

Delivering a smarter approach: Electronic monitoring

Commitment in the White Paper

'A Smarter Approach to Sentencing' states

"We want to ensure that a wider range of non-custodial sentencing options are available to the courts, by capitalising fully on Electronic Monitoring technology, alongside enhanced community supervision delivered by a reformed National Probation Service and ... We will use electronic monitoring to strengthen our supervision of offenders who have the highest offending rates."

Purpose of this paper

In our paper, *Smarter Community Sentences*¹, we argued that the bold decision to unify the management of offenders within the National Probation Service (NPS) presents policymakers with a once in a generation opportunity to reshape community supervision. Specifically, we argued that in order to make community supervision smarter, we must avoid mistakes of the past, not least the repeated pattern of previous efforts that the key to improving community sentences is simply more: more hours of unpaid work, more months on an order, more punishment, more restrictions. This focus on loading more into community sentences has been done in the hope that more will convince the public that community sentences are robust; that more will persuade judges to use community sentences more than custody. When this has been tried before, it has not resulted in reductions in the use of custody, nor rises in the confidence of the judiciary or the public.

On the face of it, the Government's White Paper, *A Smarter Approach to Sentencing*,² repeats this desire for more, especially in respect of the use of electronic monitoring. For example, the White Paper recommends that "we will legislate to increase the maximum period of electronic monitoring curfew from 12 months to two years to deal with more serious offenders serving community sentences."³ It also outlines a new House Detention Order, which will be a "new, robust community-based package... based on a lengthy and restrictive curfew."⁴ Finally, the White Paper includes provision to "strengthen our supervision of offenders who have the highest reoffending rates, using GPS tagging on acquisitive criminals during their licence period to better protect the public."⁵ This focus on lengthening and intensifying electronically monitored curfews has come in for substantial criticism from voices in the criminal justice reform lobby.

So, it could seem that the White Paper represents a missed opportunity. However, in this paper, we highlight other proposals in the White Paper that have received less notice— not least in expanding probation officer's powers to vary and tailor electronic monitoring requirements— that could be exploited to craft a fresh, smarter approach to electronic monitoring, an approach which is more responsive to the dynamic changes in the lives and behaviour of those supervised.

We set out how these powers, and the adoption of evidence-led practice in the use of electronic monitoring in community supervision, provide the building blocks for a new strategy for electronic monitoring to deliver a smarter approach.

Background

The use of electronic monitoring in community supervision of offenders

The latest snapshot data shows that, on 31st March 2020, of the 10,400 cases where electronic monitoring was used (including for individuals on bail, on supervised release from prison, and serious high risk cases such as terrorist cases), 3,924 cases were for community sentences and 2,698 where electronic monitoring is a licence condition following release from custody, including Home Detention Curfew.⁶

For community sentences, electronic monitoring can be used by the courts to monitor conditions in a number of ways: (i) radio-frequency (RF) technology facilitates the remote monitoring of whether or not wearers are in a particular indoor location, usually their homes, and is most commonly used to monitor curfew conditions⁷; (ii) Global Positioning System (GPS) technologies to monitor exclusion zones (geographic areas which offenders are not allowed to travel to), curfews, and attendance at appointments; (iii) Remote alcohol monitoring (RAM) is used to monitor compliance with Alcohol Abstinence Monitoring Requirements (AAMR) of community orders or suspended sentence orders, which can be imposed for up to 120 days (and the White Paper commits to the national availability of AAMR and it is expected to be rolled out by Spring 2021). Location monitoring is also used post-custody to monitor licence conditions and is a mandatory element of Home Detention Curfews (HDCs). Radio-frequency technology is most often used for HDC but GPS is also available.

It is also worth noting that the majority of electronic monitoring orders made within the community supervision field, namely curfews (mostly enforced by radio frequency tags) and exclusion zones (increasingly enforced by GPS tags) focus on limiting the movement of wearers as proxies for influencing their behaviour, either by binding them to a particular location at specified times or restricting their movements (or both), what we will term electronic location monitoring. Remote alcohol monitoring is different—it seeks to prohibit a specific behaviour – alcohol consumption – for a specified period of time, and is unconcerned with the wearers location or enforcing a time-bound structure to the wearers week.

The impact of electronic location monitoring on compliance and re-offending

A recent meta-analysis of electronic location monitoring, looking at 17 high quality national and international studies of its use in pre-trial, community sentencing, post-prison release settings suggests that electronic location monitoring can be successful in suppressing offending during the period in which individuals are monitored, but that there is no general longer term impact on re-offending⁸—as a recent summary published by HMI Probation states, there is “no evidence of a suppression effect beyond the period of electronic monitoring.”⁹

However, the meta-analysis does find evidence of a longer term impact on re-offending when considering specific sub groups— in particular, studies which only looked at when individuals are put on electronic location monitoring instead of prison, as compared to when they were put on electronic location monitoring after prison, suggest that there is a statistically significant reduction in reoffending for those monitored on community sentences.¹⁰ In addition, the meta-analysis also found that when it looked solely at those studies which used re-conviction or re-imprisonment as the outcome measure (rather than re-arrest or parole violations) “showed a statistically significant reduction in these outcomes for participants on electronic monitoring compared to the control groups.”¹¹ Studies that looked at re-offending for sex offenders on community sentences alone found that there is evidence that electronic location monitoring is associated with statistically significant reductions in re-offending.¹²

