

Electronic Monitoring in Scotland

A Consultation on Proposals for Legislation

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ELECTRONIC MONITORING IN SCOTLAND – A CONSULTATION ON PROPOSALS FOR LEGISLATION

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Foreword



Scotland is making major changes to support the delivery of community justice. Changes which are designed to continue the focus on public safety, prevent and reduce further offending, promote desistance from crime and tackle our high rate of imprisonment.

As Cabinet Secretary for Justice, I am committed to making these changes work and strengthening our delivery of community justice, supporting those who end up in our justice system to turn their behaviours around and become contributors to an inclusive and respectful society.

I believe electronic monitoring has a role to play in supporting this change.

That is why the Electronic Monitoring Expert Working Group was set up in 2014 to look at how we could develop electronic monitoring in Scotland to help reduce further offending and make our communities safer.

The overwhelming message from the Working Group is that electronic monitoring could be used more innovatively and strategically across the justice system, and be more integrated with other interventions and support.

The Working Group's report shows that far more could be achieved if we were to extend the usage of electronic monitoring to a broader range of situations, introduce a range of person-centred supportive measures and to introduce new technologies. Moving from viewing electronic monitoring as purely a form of punishment or control to one which is individually tailored to reflect the needs, risks and circumstances of the individual in order to secure longer term desistance.

The Working Group's report is not the final word on the future model of electronic monitoring in Scotland. Your views, experience and expertise will be crucial to help scope the legislative changes required to implement the Working Group's vision and make best use of this monitoring tool and emerging technology.

I look forward to hearing your views.

Michael Matheson, MSP
Cabinet Secretary for Justice

Overview

This consultation seeks views on the next steps in taking forward primary legislation to extend the use of electronic monitoring in Scotland in support of broader community justice policy. The proposed changes reflect the findings and recommendations of the Electronic Monitoring Expert Working Group. The Working Group report was published on 4 October 2016.

The Scottish Government will publish the contributions it receives (except where respondents request confidentiality) and use them to inform the further development of the Bill.

Responding to this Consultation

We are inviting responses to this consultation by 19 May 2017.

Should you have any queries on this consultation which you would wish to discuss prior to submitting a formal response, or if you would wish to find out more about the current uses of electronic monitoring and the work being taken forward on preparing for new uses please email:

ElectronicMonitoringMailbox@gov.scot.

Introduction

Our vision for a safer, fairer and more inclusive nation sees us moving towards a society where those who have been victims of crime can feel safer and more reassured and those with a history of offending can be supported to be active and responsible contributors to our communities as fellow citizens.

That vision reflects the values of a modern and progressive nation:

- where we prevent and reduce further offending by addressing its underlying causes;
- where we safely and effectively manage and support those who have committed offences to help them reintegrate into the community and realise their potential for the benefits of all; and
- where the protection of victims of crime and public safety is prioritised.

We believe that electronic monitoring has a role to play in supporting this vision. From continuing to offer a method of control over an individual's movements and expanding this offer, to implementing new uses to support both reintegration and rehabilitation to prevent and reduce further offending.

While there will always be a need for prison sentences in some instances, evidence shows that community sentences and community justice alternatives have an important role in helping to change the behaviour of those who offend. Like prison, electronic monitoring is not suitable for everyone, but set within a wider package of care it can be used effectively as part of a credible community sentence which is effective at reducing reoffending in the longer term.

With the above in mind and the introduction of the new model for community justice from 1 April 2017, the time is now right to take a more ambitious approach to how we use the opportunities afforded to us by electronic monitoring. We believe that this approach, which has been directly informed by the work of the Electronic Monitoring Expert Working Group, will further the aims of improving outcomes for individuals and communities across Scotland who have been impacted by crime and offending.

This consultation paper sets out the legislative proposals which we propose to take forward to both enable the new uses of electronic monitoring and introduce new technologies to make the most out of what international evidence suggests.

While legislation is necessary, a great deal will be taken forward in raising awareness, encouraging use and developing new approaches. This will involve a range of individuals and organisations working together in partnership, including people who have been victims of crime and people with a history of offending.

Use of electronic monitoring

Electronic monitoring was first piloted in Scotland in 1998, before being rolled-out nationally in 2002 as a Restriction of Liberty Order which is imposed only by Courts. Since 2002, as confidence in the use of the technology increased, an understanding has developed as to how electronic monitoring could be used more widely. It is now used to monitor a number of different community disposals as well as being included as a licence condition on release from prison. Electronic monitoring is versatile and has grown organically to become a well-established feature of the criminal justice system in Scotland.

Current legislation now allows for electronic monitoring in Scotland to be used for the following purposes:

- As part of a Restriction of Liberty Order (RLO);
- As a licence condition for the purposes of Home Detention Curfew (HDC);
- As a licence condition imposed following early release from prison;
- As part of a Restricted Movement Requirement (RMR) imposed for breach of a Community Payback Order (CPO);
- As a condition of a Drug Treatment and Testing Order (DTTO); and
- As a Movement Restriction Condition (MRC) for young people imposed by a Children's Hearing.

Scotland currently only uses radio frequency (RF) technology to monitor around 1,000 people each day. Radio frequency has proven to be an effective technology to monitor when an individual enters or leaves a specific address, either as part of a curfew or – far less frequently – where an exclusion zone has been set up to protect a victim, be that an individual or a business. An electronic tag is usually worn around the ankle and communicates with a home monitoring unit via a radio frequency signal. The information that the tag sends to the home monitoring unit provides information about a person's movements within an agreed location. A more detailed description of the electronic monitoring technology currently used in Scotland can be found at Annex B.

The current legal basis for electronic monitoring

Further information on the legal basis for electronic monitoring in Scotland is provided at Annex D. The changes proposed in this consultation would require both primary legislation and subordinate legislation. Where subordinate legislation under existing powers would be required to implement the changes proposed, it is likely that some amendment to those existing powers would also need to be made.

