

# STANDARDS AND ETHICS IN ELECTRONIC MONITORING

Handbook for professionals responsible  
for the establishment and the use of  
Electronic Monitoring



**Mike Nellis**

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

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**Mike Nellis**

# List of Abbreviations

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- ▶ **CEP** Confederation of European Probation
- ▶ **CM/Rec** Recommendation of the Committee of Ministers
- ▶ **EM** Electronic Monitoring
- ▶ **GPS** Global Positioning System
- ▶ **ISS** Intensive supervision and surveillance
- ▶ **RAM** Remote alcohol monitoring
- ▶ **RF EM** Radio Frequency Electronic monitoring

# Introduction

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**a.** Across Europe, prison overcrowding, prison population growth and the pursuit of effective systems of community supervision continue to pose major challenges to criminal justice systems, in terms of both efficient institutional management and attentiveness to the human rights of suspects and offenders. These are relatively longstanding concerns, but increasingly austere financial regimes in many countries, have further intensified the search for cost-effective solutions. The Concept Paper prepared for the multilateral meeting reflected these developments, but also underlined the vital importance of normative considerations in matters of penal policy:

The Council of Europe member states are developing policies for using imprisonment as the last resort and reducing prison overcrowding and recidivism. Probation services are being established in order to implement community sanctions and measures and to supervise and assist offenders in the community and support their social reintegration. Electronic monitoring (EM) has also been increasingly used in recent years. There are countries which have already developed their own legislation and policy on the use of electronic monitoring and in some others it has either been recently introduced or is planned. Clear guidance is needed regarding its use and limitations and the role that probation services need to play in this regard.

The Council of Europe has developed standards to assist member states to introduce in their legislation, policy and practice a proportionate and effective use of different forms of electronic monitoring in the framework of the criminal justice process, in full respect of the rights of the persons concerned. In addition to guidance provided in the Council of Europe Probation Rules (Recommendation of the Committee of Ministers CM/Rec(2010)1), a set of basic principles related to ethical and professional standards for regulating the use of electronic monitoring in the criminal justice process is defined in the newly adopted Recommendation of the Committee of Ministers of the Council of Europe CM/Rec(2014)4 on electronic monitoring.

**b.** CM/Rec (2014)4 on EM was issued in February 2014. The purpose of the multilateral meeting, held in Strasbourg on 27-28 November 2014, was to signal the importance of the EM Recommendation, to make it more widely known, to deepen understanding of it, and to gain feedback on why and how it was, or was not, being used. Delegates were told at the start of the meeting that the Recommendation constituted only minimum standards, that inevitably

there had been compromises in its making, and that the Council of Europe understood that individual countries could go further, and perhaps already had, to achieve more. There is no expectation of standardized practice across Europe in respect of EM – this may even be seen as a danger - but within the wide range of legal and policy frameworks, both traditional and emerging, there is an expectation of better, more ethically-informed practice. Some member states openly aspire to this: Latvia, for example, described the aim of its ongoing correctional service reform programme as the creation of an “improved system ... in compliance with international human rights standards”.

**c.** Latvia was one of eight countries that made presentations to the multi-lateral meeting about their existing or imminent EM schemes. The others were Albania, Austria, Denmark, Croatia, France, Turkey and (in the most detail), Estonia. From these, the participants gained a clear sense of the processes and procedures that are being used to embed EM in criminal justice systems or (in the case of mature EM systems like France and the Netherlands) to reform and refine its existing use. It is clear that in many respects processes and procedures are in accord with Council of Europe thinking, and in some instances CM/Rec (2014)4 has been directly influential. Equally clearly, there remain some sticking points and difficulties which derive from the particular pressures being faced by particular countries, traditional understandings of how criminal justice should be done, as well as the dilemmas and challenges posed by EM technologies themselves.

**d.** The following observations in no way supersede CM/Rec (2014)4. They are intended to further clarify the complex ethical issues which arise when member countries seek to implement EM with adults at the pre-trial, sentencing and post-release stages. (The Recommendation did not relate to the use of EM with young offenders, but some inferences for good practice with this age group can nonetheless be drawn from it). The observations made here are not a direct report on “things said” in the two-day event. They develop the propositions and questions referred to in the discussion documents prepared for the event, drawing on, and suggested by, various issues raised in the presentations and discussion that took place among the delegates. They highlight particular developments in some of the countries which took part, but do not give equal attention to all. Particular attention is paid to Estonia and Denmark, because they offer particular examples of good practice – albeit in different ways. The discussion at the event did not cover all points raised in CM/Rec(2014)4, notably issues of possible ethnic discrimination in the use of EM (in respect of foreign national offenders, and the cross border uses of Global Positioning System (GPS) tracking - and this document does not do so either.



# Electronic Monitoring: Relevant Ethical Frameworks

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**a.** Ethical principles are those which guide and point towards good conduct, for persons, professionals, organizations and governments. Among philosophers, there are many different theories of ethics, which have very different implications for practice in the real-world, and it is not necessarily easy to achieve an ethical consensus about what it is right to do and good to be, in criminal justice systems, or anywhere else. There are, in fact, two distinct areas of ethical deliberation relevant to debate about EM – “the ethics of punishment, control, and care” and “the ethics of technological change”. The former have long been debated in moral philosophy, jurisprudence and penology (fields which have traditionally neglected questions about technology). The implementation of electronic monitoring (EM) in the context of offender supervision may formally be governed by legal, judicial and political protocols rather than overtly ethical ones, but ethical understandings (if not always human rights concerns) invariably underpin these issues.

**b.** “The ethics of technological change” is a newer area of intellectual activity, originating in the twentieth century when the complexity, pervasiveness and potential dangers of technological change became more apparent (atomic weapons, computerized databases, climate change etc.). It now encompasses the surveillant implications of digital information and communication technologies, of which EM can be understood as a particular form, customized for use in a criminal justice setting. “The ethics of punishment” and “the ethics of technological change” come together – or, rather, need to come together – in regard to what have been called “technocorrections” – the application of technologies to the control and management of offenders, in prison or in

the community. EM is a “technocorrectional innovation” and the attitudes of policymakers, practitioners and the public towards it are shaped not only by traditional understandings of what constitutes appropriate punishment (which is how we usually debate EM) but also by more modern understandings of the acceptability or otherwise of using digital technologies in particular spheres of social life. These latter understandings may be more subliminal or unconscious because in their everyday lives middle class professionals are now immersed in a world of technological gadgetry – our smartphones, laptops and tablets most obviously. This may be less true of poorer offenders. Both these factors make it doubly important that we think more carefully about the ways in which digital technology is being deployed in our societies, and the ethics of its use.

# Defining “Electronic Monitoring”

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**a.** Electronic monitoring technologies enable judicial and executive authorities to restrict, regulate and enforce a suspect or offender’s spatial and temporal activity (their locations, movements and schedules), at a distance, often in “real-time”, potentially in a very finely calibrated way, for periods of variable duration. Contemporary monitoring technologies focus on pinpointing offenders at fixed locations, following the trails of offenders “on the move” or alerting authorities when the perimeters of designated exclusion zones are about to be crossed – separately or in combination. These technological capabilities enable the enforcement of judicial or executive requirements either to be present at a certain place at a certain time (inclusion), or to be absent from it (exclusion), and can be used on a stand-alone basis or in conjunction with other supervisory (often social work) techniques. “Movement monitoring” technologies may also be used to pinpoint offenders at a particular crime scene, and have thus become of especial interest to police officers. Data on “presence monitoring” at single locations has previously been (and remains) of interest to police investigations: but even if it showed an offender was not at home when he was required to be (which could be useful information to have) it could not link an individual to a crime scene in the way that tracking technologies can.

**b.** “Electronic monitoring” is a generic term which encompasses a range of technologies, currently using radio frequency, voice verification and combinations of satellite and cellular telephone tracking. Other technologies may develop in the future, which augment or go beyond location monitoring. Remote alcohol monitoring (RAM) already exists and although commonplace in the USA it has not been widely used in Europe. This should be understood as a form of monitoring which attempts to prohibit a particular behaviour – the intake of alcohol – rather than merely regulating a person’s location and schedules. Such regulation is an indirect means of seeking to change a person’s behavior – reducing their opportunities for criminal activity, promoting self-discipline but like RAM, future forms of EM may seek to monitor – and modify offender’s behaviour in more direct ways. This would be consistent with the way EM was first conceptualized back in the 1960s – as what would nowadays be called a “persuasive technology”. More will be said about future EM technologies later in the document.

c. It is important that EM is not simply understood as a technique used with individual offenders or suspects. It also needs to be understood as a technological system, or perhaps more accurately, as an “automated socio-technical system” which is capable – in a way that other supervision practices are not – of undertaking the mass surveillance of potentially large numbers of suspects and offenders simultaneously, if not necessarily uniformly. Detailed rules and regulations can be imposed on offenders and enforced with a precision and speed that merely human systems could never emulate, certainly not as efficiently, and probably not as impartially. People are still need to programme and tend the computers, to read the screens and make decisions about how alerts and violations are to be responded to, but many aspects of the process are or can be automated. Even telephone calls – and voices – to offenders can be automated, creating efficiencies but potentially depersonalizing the supervision process. With EM, there are always ethical choices to me made as to how automated one wants monitoring to be. In addition, once one monitoring centre is built, it is technically as easy (staff considerations notwithstanding) to monitor tens of offenders as it is to monitor thousands. Once an EM system is introduced it is relatively easy to increase the scale of its use, and this can be seen as one of its dangers.

# The Ethics of Human and Technological Surveillance

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**a.** EM is a type of surveillance, using remote monitoring technology rather than personal contact to gather data (usually locational data) on offenders, although the two sources can be combined. 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. Inevitably, nowadays, these factors will be salient to policy-makers – the presentation from the Netherlands, for example, referred both to “technology-driven policy” and to “financial-driven policy” in respect of EM, and noted that biometric location monitoring of some Dutch offenders had developed because of the financially driven closure of local police stations, to which these offenders had once reported “in person”. There is no doubt that technology can create new social possibilities, and that financial pressures can sometimes stimulate more imaginative responses to old social problems – although, rather obviously, cutbacks can simply reduce quality of service to people. However much policymakers may feel compelled, for technological and financial reasons, to change practice with suspects and offenders, they must also ask what “good” – in social and political terms - is intended and likely to be achieved by adopting technology? Reducing reoffending, increasing compliance and reducing the use of imprisonment could all be possible “goods”, but is EM an ethically defensible way to achieve them? Are there other, better ways of achieving these “goods”?

**b.** The question of using remote surveillance to augment or replace human contact has recently become more complex. The main way in which in this was originally debated in Europe, particularly within the Confederation of European Probation (CEP), was in terms of the impact of surveillance on social work. The assumption was that it would be a bad thing to replace skilled, caring professionals with impersonal monitoring, or to make EM unduly dominant in community supervision, because research has highlighted the importance of the relationship in helping an offender to change his attitudes and behaviour. It is in this sense that EM has often been considered a potential threat to social work. It has, on the other hand, long been acknowledged that the use of EM in the community is a “less bad” - more humane, rights-respecting

intervention - than imprisonment, but that has been less to do with replacing an offender's human contact with prison staff (which may well be positive) and more to do with removing them from an oppressive institutional environment which imposes more control than is necessary, in many instances, to reduce reoffending. The positive aspects of using EM as an alternative to custody, or as a means of early or conditional release, for the suspect or offender, are the obvious ways in which it enables him or her, to maintain or resume ties with family and/or employment. The possibility of gaining release on EM as a "reward for good behavior during imprisonment" - as Croatia put it - is premised on the understanding that offenders will prefer EM to remaining in the prison environment. Most offenders do prefer EM - but not all: some offenders prefer the routine and familiarity and camaraderie of imprisonment (and seek no opportunity for reform) to the responsibilities and "semi-liberty" that EM entails. The most obviously positive aspect of offenders preferring EM for the state is cost-reduction, but underlying all these positives is the deep sense that EM is a "lesser evil" than imprisonment.