Importantly, given the proposals in the White Paper, there is some evidence that keeping some people on longer periods of electronic location monitoring, both when individuals are young

and when they are assessed as low risk, “can have a backfire effect – that is, it can lead to increases in re-offending...”¹³ There are no studies relating to the impact of electronic location monitoring of wearers who reside in hostels, although such places are sometimes used for people who cannot be monitored, or who cannot be monitored in their own homes, perhaps because they fall out with, or put unnecessary strain, on co-residents. There is also no clear evidence as to which of the specific technologies of electronic monitoring (either RF or GPS as location monitors, or RAM) is more effective in reducing re-offending than the other, or which works better for whom and in what circumstances.¹⁴ Finally, it is worth highlighting that most impact studies (nationally and internationally) on electronic monitoring relate to location monitoring, and the evidence and practice base on remote alcohol monitoring is much less developed.

*How and why electronic location monitoring works*¹⁵

The evidence is not definitive on the exact mechanisms that produce these various impacts of electronic location monitoring on re-offending. However, a range of published research, including service user insights on the experience of being monitored, gives us clues to the possible ways in which electronic location monitoring produces these impacts. Broadly, electronic location monitoring can have a suppression effect because it increases the risk of offending being detected, providing authorities with data that can indicate individual breaches of conditions (for example, by keeping a record of the participant’s location at certain times of the day, where an exclusion order is in place). Electronic location monitoring often adds additional weight to an individual’s supervision, meaning wearers are monitored more than they otherwise would be.

In addition, the evidence suggests that, for some wearers, the mere presence of the device is a constant reminder to the participant of the conditions they are under, heightening their perceptions of the likelihood of being caught if they offend. There is some evidence to suggest that, for wearers of GPS tracking tags, the location monitoring enables them to be linked to or cleared of crimes, and that this awareness also can change individual behaviour.

The evidence suggests that these deterrence mechanisms can also interact with more rehabilitative mechanisms. For example, there is evidence that some users find monitoring ‘habit-breaking’, as curfews disrupt usual patterns of behaviour and may, more positively, provide structure to some individuals’ lives. Moreover, being monitored can help individuals reduce their exposure to negative influences, as it prevents them spending time with certain individuals or to enter certain areas which are linked to their prior offending. There is also evidence that, for some individuals, electronic monitoring increases positive influences in their lives, like their amount of family contact or continued participation in employment. This may be particularly relevant for those individuals who would otherwise have been imprisoned.

However, the evidence also sheds light on why electronic monitoring’s longer term impacts can be minimal, suggesting, in particular, that being monitored does not materially affect the underlying environment individuals live in, nor their capacity and ability to manage risks or their behaviour. Monitored people’s experiences suggest that behaviour change may only last for as long as the monitoring does. In the absence of other interventions, such as those that may help address unmet needs or to support them to change their behaviour and consequential thinking, it is perhaps unsurprising that the impact of electronic monitoring dissipates quickly after its removal.

Moreover, the evidence suggests that electronic monitoring impacts people differently, not least because the homes/living spaces in which people are curfewed vary in size and character. While some find it provides opportunities for reflection and stabilisation, others experience being monitored as stressful, feeling their private lives are intruded on. Some find that being monitored acts as a barrier to employment opportunities (as some employers are reticent about employing people who are being monitored). Some people on electronic

monitoring struggle to fulfil certain roles or responsibilities, such as being able to care for others, or meet the needs of children, because movement was restricted— this seems especially so for women who occupy gender-traditional roles. There is also evidence that already strained familial relationships can worsen when someone is monitored, particularly when wearers are young adults and living with their parents. There is also some evidence that the time lags between the wearer’s behaviour and the information being processed and used within supervision arrangements can impact on compliance— if wearers perceive that their behaviour is not being monitored in real time, it is likely to undermine the deterrence impact of being monitored.

A smarter approach?

The demand for ‘more’

The White Paper makes a number of proposals to change the way electronic monitoring is used in the community supervision. In many places, these proposals suggest that the most important change needed is more electronic monitoring. Specifically, the White Paper calls for more electronic monitoring in the following ways:

- Increasing community sentence’s curfew length, by legislating to increase the maximum period of electronic monitoring curfew from 12 months to two years to deal with more serious offenders serving community sentences;
- Increasing community sentence’s curfew intensity, by legislating to increase the number of hours a day someone is under curfew, from the current daily maximum of 16 curfew hours up to 20 hours a day.
- Increasing the number of opportunities to impose electronic monitoring within community supervision, through both piloting a new House Detention Order (HDO) for young adults under the age of 21 (based on a lengthy and restrictive curfew), and by creating new powers to impose GPS electronic monitoring on acquisitive offenders following release from prison.
- As the White Paper highlights, these new proposals fit with previous legislation which has recently extended the power for all courts to use “sobriety tags” (the AMMR) in community sentences (a power that was previously restricted to just a few pilot sites).