Costs of electronic monitoring in Scotland

The annual cost of electronic monitoring in Scotland in 2015/16 was £2.6m. This figure included both the installation and monitoring costs. In the same year the average caseload was typically around 853. This meant that on a daily basis the average cost per person monitored was about £8.43 per day. To date in the year 2016/17 the average caseload number is about 1000.

Informing a New Strategy for Electronic Monitoring in Scotland

Following a Scottish Government consultation in 2013 the Electronic Monitoring Expert Working Group was established to consider how electronic monitoring could be better used within the criminal justice system in Scotland. The Working Group's aim was to align electronic monitoring with existing efforts to aid desistance, support integration, protect victims, support public protection and help reduce further offending.

In the summer of 2016, the Working Group delivered a report to the Cabinet Secretary for Justice setting out recommendations on how the use of electronic monitoring as a tool should be taken forward in Scotland. The report contained eight recommendations.

Both the report and its recommendations were informed by international evidence, partner and stakeholder engagement at both national and local level along with the knowledge and expertise of the group members.

The focus of the report is the potential to extend the use of electronic monitoring to different points in the criminal justice system and within the prison estate. To ensure that electronic monitoring is used most effectively the Working Group's recommendations focussed on the need for it to be used as part of a goal-oriented and person-centred approach, tailored to the individual. Where longer term desistance is the ultimate goal, electronic monitoring should be set within a wider package of support provided by statutory bodies with third sector involvement.

The Working Group concluded that they wished to see a more extensive, more consistent and more strategic use of electronic monitoring in Scotland. The Working Group did not see electronic monitoring as more important than the existing array of community interventions, but it did believe that a better and more integrated use across the criminal justice system could enhance those interventions. We believe that the discretion to use electronic monitoring, within frameworks established and promoted by the Scottish Government, will rest with professionals involved in practice and sentencing. However, there should be much less geographical variation in its use than exists at present, whilst recognising that such variation is not unique to electronic monitoring and has complex causes in local criminal justice cultures.

The more strategic use envisaged by the Working Group has three aspects:

1. To use electronic monitoring in more integrated ways, alongside a range of supportive measures, to help prevent and reduce further reoffending and promote desistance among people with convictions;
2. To enhance the protection and security of victims of crime in ways that other community interventions are unable to do; and
3. By offering a greater degree of control in the community, to make the use of electronic monitoring more appealing to sheriffs as an alternative to custody, in particular short-term sentences and remand.

The Working Group recommendations (full list attached at Annex C), focus on:

1. Technology;
2. Future service delivery;
3. A goal-oriented and person-centred approach;
4. Compliance;
5. Future uses of electronic monitoring: in the community;
6. Future uses of electronic monitoring: within the Custodial Estate;
7. Legislative change; and
8. Encouraging ownership of electronic monitoring.

The Cabinet Secretary for Justice has accepted both the strategy put forward by the Working Group in their report and the recommendations.

The Ambition

We are committed to making electronic monitoring more person-centred and better integrated with other community justice interventions: tailored to the needs, risk and circumstances of the individual whilst supporting public protection and the protection of victims.

In considering the recommendations of the Electronic Monitoring Expert Working Group we will continue to work with partners to ensure the voice of those in the justice system and victims of crime are reflected in the new electronic monitoring strategy. Moving from viewing electronic monitoring purely as a form of punishment or control to one which also seeks to support the rehabilitation of the individual will require partners to work more closely together to both prevent and reduce further offending and to support public protection.

In addition to this consultation and impending legislative changes, some of the recommendations from the Working Group do not require legislation and can be taken forward separately, laying the foundations for the implementation of the new legislative proposals.

Demonstration Project

Giving people the support they need to desist and break the cycle of further offending can add value to our communities.

To help achieve the Working Group's vision of electronic monitoring being part of a wider, more integrated and individually tailored package of support a demonstration project will be undertaken in 2017. This project will help to determine what 'support' will comprise of, how it is best delivered and the associated resource implications.

Compliance

Effective management of compliance is a factor that can be critical to the successful completion of an electronic monitoring curfew period. Some instances of non-compliance should be seen as an opportunity for the individual to understand their responsibilities and to learn something that could help them to progress. Working with the individual and providing a more consistent response to the different causes of non-compliance can enable a graduated and tailored response.

Ensuring that effective structures and criteria are in place to support compliance and manage non-compliance is therefore crucial to contributing to a long term reduction in further offending.

The Working Group recognised that partners will need to work more closely to implement any new approach. This partnership working should ensure a consistent approach to the management of compliance and non-compliance including setting up a response framework. This new response framework will be progressed in 2017.

Enabling the Ambition – Legislative Proposals

This consultation and following questions focus on the legislative changes required to fully realise the Working Group vision.

Part 1: Exploiting the opportunities afforded by new technologies

We accept the view put forward by the Working Group that the technology, in itself, should not dictate how and in which circumstances electronic monitoring should be used.

Scotland presently uses radio frequency technology in a standalone mode mainly as a method of monitoring compliance with a court order following conviction or monitoring compliance with a condition of release from prison. This technology is an effective way to monitor an individual's presence at a place for up to 12 hours a day, or their remaining away from a place for 24 hours a day. There is still a place for the use of radio frequency technology in standalone mode or used with an integrated package of support, but in keeping with the proposed new strategy for electronic monitoring in Scotland, we also see a role for the introduction of new technologies to operate alongside the existing technology.

We recognise that any introduction of such technologies must be done in a manner which respects the goal-oriented approach, together with matters of data protection and public protection.

We also recognise that the introduction of new technologies will require significant investment in both awareness and potentially the training of professionals in its application. Full practice guidance will be developed to support any new introduction.

There may also be a requirement to update relevant national standards and guidance, such as for criminal justice social work and the Scottish Prison Service.