**c.** There are now other ways of using EM as a "lesser evil", which, admittedly, may also have positive aspects as well. Where police supervision of released prisoners has constituted "human contact" with offenders, as opposed to social work support, it has often been intended to be harassing, intimidating and unpleasant. This may have worked to deter some released prisoners from offending but it also serves to confirm them in their criminal identities, as "bad people" who cannot be trusted, and who are considered undeserving of help to change for the better. Using remote surveillance to replace this kind of negative human contact - as opposed to the positive kind represented by social work - may well be a way of enhancing the humanity and dignity of suspects and offenders and their families (if only relatively). The prospects of reverting to negative human contact-intimidating police supervision - remains as an incentive to compliance with EM, in the same way that imprisonment may do.

**d.** The Turkish delegate noted that some of their offenders have said that they "prefer EM to police inspection" and there is now an emerging sense that EM can - and should - be used to replace negative forms of human contact. This complements - rather than contradicts - the argument that EM should NOT be used to replace positive human contact represented by social work - but it does make the conceptual relationship between surveillance technology and personal, face-to-face interaction more complicated than it seemed in the earlier debates about EM. It is true that "intimidating police supervision" is usually a labour intensive and costly way of dealing with released offenders, and that states invariably have an overriding financial reason for reducing its use and replacing it with remote monitoring, but if offenders themselves experience

EM as a more legitimate and dignified way of being supervised there are also ethical grounds for pursuing this approach. If more positive outcomes can be achieved by replacing non-relational, intrusive forms of human contact with appropriate forms of EM, the ethical justification of such an approach is even greater.

e. The United Kingdom representative described a number of schemes in England and Wales in which persistent and prolific offenders, newly released from prison, were given a choice between GPS tracking and “intrusive supervision” by police officers (the traditional way of managing such offenders, who commit high volumes of property crime over short periods of time, sometimes to finance their drug habits). The schemes are run jointly by police and probation officers, but the GPS tracking is more in control of the police. GPS tracking is considered more appropriate for offenders who indicate a willingness to desist from crime, and want help from probation officers to do so. They benefit from GPS tracking in three ways. Firstly, they are not subject to frequent (daily) intimidating forms of police contact on the street and in their homes, which sometimes served as a disincentive to cooperate with probation officers. Secondly, the monitoring technology can indicate whether they are present or absent from known crime scenes – which can incriminate or exonerate them. This means - thirdly, where they are exonerated – that they will be spared the routine arrest and processing in a police station which would otherwise have happened to them. These “voluntary GPS” schemes have not been formally evaluated but preliminary observations suggest that offenders experience monitoring in this way as something that, through a mix of being trusted (a feeling which “intrusive policing” never gave them), and of hope for their own future and fear (of detection) helps them to desist. As such, this approach – which, it should be said, adds in daily support to “assist compliance”, alongside the GPS monitoring - is to be encouraged. The downside of such schemes is that they can easily be driven by cost-savings alone – the police save considerable amounts of money by stopping “intrusive supervision” and by reducing the need to make random arrests when new crimes occur. A more worrying issue is that the police may come to value the intelligence-gathering, investigative capacities which GPS tracking enables, more than its desistance-enabling capacities which, at the moment, they have made an ethical choice to include. They may in future make a different choice.

f. The social work/surveillance dilemma, however, has not gone away. An interesting exchange took place between the United Kingdom and Norway in respect of this. The United Kingdoms’ delegate put forward the idea that one aspect of the “efficiencies” that were enabled by GPS tracking was a reduction in the need for installation visits to the offenders’ homes. GPS tracking

devices can be fitted at court or prison, and the offender can be given the battery charging device to take home with him, to connect to the electricity supply himself. (This is called the “plug and play” approach). The offender can be tracked on the way home, and if no technical problems occur, there is no obvious need for a home visit. Norway does not use GPS tracking, and their delegate countered the UK view by saying that they saw intrinsic merit in home visits, over and above the fitting and checking of equipment. Home visits enabled useful personal contact between probation officers, offenders and families.

**g.** Ethically, cost alone should never be a reason for introducing EM, but given that, realistically, it is always likely to be a significant factor in policy decisions about EM more needs to be said. There is no common European model for costing EM in relation to imprisonment but the proportionate costs are likely to be similar to those described by Denmark (which has been using RF EM since 2005). The comparable prices per day in 2013 were as follows:

Closed prisons	(about 238 euro)
Open prisons	(about 156 euro)
Local prisons	(about 154 euro)
Halfway houses	(about 162 euro)
Electronic monitoring	(about 63 euro)

**h.** The low cost of EM will inevitably be attractive to policymakers, as both a direct alternative to a prison sentence and as a means of reducing the length of time spent in custody, using EM to effect earlier than otherwise release. There are sound penological arguments for creating alternatives and implementing early release (to graduate the process of re-entry and reintegration) wherever possible, and where a low cost technology makes this feasible in a way that it was not before, it might be argued that one has a moral obligation to proceed with it. In addition, reducing costs in one area can be very defensible if any money saved is then used for better purposes, to create new projects and posts in the community, or to improve the quality of the remaining prison regimes. The caveat on cost is simply this: EM should not be introduced by default simply because it is cheaper than prison (which it demonstrably is) – there have to be sound penological reasons for using it, and with deep thought been given as to how it can be used wisely and well.



# The Purposes of Electronic Monitoring

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**a.** EM is inherently a form of control, a restriction if not a full deprivation of liberty, but depending on how it is used, the point in the criminal justice process at which it is used, and what measures it is combined with, it can variously serve rehabilitative, punitive (retributive or deterrent) and public protection purposes. It is likely, in any given country that among different professional groups different points of view will co-exist on how EM should be used, and even whether or not it is a useful or ethical thing to do. The Netherlands delegate pointed out that in his country judges want punishment and public protection from EM, while policy makers want it connected to rehabilitation. These are, he said, “both legitimate options”, and indeed in many European countries punishment and rehabilitation are not incompatible penal purposes; any given sanction can have more than one purpose.

**b.** The long established and widely used (although not in the Anglophone-world) term “semi-liberty” captures quite well the kind of control that EM imposes. This does not in itself make EM inherently punitive, at least in the retributive sense. Control can be legitimately imposed at the pre-trial stage, on unconvicted people – using EM – in a way that punishment obviously cannot. The aim is to reduce the risk of flight and/or interference with witnesses and, at this stage of the criminal justice process, there is arguably a case for using EM as a stand-alone measure, either to enforce confinement at home or to monitor the perimeters of exclusion zones using GPS. Scottish research on RF EM as a pre-trial measure nonetheless suggested that some suspects may need support in order to comply with the requirement.

**c.** EM technology is not rehabilitative itself – it cannot obviously change attitudes and behavior in the long term, in ways which outlast the immediate experience of it – but it can assist, and perhaps enhance, measures which are intended to be rehabilitative, and help offenders acquire the initial self-discipline necessary to stimulate desistance from offending. Any long term positive change that does follow a period on EM is likely to be serendipitous, rather than a result of experiencing the technology: if long term change is desired and intended, other methods of intervention must be used.

**d.** One might also argue, similarly, that EM is not retributive in itself (unless one believes that imposing control is necessarily and inherently punitive) – which seems particularly important when one imposes it on suspects at the pre-trial stage, before they have been convicted – but it clearly lends itself to a distinct form of restricted liberty, and it is not surprising that it is most commonly discussed as a punishment. It is perhaps more readily understood as a form of deterrence rather than retribution, because it does seek to make offenders aware and afraid of the consequences of violation – the increased likelihood of detection (compared to non-technological forms of supervision) and (probably) more severe punishment if caught. It would be a mistake, however, to think that EM can only be associated with fear; it may be possible to use it in ways that also stimulate hope and a sense of being trusted, which would clearly be complementary to rehabilitative interventions.

**e.** Whether EM is used for punitive or rehabilitative purposes, or combinations of the two, the onerousness of the experience should not be underestimated, however lenient the penalty may appear to uninformed, outside observers. It may be helpful, with EM sanctions over a certain length - say three months – to graduate the process of coming off EM by progressively relaxing the severity of the spatial and temporal restrictions imposed on the offender. It is in the nature of EM technology that schedules can easily be recalibrated on the computer and explained to the offender, so that offenders' experience of monitoring grows less as their sentence nears its end. The gradual lessening of restrictions may also serve as an additional incentive to comply with EM.

# The “Proportionality” of Electronic Monitoring

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a. Measures and sanctions should be proportional to the seriousness of the offence and/or the degree of risk posed. It is not logical to say of “EM” or “GPS tracking” that they are proportional, or not, in themselves. Rather, it is the type and duration of supervision regimes which the technology can be used to create to which degrees of proportionality can be attributed. These can vary considerably in their intrusiveness and onerousness, addresses different levels of risk, and be used at high and low points on the sentencing tariff. A short period of stand-alone RF monitoring may be an appropriate alternative to a small fine, for example (see below). Constant monitoring of high risk sex offenders’ movements may be appropriate when they are released from prison. The use of EM to enforce 24 hour “lockdowns” in offenders’ homes can be very intrusive, and is probably only bearable for a few months, quite apart from the burden it imposes on other household members. Using EM to enforce curfews for only part of the day, allowing offenders “free time” or opportunities for employment, is probably bearable for longer periods. The daily length of a curfew, and the overall duration of an EM-order are key elements of its proportionality, but account must be taken of whether or not EM is a stand-alone penalty, or linked to other measures (which must also be factored in to the proportionality equation). In some jurisdictions the very principle of constant, real-time GPS tracking is believed to be such an invasion of privacy that it is considered to be an inherently disproportionate response to any crime. Exclusion zones are often considered more acceptable, but which is in fact the more intrusive – discreet, remote monitoring of all movement or specific exclusion from public space, especially a whole town? At present there seems to be a clear consensus that EM-exclusions from public space can be justifiable in principle, but much less understanding of how they can be made proportionate to the risk, or of what factors should be taken into consideration (the risk of harm to the victim; the nature (and definition) of “the location” itself; the availability of police resources?).

**b.** Discussion of the proportionality of EM-sanctions inevitably (although sometimes misleadingly) raises questions about its relationship to imprisonment: in what sense can EM-sanctions be an equivalent to prison? While no-one has full information on the subject it seems to be becoming the norm that one full day on Radio Frequency Electronic Monitoring (RF EM) is regarded as the equivalent of one day of imprisonment. The Netherlands, Belgium, Norway and Denmark operate this way. Latvia and the Slovak Republic are planning to do the same, the latter having enshrined it in section 53(5) of its Criminal Code, (effective from January 2016), which reads as follows:

If a prisoner fails to comply with the restrictions or obligations arising under a house arrest sentence, the court shall convert the sentence to a term of imprisonment so that outstanding day house arrest sentence is equivalent to one day of a prison sentence.

**c.** Creating this kind of correspondence between time served on EM and time served in prison is certainly clear and transparent, and easy for an offender and their family to understand, but it arguably reinforces the idea of RF EM as a form of confinement rather than a flexible form of control which can be used in different ways alongside, and integrated with, other penal interventions. It ought to be possible to use shorter periods of RF EM to confine an offender during the specific hours that he has been known to engage in theft from shops, or to get drunk and become involved in fighting. This curfew – less than a full day on EM – would not need to be an equivalent to a day in prison. A case could also be made for saying that when EM is used for curfews (of, say, 12 hours maximum), the period of supervision in the community could legitimately be longer (but still proportional) than the period of imprisonment that the offence might otherwise have attracted. There is similarly room for argument about the equivalence of days spent on GPS tracking (and the specific regime it is used to create) and days in prison. None of this is meant to suggest that EM-regimes are not intrusive or onerous, or that EM is an inherently more lenient sanction than imprisonment: temporal and spatial regulation can be calibrated in such a way as to make it very punitive. EM has its own “pains”, although it is never incapacitative in the manner of imprisonment. The point being made here is that creative uses of EM may be stifled if it is only considered as an equivalent and commensurable form of confinement to imprisonment.