The rationale for this approach is expressed in various ways: at times, the White Paper argues that the need for more electronic monitoring will enhance rehabilitation, in other places that it will strengthen ‘control’ over offenders, and, in others, that it is part of an effort to restore sentence and public confidence in community supervision of offenders.

Lockdown everything

This set of proposals has come in for substantial criticism. In a trenchant critique of the electronic location monitoring proposals, Mike Nellis, Emeritus Professor of Criminal and Community Justice in the Law School at the University of Strathclyde, excoriates the White Paper’s approach as “lockdowns as the answer to everything”, arguing that “(Z)ero thought is given in the White Paper to the vital questions of compliance, legitimacy and proportionality. Altering the duration of a community sentence alters the calculus of compliance; what is bearable punishment for a year may not be for twice that.”¹⁶

Similar criticism has been voiced in a coordinated response, compiled by the Criminal Justice Alliance, from a variety of criminal justice reform organisations.¹⁷ Revolving Doors Agency, a charity, states “The sentencing White Paper shows enthusiasm for monitoring and curfews,

believing it can be a vital rehabilitative tool for repeat offenders. This is concerning... these measures are more likely to increase breach rates of community orders or licence conditions and increase the number of convictions for people in the revolving door.” Transform Justice, a charity, argues that the White Paper’s expansionist approach comes despite the evidence for the efficacy of electronic monitoring being “very mixed”. Women in Prison, a charity, raises “concerns around electronic tagging and the impact on women accessing support in the community.”

This criticism includes specific criticism of the proposed House Detention Order, with the paper arguing that “the House Detention Order should only be used as a genuine alternative to prison, not for people who have committed repeat low-level offences.” The Transition to Adulthood Alliance, a collaborative alliance between 12 criminal justice, health and youth organisations, criticises the White Paper, arguing that “the government has not taken the opportunity to establish a coherent, rational and strategic approach to sentencing young adults” using the House Detention Order as an example: “testing ‘house detention’ for young adults aged 18-20 without any rationale for why it might be effective for this cohort.”

Moreover, the White Paper’s claim that extending the time the courts can order a wearer to spend on an electronically monitored curfew will give sentencers the confidence they need to use more community sentences is an unproven assumption— indeed, previous attempts to ‘toughen’ community sentences have not been shown to reduce the imprisonment rate. Without a developed understanding of the drivers of sentencer decision making around community sentences and short custody, it is unclear that these toughening measures will significantly change those decisions.

Effective practice principles

Yet despite these less than positive critiques, electronic location monitoring and remote alcohol monitoring are here to stay. They are likely to be only the first generation of later waves of monitoring technology which will find widespread use, as, already different jurisdictions are using new forms of electronic monitoring via mobile phones, with new innovations on the horizons. At the Centre, we agree with those who have argued that previous iterations of electronic monitoring have been introduced in a vacuum in England and Wales, because both probation practitioners and criminal justice reformers quit the field, rather than grapple with the moral, ethical and other implications of electronic monitoring in community supervision. We agree with Professor Mike Nellis, who has argued that “progressive penal interests have no alternative but to engage with this “digital humanism” ... because there is immense cultural and political, as well as economic, momentum behind it.”¹⁸

With that in mind, it strikes us that the key question for the future of electronic monitoring within community supervision is, to borrow from the title of the White Paper, how to make our use of electronic monitoring smarter. By that we mean setting out a vision of what the most effective practice is, based on a careful reading of the evidence base about when, how, where and for whom electronic monitoring is likely to make the most impact to keep our communities safer.

Practice principle 1: Location monitoring that is more tailored to individual, family/ household and victim circumstances are likely to be more effective

We know, at present, that the courts tend to adopt a relatively standard approach to electronic monitoring within community sentences: a curfew order, for example, with a radio frequency tag, is generally imposed for seven days a week for 12 hours a day between 19.00 and 07.00 for the duration of an order. This standardisation does have some advantages— this uniform approach means curfews are a known quantity for sentencers, electronic monitoring companies and wearers, especially those who have been subject to them in the past. There

is similar standardisation in how prison governors set Home Detention Curfews for those released from prison.

Yet the White Paper provides a new legislative framework where the length and intensity of curfews has been made more elastic. In doing so, the White Paper calls for “a more creative approach to imposing curfews”¹⁹ but it does not specify in any significant detail what that approach would be. For example, longer curfews are envisaged to be used for “more serious offenders serving community sentences”²⁰ but does not define for courts what kinds of case this could be used for.