Global Positioning Systems Technology

We propose to legislate for the introduction of Global Positioning Systems (GPS) technology in Scotland in support of both current and new uses of electronic monitoring.

GPS technology enables the monitoring of movement over a wide area rather than the monitoring of presence at a single location. GPS technology allows for larger or more sophisticated exclusion zones, tailored, if necessary, from a house, to specific street patterns, to a neighbourhood, to a whole city. GPS also allows more than one exclusion zone to be set. Using GPS technology to set exclusion zones can help create safe spaces for victims of crime.

GPS also allows for the setting of inclusion zones of varied shapes and size. Using GPS technology to set an inclusion zone limits a monitored person's movements to remaining within a defined geographical area, setting up an external perimeter in which, for a specified period of time, they are contained. GPS can be tracked

real-time if 24/7 monitoring is required or retrospective tracking if less immediate deterrence is required.

GPS technology can be combined with a requirement for an overnight curfew (or shorter period), to ensure that a person wearing a tracker is obliged to return home to charge it. While the public image of GPS tracking is literally one of “anytime-everywhere” monitoring of movement, usually in real time, this may not be the best – and certainly not the only – way to help manage individuals in the community.

We do not intend to introduce blanket approaches to particular types of offences nor restrict the use of technologies to low or high impact crimes.

Question 1: Do you agree that we should introduce legislation to permit the use of GPS technology for electronic monitoring?

Yes No

Question 1a: Please give reasons for your answer

Comments:

Question 1b: Who do you consider should determine which technology (RF or GPS) should be used in each case?

The Judiciary Scottish Prison Service
Criminal Justice Social Work Other (please specify below)

Comments:

Question 1c: What factors do you think should be taken into consideration when deciding which technology should be used?

Comments:

Buffer zones

GPS exclusion zones can include a buffer zone, an area that is set just outside an exclusion zone to which entry generates an early alert to possible boundary encroachment. As the buffer zone is set outside an exclusion zone, by entering this area the individual is not technically breaching their order conditions, but it does allow for the possibility of those monitoring the individual to take action to prevent them from encroaching on the exclusion zone. This may be of particular benefit where the exclusion zone relates to the victim of the crime.

Question 2: What response, if any, should there be to an infringement of a buffer zone?

Comments

Crime type

We do not propose to restrict or mandate the use of GPS for any particular crime type.

Decisions on the use of GPS must be based on an appropriate risk assessment to ensure public protection, consideration of victim safety and take into account both an individually tailored approach and support to the monitored person's desistance.

Keeping a Goal-Oriented Approach in Mind

We intend to introduce GPS technology to different points in the justice system in Scotland, both within a community setting and within the custodial estate.

Electronic monitoring can be used at different levels of intensity. It is never the technology which is proportionate to the offence itself but the rigour and duration of the schedules which are used to support and enforce it. In keeping with the accepted broader strategy, the use of technologies must always be within a goal-oriented approach.

Domestic Abuse

We are considering how GPS technology can offer victims more choice and support their safety in the community.

Internationally there has been wide spread interest in the use of GPS tracking in the context of responses to domestic abuse, particularly at the pre-trial stage. The goal in this instance is to keep the alleged perpetrator and the victim apart from each other. This is done by tracking the former and placing an exclusion around the latter, and in some instances giving the victim a mobile alarm which alerts them, the police or electronic monitoring service provider if the perpetrator comes within proximity of the victim (accidentally or deliberately).

Devising a model of electronic monitoring in a domestic abuse context is complex and can be contentious, but there is evidence from the U.S. that suggests some victims, though not all have found it useful. The Working Group is clear that GPS tracking is not in itself a full solution to the risks posed by domestic abuse perpetrators (alleged or sentenced); let alone a means of changing attitudes or behaviour. It can, however, add a level of control in situations where none (or little) existed before.

Voluntary GPS schemes for people who offend persistently

We propose to bring forward legislative proposals for GPS technology to provide for voluntary schemes for people who have a persistent history of offending.

Voluntary GPS schemes have been on-going in other jurisdictions for some time and can provide some individuals with an additional motivation/incentive to change their reoffending habit. Voluntary agreement to being tagged allows the persistent offender to demonstrate their desire to desist to their family and friends. In addition to

providing a deterrent to reoffending, it can play a role in creating a more structured lifestyle for some persistent offenders giving the individual a chance to find stable housing, seek employment and foster positive relationships. Essentially it can provide opportunities where individuals can pursue, with the appropriate support in place, factors which the evidence tells us are vital to breaking out from the cycle of reoffending.

We see potential value in a voluntary scheme being undertaken in Scotland, subject to stringent arrangements for its usage:

- there must be clear criteria for such a scheme being offered;
- this would not be as part of a surveillance programme of an individual;
- as with all other forms of electronic monitoring, there must be the written consent of the monitored person, including relating to the use of their data;
- there will be strict rules in place governing the collection, use, retention and destruction of any data associated with an individual's movements;
- the use of such a scheme must be in conjunction with a wider support package being offered, with a view to aiding desistance to prevent and reduce further offending;
- due to its voluntary nature, there will be no breach of such a scheme but any infringements would be discussed as part of the support package; and
- such a scheme would be for a specified time period for each individual.

Voluntary schemes could be offered to those who have fully completed their sentence, whether community or custodial, or those subject to another community sentence to provide additional motivation/incentive.

Question 3: Do you agree that we should introduce legislation to permit a voluntary GPS scheme?

Yes No

Question 3a: If you answered yes, who should be eligible, how would this operate and who should manage the scheme?

Comments

Alcohol Monitoring Technologies

The use of alcohol as a factor in offending in Scotland is well documented, with the Working Group considering the use of Transdermal Alcohol Monitoring. This is where ankle bracelets are used to detect the presence of alcohol when it is sweated out through the skin (transdermally).