# Stand-Alone Electronic Monitoring and Netwidening

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**a.** Where punishment is the intention, EM can justifiably be used simply as a stand-alone measure, and spatial and temporal violations rigorously enforced; at the most offending will be reduced during the period under surveillance because offenders fear detection and the threat of painful consequences. Some English research does show that even stand-alone RF EM can prompt offenders to consider desistance (Hucklesby 2009) without, in itself, necessarily equipping them with the personal or social resources to do so. EM-curfews can help break criminogenic habits – for example associating with criminal peers. In addition, family members, out of concern for the offender, may bring a positive influence to bear on him or her, and this may help strengthen tentative inclinations to desistance. Hucklesby’s very useful research should not however be understood to give general legitimacy to stand-alone EM; it shows that it can on occasion be a helpful punishment, but it leaves too much to chance (habits may not be broken, family members may not in fact be a positive, or sufficient influence) if rehabilitation is the aim.

**b.** One implication of Hucklesby’s research, however, is that short periods of stand-alone EM may be a useful punishment for low risk offenders, for whom imprisonment would be inappropriate and excessive. It may be particularly appropriate – for sound ethical reasons – as an alternative to a financial penalty which may, with poorer offenders, have a more deleterious impact on a family’s wellbeing than the curfewing or confinement of the offender. As noted above, house arrest, is by no means without consequences for an offender’s co-residents but there may be instances when the deprivation of an offender’s time or more defensible than the deprivation of his (and his family’s) money.

c. To some, the practice of using EM on low risk offenders - which already happens in some jurisdictions - might be considered an example of netwidening, and therefore a misuse of EM. Netwidening – the use of an intensive penal measure on offenders (individually or as a category) exhibiting lower levels of risk than those for whom the measure was originally intended, or initially targeted – is indeed to be avoided. It results in some offenders being given more intrusive penalties than the severity of their offence, or their risk level, actually warrants. Judges can netwiden when they pass intrusive sentences on offenders whom policymakers and legislators had not expected them to; equally policymakers and legislators can themselves netwiden when they extend a penalty introduced for offenders specifically at risk of custody to offenders who are less risk of it. So long as it is deliberately chosen by policymakers, or judges, the use of stand-alone EM (which cannot be relied on to change behaviour) on low-risk offenders is not, strictly speaking, netwidening: rather it is being used as an appropriate, agreed punishment in some cases. If even this use of EM is actually considered to be an alternative to custody – if low risk offenders really are at risk of imprisonment - the view might reasonably be taken that the threshold of custody in that jurisdiction is unacceptably low. The use of stand-alone EM should never become the norm for low-risk offenders – there are always other options – but it may have its place.

# Electronic Monitoring, Rehabilitation and Desistance

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a. If longer-term rehabilitation and sustained desistance is the intention, EM must be combined with other measures which address offenders' problems and criminogenic needs, and which support their inclinations to desist (allowing time for them to engage in employment or training). Spatial and temporal violations must be enforced more flexibly than in a purely punitive approach, taking account of compliance with other constructive measures and general progress towards desistance. Different countries will doubtless take a different approach to flexibility, according to the prevailing ethos of their criminal justice systems, but the discretion given to probation officers in Estonia – to decide at different points in a sentence whether RF or GPS might be the most useful form of control to impose, or remove – is an intriguing example of how a country that is relatively new to both probation and EM has been able to create a form of integration between the two approaches that may not be as easy to implement in countries with more established probation services, and more settled practices, and some degree of resistance to EM. The research which has most clearly shown that “intensive supervision combined with EM” has a significant impact on reducing reoffending (compared to control groups which had less impact) comes from Sweden (Marklund and Holmberg 2009). The results may not be replicable in schemes that combine EM and supervision in different ways to Sweden, but they are undoubtedly promising. The authors modestly admit that they cannot entirely disentangle the effects of EM and the other component interventions, but Hucklesby's above mentioned research on stand-alone EM, helps in understanding what the specific psychological impact of the technology and the home confinement might have been (although the daily periods of home confinement are shorter in England and Wales than in Sweden).

**b.** In England and Wales, there has been a tendency to speak of “modular sentences”, which combine punitive, rehabilitative and reparative elements in a single judicial or executive response, on the understanding that these will seem coherent and complementary to an offender subject to them, rather than contradictory and in tension with each other. EM-night-time curfews are invariably considered to be “the punitive part” of such a sentence. Its main application in England and Wales is with young offenders, in Intensive Supervision and Surveillance Orders (a community sentence) and in the “intensive supervision and surveillance” (ISS) requirements that constitute the community half of a Detention and Training Order, after an offender has been released from custody at the mid-point of their sentence. The Howard League for Penal Reform (2014) has recently shown that ISS is used extensively, but inconsistently, across England and Wales and that these rigid breach conditions, which result in young people being returned to custody, undermine the supposedly reintegrative elements of the order. Furthermore, “the decision to release a child on ISS is not taken by a judge [but by an executive authority] and the child has no say in it. There is no due process in the decision to put a child on ISS”. The Howard League points out that there is no equivalent sentence for adults in England and Wales and questions the legality and helpfulness of this kind of sentence with young offenders.

**c.** Whether EM is used for rehabilitative, punitive or public protection purposes, offenders (and their families) may need assistance to comply with the onerousness of EM itself, to manage the stresses and frustrations that it can cause. Offenders may not get the full benefit of EM unless such assistance is given, and this is one advantage of having probation staff involved with the administration of EM. It should be remembered, however, that “assisting compliance” in order to complete an EM-order still makes EM the main focus of the intervention. It can be undertaken – and should be available – even if the purpose of the intervention is punishment or public protection. But “assisted compliance” should not in itself be confused with the support and help necessary to achieve longer-term rehabilitation and desistance. Social work with offenders should have a larger purpose than enabling compliance with EM.



# Consent to and Compliance with Electronic Monitoring

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**a.** The nature of an EM regime needs to be explained to suspects/offenders/prisoners (and their families), so that they can give informed consent to it – or not. It is crucial that they have a clear idea from the outset of what compliance requires and what the criteria for breach are. They also need to be given a clear and simple understanding of how particular EM technologies actually work to detect presence or absence (or in the case of GPS, location) otherwise they may not realise how easily and reliably violations will be registered at the monitoring centre. Some jurisdictions use brochures which explain what is required and give contact numbers (of the monitoring centre, for example) but this does not obviate the need for a verbal explanation, which allows offenders and families to ask appropriate questions of monitoring officers. The CEP is building up a collection of such brochures on its website. It is probably for families themselves to decide at what age children and teenagers of monitored parents are involved in explanations, but Norway has developed guidance for parents to explain to young people what EM entails, what restrictions it imposes and how they might impinge on the parent-child relationships (eg not necessarily being able to collect them from school).

**b.** While most European jurisdictions do seem to require formal consent from an offender before EM can be used, or create legal frameworks in which offenders, suspects or prisoners can “volunteer” for EM, there are some who do not. There are also some jurisdictions that require consent in some contexts, with some offenders. This tends to be justified either by the authoritative argument that offenders should not be allowed to choose their punishment, or by the paternalistic (but sometimes correct) argument that offenders might not consent to something that would be of benefit to them, and only come to realise this after it has been imposed on them. The question of consent might in one sense be moot: given that offenders have to actively comply with EM

in order to make the system work – eg, take their curfews seriously or, in the case of GPS, to regularly charge batteries – it might be argued that effective EM is never, strictly speaking, non-consenting. Those who reason along these lines are not entirely wrong, but blurring the distinction between consent and compliance in this way begs the question of whether offenders and their families are fully prepared for the experience of monitoring. Asking for consent creates a moment when, logically, information has to be offered so that the choice made can be an informed one, and also, arguably, a moment when an offender makes a specific mental commitment to change his behaviour, a promise he can later be reminded of if and when his commitment begins to waver. With higher risk offenders—say, some released sex offenders – grounds might easily be found for dispensing with a consent requirement to EM. They will be expected to comply-or-else, but even high risk offenders should not be denied information about the experience they are likely to have.

**c.** EM adds a new modality of compliance – surveillance-based compliance of movements and schedules – to the traditional means that supervisors have traditionally used to gain an offender’s compliance. These are a) incentives (eg learning skills, earning a living, becoming drug free, the pleasures of being law-abiding), b) through deterrents (threats of a more severe sentence, usually prison) and through trust (making a mutually respectful relationship with the offender). Alongside the new aspect of surveillance, these strategies can also be used to encourage compliance with EM, and EM can certainly be used in ways which make an offender feel trusted, an important ingredient in the rehabilitation process.

**d.** There are potentially, emerging technical ways of – if not of making compliance easier or more likely – then making non-compliance more difficult. Most countries using EM use plastic ankle bracelets that can easily be cut off using an ordinary pair of scissors if the offender or suspect is motivated, for whatever reason, to do this. Health and safety considerations (a type of ethical consideration) are the usual rationale for this: if, for example, the bracelet catches on the moving parts of a motorcycle or the offender sustains a lower leg injury which requires medical attention, it needs to be easily removable. The fact that a bracelet can easily be removed is one of the ways in which the offender is encouraged to act in a responsible way and comply with his monitoring: despite being able to cut the bracelet off he must discipline himself not to. It might however be said that an easily removable strap makes non-compliance too easy, and it is relatively easy to manufacture and use straps that are more difficult to cut through. Some bracelets - used in some of the England and Wales police GPS schemes comprise leather straps with steel bands in, or plastic straps with steel mesh in them, and can only be

cut off with industrial bolt cutters (which the offender has first to acquire). This may take twenty minutes, during which time the monitoring centre is being signaled that the strap is being tampered with, and police directed to the known whereabouts of the offender. It might be argued that quite apart from the additional layer of public protection offered by a hard-to-remove bracelet the difficulty of removing it may help impulsive offenders to be more disciplined, and avoid doing something they may later regret. Equally, it may not be considered right to dispense with the health and safety considerations, even for higher risk offenders from whom hard-to-remove ankle bracelets might be considered appropriate. There is one ankle device on the market (manufactured but not used in Europe) – which looks more like a shackle than a bracelet – which can be remotely unlocked from the monitoring centre if the offender requires medical treatment (or if the offender is arrested and the police want it removed).

e. EM is, potentially, stigmatizing, and this may have a bearing on the ease, or otherwise, of compliance. The ankle bracelet that is essential to EM places a “visible mark” on an offender or suspect in a way that other community sanctions and measures do not (although some jurisdictions require offenders on community service to wear marked or coloured clothing). The ankle tag may be considered stigmatizing by the offender and his or her family, who may be reluctant to appear in public with him. For a man, it is not difficult to obscure the bracelet with clothing (long socks and trousers). For a woman to do the same means not wearing skirts or dresses, and the bracelet itself precludes the wearing of high-boots for whatever is the duration of the period over which she is monitored. In swimming pools or sports fields any wearer of a bracelet will be exposed – which may mean that people refrain from these forms of recreation and exercise. Experiencing the bracelet as stigmatizing maybe a personally idiosyncratic thing – and is clear that not all offenders do experience it in this way – but it is not something that is entirely within the control of offenders, or of the penal authorities who monitor them. National or local media coverage of EM – and especially coverage of crimes committed by offenders on EM - can create climates of opinion in which anyone seen wearing a bracelet may be shunned or abused, or worse. If the media have inadvertently or mistakenly promulgated the view that only sex offenders are subject to EM, all offenders seen wearing a bracelet, whatever their actual offence, may be perceived as sex offenders, or fear that they will be seen in this way. Their safety may be compromised. Penal authorities should take such fears seriously among those who are being managed on EM and consider what the climate of public opinion towards EM might be, in some places of not all places, at any given time. Offenders, suspects and affected families should be advised how to cope with possible stigma of EM.