So, taking the creative spirit of the White Paper at face value, what does the evidence suggest this approach could be? Clearly, given what the evidence suggests about the differential impact of monitoring on different types of individual, a more creative approach suggests one in which the use of the curfew could better take into consideration an individual’s circumstances. There is some evidence, for example, that the extent to which employment is taken into account in curfew decisions is variable, with particular problems caused when wearers work non-standard hours or when they are required to work away from home.²¹ Moreover, the evidence also suggests that there is limited variation in how courts take account of individual’s childcare responsibilities when setting curfew hours.²² In parallel, evidence from the use of exclusion zones, monitored via GPS, indicates that are recurring issues in setting exclusion zones that avoid ‘accidental non-compliance events.’²³ In short, exclusion zones are only effective when they are workable (i.e. they take into consideration the wearer’s circumstances) and when they are clearly understood by the wearer.

In addition, the evidence also suggest that more consideration needs to be given to the familial/domestic circumstances of the lives of potential wearers. For example, some of the evidence suggests that support provided by family and friends, including staying in with the wearers during curfew hours, can make a real difference to compliance. In particular, “the women in wearers’ lives – mothers and wives/partners and girlfriends – seem to provide a high proportion of the pro-social support and advice... Equally, some family and friends can be facilitators of non-compliance.”²⁴ Moreover, especially in reference to exclusion orders, more account needs to be taken of victim views on what restrictions would work, especially when it concerns victims of domestic abuse. Victims should be involved in advising on what restrictions they would find helpful to avoid contact.

Therefore, it seems important that courts and prisons need to take account of these circumstances when making their decisions, and that during the monitored periods, there is the ability to vary restrictions in response to the changing dynamics of wearer’s lives.

Practice principle 2: Blending electronic location monitoring with support is likely to be more effective than standalone orders

The evidence suggests that electronic location monitoring is more effective when it is blended and integrated into probation supervision and support. Reviews of the evidence suggest that the international evidence points to probation supervision alongside electronic monitoring curfews being more effective than standalone curfews.²⁵ As noted above, this may well be because integrating electronic monitoring with supervision promotes and supports wearer’s access to other interventions that assist them in desisting from offending. In this way, electronic monitoring is “designed to enhance this supervision, providing information to these officers and judges in cases where the offender is believed to have breached the terms of their monitoring or committed a crime, and effectively extending the network of guardianship over an offender.”²⁶

The seemingly greater impact on outcomes of a more blended electronic monitoring approach may also be because integration of electronic monitoring within broader supervision plans may overcome a number of implementation issues, such as information exchange, that can

lead to delays or inaccuracies in the data that electronic monitoring suggests about wearer's compliance.²⁷ So, better integration (plausibly) minimises inefficiencies. but it may also increase wearer's perceptions that the data from their monitoring device is acted upon and shared with all relevant decision makers, increasing the deterrent effect. By demonstrating to the wearer that breaches of curfews/exclusion zones have been noted is likely to maximise the deterrence effect, and may be an effective way to bolster compliance and prevent non-compliance escalating.²⁸

That said, we note that we would not want to remove standalone orders from the sentencing toolbox. We also recognise that the evidence implies that, in some circumstances, additional support, if it were tied to enforcement, would deepen contact with the criminal justice system, which may well be counter-productive. As a recent study on the use of electronic monitoring in five European jurisdictions (including England and Wales, and Scotland) suggests, that "Whilst probation supervision is appropriate for some monitored individuals, it may not be necessary or proportional for all. For example, it is inappropriate... for low level offenders, supervision by probation services may be viewed as net-widening."²⁹

Practice principle 3: Once conditions are set, probation practitioners should be encouraged to use their new powers to make the supervision of electronic monitoring more responsive and dynamic

Perhaps the White Paper's most radical shift in how probation will work in the future is its emphasis on probation empowerment— that "varying the responsibilities and powers available to probation practitioners (will) enable them to act swiftly and responsively on their professional judgement, to make sure we have a strong and responsive probation service that is delivering reductions in reoffending."³⁰ In the White Paper, electronic monitoring is specifically referenced in this empowerment agenda— "We will also give probation staff the power to vary electronic monitoring requirements."³¹

We know that, during an order, the circumstances, behaviour and compliance of wearers is likely to fluctuate. As we have already observed, there is evidence that, in England and Wales, electronic monitoring restrictions can, both initially and over time, be restrictive to wearer's ability to participate in pro-social activities like employment. Given that circumstances can change during the course of an order, it is welcome the Government is giving probation the power to vary electronic monitoring requirements "within a prescribed range of circumstances, where the change will in no way undermine the weight or purpose of the requirement as imposed by the court."³² Hopefully, these changes will ensure that changes to things like addresses or working patterns will not lead to compliance issues in the future.

Allowing probation staff to make these decisions may also provide probation staff further opportunities to have meaningful discussions with wearers about their lives, strengthening compliance messages and signalling the willingness of the 'system' to consider and respond to shifting individuals' circumstances. In addition, this more flexible and responsive process can help avoid unnecessary non-compliance issues that can arise in unforeseen circumstances, for example attendance at funerals. It may also help probation empower victims, by varying restrictions in light of changing victim circumstances.

