, forces clients to plan very carefully, and...this may impose some order to a previously disordered life.”

<sup>20</sup> See Home Office, *Punishment, Custody and the Community*, Cmnd. 424 (London, HMSO, 1998), at para.320 stating: “By itself, electronic monitoring could not prevent reoffending, though it might limit opportunities to commit offences to a degree that a court would consider justified diversion from custody.” See Gainey, R.R. and Payne, B.K., “The Relationships Between Time in Jail, Time on Electronic Monitoring, and Recidivism: An Event History Analysis of a Jail Based Program (2000) 17(4) *Criminal Justice Quarterly*, 733.

<sup>21</sup> Criminal Justice Act 2006, s.101(1).

<sup>22</sup> See Cadigan, T.P., “Electronic Monitoring in Federal Pretrial Release” (1991) 55 *Federal Probation*, 26 at 27.

Welfare Service, there is human contact with the offender and the criminal justice system. The use of EM *per se* may not adequately address the issues that initially gave rise to the offenders criminal transgressions. Consequently, strategies to assist the offenders rehabilitation process may not adequately devised by the relevant authorities.

The use of EM technology still requires administrative considerations in the form of personal involvement with the offender by a probation and welfare officer. This is to ensure that the offender is complying with the conditions of the order. While EM equipment automates the monitoring process, personal involvement is still required by probation and welfare officers and the security company contracted by the authorities to provide EM surveillance of offenders.

The use of EM as a criminal justice measure is only brought into play once an individual has committed a criminal offence. The question to be asked, therefore, is given the nature of EM does participation in EM schemes constitute adequate punishment? Does participation in EM constitute a ‘soft response to crime’, albeit less serious offences? Is it an inadequate response to crime? EM is in effect used as a ‘correctional measure’ *i.e.* to facilitate restriction of movement and the provision of surveillance in the administration of the criminal justice system.

Will participation in EM ultimately reduce the prison population and the costs involved in the administration of offenders in custody? If EM orders are regularly breached this may lead to an increase in the imprisonment rates due to the incarceration of offenders for the failure to comply with the ‘restriction of movement’ order imposed by the court. However, this is the responsibility of the offender to comply with the court order, as the offender has been given the opportunity to participate in the EM scheme as an alternative to incarceration.

## **VI. ELECTRONIC MONITORING IN THE IRISH CRIMINAL JUSTICE SYSTEM**

The system of EM proposed for the Irish jurisdiction<sup>23</sup> provides that it would be used mostly in the case of public order offences and for first time offenders.<sup>24</sup> Provision has been made for the introduction of EM to the Irish criminal justice system<sup>25</sup> and also for the outsourcing of arrangements for the provision of equipment to ensure compliance with a ‘restriction of movement order’.<sup>26</sup>

The constitutional rights of the individual must also be considered with regard to the imposition of an EM order on an offender. While it may be argued that EM is an inadequate response to crime, does this form of State intrusion<sup>27</sup> infringe the right to privacy (Article 40.3.1°), personal liberty (Article 40.4.1°), and bodily integrity (Article 40.3.2°)? The type of EM proposed for this jurisdiction is non-invasive in that an offender will ‘have an electronic

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<sup>23</sup> See the remarks of the Minister for Justice, Equality and Law Reform, 14 May 2004 (57th Annual Conference of the POA).

<sup>24</sup> See the remarks of the minister for Justice, Equality and Law Reform, 28 March 2006: “I am also introducing provisions for new ‘restriction on movement orders’. In some circumstances, these orders may entail electronic tagging of offenders. These proposals will give the courts significant new and additional means of dealing with offenders, especially those convicted of public order offences and more minor assault type cases.” See also Criminal Justice Act 2006, Schedule 3.

<sup>25</sup> Criminal Justice Act 2006, s.102.

<sup>26</sup> Criminal Justice Act 2006, s.112.

<sup>27</sup> Fay, S.J., “The Rise and Fall of Tagging as a Criminal Justice Measure in Britain” (1993) 21 *International Journal of the Sociology of Law*, 301 at 314 writes: “Apart from the obvious ethical problems stemming from the denial of privacy and autonomy inherent in such applications, one is reminded both of Foucault’s vision of a ‘carceral archipelago’ in which a chain of institutions provides surveillance and discipline throughout the social body...”

monitoring device *attached* to his or her person' (emphasis added).<sup>28</sup> Invasive EM devices, *i.e.* surgically placed under the skin, would certainly raise constitutional issues principally the personal right to bodily integrity of the offender.