**f.** Explaining breach criteria to suspects and offenders is an important aspect of facilitating informed consent. They need to have a clear understanding of their spatial and temporal parameters – the times they are under curfew, the boundaries of the spaces from which they are excluded. Maps may need to be given to them. Punctual timekeeping is clearly crucial, but there needs to be a policy describing how minor instances of lateness are dealt with (which may reflect traffic jams and unreliable public transport systems). It may be helpful to have a tiered system of responses, with immediate breach for a failure to return home for a curfew after two hours, and one or more warnings for lesser violations. Small violations of ten or fifteen minutes, whilst never desirable, are most efficiently dealt with by accumulating them until two hours has been achieved, and then initiating breach proceedings. Similar processes can be devised to manage major and more minor violations of exclusion zones. There is scope for argument as to whether offenders should be told about the margins they have for being late. Some practitioners will say that this helpfully reduces their anxiety when they are late through no fault of their own, and increases the legitimacy of the sentence. Others will say that knowing the margins will enable offenders to play the system, to practice deliberate lateness - and will recommend that offenders are kept in a state of uncertainty about what the exact consequences of minor degrees of unpunctuality might be. In truth, offenders may respond in either of these ways: there is no perfect solution. It is also defensible to say that breach criteria for higher risk offenders should be tighter than for lower risk offenders – they may only be given ten minutes leeway on their curfew time before police are notified to search for and apprehend them.

**g.** Where EM is part of an integrated programme, with a number of different components, decisions on breach can become more complicated, and an issue of contention between different groups of practitioners. If an offender is complying with probation and making progress towards desistance, there may well be arguments as to whether it is right to breach them for non-compliance with EM, if this then jeopardises the continuation of probation. Judges may rigid enforcement, probation officers may prefer a more flexible and holistic approach. Evidence of breach will be quite tangible – a computer print-out of an offender's poor compliance, timed to the second – while the evidence of progress might be more subjective and open to different interpretations, leading to disputes about the weight that should be attached to each in making the breach decision.

**h.** Compliance and consent are related to each other, but not the same. An offender who complies with a sanction or measure (acts in accordance with the regulations required of him) is demonstrating, in practice, acquiescence to

authority even if he has never formally been asked in court to say “yes” or “no” to it. Such acquiescence may be willing or unwilling, but the mental state of the offender is less important than the simple fact of him obeying the rules. Compliance with judicial or executive authority is to be desired, but that does not mean that asking for formal consent should always be dispensed with. To ask for consent is a way of showing respect to an offender, a preliminary gesture of trust in him, insofar as he is being asked to promise to abide by the rules being imposed on him and to make a choice about the way he will behave in the future. Traditionally, asking an offender to consent has been associated with the idea that he will cooperate with his supervisors in order to change his behaviour in the longer term, to do more than merely comply with the immediate requirements imposed on him. Consent, arguably, is more associated with a rehabilitative and desistance-based approach than a punitive one. As far as possible, offenders should be asked to consent to EM and the forms of supervision with which it is connected (and to be given enough information in advance to understand what the experience is likely to be like) on the assumption that they will actively make the effort to stop offending and to address any personal difficulties which may underlie their offending. There is, however, a very pragmatic reason for asking an offender to consent to EM: if the bracelet is imposed on him against his will, if he refuses to give any advance assurance that he will accept being remotely monitored it is likely that he will remove or destroy the tag or tracker, wasting a resource from which a more willing offender might have benefited.

i. Where punishment or public protection is the aim, especially in the case of more serious or high-risk offenders it can be legitimate to dispense with formal consent, because other considerations – for example the safety of the community, the wellbeing of former or future victims – outweigh the importance of seeking the offender’s agreement. Immediate and sustained compliance, in this instance, is the primary consideration: longer term change, if it occurs, is a bonus but not something that is required or even expected. Technical difficulties notwithstanding, failure to comply with EM is arguably more easily detectable and verifiable than other forms of non-compliance with community supervision – this is often perceived as one of EM’s main advantages, and is literally a “selling point” from the point of view of its commercial providers. But having sophisticated electronic tools to make compliance easier to detect does not in itself make it more ethically desirable. There is potentially a danger that “surveillance-based compliance” will become so easy that – especially if it effectively reduces re-offending in the short term – our commitment to the pursuit of longer-term personal change will weaken, and attract fewer resources (eg staff training in social work skills). The availability of a viable technology should not – by itself - determine (or limit) our ethical goals in offender supervision.

j. One of the presenting countries said of EM that it is “non-intrusive if the offender complies”, but this may not be so. Compliance, and consent even more so, whilst important, are not forms of “moral magic” which makes any and every form of intervention ethically acceptable. Consent, certainly, cannot by itself be the final determinant of an ethical response to an offender: other criteria must also be applied in the design of fair and constructive interventions which protect the dignity of the offender, even if the offender him or herself is indifferent to this. Offenders may consent to forms of EM only because the alternatives (such as imprisonment or police surveillance) are perceived to be more onerous and less desirable. EM may be consented to because it is considered a lesser evil rather than a positive good, but both these are acceptable in offender supervision; having the opportunity to accept (or choose) a less severe penalty may make an offender feel trusted, and help to motivate them to change. But choosing and consenting does not in itself make any level of intrusiveness acceptable. The form, intensity and duration of EM must still be proportionate to the seriousness of the offence or the degree of risk posed.

# Electronic Monitoring and Public Protection

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**a.** Precisely because EM is not incapacitative – offenders can choose to disregard its requirements – it is important to remember that when it is being used primarily for public protection (or victim protection) with high-risk offenders it is not the physical equivalent of holding a person in a prison cell. EM demands a degree of self-control in respect of permitted activities and boundaries from offenders, but it cannot replicate the effect of locks, bolts and bars. It can prohibit (psychologically), but it cannot inhibit (physically). That does not mean EM has no merit as a form of public protection: with high risk sexual offenders it is ethically better to know where they are located, for some or all of the time (but only up to a certain, reviewable time-limit) even if, from location data alone, it is impossible to know what they are doing. But it does mean that EM cannot achieve “public protection” on its own – any more than it can “achieve rehabilitation” on its own. Other forms of support, and indeed other forms of control, are necessary to increase the likelihood of reduced offending. It is ethically important that the public are not given false expectations about the capabilities of GPS tracking by any of the officials involved in its implementation. Where EM is used as part of a public protection strategy it should be accompanied by other measures – some of which may be rehabilitative, some of which may entail other forms of intelligence-gathering (by the police).

**b.** It can be argued that the use of EM at the pre-trial stage of the criminal justice process is justifiable as a form public protection, simply because it is not appropriate to administer punishment or pursue rehabilitation with unconvicted suspects. The aim of EM at the pre-trial stage is to add an element of control to unconvicted (or convicted but unsentenced offenders) who might still be considered a flight risk, or have the potential to interfere with witnesses – and who would otherwise be remanded in custody. Used in this way, it may be possible to grant a non-custodial remand to offenders who may not otherwise have been considered eligible for it, and thereby reduce

the use of imprisonment for remand, or reduce overcrowding in remand prisons. Indeed, reducing pressure on the remand prison population may often be the primary rationale of using EM at the pre-trial stage, because of a presumption that wherever possible, technically innocent suspects should not be imprisoned, or be damaged in any way (eg losing their employment) - with the added advantage that it is much cheaper. Estonia for example, says that within the framework of targeting suspects who may not otherwise comply with their conditions while in the community, the purpose of its pre-trial EM scheme is to “maintain normal life style (work, family life); reduce the number of detainees; and improve the conditions of detainees”.

**c.** There is a potential danger of netwidening at the pre-trial stage – using EM on suspects who would comply with their non-custodial requirements without the additional element of EM, from whom society needs no additional protection – and this should be avoided. There is also a need for consent, of both the suspect and the co-residents.

**d.** Pre-Trial EM may be granted at the first court appearance but because there may be a need to assess the suspect and his family a period of remand in custody may be considered necessary while this takes place. This period should be kept as short as possible. Estonia uses a procedure of this kind, and relies upon its Probation Service to do the assessment so the court can decide what is appropriate. The process takes fifteen days, and the stages are as follows:

- ▶ Suspect or accused person is detained in custody and informed about EM;
- ▶ Request to Court for EM by Detainee;
- ▶ Court asks the opinion from the Probation Agency;
- ▶ Probation Agency gives the opinion after visiting the home, checking suitability and gaining family members consent;
- ▶ Prosecutors and detainees are also to participate in the court hearing (by video, if necessary) court decides the EM commutation and the term of EM (six months, or until the end of proceedings, with a maximum of one year);
- ▶ Court decision comes into force within ten days.

**e.** Estonia’s Pre-trial Scheme allows for 24/7 monitoring, but this is not used in practice. Authorised absences from home are allowed for working and studying, church attendance, shopping (for people living alone) and for other (unspecified) needs, if a situation should arise. Detainees meet with a probation officer every 10-14 days, for individual counselling (but not offence-focused interventions) and to vary the monitoring schedule if necessary.



**f.** In the event of the suspect receiving a custodial sentence, some jurisdictions using EM at the pre-trial stage give a “sentence discount” for time already spent under house arrest (in the same way that time spent remanded in custody usually does warrant a consequent, commensurate reduction in the time served on a custodial sentence. Other jurisdictions do not. Without a sentencing discount on Pre-Trial EM, suspects who anticipate being found guilty and being given a custodial sentence may prefer to be remanded in custody, and not consent to EM in order to get their overall time in prison over more quickly. Where a day on EM and a day in prison are regarded as equivalents of each other it might well be considered unfair not to give a sentence discount for time spent on EM.

**g.** It is sometimes thought, mistakenly, that it is only with the advent of GPS tracking that EM impinges on police investigation processes. In its current Criminal Procedure Act (s 119) Croatia anticipates using RF EM for “investigatory detention in the home”, as opposed to a remand in custody in some instances, while police and prosecutors gather evidence to build a case against the accused. Although the investigatory element is not formally acknowledged in other jurisdictions using Pre-Trial-EM it is in reality something that all police and prosecutors do while suspects and accused persons are remanded, whether in prison or in custody. From a police standpoint, gathering evidence to secure a conviction may be understood as a way of reducing reoffending and in that sense EM is already implicated in investigatory processes.

# Shaping Media and Public Images of Electronic Monitoring

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Public images of EM, and the consequent expectations of how effective and useful it is, are not entirely in the control of the officials who manage its delivery and use. Climates of opinion can be created about EM, which affect the way the public perceive it and the way offenders experience it irrespective of official efforts. EM can be represented in a wide range of media, from news and documentaries to fiction, with varying degrees of comprehensiveness and accuracy. It is good, in democratic societies to have debates about measures and sanctions like EM, but inevitably some claims made about it will be misleading and exaggerated, or simply wrong. It is important that an official government version of what EM is for and what can and cannot be expected of it is placed in the public domain, in a variety of media, but whether it will be the version that prevails in popular understanding can never be guaranteed. The Netherlands have had a good experience of persuading journalists to report EM accurately and unsensationally. Sweden made a determined effort to persuade crime victims of the merits of RF EM, who might otherwise have imagined it to be a lenient penalty or an inadequate form of public protection, not least by making a small daily charge to offenders on EM and paying it into a victim compensation fund.

# The Ethics of Curfews and House Arrest

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**a.** House arrest/home detention (for a full day) and curfews (for part of a day, usually overnight) existed as measures and sanctions in some parts of Europe before EM became available, and were enforced through intermittent personal contact or telephone calls (often by the police). Remote “presence monitoring” is an obvious way of reducing the labour costs associated with police visits and may be preferred by offenders, suspects and their co-residents – EM does not require that they are woken up in the night (although false alarm telephone calls may also have that undesirable effect). For the police themselves, the cost-savings may be beneficial, and many more offenders and suspects can be monitored remotely than police forces would ever have the staff or the time to cover. It is also possible that police forces will resist remote monitoring technology if they think it will take away a legitimate aspect of their employment. Ideally, there should always be an ethical reason for using curfews and house arrest – and for using EM to enforce them – above and beyond cost-considerations. The most obvious ethical benefit of confinement at home is that it can have psychological advantages for the offender and his or her family, and permit continued employment.

**b.** Confining a person to their own home merely for the sake of keeping them behind four walls for a limited time is one thing, confining them in order to keep them away from public space for a limited time (reduce the likelihood of re-offending, or to deny them opportunities for participation in leisure activities), is another. Either aspect might be punitive. In practice, these emphases may be impossible to separate, but for those who impose or administer home confinement it would be useful to consider which of the two is more important, and which is actually intended, in individual cases.