Further to these helpful powers, there exist other measures that, in improving probation practice around electronic monitoring, can demonstrate greater responsivity to wearers lives. For example, the information about compliance and non-compliance with electronic monitoring requirements can provide vital information for supervisors to discuss with the wearer about their progress on orders. The evidence suggests that most non-compliance relates to "time violations, i.e. being late for the start of curfews or going out for short periods during curfews. Wearers suggested that these non-compliance events were a result of their circumstances (e.g. needing to pop to the shop for essentials) and poor planning rather than deliberate acts of defiance."³³ Discussing this can help start a much broader conversation about compliance,

progress and the wearer's shifting circumstances and their aspirations.

As we have already noted, in addition, making wearers aware that their non-compliance has been noted may be an important driver of future compliance, and evidence of compliance may help probation officers to take opportunities to praise individuals for being compliant. Reducing the time lags between the wearer's behaviour, the download of the data that records this and using this data swiftly in supervision arrangements is likely to impact on compliance— if wearers perceive that their behaviour is being monitored and acted on in something close to real time, rather than weeks after if at all, it is likely to enhance the deterrence impact of being monitored.

As compliance is maintained, the use of these new powers should be used to reward progress by gradually relaxing curfew conditions or other restrictions. For example, there may be good reasons to keep an individual on a GPS tag but to apply to halt the requirements of the exclusion zone so that while probation can still 'know' where an offender is, that individual is free to, for example, go into the town centre which they have been previously barred from. This type of flexibility tends not be currently used in the more standardised approaches we have to electronic monitoring restrictions.

Furthermore, our standardised approaches tend also not to incorporate clear electronic monitoring exit strategies whereby "curfew hours, exclusion zones or alcohol monitoring are reduced towards the end of the order to aid the transition from electronic monitoring to freedom."³⁴ Yet these types of processes are likely to assist wearers manage transitions from both being monitored to not but also, hopefully, from negative habits and routines to more pro-social ones. Such a strategy has the potential to assist with managing the transition, recognising the potential to return to previous habits and routines. This will be especially important, given the implications of the White Paper to potentially increase the intensity and duration of some wearer's monitoring. The "more intensive the monitoring, the more important an effective exit strategy is likely to be."³⁵

Practice principle 4: Improving compliance with electronic monitoring conditions rests on improving wearer's perceptions of procedural fairness

A Ministry of Justice review of the evidence on service user experiences of electronic monitoring found that the "very nature of electronic monitoring, restrictive but community-based, appears to potentially both facilitate and hinder people attempting to take control over their lives, develop new skills, access opportunities (such as employment) and establish a pro-social lifestyle."³⁶ As we have already observed, for some, where there are pre-existing strong and positive familial ties, electronic monitoring can improve those relationships, while for others, it can place additional stresses on them. For some, electronic monitoring provides helpful structure; for others, it can place additional stress, shame and anxiety into their lives.

The evidence suggests, however, that there are a set of activities that are likely to assist all wearers of electronic monitoring, namely those associated with increasing wearer's perceptions of procedural fairness. Procedural fairness research suggests that when people understand what is going on, when they feel treated with respect and decency and where they have a voice in the process, they are much more likely to comply with the law. So, for example, it is very likely that investment in providing clear explanations of the restrictions being imposed, and the steps that need to be taken for those restrictions to be removed, is likely to improve wearer's compliance with the conditions set.

Similarly, the promotion of in-person supportive visits as part of the electronic monitoring orders, marked by respect and active promotion of wearer's ability to access support, is likely to improve wearers perceptions of procedural fairness. Even in standalone orders, where there is no probation involvement, visits of contracted electronic monitoring staff can play a role in promoting perceptions of procedural fairness.

In addition, a number of the issues already mentioned, such as providing a more responsive regime which can change restrictions based on changing circumstances, and which can reward progress by removing restrictions, is likely to be perceived as fairer, re-enforcing wearer's compliance with the orders. Enhancing electronic monitoring in these ways is consistent with research showing perceptions of fair and just treatment to result in law-abiding behaviours and cooperation with the criminal justice system.

Delivering a smarter approach: A new electronic monitoring strategy

Based on these four practice principles— tailoring, blending, flexibility and procedural fairness— we have thought about how to put these into practice. Basing our thoughts on how we can best use the various powers the Government has proposed in the White Paper, and the unique opportunities presented by the reforms to our probation service, we suggest the Ministry create a new electronic monitoring strategy that includes the following:

1. The Ministry of Justice and HMPPS need to develop a range of electronic monitoring 'packages' and market them to sentencers.

At present, it appears that one frustration with the current electronic monitoring framework amongst policymakers is that it would appear that sentencers are not using the full range of powers they currently have. For example, the deployment of GPS tagging has come only in fits and bursts. The reasons for this is unclear but one premise, held by policymakers, is that sentencers do not receive clear communication about when and for whom these tools may be useful. This is part of a wider concern, voiced by sentencers themselves, that there has been a lack of information about the services provided by probation and that, under the Transforming Rehabilitation reforms, there were real barriers to dialogue between probation (specifically the Community Rehabilitation Companies) and sentencers about community sentence options.