In addition, technology also exists to allow individuals to have their alcohol consumption monitored with the use of a breathalyser (which can be incorporated into a monitoring unit). Such testing could be scheduled and/or random.

The Working Group recognised that evidence showed that to be effective, any use of alcohol monitoring requires being set within a legal framework. This will be required for both voluntary schemes and statutory orders.

We welcome the conclusion of the Working Group and believe that further research and practical exercises are required before decisions can be taken as to how to introduce alcohol monitoring technologies in Scotland. To enable such research and exercises to take place, enabling provisions must be introduced in legislation.

We intend to take forward a demonstration project to determine how alcohol monitoring might be used effectively and at which points within the Scottish Justice setting.

This project will consider:

- At which points in the Scottish criminal justice system, alcohol monitoring technology could be used;
- What support to a monitored person on such technology would look like, if this were to be different from support for radio frequency or GPS technologies;
- Which organisation(s) would be best placed to offer support;
- Matters of compliance and the management of such;
- How breaches would be handled in a voluntary scheme; and
- The involvement of health organisations in supporting the monitored person.

To allow for the above to take place and recognising the view put forward by the Working Group, we will put in place enabling legislation to allow for the demonstration project.

Question 4: Should alcohol monitoring be permitted as part of an electronic monitoring programme?

Yes No

Question 4a: Please give reasons for your answer

Comments:

Question 4b: If you answered yes to **Question 4** in what circumstances do you think alcohol monitoring would be appropriate?

Comments

Part 2: Extending the use of Electronic Monitoring in a Community Setting

A key part of our vision for community justice is to reduce the reliance on ineffective, short-term custodial sentences with a stronger emphasis on robust community sentences. These community sentences will focus on actively addressing the underlying causes of offending behaviour. Electronic monitoring has a role to play here in providing structure and control but will be most effective when combined with supervision.

We propose to draft legislation to include an electronic monitoring option in the following circumstances:

Electronic Monitoring Requirement as part of a Community Payback Order

The current legal framework allows a person subject to a community sentence to have both electronic monitoring and a support package in place. At present, the preferred method of imposing a curfew as part of a more complex community sentence and one which ensures supervision and support for the monitored person is to have two disposals from the court: a Restriction of Liberty Order (RLO) and a Community Payback Order (CPO). However, the RLO cannot extend beyond 12 months whereas the CPO can be imposed for up to 3 years. This is a cumbersome situation and one which could be rectified if electronic monitoring could form part of a CPO when the CPO is initially imposed and not as part of a separate court order.

A restricted movement requirement using electronic monitoring can, at present, be applied by the court as a result of a breach of a CPO. If electronic monitoring were a requirement of a CPO then this may no longer be required.

Question 5: Should electronic monitoring be an optional requirement of a CPO when it is initially imposed?

Yes No

Question 5a: Please give reasons for your answer

Comments

As an alternative to a fine

Fines have invariably been understood as a purely punitive - indeed straightforwardly retributive - measure. An element of deterrence may also be intended by the court which imposes them, and they may be experienced as such by the person paying the fine. There is, however, no meaningful sense in which fines can be used to change a person's attitudes and behaviour. A fine is a merely transactional penalty where compliance is simply a matter of pay/don't pay. The utility of this penalty is not disputed, but when applied to low income individuals they have two obvious drawbacks. Firstly, they may impose undue hardship on the individual's family.

Secondly, it may be impossible for the court to impose a fine that is proportionate to the seriousness of the offence because it would be beyond the means of the individual to pay it. In this context a period of electronic monitoring could be an appropriate alternative – a “fine” on time in the form of a curfew, rather than a fine on income.

There would be no expectation of criminal justice social work support for electronic monitoring in this context any more than there routinely is for fines. This would remain a purely punitive use of electronic monitoring.

Question 6: Should electronic monitoring be introduced as an alternative to a fine?

Yes No

Question 6a: Please give reasons for your answer

Comments:

Condition of a Sexual Offences Prevention Order

Sexual Offences Prevention Orders (SOPOs) and Interim SOPOs are intended to regulate or otherwise control, the behaviour of those convicted of a relevant offence.

A SOPO is made only for the purpose of protecting the public or particular members of the public from serious sexual harm (serious sexual harm being any serious physical or psychological harm). An order may prohibit the individual from doing anything specified in it, or positively oblige them to carry out a specified act or course of conduct. The duration of a SOPO cannot be for less than five years.

The SOPO regime could be amended so that compliance with a SOPO can be electronically monitored. Electronic monitoring could be imposed where the court is satisfied that it is necessary for the purpose of protecting the public, or any particular members of the public, from serious sexual harm from the person. As is the case with any requirement for electronic monitoring this would be proportionate, being tailored to the risk and forming part of the individual's risk management plan.

Question 7: Should electronic monitoring be permitted as a condition of a SOPO?

Yes No

Question 7a: Please give reasons for your answer

Comments:

As a condition of a Risk of Sexual Harm Order

The Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 introduced Risk of Sexual Harm Orders (RSHO) as a tool to achieve the goals of protecting children and of proactively targeting those who pose a risk. They are preventative orders which can prohibit an individual from doing anything specified in it, or positively oblige them to carry out a specific act or course of conduct.

There is no minimum age for an individual for whom an RSHO can be sought. The minimum duration of an order is two years.

Question 8: Should electronic monitoring be introduced as a possible condition of a RSHO?

Yes No

Question 8a: Please give reasons for your answer

Comments:

As a condition of a Structured Deferred Sentence

The Structured Deferred Sentence (SDS) is a low-tariff intervention offering the courts the option to provide a short period (usually around 3-6 months) of intensive supervision by criminal justice social work to those who offend. This supervision will take place post-conviction but prior to final sentencing as it is a condition of the court deferring sentence. It is intended for individuals who have offended with underlying problems such as drug or alcohol dependency, mental health issues or learning difficulties and allows for intervention work to be carried out without the imposition of a community sentence.