**c.** It is hard to see that a full 24 hour home detention could be anything other than punitive in intent, because it allows the suspect/offender no opportunity to demonstrate in his “free time” (outside the curfew hours) that he is seeking to change his behaviour, or seeking legitimate employment. Compliance simply requires staying at home all day and all night, there is no obvious opportunity to show “personal responsibility”. Some jurisdictions do

nonetheless use full 24 hour home detention at the pre-trial, sentence and post-release stage on the understanding that it still enables an offender to be with his family and avoids the contamination effect that may occur in prison. It may also be the case that judges are only willing to use EM as an alternative to a custodial sanction or measure if the experience is a fully confining one.

**d.** The enforced proximity entailed by confining a suspect or offender at home places stresses on other family/ household members and may interfere with the performance of family responsibilities, eg if the boundary is too restrictive, a parent may not be able to play with a child in a garden. The consent of co-residents in a place to which an offender is curfewed must be sought, even in those instances where the consent of the offender has not been required. Given that most offenders are adult males, the burden on other family members may fall disproportionately on women or children if he has only limited free-time away from the home. It is arguably unethical to allow EM to reinforce structures and patterns of gender inequality. Allowing him to be absent from the family home (as curfews do) – quite apart from the opportunity this gives him to demonstrate law abiding behaviour - gives other family members a break from his company in their shared domestic space. This may be a vital means of managing the stress and strain of enforced proximity.

**e.** If an offender under full 24/7 home detention lives alone, he or she will need outside support (presumably from social workers) to shop for food etc. If the curfew is only partial he or she can take responsibility for this themselves, and it is surely one of the key ethical advantages of EM that it can assist in fostering responsibility (and in that sense is very compatible with the ethos of probation). Simply to use EM to replicate the confining aspects of imprisonment - to turn the home into an approximation of a prison cell - is a somewhat limited use of EM, which on no way exhausts its potential. EM-house arrest cannot be defended, ethically, simply because they are “less bad” than prison – they need to be implemented intelligently even if they are intended as no more than a punishment.

**f.** Where home confinement is used, even if only as a night-time curfew, some penal authorities allow the offender “authorised absences” from the home in the event of medical emergencies (the offender, or a partner or child needs to go to hospital) and unforeseen events (family funerals, perhaps some distance away). The offender usually has to seek permission by phoning the monitoring centre and, in the case of medical emergencies, a quick, non-bureaucratic response is needed from the penal authorities. The possibility of offering “authorized absences” so that an offender can fulfil domestic and personal responsibilities is crucial to the legitimacy of EM.

# EM and Reducing the Use of Short Custodial Sentences

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**a.** It is widely recognised in many jurisdictions that short custodial sentences are of limited rehabilitative value, and alternatives to them are frequently considered desirable. A number of countries aspire to use it in this way, although not all have had equal success, Estonia, for example, despite its effective integration of EM within probation, has not managed to persuade its judges to use monitored sentences as a strategic means of reducing the use of short periods of custody. England and Wales has been almost the same in that respect. Denmark, however, which, (emulating Sweden) introduced “home detention under intensive electronic monitoring and control” in 2005 quite specifically to reduce pressure on its prison population, has made a particular success of doing this.

In the beginning the scheme was targeted at road traffic offenders sentenced to prison for a period of up to three months. The home detention scheme has been expanded four times since 2005. In 2006, the target group was expanded to include other groups of offenders under 25 years of age sentenced to a period of up to three months imprisonment, and in 2008 the age requirement was removed. In 2010, the scheme was expanded to target all offenders sentenced to imprisonment for a period not exceeding five months regardless of age and type of offence, and in 2013 it was expanded again for all offenders sentenced to imprisonment for a period not exceeding six months.

**b.** Denmark has achieved this by making use of its pre-existing conditional custodial sentence. Offenders are first sentenced to custody by a judge and then given the option of serving their sentence on EM by the Danish Prison and Probation Service: offenders then apply to do so. The criteria are as follows:

- ▶ The offender must have a suitable place of residence;
- ▶ All cohabitants over the age of 18 at the place of residence must give their written consent ;
- ▶ The offender must be engaged in some kind of employment, training or education while serving their sentence;
- ▶ The offender may not take drugs or drink alcohol while serving their sentence;
- ▶ The offender must accept supervision by the probation service and regular unannounced control visits, including alcohol testing and maybe urine testing.

**c.** In Denmark, 60% of all prison sentences up to six months are now executed at home under EM. Denmark understandably considers its experience of RF EM to have been positive and there are at the moment no plans to introduce GPS. The average number of Danish offenders serving sentences on “home detention under intensive electronic monitoring and control” have risen from approximately 100 in 2007 to about 400 per day in 2014, saving this number of prison places per day. Permission for EM is revoked in under 10% of cases, in which case the offender is returned directly to prison.

**d.** The recidivism rate for EM is much lower than for prison (38% for custody; 29% for suspended sentences, 20% for community service, and 17% for EM-home detention in 2013). EM is also valued because it is cheaper than prison, and in 2013 Denmark introduced EM as a form of early release from prison, for a maximum period of six months before the end of the sentence. EM is still considered a punishment by offenders subject to it, because of the strict control and quick reactions to violations. And significantly, EM is broadly accepted by public opinion, the media, and politicians. There is nonetheless an ongoing discussion in Denmark among politicians as to whether judges should decide upon a sentence involving EM, rather than the Danish Prison and Probation Service.

**e.** Not all countries have been as effective as Denmark, or indeed other Scandinavian countries, at reducing the use of short custodial sentences by means of “intensive supervision and EM”, even where – like Estonia - they have legislated to do so. The variation seems to be explained by the influence of the judiciary in different jurisdictions. Where conditional custodial sentences are used, in which a judge passes sentence but an executive agency determines how the sentence shall be served, and the offender is given a choice in the matter (to consent to EM or not), it is easier to reduce the use of short custodial sentences. Where judges sentence directly to prison or community sanctions they seem less likely to opt for an EM-sanction over imprisonment, and it then becomes more difficult to reduce the use of custody. In respect of CM/Rec(2014)4 there is paradox here. The Recommendation’s understandable desire to see all decisions about the use of EM dealt with by a judicial authority or, if taken by the executive, subject to judicial review begs the question of what judicial attitudes towards EM actually are. Judges in some jurisdictions may, in fact, be among the least likely groups in criminal justice to desire the progressive, integrated use of EM as a means of prison reduction that the Recommendation proposes. At the very least, if the progressive potential of EM is to be realised, significant judicial education seems to be needed.

# The Ethics of GPS Tracking

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**a.** The England and Wales representative referred to the advent of GPS tracking as a “game changer”, and insofar as it enables significantly different kinds of surveillance to RF EM – although it can easily be combined with it, that is arguably true. However, how “the game” changes still depends of political, legal, professional – and ethical - decision-making, it is not determined by, and should not be led by, technology alone. It is often taken for granted that because GPS tracking is more obviously “intrusive” than the presence monitoring enabled by RF EM – it can subject the offender to continuous monitoring and generates a much greater amount of information – that it should always be used with more serious, higher risk offenders. There is cogency in this view, and there is no reason to think that lower risk offenders would need to be routinely tracked in order to reduce reoffending or to protect society. However, the idea that GPS tracking is inherently more “intrusive” than RF EM may be misleading: notwithstanding the greater amount of data that GPS generates, and the behavioural inferences that maybe drawn from this, some offenders may experience this as less “intrusive”, because it permits movement rather than requires confinement at home. To some offenders, this may seem more dignified, and therefore more legitimate as a sanction. In reality, curfews may be required in conjunction with GPS tracking, in order to ensure that the offender goes home regularly to charge the battery in the ankle device which is essential to accurate and reliable monitoring.

**b.** While the basic technical of capabilities of GPS are very clear – continuous monitoring, in either real-time or retrospectively, and the possibility of creating one or multiple exclusion zones whose perimeter the offender is forbidden to cross, either always or in particular periods, the ethics of tracking are much less so, and will probably be debated for some time to come. For example, with GPS tracking, is it ethical to track all of an offender’s movements, wherever

they go, in real-time? “anytime-everywhere” tracking maybe appropriate for some offenders some of the time, and perhaps for some offenders all the time: clarity of purpose is all important here. The question of duration – and the need to pursue the genuine social reintegration of an offender rather than rely on constant or perpetual monitoring is also a vital consideration. Decisions about duration should always be reviewable – but there may be room for argument at what intervals these should take place. It is difficult to imagine that tracking a released offender for a whole lifetime, even if there are stage by stage reviews of the monitoring process, would ever be thought compatible with human dignity, although it may be more so than the continued imprisonment of elderly offenders on public protection grounds.

c. Although issues of privacy were debated in the early days of RF EM, particularly in regard to the sanctity of the home and the wisdom of using private dwellings as “jailspace” (as some US commentators called it), the advent of GPS tracking has brought it back into prominence. All offenders sacrifice some degree of privacy to state authorities, before, during and after sentence: whatever the sanction, they are always required to yield personal information about themselves. The view has however been expressed that “anytime-everywhere” GPS tracking takes away more privacy than is necessary to reduce criminal behaviour or effect rehabilitation. It is certainly true that GPS tracking systems have the capacity to amass detailed, retrievable records of a person’s trails, the time and speed of travel, addresses visited, locations lingered in or (in the case of exclusion zones) avoided. One response to this might be – privacy being a multi-faceted phenomenon - that only “locational privacy” is being lost here, in a similar way to which all citizens with a mobile phone forego this type of privacy for the convenience of being “found” by a transmitted signal, wherever they are, a location which can later be pinpointed with some accuracy if the authorities are minded to do so. It might further be said that GPS tracking does not affect “bodily privacy” (except in the sense that an offender wears a tag) or “decisional privacy” (what to buy, what to watch on TV, how to vote etc) to the same extent, although it does affect them too, as RF EM did, and does). This is true, but while “locational data” is only metadata (not personal information as such) analysis of it (particularly if augmented by other forms of intelligence and information) can provide considerable insights into a person’s lifestyle, associations and behaviour. Looked at in isolation GPS tracking might easily be defended as a means of monitoring offenders, but in the contemporary world it is just one of many ways in which offenders can give up information about themselves, and it is desirable that police and penal authorities consider the impact on privacy of their interventions.



d. The main sense in which GPS tracking is a “game changer” – one which creates a potent challenge for CM/Rec (2014)<sup>4</sup> – is the way in which it can be linked to crime correlation software and used to pinpoint an offender at a crime scene – or show that they were absent from it, and thereby potentially exonerate them (although it is possible that they may have persuaded or employed a surrogate person to commit the crime on their behalf). This capacity, coupled with a further capacity to infer patterns of behavior from accumulated movements and to perhaps pre-empt planned or possible criminal activity is clearly of value to police investigations. CM/Rec (2014)<sup>4</sup> discouraged the investigatory uses of GPS tracking, but it is not difficult to see why police forces will argue that they should use this technology in order to prevent crime and victimisation. Victim advocacy groups may feel the same way. The ethical high ground here is cluttered and contested, and it seems unlikely that there will be simple solutions to the emerging debates.

# Electronic Monitoring and Victim Protection

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**a.** Using EM to protect victims necessarily involves the police in its use. It is only ethical to use EM devices with crime victims (usually victims of sexual offences, stalking and domestic violence) if the effect of doing so is empowering for them - if they feel less vulnerable to re-victimisation, more protected (knowing that the police know both her and the suspect/offenders whereabouts), safer in their own homes and when they move about in public space. Victims must only be offered portable receiving devices (to pick up a signal from the offender's tracker), never persuaded to wear a tracker themselves. If real-time location data shows offender and victim coming into proximity of each other (before they have visual contact with each other) good practice requires, in the first instance, the urgent provision of police support to the victim, and only secondarily seeking out and intervening with the offender (although both can be pursued simultaneously). Care must be taken to ensure that the offender is not inadvertently alerted (electronically, or by a police phone call) to the nearby presence of a former victim - if he does not know, and is not allowed to know - the new area (or the women's refuge) in which she is living.