In order to reverse this, and to positively re-engage the court with probation more widely, we suggest that the Ministry of Justice and HMPPS develop a range of electronic monitoring 'packages' and market them to sentencers, as part of wider efforts to build sentence confidence in community sentences. We do not recommend that legislation needs to change the current community sentence framework, where requirements are attached to orders. We, instead, suggest that HMPPS and the Ministry of Justice develop a small number of 'packages' of requirements, broadly targeted at specific types of offender profile. These could, for example, include packages of requirements for sex offenders on community sentences— where we know that the combination of GPS monitored curfews and exclusion zones combined with behaviour change programming is likely to improve community safety.

Similarly, consideration could also be given into targeting the use of the more intense curfews within community sentences envisaged in the White Paper for particular circumstances: for example, they could be used for the period in which an individual is due to attend in-patient residential drug treatment as part of a community sentence. When it comes to remote alcohol monitoring, the Ministry could consider dual requirement packages for violent offenders whose behaviour stems from the misuse of alcohol associated with the night time economy where GPS monitoring of exclusion zones plus cognitive behavioural therapy may serve to reduce re-offending. Separately, another package could involve the use of exclusion zones and remote alcohol monitoring for domestic abuse perpetrators, where the victim's view and circumstances play a crucial role in setting the details of the restrictions.

These are just suggestions. The development of these packages needs to be informed by analysis of the main sub groups of offenders likely to receive community sentences who would benefit from electronic monitoring. This analysis should also include consideration of where electronic monitoring is unlikely to be useful, including where it is currently used and ought not to be. Yet, once the packages are developed, in consultation with sentencers, especially

magistrates, the Ministry and HMPPS need to consider how to best market them at sentencers and probation court staff. The packages need to have clear branding, so sentencers and probation staff know what the content of each package is, so that expectations are met and managed. This will include guidance, training and the creation of feedback loops between sentencers and probation teams about when the packages should be used, and discussions about borderline cases. In particular, there is a perception that there has not been sufficient information and training provided to sentencers about the differing capabilities of electronic monitoring and that, in providing clear training and additional materials, there is an opportunity to ensure that sentencers are educated about electronic monitoring.

This marketing effort will rely on the NPS, through its court reporting and its post-release responsibilities, being able to provide the court and prisons with the relevant information to ensure that the restrictions within the packages (i.e. where a curfew will be imposed) fit around potential wearers' circumstances, including their family circumstances. This work will feed into wider efforts by the NPS to improve court reporting and, as the Ministry does this, it should also consider how other analogous 'packages', such as the Community Sentence Treatment Requirement (CSTR), are included within this wider marketing effort.

2. As one of these packages, the Ministry of Justice could re-focus proposals for the House Detention Order (HDO) and pilot an alternative to prison order.

As noted above, the White Paper proposes to pilot a new House Detention order based on a "highly restrictive and lengthy curfew... for young adults under the age of 21..." Further to that, the White Paper envisages that the House Detention Order (HDO) is not for those who would have "otherwise received a custodial sentence... they could not be used for offenders who had already had a prison sentence in the past." The White Paper asserts that this House Detention Order will deliver "robust punishment in the community", avowing that "such orders will be more effective at ensuring compliance and deterring crime and therefore preventing the conveyor belt that leads too many offenders on a path towards repeated short spells in prison."³⁷

Unfortunately, the evidence suggests otherwise. Indeed, it is hard to think of a group of individuals less likely to comply with an oppressive 'lockdown' style curfew than under 21 year olds whose offending had not previously resulted in a custodial sentence. As the summary of the evidence we have provided already states, electronic monitoring in particular works when it is an alternative to prison³⁸ and it can lead to increases in re-offending specifically when individuals are young and when they are assessed as low risk.³⁹ The evidence from countries which already use longer curfews suggests that people with fewer non-curfew hours disclosed "rushing and racing to 'beat the clock' in daily tasks. They described living in a state of hyper-alertness and being constantly vigilant and 'on edge'."⁴⁰ Although not clearly stated, this is suggestive that more intense curfews may push some otherwise compliant individuals into non-compliance due to the extra weight they have to forgo. Given what we have said about the highly contingent circumstances in which electronic monitoring works, the legitimacy and proportionality of a long, intense curfew, for both wearer and those that reside at the same address, are very real— as Professor Nellis states, "For lengthened electronic monitoring curfews, in particular, the calculus crucially alters for the other members of an offender's household – either the burden increases for them too, or they become more likely to refuse the offender's residence with them, or both."⁴¹

However, despite this critique, we do not dismiss the idea of the HDO out of hand. As the Sentencing Academy, in their response to the White Paper, highlights, "Most western jurisdictions now operate a home confinement, community custody or virtual imprisonment sanction. These have the potential to safely hold offenders accountable without necessitating imprisonment."⁴² Moreover, it is not good enough to simply resist these ideas without

proposing an alternative, especially when there is such broad agreement, within and outside of Government, that we continue to unnecessarily incarcerate some people who could be kept safely in the community and when the evidence around electronic monitoring, at least, suggests it is part of a wider strategy to avoid unnecessary imprisonment. Our previous public opinion polling work on electronic monitoring suggested that there is a majority in favour of using electronic monitoring as an alternative to short prison sentences,⁴³ a finding that has been re-confirmed by the latest public opinion research, published by Crest Advisory, which shows 52% of the public support the use of electronic monitoring as an alternative to short prison sentences.⁴⁴

Therefore, we suggest that the existing proposals on the House Detention and the longer curfew are refocused into the piloting of a home confinement order that explicitly is targeted at people who would otherwise go to short prison sentences. We suggest that the Ministry instead pilots a replication of the Swedish Intensive Supervision with Electronic Monitoring Order (see case study).