SDS are designed to provide courts with an alternative to imposing an immediate sentence and this can benefit the individual by providing them with support to help change their behaviour and address their needs and in turn it can potentially lead to a reduced sentence. At the end of the period of intervention, the court retains the discretion to pass sentence in any manner that would have been appropriate at the time of conviction, but with the benefit of information from the supervising officer in relation to the period of deferral.

SDS with electronic monitoring could provide more structure to the intensive supervision for all or part of the deferral period, and may facilitate SDS for higher-tariff individuals.

Question 9: Should electronic monitoring be introduced as a possible condition of a SDS?

Yes No

Question 9a: Please give reasons for your answer

Comments:

Part 3: Alternative to Remand and Support to pre-trial conditions

Alternative to Remand

We propose to introduce new legislative provisions which will provide courts with the option to restrict an individual's movements whilst on bail via the use of electronic monitoring.

There is a disproportionately high rate of people on remand in prison in Scotland. For the past decade the remand population has accounted for approximately 20% of the average daily prison population. Many of those on remand do not constitute a significant risk to the public.

Short-term imprisonment, of any kind, can disrupt families and communities. It adversely impacts on employment opportunities and stable housing which are the very things that evidence shows supports desistance from further offending.

The Working Group recommendation to using electronic monitoring as an alternative to remand opens up opportunities to reduce the use of remand and support more people in the community pre-trial, without losing sight of the need to ensure public safety. This may be used on a standalone basis or as part of a bail supervision package.

An electronic monitoring bail condition would be intended to be used as an alternative to remand i.e. where an individual would not normally have received bail without electronic monitoring. It is not intended to apply an electronic monitoring bail condition to those who would not have received bail in any case.

As is the case whenever bail conditions are applied, a risk assessment must be carried out. Therefore, we will need to consider who is best placed to carry this out. This risk assessment will give consideration to public protection, inclusive of victims, and to preventing and reducing further offending by the individual.

Careful consideration will require to be given to the management of compliance and potential breaches, together with the use of a response framework. Some of this consideration will be taken forward in the work with partners and stakeholders on compliance and response frameworks.

Through funding we have supported bail supervision services across Scotland for a number of years. However, provision and usage is not Scotland-wide. The new model for criminal justice social work funding offers a flexibility which we expect will see local authorities put in place increased opportunities for bail supervision.

Question 10: Should electronic monitoring be introduced as an alternative to remand?

Yes

No

Question 10a: Please give reasons for your answer

Comments:

Question 10b: If you answered yes to **Question 10**, when would you consider this appropriate?

Comments:

Police Liberation on Undertakings and Investigative Liberation

We propose to introduce new legislative provisions which will provide Police Scotland with the option to restrict an individual's movements whilst they are released on pre-trial conditions via the use of electronic monitoring.

Police Liberation on Undertakings are used by the police routinely to release people from police stations when they have been charged, arrested and liberated to appear at a specified court on a specified date and time. This is an alternative to keeping a person in custody to appear at court the next lawful day.

Investigative Liberation allows the police to arrest a person for a crime punishable by imprisonment, interview them and release them pending further enquiries, such as waiting for forensic evidence.

The introduction of electronic monitoring as a condition of a Police Liberation on Undertakings or as a condition of Investigative Liberation, could strengthen the protection arrangements for victims and witnesses.

Question 11: Should electronic monitoring be permitted as a condition of Police Liberation or Investigative Liberation?

Yes

No

Question 11a: Please give reasons for your answer

Comments:

Question 11b: If yes, when would you consider this appropriate?

Comments:

Part 4: Extending the use of Electronic Monitoring for the purposes of temporary release from prison

The Working Group agreed that for those prisoners who are on the margins of acceptable risk, introducing the use of electronic monitoring for the purposes of temporary release from prison may provide additional options for prison managers to test those individuals while maintaining public safety. This form of release is different to the system of Home Detention Curfew, where eligible prisoners are released in the 6 months prior to their release date, as it is temporary and can be used at any point in a prisoner's sentence.

For those in custody, electronic monitoring could be utilised on some occasions for work placement, home leave and future female community custody units in order to help prepare for release from prison. This approach has the potential to increase the number of prisoners who progress to less secure conditions and provide them with the confidence to live successfully, supporting rehabilitation and the eventual integration back into the community.

Question 12: Should electronic monitoring be permitted as a condition of temporary release from prison?

Yes

No

Question 12a: Please give reasons for your answer

Comments:

Question 12b: If you answered yes, when would you consider this appropriate?

Comments:

Part 5: Information and Data Sharing and Retention

Given the nature of the data collected which includes details of an individual's movements, decisions on how electronic monitoring data and information is generated, stored, analysed and accessed is an important consideration. The new technologies which could be utilised for the purpose of electronic monitoring, discussed in Part 1 above, would result in the collection of even more detailed information about the person being monitored. The question of data protection is even more important in this context.

The management of data produced or held under GPS, in common with all other data for electronic monitoring, must comply with the terms of the Data Protection Act 1998 and be proportionate. The federal GPS scheme for released sexual and violent individuals in Germany only uses inclusion and exclusion zones - the moment by moment monitoring of movement and the recording of trails is considered disproportionate and not strictly relevant to the safeguarding of former or potential victims. Information about the person's movements is available to the police for investigatory purposes only by request, and requires judicial approval.

The Working Group recommended that a clear framework be put in place to ensure that the control and processing of data collected as a result of electronic monitoring is appropriate and that such data is only used for the purpose for which it was intended. The collection, use, retention and destruction of all data collected in the course of electronic monitoring must comply with the data protection principles contained in the Data Protection Act 1998.

Particular attention will be paid to outlining the purpose for which the data will be collected and regulating the use and sharing of the data, especially in the context of criminal investigations and proceedings. The restrictions on the collection and use of data will apply to all agencies involved in the electronic monitoring system where they collect, use, retain or destroy the data collected.