Relevant provisions of the ECHR<sup>29</sup> may also be invoked in due course (especially if invasive EM devices are proposed) concerning EM as a measure in the criminal justice process. The most likely provisions of the ECHR applicable to the surveillance of offenders through EM are individual liberty (Article 5), the right to private and family life (Article 8), and the right of freedom of peaceful assembly and association (Article 11).

Who would have responsibility for monitoring offenders placed on this scheme? Responsibility for the surveillance of offenders through EM in England and Wales was transferred to the National Probation Directorate in January 2003. EM was introduced in England and Wales in 1999 – Home Detention Curfew (HDC) – which became largest scheme in world. Private security companies (Securicor Justice Services Ltd. and Premier Monitoring Services Ltd.) have been contracted to provide EM surveillance for England and Wales. These companies install the equipment in the offenders' home and provide the electronic 'tag' usually worn on the ankle of the offender. If the offender attempts to remove this tag a signal is sent to the central monitoring centre (service provider) usually a private security company.<sup>30</sup> In Ireland, the Probation and Welfare Service may not have the expertise and resources to supervise offenders on EM schemes. The alternative is to contract out the monitoring of offenders to private security firms, which may prove to be costly.

This use of private security firms to provide and operate EM systems may raise some contentious issues in 'the role of the private sector in the criminal justice system' (prison management) such as accountability, adequate training and the quality of service provided, especially if breaches of curfew orders are not properly followed up.

## VII. CONCLUSION

The experiences of other jurisdictions of systems for EM should be examined for their suitability in the Irish criminal justice system before the introduction of an adequate system of EM. The provision of proper EM equipment is fundamental to the successful operation of this scheme. The Department of Justice, Equality and Law Reform should first examine the most appropriate and sufficient method of EM provided by a reputable security company before the introduction of EM in this jurisdiction.<sup>31</sup>

The principal arguments in favour of EM of offenders as a criminal justice measure are that it would reduce prison overcrowding and would reduce the administration costs of offenders in custody. However, against this, is the contention that if prisons were spacious and less expensive, would EM be considered as an alternative criminal justice measure (diversion programme) for appropriate offenders?

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<sup>28</sup> Criminal Justice Act 2006, s.102(b); see Ball, R.A., "Legal Issues in Electronic Tagging of Offenders in the Home: Examples from the United States" (1989) 4 *Yearbook of Law, Computers and Technology*, 143 at 155-156.

<sup>29</sup> Incorporated into Irish domestic law by virtue of the European Convention on Human Rights Act 2003; see the remarks by Kearns J. in *Dublin City Council v. Fennell* [2005] IESC 33 (12 May 2006) on the incorporation of the Convention directly into domestic law.

<sup>30</sup> The EM device worn by the offender may only be removed by breaking its strap thus breaking the fibre-optic circuitry which immediately registers as an unauthorised tamper necessitating intervention by the authorities.

<sup>31</sup> Haverkamp, R., Mayer, M. and Lévy, R., "Electronic Monitoring in Europe" (2004) 12(1) *European Journal of Crime, Criminal Law and Criminal Justice*, 36 at 44 write: "...the criminal justice system should design well worked out programmes on electronic monitoring before approaching equipment monitors. In the same way, it would be essential to expect technology-related problems in order to counter them wisely."

While modern EM ‘tags’ are relatively small (non-invasive ankle or wrist bracelets), electronic surveillance nevertheless raises concerns of over-regulation and the possibility of the infringement of constitutional and human rights, especially if invasive methods of EM are ultimately proposed. These considerations are fundamental to policy-making and the adoption of EM in Ireland so as to ensure the effective, productive and ethical use of this criminal justice measure in this jurisdiction. Informed consent by the offender is essential as indeed are procedures for dealing with any illegal or unethical practices that may arise.

The use of EM for offenders via curfew orders requires the offender to remain at home at specified times, typically outside of daytime hours. This is to permit young and adult offenders to attend school, probation and rehabilitation centres or to engage in employment. To this end, the Probation and Welfare Service will still have a part to play in that they will monitor the offenders participation in these programmes and activities during the day.

In the final analysis, provision for the introduction of EM by the Criminal Justice Act 2006 is to be welcomed.<sup>32</sup> It provides the opportunity for the diversion and rehabilitation of less serious offenders from the mainstream criminal justice system. Nevertheless, responsibility rests with offenders deemed suitable for participation on the EM programme to comply with the ‘restriction of movement order’ imposed by the court and avail of the opportunity to accept responsibility and divert from a criminal lifestyle.

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<sup>32</sup> At the time of writing, the relevant provisions of the Criminal Justice Act 2006 for the introduction of EM in this jurisdiction were not in force; see Criminal Justice Act 2006 (Commencement) Order 2006, S.I. No. 390 of 2006.