**b.** It may be more difficult to use EM devices to protect victims in this way in small communities with a great deal of common space, where offenders and victims are more likely to meet by chance, than in the more anonymous spaces of larger towns and cities. In larger places care must be taken to ensure that exclusion zones around a victim's home are large enough to permit police to get there in the event of an emergency. Large exclusion zones, on the other hand, also raise questions about what restriction of access it is actually proportional to impose on the offender.

**c.** Some jurisdictions consider it legitimate to protect whole communities or neighbourhoods of potential victims by creating exclusion zones which prevent offenders from accessing particular residential and commercial areas in which, for example, they have regularly committed burglaries or been drunk and disorderly. Some released prisoners have been excluded from whole towns and cities, and while the principle of time-limited exclusion for the purposes of public protection seems defensible, there remains room for ethical argument about the size of the area from which they can be excluded.

**d.** Insofar as offenders may be highly motivated to return to these types of exclusion zone, because they have family and friends living in them, to make shopping more convenient and keep transport costs low, it might be considered legitimate to use “authorised returns” (an afternoon, a full weekend) to these zones as rewards for compliance with other aspects of probation supervision. This would constitute a variation of the graduated, incentivizing reduction of monitoring referred to in 5e), as a preparation for the point at which an offender becomes free of monitoring, if not of other forms of supervision.

# The Responsibilities of Staff Involved in EM

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**a.** All staff involved in supervising offenders in prison and the community should be people of moral integrity and be trained to a certain level of competence appropriate to their role. It is simply unethical to expose offenders to staff who have been inadequately trained – and certainly to assume that knowledge and understanding of EM can be picked up without specialist training. In any given country the training of probation officers (usually understood as a form of social work training focused on criminal justice matters) may or may not cover electronic monitoring, but in any case it is desirable that those officers who become involved in administering EM are given specialist in-service training. In some countries the probation staff involved in EM – at least the fitting of the equipment – may be trained assistants rather than fully qualified probation officers, in others they are fully qualified: so long as the assistants are competent and adequately supervised this arrangement will work. The merit of probation/social work training, above and beyond the competences it instills, is the ethical values it promotes in respect of offenders, values which should also shape the way that EM is itself used. It is also desirable that probation officers are kept acquainted with the latest research findings on EM, in respect of its effectiveness in the context of different sanctions and different types of offender, and in respect of ever improving understanding of how compliance and legitimacy are to be achieved.

EM is among the tasks that Estonia employs its probation officers to undertake. These tasks are understood to comprise a Preparation Phase (evaluation for the suitability of EM) and an Implementation Phase which involves the following (informing and instructing; choice of device (RF or GPS); devising curfew schedule; risk assessment; devising and individual sentence plan, counseling; supervision and monitoring; reacting to violation by increase control, warnings, report and returning the suspect or offender to court. Probation officers who supervise high risk offenders have a maximum caseload of 30 (not all of whom will be on EM)

**b.** Not all staff involved in the administration of EM have probation or social work backgrounds. Police and Prison Service staff is also involved – as are, in some jurisdictions, private sector staff who are involved in installation visits and operating the monitoring centres. These staff need also be trained in the ethics of care and respect for offenders and, like probation officers, held accountable for the way they undertake their tasks. As in probation services, the knowledge needed by front line staff may be different from what is needed by management and supervisory staff, but both should know what is necessary to implement in EM effectively and ethically. Managers should be aware of all official policy documents relating to the strategy and vision of EM in their jurisdiction, and have the capacity to critique and recommend improvements to them in the light of practice experience on the ground.

**c.** Some jurisdictions have gender-sensitive approaches to supervising women offenders, only permitting women offenders to do so, on the grounds that many women offenders have had histories of physical and sexual abuse and would be uncomfortable and perhaps fearful in the company of male supervisors. Those jurisdictions – England and Wales and Ireland, for example – who do this, have taken a similar view to monitoring staff in the EM field, not least because physical contact is involved in the fitting and removal of the ankle bracelet. Only female monitoring officers are permitted to do this. Feminist ethics might well be considered to point directly towards the wisdom of doing this but it may be that some countries would need to undertake research into the preferences of women offenders on this matter, before they could arrive at an ethical decision.

**d.** It is not uncommon now for some probation services to enlist the aid of ex-offenders either as volunteers or paid employees, in programmes for current offenders. Ex-offenders who have successfully desisted from crime can have a unique credibility with offenders who are still on supervision or have been released from prison, having gone through similar experiences themselves. Some of these ex-offenders have a very keen sense of wanting to “give back” to others, as a way of making amends for harm done when they themselves were offending, and they can be a useful complement to professional supervisors. It maybe that some ex-offenders who have experienced EM themselves are well placed to counsel other offenders who are undergoing the process of monitoring, to cope with its difficulties and to assist them with the process of complying.

# Electronic Monitoring: Data Analysis and Data Protection

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**a.** EM systems use sophisticated computers which generate data which can be stored, analysed cumulatively over time, and retrieved – perhaps for later use as evidence in court in a particular case. Rightly or wrongly, this never seemed to be a significant issue in data protection when the only data involved was the presence or absence from home registered by RF EM. The advent of GPS tracking (almost always augmented by mobile telephone networks in order to increase the accuracy of location finding) however, has seeming changed perceptions of the importance of data protection, precisely because of the vast amount of data that can be collected on any one person and the ease with which it can be aggregated and analysed to discern patterns in, and generate knowledge from “big data”. While no one yet knows what insights (if any) into offender behavioural patterns might be gained from the large scale aggregation of GPS data, how useful they may be to policymakers, the right to access, gather and use such data remains a grey area in many jurisdictions and is yet another way in which the advent of GPS can be regarded as a “game changer”. This technology has created new possibilities for offender supervision AND for police investigation.

**b.** Location data, of the kind and on the scale potentially generated by GPS tracking is arguably different in kind from the type of information generated in the course of, for example, probation supervision interviews, records of professional conversations, details of court appearances, and new forms of data protection may be needed to deal with it. For the duration of their supervision or incarceration, or in the immediate period after release, an offender’s right to privacy may well be regarded as less than a law-abiding citizen’s right to privacy. Police, prison and probation files containing “personal details” have long been kept on offenders after their sentence has expired but it is increasingly easy to store vast quantities of much more detailed information in digital form for longer periods on the grounds that they may, so long as certain protocols are followed, be useful for future police investigations. France, for example, is planning to keep its data on GPS tracked offenders for ten years from the end of the monitoring period. In Germany, data is destroyed two months after the expiry of the monitoring period

c. CM/Rec (2014)4 is clear on the kinds of data protection strategy that should in general terms be applied to EM, but there is as yet no European consensus on the ethical implications of the new technologies involved in offender supervision, and their relevance to policing. In a climate and which, rightly or wrongly, the mass surveillance of ordinary citizen's electronic communications by police and security services is increasingly being considered necessary to protect society from terrorism and children in particular from organised online paedophiles, it may become progressively more difficult to defend and create rigorous data protection arrangements for offenders on EM, especially those deemed high risk. Encryption and judicially restricted access to stored GPS seem like a basic minimum requirement but on almost all other matters relating to data protection there are likely to be protracted ethical and political discussions.

# Ethical Aspects of Researching EM

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**a.** It is ethically desirable to research the effectiveness and impact of all penal measures. Penal authorities should never use penal techniques on suspects or offenders without having at least some understanding of what their actual effect is, whether they are achieving the intended effect, and whether there are unintended and unforeseen consequences. It is impossible to know fully whether – and how – a penal measure is effective without evaluating its impact over an agreed period of time. This is not the place to explore evaluation methodologies – there are many textbooks which explain these – but it should be emphasised that both quantitative and qualitative elements are important, and that the informed consent of participants to research (professionals and offenders) should always be sought. A human rights perspective on research requires that evaluations are always more than cost-benefit analysis and that the social realities of those who experience penal interventions are given due prominence.

**b.** Pilot programmes (usually in selected geographical areas – one or more – of a given jurisdiction) are essential for EM to test both the viability of proposed administrative procedures and equipment, and to make adjustments on the basis of lessons learned before a scheme is mainstreamed or, indeed, not to proceed at all. One additional advantage of pilots is they permit the use of “random controlled trials”, viewed in some quarters as the gold standard in evaluative research methodology. Evaluators can compare the effects and impact of EM on the sample of research subjects in the pilot areas with a matched “control group” from one or more of the areas that are not involved in the pilot, but are in the same national jurisdiction. In schemes that are already mainstreamed across whole counties it is arguably unethical to allocate offenders randomly to “subject” or “control” groups merely to serve the interests of research: it introduces an extraneous consideration into sentencing, and it makes the issue of gaining informed consent more complex. The value of being able to undertake random controlled trials at the pilot stage of an EM scheme should not be understood as implying that random controlled trial evaluations are the only valuable form of research into EM: there are others which are also of value to policymaking and practice.



**c.** As far as possible evaluative research should be undertaken independently, even if it is commissioned by government. It should not be influenced by people or organisations that have a vested interest, and certainly not a commercial interest, in the outcomes intended by an EM supervision programme. Pragmatically, often for financial reasons, service organisations can and do research themselves using data that they generate as a matter of course for the purpose of implementing particular measures. It is also true that commercial organisations which manufacture or sell EM have occasionally funded independent research into it, paying an academic to undertake it. It is certainly possible that commercial organisations can be committed to the disinterested pursuit of truth necessary to objective research, confident that the emergent results will work to their advantage, but this is of its nature an ethically precarious arrangement, and the guarantees of independence given to the researcher must be cast-iron in all respects, from access to data and relevant personnel, through to the publication and dissemination of results, even if they are critical of the practice in which the commercial organization is involved.

**d.** It is not only the outcomes of EM, in terms of reduced offending, reduced prison use and reduced costs that should matter to researchers, and not the only things that should be evaluated. The process of administrative innovation (what facilitates it, what impedes it), the quality of professional (including ethical) debate about EM's use and purposes, and the procedural fairness of its application should also be researched. It is particularly important to appraise the training, competence and understanding of staff who implement EM, in whatever organisation they work (and how they work across organizational boundaries) because the manner in which they implement it can play an important part of an offender's sense of the sanction's legitimacy.

**e.** Offender (and family) experiences of EM are a vital element in any evaluation that takes human rights seriously. Offenders (and, in the case of EM, co-residents) have a right to express an opinion about the impact and legitimacy of the way they are supervised (or punished) – and, in addition, the knowledge they yield can be part of what helps policymakers and practitioners to improve their systems and services, as well as helping lawyers to become better advocates for them. Evaluating offender and family experiences of EM requires more than gathering cursory information in exit interviews when a period of time on EM has come to an end (useful as this can be). Most countries who have researched their use of EM have taken account of offender and co-resident experiences, in greater or lesser degree. Arguably the richest data and argument in this area comes from a postgraduate research project in Belgium, whose exemplary methodological sophistication could usefully be emulated elsewhere. (Vanhaelemesch D, Vander Beken T (2012); Vanhaelemesch D, Vander Beken T and Vandeveldel S (2013))

**f.** Where EM is used in conjunction with other forms of probation supervision it may be difficult (particularly in reconviction studies) to ascertain and attribute the specific effects of particular components of the sentence. It is unethical to claim positive effects of EM, which may in fact be the effects of probation, or, indeed, more subtly, of the interplay entailed by their combined use. It is equally important not to be dismissive of EM's impact, and it is probably helpful to take an international perspective on EM research in order to get a rounded perspective on the varied potential and dangers of EM. An EM-sanction that (after evaluation) seems unsuccessful in one jurisdiction should not be taken as evidence that EM as such "does not work" – its use within a different legal and penal context may have better results, and point to different and better ways in which it might be used in that first jurisdiction. "Policy transfer" of EM-sanctions between jurisdictions (some more than others) may never be easy precisely because even subtle distinctions in legal and administrative frameworks, as well as political, historical and cultural factors, can make a significant difference between what is considered feasible and desirable in different jurisdictions. Research from other countries however may help a jurisdiction learn new ways of using EM, even if they cannot exactly emulate the arrangements that wrought success elsewhere. Comparative research into the ways that different countries use EM is also helpful in this respect, and should be encouraged on a larger scale than it has so far been practiced in Europe.