Question 13: Should the data collected only be for the purpose of monitoring compliance with an order or licence condition, or should it also be used for other purposes such as the investigation of crime? Please include reasons for your answer.

Comments:

Question 13a: What appropriate safeguards should be put in place for the collection, use, retention and destruction of data?

Comments:

Part 6: Electronic Monitoring Equipment

Any electronic monitoring condition places a requirement on the monitored person not to damage or tamper with the electronic monitoring equipment. By doing so, the monitored person is breaching their order and is at risk of being recalled to custody or returned to court.

In some jurisdictions the responsibility on those electronically monitored goes further - those monitored are responsible for the upkeep and return of the electronic monitoring equipment with sanctions in place for failing to do so.

In Scotland there is provision within the contract for the return of the equipment and for the majority of individuals monitored, this provision is satisfactory. This requires the service provider to make arrangements with the monitored person to uplift the equipment at a time suitable to that person. However, in some instances the electronic monitoring service provider is unable to gain access, for example when the monitored person lives alone and is returned to custody. In these instances the equipment, in particular the monitoring unit, will remain at the address until such time as the person returns to that address or the landlord clears the property. This has a significant resource impact, both financial and staff time, for the electronic monitoring service provider.

There is no legal right for any agency to enter the address without the persons consent, however, if this consent is given it does not mitigate the potential risk to the agency entering the property in the absence of that person (these risks include accusation of theft, damage to contents etc.).

Question 14: Who should be responsible for the safe return of the monitoring equipment?

Comments:

Question 14a: Should there be sanctions for not doing so?

Yes

No

Question 14b: If you answered yes, what do you consider these sanctions should be?

Comments:

Question 14c: If the sole key holder to a property is not available should a legal right of access be given to Scottish Ministers (and their agents) to enter a property to recover their equipment?

Yes No

Question 14d: If you answered yes, should this access only be via a court warrant?

Yes No

Question 14e: Please include any further comments below

Comments:

Part 7: Impact Assessments

Equality

The Scottish Government is committed to promoting equality and removing or minimising disadvantage which may be experienced by different groups of people. We have a legal duty to consider the impact of policies on people who may be differently affected in relation to the “protected characteristics” under the Equality Act 2010. The protected characteristics are age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

Question 15: Please tell us about any potential equality impacts, either positive or negative, that you consider the proposals in this consultation may have.

Comments:

Business and regulation

We do not consider that a Business and Regulatory Impact Assessment is necessary as the Electronic Monitoring policy will not directly impose new regulatory burdens on businesses, charities or the voluntary sector. Any new measures which arise in relation to the new bill will be subject to assessment as appropriate.

Question 16: Please tell us about any potential costs and burdens that you consider may arise as a result of the proposals within this consultation.

Comments:

Environmental

The Environmental Assessment (Scotland) Act 2005 ensures those public plans that are likely to have a significant impact on the environment are assessed and measures to prevent or reduce adverse impacts are sought, where possible, prior to implementation of the plan in question. We do not consider that a Strategic Environmental Assessment is necessary as the Electronic Monitoring policy will not directly impose on the environment.

Question 17: Please tell us about any potential impacts, either positive or negative, that you consider that any proposals in this consultation may have on the environment.

Comments:

Responding to this Consultation

We are inviting responses to this consultation by **19 May 2017**

Please respond to this consultation using the Scottish Government's consultation platform, Citizen Space. You can view and respond to this consultation online at <https://consult.scotland.gov.uk/community-justice/electronic-monitoring-in-scotland>

You can save and return to your responses while the consultation is still open. Please ensure that consultation responses are submitted before the closing date of **19 May 2017**

If you are unable to respond online, please complete the Respondent Information Form (see "Handling your Response" below) and send to:

ElectronicMonitoringMailbox@gov.scot

Or

Jamie Begbie
Justice Directorate
Community Justice Division
Scottish Government
Area GWR, St Andrews House
Regent Road
Edinburgh, EH1 3DG

Handling your response

If you respond using Citizen Space (<http://consult.scotland.gov.uk/>), you will be directed to the Respondent Information Form. Please indicate how you wish your response to be handled and, in particular, whether you are happy for your response to be published.

If you are unable to respond via Citizen Space, please complete and return the Respondent Information Form included in this document. If you ask for your response not to be published, we will regard it as confidential, and we will treat it accordingly.

All respondents should be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

Next steps in the process

Where respondents have given permission for their response to be made public, and after we have checked that they contain no potentially defamatory material,

responses will be made available to the public at <http://consult.scotland.gov.uk>. If you use Citizen Space to respond, you will receive a copy of your response via email.

Following the closing date, all responses will be analysed and considered along with any other available evidence to help us. Responses will be published where we have been given permission to do so.

Comments and complaints

If you have any comments about how this consultation exercise has been conducted, please send them to ElectronicMonitoringMailbox@gov.scot

Scottish Government consultation process

Consultation is an essential part of the policy-making process. It gives us the opportunity to consider your opinion and expertise on a proposed area of work.

You can find all our consultations online: <http://consult.scotland.gov.uk>. Each consultation details the issues under consideration, as well as a way for you to give us your views, either online, by email or by post.

Consultations may involve seeking views in a number of different ways, such as public meetings, focus groups, or other online methods such as Dialogue (<https://www.ideas.gov.scot>)

Responses will be analysed and used as part of the decision making process, along with a range of other available information and evidence. We will publish a report of this analysis for every consultation. Depending on the nature of the consultation exercise the responses received may:

- indicate the need for policy development or review
- inform the development of a particular policy
- help decisions to be made between alternative policy proposals
- be used to finalise legislation before it is implemented

While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.