CASE STUDY: Intensive Supervision with Electronic Monitoring (ISEM), Sweden⁴⁵

In Sweden, the Intensive Supervision with Electronic Monitoring (ISEM) is a permanent legal alternative to a short prison sentence of up to six months. Created in the early 2000s, the Swedish Prison and Probation service developed this scheme from within their probation service, using a commercial organization to provide the technology only. The average duration of an ISEM or an electronic monitoring release order is 2-4 months, commensurate with the period they would have otherwise served in prison.

ISEM has been described as a sentence that aims to provide both ‘high level of support and high level of control’. Under the ISEM, monitored people are confined to their home and only allowed to leave when taking part in education or employment, or in other scheduled activities required by their sentence, such as taking part in a treatment programme. Where a person is otherwise eligible for ISEM but does not have a job, the Swedish Prison and Probation Service ‘will arrange employment’ doing tasks that are similar to unpaid work. Probation Officers visit the person a few times a week, without giving prior notification, to supervise compliance and, where necessary, conduct alcohol breath tests or drug tests to check abstinence from substance use. A further component of the ISEM is a small monetary penalty where monitored people who have a ‘viable’ income pay a small daily fee into a victim support fund. If the monitored person leaves or comes home at times that are not scheduled, the Swedish Prison and Probation Service is alerted to follow them up.

Research suggests that a ‘large proportion’ of people monitored through ISEM have been convicted of violent crimes (e.g., assault), drink driving and sexual crimes. However, eligibility and acceptance into ISEM is largely limited to those who are assessed as low risk. Breach and revocation rates are reportedly low (around 10%). Various evaluations have found that monitored people consistently express mostly positive perspectives about their experiences of electronic monitoring.

This pilot would (i) explicitly use an intense curfew as direct replacement of short prison; (ii) experiment with the greater integration of electronic monitoring within probation. Of course, any pilot would need to be tailored to the English and Welsh system and have regard to the problematic finding that the ISEM in Sweden is not offered to a significant number of offenders

sentenced to a maximum of six months and that evaluations have found that offenders selected to participate are better educated and come from more favourable socio-economic backgrounds.⁴⁶ Moreover, any pilot of this approach would need to recognise that the import of this model to “other non-Scandinavian jurisdictions may be ‘somewhat limited given the umbrella of Sweden’s employment, housing, social and medical services available to both the EM and control groups.’⁴⁷

Nonetheless, such a pilot would fit within the renewed, rejuvenation of the National Probation Service, and should be developed from within the National Probation Service as a way of testing how integration of electronic monitoring with supervision and support could be made to work. Moreover, our previous public opinion polling work on electronic monitoring, which suggested that there is a majority in favour of using electronic monitoring as an alternative to short prison sentences,⁴⁸ has been re-confirmed by the latest public opinion research, published by Crest Advisory, which shows 52% of the public support the use of electronic monitoring as an alternative to short prison sentences.⁴⁹ Consideration could also be given into targeting the use of the more intense curfews within community sentences envisaged in the White Paper for particular circumstances: for example, they could be used for the period in which an individual is due to attend in-patient residential drug treatment as part of a community sentence or for sex offenders.

3. HMPPS needs to develop a presumption toward electronic monitoring plus support.

Alongside these packages, HMPPS should consider the evidence that ‘blended’ electronic monitoring is likely to be more effective than standalone electronic monitoring. It seems that the default should be that courts and prisons always consider the imposition of supervision and rehabilitative support any time they are considering imposing an electronic monitoring requirement. To enact this, the Ministry could introduce a presumption toward supervision/support whenever electronic monitoring is being considered in a community sentence or in a prison release.

However, we recognise that in places, the use of standalone orders⁵⁰, especially in community sentences, will still be necessary— indeed, as we have noted from the research, that placing more burdens on low-level offenders to those they already receive may be counterproductive. We, therefore, suggest that greater guidance should be given to courts and prisons about the circumstances in which standalone electronic monitoring should be used in community sentences and prisoner release. Guidance should recognise that, in certain circumstances, such as for younger first time offenders or those convicted of relatively minor offences, and where individuals are already voluntarily engaging in support, a standalone order may be appropriate if it minimises exposure to the harmful effects of the criminal justice system, and that this may, in these circumstances, be more important than imposing additional enforceable conditions, even those that seek to help/support rehabilitation.