**g.** It is important to produce research that is accessible and intelligible to policymakers and practitioners, and that even when research is first being planned strategies for dissemination to relevant audiences are designed in, and costed. If time and energy are to be allocated to the evaluation of EM schemes – which some resource-starved practitioners may well say would not be prioritised over delivering the services themselves – it is incumbent on all concerned parties to ensure that effort is not wasted, and that the research has impact in the right places. To complete research which could be of benefit to offenders, their families and crime victims and not to use it is ethically unacceptable.

# The Private Sector and Electronic Monitoring

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**a.** Commercial organisations are inevitably involved in the provision of EM, if only as providers of technology (hardware and software) and technical support. Sometimes they provide monitoring staff and run monitoring centres. Ankle bracelets are either bought or rented from commercial suppliers. None of this means that commercial organisations cannot be integrated into ethically defensible arrangements for administering EM, but where service delivery is itself in the hands of a commercial provider, as in England and Wales, this creates yet another organisational interface within the multiagency structures that are usually required to provide efficient and effective, integrated services to offenders. Evidence from the combined inspectorates of police, courts and probation in England and Wales suggested that integration across the public/private divide was never designed-in and remained hard to accomplish even when it belatedly came to be regarded as politically desirable (Criminal Justice Joint Inspection (2008; 2012). Compared to most other European countries, probation officers in England and Wales have had negligible experience of supervising offenders on EM, have been somewhat resentful of the commercial organisations involved, and prone to regarding EM as someone's else's business. Now that the England and Wales probation service has itself been privatised, albeit in separate organisations from the commercial body which delivers EM, it remains to be seen whether collaboration and integration will become any easier.

**b.** Government decisions to use commercial organisations to deliver EM are as likely to be taken on ideological grounds as on practical grounds. They may, in the early days of EM (the late 1990s and early 2000s), have reflected an official belief that private companies were more adept at managing technological projects than the public sector which, with the exception of the police, did not usually comprise technologically sophisticated organisations. In the second decade of the twenty-first century this is less true, and even the Netherlands, which had public sector delivery of EM from the outset, albeit with a private organisation running the monitoring centre, has recently taken the monitoring centre into public ownership, in its prison service. At the multilateral meeting,

many of the countries which have only recently developed EM, or are about to – Estonia, Latvia and Croatia, for example – and who have only recently developed probation as well, seem to have no difficulty in contemplating the integrated delivery of EM. In that sense, it is the Scandinavian/Dutch/Belgian public sector model of EM service delivery that has largely prevailed in the longer term over the Anglo-Welsh preference for a privatised model

**c.** Commercial organisations may promote social visions of how EM might be used to improve the efficiency and effectiveness of penal systems which are potentially more profitable to them than other forms of offender supervision like probation and community service. Large commercial organisations may also be more influential politically than social work organisations, and “commercial confidentiality” at the commissioning and procurement stage may mean that decisions to involve them are not as transparent as they are likely to be when public sector organisations are being primed to deliver EM. Commercial organisations may be exempted from freedom of information legislation, making it more difficult to scrutinise the nature of their operation and to ensure the accountability of personnel, compared to public sector equivalents.

**d.** None of the above should be taken to mean that the public sector will always deliver EM well or always be properly accountable. There is expertise on all aspects of EM in the private sector which prison, probation and police services can use to make themselves more imaginative and effective in the way they use it. The public sector and the judiciary can sometimes be unduly resistant to potentially helpful innovation, and the private sector can sometimes be a refreshing stimulus. There are no reasons why consultants and advisers with this background should not be used. The simple fact remains, however, that all-important integrated services are harder to deliver when probation and EM are placed in separate organisations.

# Future Electronic Monitoring Technologies

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**a.** Since its inception in the USA in the 1980s, the forms of EM technology have already changed, and are highly likely to change again in the future, perhaps creating new ethical dilemmas for offender supervisors. There will certainly be further upgrades to existing technology and already there are debates as to whether GPS technology will supplant RF technology, or combine with it so that EM will always have a tracking capability even if the ankle bracelet is used primarily to enforce home confinement. This debate has been influential in England and Wales where, in comparison say to Denmark, government has expressed some disillusion with the limitations of RF EM. As other global satellite systems become available alongside with the American GPS system, the scope for monitoring the location of offenders will only increase, and already there is at least one European EM manufacturer whose technology can be configured to use any or all of the upcoming satellite systems.

**b.** There are likely to be debates on the use of radio frequency implants as a means of tracking offenders (as there are similar debates in healthcare) but given the likelihood of there being even stronger ethical objections to devices which penetrate the body, wearable monitoring technology may remain prevalent for many decades yet. More likely is the potential for integration of individualised EM into wider surveillance infrastructures, relating to health, finance and social media use, so that supervisors and police officers have access to an even greater range of data on the lifestyles and movements of those under supervision. Whether any new EM technologies will become mainstream in the way that RF has is difficult to predict. It is more likely, however, because of commercial innovation and the expansion of techniques of e-governance, that there will be pilots and experiments.

**c.** Remote alcohol monitoring is not a new technology as such, although compared to the USA its use is not widespread in Europe. It goes a step beyond location monitoring, entailing the monitoring of an aspect of the offender's behaviour itself (specifically, the intake of alcohol, or the prohibition against doing so). It shifts the focus of monitoring from the position of a person's body in a particular place at a particular time, to the physical state of the offender's body (impairment or intoxication) - and what this then implies about the offender's attitude towards compliance with supervision requirements. Although remote alcohol monitoring could be used punitively on an offender whose use of alcohol had contributed to criminal behaviour - by denying him the pleasure of its consumption - it is more usual to use it as an aid to treatment of an alcohol problem, with offenders who actively want to reduce their alcohol consumption. Remote alcohol monitoring may be the precursor of remote drug monitoring, or even of remotely administered medication which could affect the behavior of, or sustain the health of say mentally disordered offenders.

**d.** In the past there was a tendency for probation services (in particular), but also judges, to be surprised by EM, to imagine it would not or could not happen, and to be too dismissive of it. In just one generation we have grown better at anticipating and adapting to technological change, especially change in digital technology, largely because there is so much of it around us. In criminal justice, nonetheless, we must become even better at "horizon scanning" for the new technologies which might be customised for use with offenders, to think through the ethics in advance and devise legislation which is equal to the challenge posed by the technology.

# Conclusion

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CM/Rec (2014)4 constitutes the first European attempt to provide an ethical framework for the use of EM, and as the multilateral meeting in November 2014 showed, it is capable of generating deep ethical reflection on all matters pertaining to EM. The reflections in this document, elaborated from the discussions that took place at that event, are intended to stimulate further discussion in the jurisdictions using, or planning to use, this technology. Some of the points are made definitively, others more tentatively, but none, in fact are intended to be the last word. The potential of EM to make a positive difference to penal practice in Europe is clear, but equally its misuse could impose dangers for traditional, but still desirable, forms of probation supervision, as well as giving unprecedented powers of surveillance to the police. Rising to the challenge of realising the potential and facing down the dangers must be a collective – and continuing – effort, building on the start that has been made by the Council of Europe.

# Glossary

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## **Retributive punishment**

A form of punishment which looks backwards to the offence committed, assumes that the offender deserves pain or loss because of the harm done, and determines the severity of the pain (unpleasant experience) or loss (of liberty) that is inflicted in terms of what is considered proportional to the seriousness of the offence. Retributivism is not typically concerned with the future consequences of punishment: it responds to what has already happened, not what might yet happen. A fine can be retributive as easily as imprisonment - neither is necessarily concerned with changing an offender's future behaviour (although this might be an incidental consequence of a retributive punishment).

## **Deterrent punishment**

A form of punishment which looks forward and seeks through the instilling of fear of pain or loss to discourage an offender from future lawbreaking. Judicial authorities may feel that an offender needs a painful experience (like imprisonment) to understand what the future holds if he re-offends, and to become suitably fearful, but some types of sentence – conditional and suspended sentences – may not be painful in themselves, but still work by instilling fear of the consequences. Conventional EM seems to work in this way; over and above the distinct pains of experiencing EM, it is fear of detection and/or fear of future punishments that produces compliance in the here and now. “General deterrence” – the fear of punishment and its associated sense of stigma - is the term used to describe the way in which ordinary law-abiding citizens are kept in a state of conformity. It is unclear if EM-penalties can function as a general deterrent, because many of them are imagined (mistakenly) by the public and the media to be a lenient sentence, neither properly retributive nor deterrent to offenders themselves.



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# Recommendation CM/Rec(2014)4

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## of the Committee of Ministers to member States on electronic monitoring

*(Adopted by the Committee of Ministers on 19 February  
2014, at the 1192nd meeting of the Ministers' Deputies)*

The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe,

Considering that the aim of the Council of Europe is to achieve greater unity among its members;

Agreeing that it is necessary to further develop international cooperation in the field of enforcement of penal sentences;

Considering that such cooperation should contribute to improving justice, to executing sanctions effectively and in full respect of human rights and dignity of offenders and to reducing the incidence of offending;

Agreeing that deprivation of liberty should be used as a measure of last resort and that the majority of suspects and offenders can be efficiently and cost-effectively dealt with in the community;

Considering that the continuing growth of prison populations can lead to detention conditions which are not in conformity with Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedom (ETS No. 5), as highlighted by the relevant case law of the European Court of Human Rights;

Reiterating that prison overcrowding and prison population growth are a major challenge to prison administrations and the criminal justice system as a whole, both in terms of human rights and of the efficient management of penal institutions;

Recognising that electronic monitoring used in the framework of the criminal justice process can help reduce resorting to deprivation of liberty, while ensuring effective supervision of suspects and offenders in the community, and thus helping prevent crime;

Recognising at the same time that electronic monitoring technologies should be used in a wellregulated and proportionate manner in order to reduce their potential negative effects on the private and family life of a person under electronic monitoring and of concerned third parties;

Agreeing therefore that rules about limits, types and modalities of provision of electronic monitoring technologies need to be defined in order to guide the governments of the members States in their legislation, policies and practice in this area;

Agreeing further that ethical and professional standards need to be developed regarding the effective use of electronic monitoring in order to guide the national authorities, including judges, prosecutors, prison administrations, probation agencies, police and agencies providing equipment or supervising suspects and offenders;

Taking into account:

- the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5);
- the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders (ETS No. 51);
- Recommendation Rec(92)16 on the European rules on community sanctions and measures;
- Recommendation Rec(92)17 concerning consistency in sentencing;
- Recommendation Rec(97)12 on staff concerned with the implementation of sanctions and measures;
- Recommendation Rec(99)22 concerning prison overcrowding and prison population inflation;
- Recommendation Rec(2000)22 on improving the implementation of the European rules on community sanctions and measures;
- Recommendation Rec(2003)22 on conditional release (parole);
- Recommendation Rec(2006)2 on the European Prison Rules;
- Recommendation CM/Rec(2008)11 on the European Rules for juvenile offenders subject to sanctions or measures;
- Recommendation CM/Rec(2010)1 on the Council of Europe Probation Rules;

- Recommendation CM/Rec(2012)5 on the European Code of Ethics for Prison Staff;

Bearing in mind:

- the United Nations Standard Minimum Rules for Noncustodial Measures (the Tokyo Rules) (Resolution 45/110);
- the United Nations Rules for the Treatment of Women Prisoners and Noncustodial Measures for Women Offenders (the Bangkok Rules) (Resolution 2010/16);
- the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) (Resolution 40/33);
- the European Union Council Framework Decision 2008/947/JHA on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions;
- the European Union Council Framework Decision 2009/829/JHA on the application, between member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention,

Recommends that the governments of member States:

- take all appropriate measures, when reviewing their relevant legislation and practice, to apply the principles set out in the appendix to this recommendation;
- ensure the dissemination of this recommendation and its commentary among the relevant authorities and agencies, above all among the relevant ministries, the prison administration, probation agencies, the police and other relevant law enforcement agencies, as well as among any other agency providing electronic monitoring equipment or supervising persons under electronic monitoring in the framework of the criminal justice process.