Current electronic monitoring technology

The tag also known as a Personal Identification Device (PID) is usually worn around the ankle and communicates with the home monitoring unit (below) via a radio frequency (RF) signal. The tag is robust, built with Kevlar strips and a fibre optic band running through it and it is designed to be tamper proof and also to register attempts to tamper with it. It is important to note though that it is not the case that it could not be removed by an offender. It is designed so that if it needs to be removed, for medical reasons for example, it can be cut. It is designed to be robust so that such an action to cut or remove the tag could not be taken accidentally and the tag will accurately register if such an attempt, successful or otherwise is made. The information the tag sends to the monitoring unit provides information about a person's movements within an agreed location. The locational information is essentially binary though: in other words in terms of "location" it can only indicate whether the tag is present (or is not present) within the range of the home monitoring unit. The tag only "communicates" with the monitoring unit and it is the monitoring unit that sends the information back to the monitoring company. This means that the two pieces of equipment need to be within range of each other in order for locational information (such as whether the tag is present) or other information (such as whether the tag has been tampered with) to be registered by the monitoring unit.

The home monitoring unit is a data collection and communication device which is placed at the restricted location and continuously collects and stores data from signals sent by the tag. It has a signal detecting range which can be set to cover the size of most domestic dwellings. It then passes the data collected to a central computer at a monitoring centre via either a landline or mobile phone network. The monitoring unit has battery backup so it can continue to operate and can continue to store events even if the power or communications routes are interrupted. These recorded events can then be communicated back to the monitoring centre once the power or communications link is restored. The events communicated back to the monitoring centre are acted upon by the monitoring company. The monitoring unit has 'tamper and tilt' recognition technology that will register and communicate any attempts to tamper with the box or move its location. The monitoring unit has a phone which can allow the company to call the restricted location to speak to the offender or can allow the offender to call the monitoring company. The monitoring company then report on how each order is being monitored (compliance or non-compliance) back to the supervising officer or authorising agency (Scottish Courts, Scottish Prison Service, etc.) who will decide on the most appropriate action to be taken in response to each case.

Electronic Monitoring Expert Working Group Recommendations

Recommendation 1-Technology: Introduction of GPS technology and a demonstration project to look at how Alcohol Monitoring technology could be used.

Recommendation 2-Future Service delivery: Electronic monitoring should be part of a wider package of support, be more integrated and tailored to reflect the personal circumstances of each monitored person.

Recommendation 3-Goal-Oriented and Person-Centred Approach: To help achieve Recommendation 2, a demonstration project should be undertaken to determine what 'support' may comprise of, how it is best delivered and the associated resource implications.

Recommendation 4-Compliance: Effective structures and criteria should be in place to support compliance and manage non-compliance and to ensure non-compliance reporting is more consistent.

Recommendation 5-Future uses: There is scope to extend the use of electronic monitoring within a community setting where a risk and need assessment indicates it is appropriate. These include:

- community re-integration following prison;
- alternative to remand;
- alternative to short prison sentences;
- voluntary scheme for persistent offenders;
- alternative to secure care for young people;
- alternative to fines;
- condition of a Sexual Offences Prevention Order; and
- condition of a Risk of a Sexual Harm Order.

Recommendation 6-Within the custodial estate: For those in custody, electronic monitoring could be utilised on some occasions for work placement, home leave and future female community custody units in order to help prepare for release from prison.

Recommendation 7-Legislative Changes: Amendments to primary legislation will be necessary to enable all of the recommended future uses. In addition, the Expert Working Group recommends:

- removing section 16 and 17 Statutory Exclusions for HDC;
- electronic monitoring as a requirement of a Community Payback Order;
- introducing legislative changes to allow for the introduction of GPS technology, including amendments to Data Protection legislation;
- enabling legislation to provide for a demonstration project on Alcohol Monitoring technology; and
- redefining an RLO as a standard standalone community sentence as opposed to an alternative to custody.

Recommendation 8-Ownership of Electronic Monitoring: Statutory and non-statutory organisations should be invited to draft their own statement of intent around the use of electronic monitoring going forward.

Legal Background

All forms of electronic monitoring in Scotland have a statutory basis; whether imposed by a court following conviction or as a licence condition following release from prison.

- Under section 245C of the Criminal Procedure (Scotland) Act 1995, electronic monitoring can be imposed by a court in order to remotely monitor compliance with a Restriction of Liberty Order (RLO);
- Under sections 12AA and 12AB of the Prisoners and Criminal Proceedings (Scotland) Act 1993, electronic monitoring must be imposed for the purposes of remotely monitoring compliance with a curfew condition imposed for the purposes of Home Detention Curfew (HDC);
- Under section 40 of the Criminal Justice (Scotland) Act 2003, and section 245C of the Criminal Procedure (Scotland) Act 1995, electronic monitoring may be imposed as a licence condition following a prisoner's release from prison under Part 1 of the 1993 Act. An electronic monitoring licence condition is for the purpose of remotely monitoring compliance with licence conditions and the prisoner's whereabouts other than for the purpose of compliance with licence conditions;
- Under sections 227ZI and 245C of the Criminal Procedure (Scotland) Act 1995, electronic monitoring can be imposed by a court in order to remotely monitor compliance with a Restricted Movement Requirement imposed for breach of a Community Payback Order;
- Under sections 234CA and 245C of the Criminal Procedure (Scotland) Act 1995, electronic monitoring can be imposed by a court in order to remotely monitor compliance with a Drug Treatment and Testing Order (DTTO);
- Under regulation 7 of the Children's Hearings (Scotland) Act 2011 (Movement Restriction Conditions) Regulations 2013 (SSI 2013/210), electronic monitoring may form part of a movement restriction condition which is imposed as part of a compulsory supervision order made in relation to a child by a Sheriff or a Children's Hearing.