4. These packages need to allow probation officers to vary the electronic monitoring restrictions of the orders.

In creating ‘marketable’ packages of requirements, the expectation should be that the court passes the sentence with the requirements identified but that, during the order, probation officers will have limited powers to vary the restrictions imposed. As the White Paper suggests, the forthcoming sentencing bill will provide ways in which “varying the responsibilities and powers available to probation practitioners to enable them to act

swiftly and responsively on their professional judgement...” These proposals are designed enable probation powers to act quickly and responsively to behaviour that needs to be addressed without necessarily needing to return to the courts.

As we have already noted, this flexibility holds the potential for ensuring the electronic monitoring is more tailored. This is particular crucial as the order progresses and individuals’ circumstances change— it will enable, for example, addresses to be shifted without recourse to the courts. It may also include the ability of probation officers to shift the hours of a curfew to cater for changes in employment or the exact boundaries of an exclusion zone. It may also help probation empower victims— for example, where victims’ residence changes, the exclusion requirements should be able to be changed administratively in these cases. Equally, if there has been unwanted contact between the victim and the wearer, probation should be empowered to adjust restrictions accordingly.

Moreover, the ability to vary electronically monitored restrictions will be particularly important in providing the flexibility needed to craft exit strategies, helping wearers transition out of electronic monitoring. This may include reducing the intensity of aspects of electronic monitoring restrictions and even, where appropriate, using positive compliance to go back to court to ask for orders to be determined earlier.

This new ability to vary, however, will need to be clearer explained to sentencers, with real clarity about what the limit of those powers will be. We have found, in previous research, the experience of the implementation of the Rehabilitation Activity Requirement (RAR), which was intended to offer the responsible officer flexibility in tailoring the activities to the changing situation of the offender, has resulted in “a lack of clarity about what an offender will actually do if given a community sentence.” However, this primarily stemmed from a lack of clarity about what ‘rehabilitative activities’ really meant, as delivered by differing Community Rehabilitation Companies across the country. With the renewed effort to market and inform sentencers about electronic monitoring (see above), the Ministry and HMPPS should take the lessons about the RAR and ensure there is effective feedback to sentencers about electronic monitoring conditions and how they are working.

5. The Ministry of Justice needs to commission regular research into sentencer perceptions of electronic monitoring and community sentences more generally.

At the heart of the White Paper is an assumption that adding to the powers the court (like extending the length of curfews) has in imposing community sentences will lead to sentencers using them more. In addition, the White Paper assumes, in reference to electronic monitoring, that ‘adding teeth’ will lead to changes in sentencing behaviour.

But the basis for these assumptions is, largely, guesswork. The fact is that we do not know what drives sentencer behaviour in relation to community sentencing more generally, and what, if any, additional weight sentencers may place on the ability of electronic monitoring to make the difference between community sentences and custody. The existing evidence base is notably limited in terms of scope, depth and generalisability— for example, we have not identified any recent evidence on the views of the paid judiciary about the credibility of community sentences or, crucially, whether new powers for imposing electronic monitoring restrictions might make them more credible. Such research may indicate, for example, that sentencers are well aware of their existing powers to order electronic monitoring— but don’t use them for a variety of reasons, including proportionality. It may also reveal that they do not know what the latest technological innovations are in electronic monitoring, which may play some role in changing their sentencing decisions.

This fits into a broader pattern. While there has been some limited research on magistrates' perceptions of community sentences,⁵¹ given that the use of community sentences is so reliant on the trust of sentencers, we suggest that it is imperative that the Ministry of Justice invest in research around sentence perceptions of the operation of, at the very least, community sentences if not indeed all sentencing options. To borrow a commercial analogy, at the moment it is like a company selling services to its customers without asking them routinely what they like, what they find frustrating and what improvements they would value.

Conclusion

In the Government's White Paper, the discretionary impulses toward flexibility, responsiveness and empowerment of probation compete with more orthodox, 'get tough' rhetoric that has been the dominant language of sentencing reform for the past thirty years. As we set out in our paper in June 2020, we are explicitly on the side of a nimbler, flexible and dynamic approach to the community supervision of offenders. This is partly because we think this better follows the evidence of what works, is more likely to be responsive to the dynamic nature of those subject to community supervision and also, crucially, because we do not believe the effort to get tough has either made the public safer or made the public feel any more confident in probation over the past three decades.

With that in mind, we have set out in this paper a way to stitch together some of the proposals and powers outlined in the White Paper with a more progressive vision of how electronic monitoring can be deployed in England and Wales. This rests on the interrelated observations that more tailored use of electronic monitoring, that is better integrated into probation supervision and support, and which is more flexible to the changing dynamics of those subject to being monitored, and which is delivered within a more procedurally fair environment, is likely to keep communities safer than our existing framework.

While delivering this is not without its challenges, not least the onus it will place on probation to better inform the initial setting of conditions and to provide more responsive supervision once it starts, we believe it is the key to delivering a smarter approach to sentencing and keeping communities safer.

Endnotes

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About the Centre for Justice Innovation

The Centre for Justice Innovation seek to build a justice system which all of its citizens believe is fair and effective. We champion practice innovation and evidence-led policy reform in the UK's justice systems. We are a registered UK charity.

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