## **Appendix to Recommendation CM/Rec(2014)4**

### **I. Scope**

The aim of this recommendation is to define a set of basic principles related to ethical issues and professional standards enabling national authorities to provide just, proportionate and effective use of different forms of electronic monitoring in the framework of the criminal justice process in full respect of the rights of the persons concerned.

It is also intended to bring to the attention of national authorities that particular care needs to be taken when using electronic monitoring not to undermine or replace the building of constructive professional relationships with suspects and offenders by competent staff dealing with them in the community. It should be underlined that the imposition of technological control can be a useful addition to existing socially and psychologically positive ways of dealing with any suspect or offender as defined by the relevant Committee of Ministers' recommendations and particularly by Recommendation Rec(92)16 on the European rules on community sanctions and measures; Recommendation Rec(97)12 on staff concerned with the implementation of sanctions and measures; Recommendation Rec(2006)2 on the European Prison Rules; Recommendation CM/Rec(2010)1 on the Council of Europe Probation Rules and Recommendation CM/Rec(2012)5 on the European Code of Ethics for Prison Staff.

## II. Definitions

**“Electronic monitoring”** is a general term referring to forms of surveillance with which to monitor the location, movement and specific behaviour of persons in the framework of the criminal justice process. The current forms of electronic monitoring are based on radio wave, biometric or satellite tracking technology. They usually comprise a device attached to a person and are monitored remotely.

Depending on the national jurisdictions, electronic monitoring may be used in one or more of the following ways:

- during the pretrial phase of criminal proceedings;
- as a condition for suspending or of executing a prison sentence;
- as a standalone means of supervising the execution of a criminal sanction or measure in the community;
- in combination with other probation interventions;
- as a prerelease measure for those in prison;
- in the framework of conditional release from prison;
- as an intensive guidance and supervision measure for certain types of offenders after release from prison;
- as a means of monitoring the internal movements of offenders in prison and/or within the perimeters of open prisons;
- as a means for protecting specific crime victims from individual suspects or offenders.

In some jurisdictions, where electronic monitoring is used as a modality of execution of a prison sentence, those under electronic monitoring are considered by the authorities to be prisoners.

In some jurisdictions, electronic monitoring is directly managed by the prison, probation agencies, police services or other competent public agency, while in others it is implemented by private companies under a serviceproviding contract with a State agency.

In some jurisdictions, the suspect or offender carrying the device is required to contribute to the costs of its use, while in others the State alone covers the costs of electronic monitoring.

In some jurisdictions electronic monitoring may be used in the case of juvenile suspects and offenders, while in others the measure is not applicable to juveniles.

**“Suspect”** means any person who is alleged to have committed or who has been charged with having committed a criminal offence but who has not been convicted of it.

**“Offender”** means any person who has been convicted of a criminal offence.

**“Agency providing electronic monitoring equipment”**: usually a private company which produces, markets, sells, rents and maintains such equipment.

**“Agency responsible for supervising persons under electronic monitoring”**: a public agency or a private company which is entrusted by the competent authorities to supervise the location, movement or specific behaviour of a suspect or an offender for a specified period of time.

**“Probation agency”**: a body responsible for the execution in the community of sanctions and measures defined by law and imposed on an offender. Its tasks include a range of activities and interventions, which involve supervision, guidance and assistance aiming at the social inclusion of offenders, as well as at contributing to community safety. It may also, depending on the national legal system, implement one or more of the following functions: providing information and advice to judicial and other deciding authorities to help them reach informed and just decisions; providing guidance and support to offenders while in custody in order to prepare their release and resettlement; monitoring and assistance to persons subject to early release; restorative justice interventions; and offering assistance to victims of crime.

A probation agency may also be, depending on the national legal system, the “agency responsible for supervising persons under electronic monitoring”.

### **III. Basic principles**

1. The use, as well as the types, duration and modalities of execution of electronic monitoring in the framework of the criminal justice shall be regulated by law.
2. Decisions to impose or revoke electronic monitoring shall be taken by the judiciary or allow for a judicial review.
3. Where electronic monitoring is used at the pretrial phase special care needs to be taken not to netwiden its use.
4. The type and modalities of execution of electronic monitoring shall be proportionate in terms of duration and intrusiveness to the seriousness of the offence alleged or committed, shall take into account the individual circumstances of the suspect or offender and shall be regularly reviewed.
5. Electronic monitoring shall not be executed in a manner restricting the rights and freedoms of a suspect or an offender to a greater extent than provided for by the decision imposing it.
6. When imposing electronic monitoring and fixing its type, duration and modalities of execution account should be taken of its impact on the rights and interests of families and third parties in the place to which the suspect or offender is confined.
7. There shall be no discrimination in the imposition or execution of electronic monitoring on the grounds of gender, race, colour, nationality, language, religion, sexual orientation, political or other opinion, national or social origin, property, association with a national minority or physical or mental condition.
8. Electronic monitoring may be used as a standalone measure in order to ensure supervision and reduce crime over the specific period of its execution. In order to seek longer term desistance from crime it should be combined with other professional interventions and supportive measures aimed at the social reintegration of offenders.
9. Where private sector organisations are involved in the implementation of decisions imposing electronic monitoring, the responsibility for the effective treatment of the persons concerned in conformity with the relevant international ethical and professional standards shall remain with public authorities.
10. Public authorities shall ensure that all relevant information regarding private sector involvement in the delivery of electronic monitoring is transparent and shall regulate the access to it by the public.

11. Where suspects and offenders are contributing to the costs for the use of electronic monitoring, the amount of their contribution shall be proportionate to their financial situation and shall be regulated by law.

12. The handling and shared availability and use of data collected in relation to the imposition and implementation of electronic monitoring by the relevant agencies shall be specifically regulated by law.

13. Staff responsible for the implementation of decisions related to electronic monitoring shall be sufficient in number and adequately and regularly trained to carry out their duties efficiently, professionally and in accordance with the highest ethical standards. Their training shall cover data protection issues.

14. There shall be regular government inspection and avenues for independent monitoring of the agencies responsible for the execution of electronic monitoring in a manner consistent with national law.

#### **IV. Conditions of execution of electronic monitoring at the different stages of the criminal process**

15. In order to ensure compliance, different measures can be implemented in accordance with national law. In particular, the suspect's or offender's consent and co-operation may be sought, or dissuasive sanctions may be established.

16. The modalities of execution and level of intrusiveness of electronic monitoring at the pretrial stage shall be proportionate to the alleged offence and shall be based on the properly assessed risk of the person absconding, interfering with the course of justice, posing a serious threat to public order or committing a new crime.

17. National law shall regulate the manner in which time spent under electronic monitoring supervision at pretrial stage may be deducted by the court when defining the overall duration of any final sanction or measure to be served.

18. Where there is a victim protection scheme using electronic monitoring to supervise the movements of a suspect or an offender, it is essential to obtain the victim's prior consent and every effort shall be made to ensure that the victim understands the capacities and limitations of the technology.

19. In cases where electronic monitoring relates to exclusion from, or limitation to, specific zones, efforts shall be made to ensure that such conditions of execution are not so restrictive as to prevent a reasonable quality of everyday life in the community.



20. Where substance abuse needs to be monitored, consideration shall be given to the respective intrusiveness and therapeutic and educative potential of electronic and traditional approaches when deciding which approach is to be used.

21. Electronic monitoring confining offenders to a place of residence without the right to leave it should be avoided as far as possible in order to prevent the negative effects of isolation, in case the person lives alone, and to protect the rights of third parties who may reside at the same place.

22. In order to prepare offenders for release, and depending on the type of offence and offender management programme, electronic monitoring may be used to increase the number of individual cases of shortterm prison leave that are granted, or to give offenders the possibility to work outside prison or be given a placement in an open prison.

23. Electronic monitoring may be used as an alternative execution of a prison sentence, in which case its duration shall be regulated by law.

24. Electronic monitoring may be used, if needed, in case of early release from prison. In such a case, its duration shall be proportionate to the remainder of the sentence to be served.

25. If electronic monitoring is used, if needed, after the prison sentence has been served, as a postrelease measure, its duration and intrusiveness shall be carefully defined, in full consideration of its overall impact on former prisoners, their families and third parties.

## **V. Ethical issues**

26. Age, disability and other relevant specific conditions or personal circumstances of each suspect or offender shall be taken into account in deciding whether and under what modalities of execution electronic monitoring may be imposed.

27. Under no circumstances may electronic monitoring equipment be used to cause intentional physical or mental harm or suffering to a suspect or an offender.

28. Rules regarding the use of electronic monitoring shall be periodically reviewed in order to take into account the technological developments in the area so as to avoid undue intrusiveness into the private and family life of suspects, offenders and other persons affected.

## **VI. Data protection**

29. Data collected in the course of the use of electronic monitoring shall be subject to specific regulations based on the relevant international standards regarding storage, use and sharing of data.

30. Particular attention shall be paid to regulating strictly the use and sharing of such data in the framework of criminal investigations and proceedings.

31. A system of effective sanctions shall be put in place in case of careless or intentional misuse or handling of such data.

32. Private agencies providing electronic monitoring equipment or responsible for supervising persons under electronic monitoring shall be subjected to the same rules and regulations regarding handling of the data in their possession.

## **VII. Staff**

33. All relevant rules of Recommendation Rec(92)16 on the European rules on community sanctions and measures, of Recommendation Rec(97)12 on staff concerned with the implementation of sanctions and measures, of Recommendation CM/Rec(2010)1 on the Council of Europe Probation Rules and of Recommendation CM/Rec(2012)5 on the European Code of Ethics for Prison Staff, which relate to staff, shall be applicable.

34. Staff shall be trained to communicate sensitively with suspects and offenders, to inform them in a manner and language they understand of the use of the technology, of its impact on their private and family lives and on the consequences of its misuse.

35. Staff shall be trained to deal with victims in cases where victim support schemes are used in the framework of electronic monitoring.

36. In establishing electronic monitoring systems, consideration shall be given to the respective merits of both human and automated responses to the data gathered by the monitoring centre, bearing in mind the advantages of each.

37. Staff entrusted with the imposition or execution of electronic monitoring shall be regularly updated and trained on the handling, use and impact of the equipment on the persons concerned.

38. Staff shall be trained to install and uninstall technology and provide technical assistance and support in order to ensure the efficient and accurate functioning of the equipment.

## **VIII. Work with the public, research and evaluation**

39. The general public shall be informed of the ethical and technological aspects of the use of electronic monitoring, its effectiveness, its purpose and its value as a means of restricting the liberty of suspects or offenders. Awareness shall also be raised regarding the fact that electronic monitoring cannot replace professional human intervention and support for suspects and offenders.

40. Research and independent evaluation and monitoring shall be carried out in order to help national authorities take informed decisions regarding the ethical and professional aspects of the use of electronic monitoring in the criminal process. ww

The handbook is conceived as a policy guide and a management tool for professionals responsible for the establishment and the use of electronic monitoring. The text highlights important ethical standards in line with the Recommendation of the Committee of Ministers of the Council of Europe CM/Rec (2014)4 on electronic monitoring and other Recommendations in the field of prisons and probation, and suggests responses to a number of ethical dilemmas. The handbook is a result of a multilateral meeting on electronic monitoring, held in Strasbourg in November 2014, as part of the co-operation activities in the penitentiary field implemented by the Criminal Law Co-operation Unit. The text is also online at:  
<http://www.coe.int/t/DGI/CRIMINALLAWCOOP/>

The Council of Europe is the continent's leading human rights organisation. It comprises 47 member states, 28 of which are members of the European Union. All Council of Europe member states have signed up to the European Convention on Human Rights, a treaty designed to protect human rights, democracy and the rule of law. The European Court of Human Rights oversees the implementation of the Convention in the member states.

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