The Scottish Ministers have powers to prescribe the methods of monitoring compliance with RLOs, restricted movement requirements and DTTOs. The Ministers also have a duty to specify the devices which are to be used for electronically monitoring compliance with RLOs, restricted movement requirements, DTTOs, HDC curfew conditions, and electronic monitoring licence conditions. The power to prescribe the methods of monitoring and the duty to specify devices that may be used for electronic monitoring have been exercised in the Restriction of Liberty Order etc. (Scotland) Regulations 2013 (SSI 2013/6) ("the 2013 Regulations").

Regulation 4 of the 2013 Regulations prescribes the permitted methods of monitoring compliance with a RLO, restricted movement requirement and a DTTO as: the use of radio frequency technology, periodic telephone calls to the offender and random visits to the offender's place of curfew during periods of restriction. If any new methods of monitoring compliance with these orders are to be introduced (such as GPS monitoring or alcohol monitoring), those new methods would require

to be added to the 2013 Regulations. This would require further subordinate legislation.

If more substantive changes are to be made to electronic monitoring (such as the extension of electronic monitoring to other forms of sentence or the use of more intrusive methods of electronic monitoring) primary legislation may be required.

Any modification of existing uses of electronic monitoring and any extension of electronic monitoring would still require to be within the legislative competence of the Scottish Ministers. Any policy proposal would require to be compatible with the rights of prisoners under the European Convention on Human Rights (ECHR), and the law on reserved matters. A modification of the existing electronic monitoring regime could result in additional information being collected about a prisoner. If that is the case, the Scottish Ministers must ensure that the collection, use, retention and destruction of that data complies with the requirements of the Data Protection Act 1998.



RESPONDENT INFORMATION FORM

Please Note this form **must** be completed and returned with your response.

Are you responding as an individual or an organisation?

- Individual
 Organisation

Full name or organisation's name

Phone number

Address

Postcode

Email

The Scottish Government would like your permission to publish your consultation response. Please indicate your publishing preference:

- Publish response with name
 Publish response only (without name)
 Do not publish response

Information for organisations:

The option 'Publish response only (without name)' is available for individual respondents only. If this option is selected, the organisation name will still be published.

If you choose the option 'Do not publish response', your organisation name may still be listed as having responded to the consultation in, for example, the analysis report.

We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

- Yes
 No

CONSULTATION PAPER QUESTIONS

Electronic Monitoring in Scotland – A consultation on proposals for legislation

Question 1: Do you agree that we should introduce legislation to permit the use of GPS technology for electronic monitoring?

Yes

No

Question 1a: Please give reasons for your answer to **Question 1**

Comments:

Question 1b: Who do you consider should determine which technology (RF or GPS) should be used in each case?

The Judiciary

Scottish Prison Service

Criminal Justice Social Work

Other (please specify below)

Comments:

Question 1c: What factors do you think should be taken into consideration when deciding which technology should be used?

Comments:

Question 2: What response, if any, should there be to an infringement of a buffer zone?

Comments

Question 3: Do you agree that we should introduce legislation to permit a voluntary GPS scheme?

Yes

No

Question 3a: If you answered yes, who should be eligible, how would this operate and who should manage the scheme?

Comments

Question 4: Should alcohol monitoring be permitted as part of an electronic monitoring programme?

Yes

No

Question 4a: Please give reasons for your answer

Comments:

Question 4b: If you answered yes to **Question 4** in what circumstances do you think alcohol monitoring would be appropriate?

Comments:

Question 5: Should electronic monitoring be an optional requirement of a CPO when it is initially imposed?

Yes No

Question 5a: Please give reasons for your answer

Comments

Question 6: Should electronic monitoring be introduced as an alternative to a fine?

Yes No

Question 6a: Please give reasons for your answer

Comments:

Question 7: Should electronic monitoring be permitted as a condition of a SOPO?

Yes

No

Question 7a: Please give reasons for your answer

Comments:

Question 8: Should electronic monitoring be introduced as a possible condition of a RSHO?

Yes

No

Question 8a: Please give reasons for your answer

Comments:

Question 9: Should electronic monitoring be introduced as a possible condition of a SDS?

Yes

No

Question 9a: Please give reasons for your answer

Comments:

Question 10: Should electronic monitoring be introduced as an alternative to remand?

Yes

No

Question 10a: Please give reasons for your answer

Comments:

Question 10b: If you answered yes to **Question 10**, when would you consider this appropriate?

Comments:

Question 11: Should electronic monitoring be permitted as a condition of Police Liberation or Investigative Liberation?

Yes

No

Question 11a: Please give reasons for your answer

Comments:

Question 11b: If yes, when would you consider this appropriate?

Comments:

Question 12: Should electronic monitoring be permitted as a condition of temporary release from prison?

Yes

No

Question 12a: Please give reasons for your answer

Comments:

Question 12b: If you answered yes, when would you consider this appropriate?

Comments:

Question 13: Should the data collected only be for the purpose of monitoring compliance with an order or licence condition, or should it also be used for other purposes such as the investigation of crime? Please include reasons for your answer.

Comments:

Question 13a: What appropriate safeguards should be put in place for the collection, use, retention and destruction of data?

Comments:

Question 14: Who should be responsible for the safe return of the monitoring equipment?

Comments:

Question 14a: Should there be sanctions for not doing so?

Yes No

Question 14b: If you answered yes, what do you consider these sanctions should be?

Comments:

Question 14c: If the sole key holder to a property is not available should a legal right of access be given to Scottish Ministers (and their agents) to enter a property to recover their equipment?

Yes No

Question 14d: If you answered yes, should this access only be via a court warrant?

Yes No

Question 14e: Please include any further comments below

Comments:

Question 15: Please tell us about any potential equality impacts, either positive or negative, that you consider the proposals in this consultation may have.

Comments:

Question 16: Please tell us about any potential costs and burdens that you consider may arise as a result of the proposals within this consultation.

Comments:

Question 17: Please tell us about any potential impacts, either positive or negative, that you consider that any proposals in this consultation may have on the environment.

Comments:



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