

# REGULATORY IMPACT STATEMENT

## Progressing the Electronic Monitoring of Offenders Legislation Bill

### AGENCY DISCLOSURE STATEMENT

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This Regulatory Impact Statement was prepared by the Department of Corrections (the Department). It provides an analysis of options for removing legislative barriers in the Sentencing Act 2002 that preclude the electronic monitoring of offenders serving certain sentences and orders.

The Department's use of electronic monitoring tends to improve sentence integrity and the Department's ability to safely manage offenders in the community. As monitoring technologies such as GPS improve and become more cost-effective, the public interest in their use on offenders in the community increases. However, the Sentencing Act 2002 contains provisions that prevent the courts from imposing conditions requiring offenders to submit to electronic monitoring under certain sentences and orders.

After assessing them against the status quo, the Department prefers two options for removing these legislative barriers to electronic monitoring:

- empowering the sentencing courts to impose electronic monitoring as a condition of intensive supervision
- empowering the sentencing courts to impose electronic monitoring as a condition of release from a prison sentence of two years or less.

This analysis of options is subject to the following constraints:

- limited evidence (applicable to the options) of the effect electronic monitoring (GPS monitoring in particular) has on the rate and seriousness of re-offending
- uncertainty about the frequency with which sentencing courts would exercise the discretion to impose electronic monitoring under the options and how else the options might affect sentencing outcomes (for example, whether offenders might receive shorter custodial sentences due to the availability of GPS on release).



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## THE STATUS QUO

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### ***Sentences and orders under the Sentencing Act 2002***

- 1 The Sentencing Act 2002 (the Act) governs the activity of the courts in sentencing or otherwise dealing with people convicted of a criminal offence. Sentences and orders that involve some form of detention or supervision are administered by the Department. From least restrictive to most restrictive, these are:
  - sentences of community work and supervision
  - sentences of intensive supervision and community detention
  - sentence of home detention (may include a subsequent order of post-detention conditions)
  - sentence of imprisonment for one year or less (with automatic release after half the term and the possibility of standard and special release conditions imposed by the court)
  - sentence of imprisonment for more than one year but not more than two (with automatic release after half the term, standard release conditions, and the possibility of special release conditions imposed by the court)
  - sentence of imprisonment for more than two years (with the possibility of release on parole after a third of the term or release conditions applying for up to six months from the conclusion of the sentence).

### ***Current use of electronic monitoring***

- 2 Electronic monitoring (EM) has been available as a condition of parole under the Parole Act 2002 since 2004. It was first made available under the Sentencing Act 2002 as a condition of sentences of home detention and community detention. These sentences require the offender's detention at an address at all or specified times (with the possibility of authorised absences).
- 3 The Department has traditionally used radio frequency technology to administer EM under these sentences and conditions of parole confining the offender to an address. Radio frequency devices are installed at the address and communicate with a device attached to the offender's ankle. The Department is notified if the offender breaches the requirement to remain at the address by crossing the electronic boundary transmitted by the device.
- 4 Because the statutory definition of EM does not specify a particular kind of technology, alternatives to radio frequency technology, like GPS, may be used by the Department if they are better suited to monitoring compliance with the offender's conditions. The sentencing courts and the Parole Board sometimes impose conditions restricting the offender's movements in public. These conditions prohibit the offender from entering areas associated with their offending or risk of re-offending, without confining them to an address.
- 5 In 2012, the Parole Board began imposing EM as a condition of release in some cases for the purpose of enforcing these conditions restricting the whereabouts of offenders. This was because the Department had developed the capability to monitor offenders by GPS, which provides real-time and retrospective information



about the offender's movements and location. There is also some potential for GPS to be used to monitor the movements of offenders during authorised absences from the address of their detention.

- 6 Under current legislation, EM cannot be imposed as a condition of:
- a sentence of supervision
  - a sentence of intensive supervision
  - release from a prison sentence of two years or less
  - release from a sentence of home detention ("post-detention conditions").

## **OBJECTIVE**

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- 7 The objective is to improve the safety of the public by making more extensive, but fiscally sustainable, use of technologies that allow the Department of Corrections to detect and deter non-compliance with conditions that restrict offenders' movements, thereby preventing the commission of further offences.

### ***How can GPS monitoring improve public safety?***

- 8 GPS monitoring is generally understood as a tool that improves an agency's ability to safely manage offenders, rather than something that replaces other techniques for managing offenders. The information it makes available often increases the Department's ability to prevent serious re-offending, either through timely intervention and/or through prosecution before re-offending escalates.
- 9 There is some international evidence that the high likelihood and immediacy of detection under GPS monitoring can deter re-offending in some cases. However, there are strong doubts expressed in the literature about whether this deterrent effect is sustained once monitoring ceases. There are also differences between the circumstances of the studies and those relevant to the proposals of this paper. For example, many studies are concerned with the use of GPS to monitor offenders detained at an address, rather than those whose movements are less restricted.

## **PROBLEM DEFINITION**

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- 10 Current legislative restrictions on EM limit the ability of the Department of Corrections to protect the public from certain offenders whose risk of re-offending is associated with certain areas in the community.

## **REGULATORY IMPACT ANALYSIS**

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### ***Options and analysis of options***

- 11 For each of the four legislative barriers we have identified as precluding the use of EM, there arises the binary question of whether removing the barrier would afford benefits to the public that outweigh the financial and any other costs of monitoring those offender populations.

## EM as a condition of release from a prison sentence of two years or less

- 12 Offenders sentenced to imprisonment for two years or less are statutorily released (usually on conditions) after the first half of their sentence to facilitate their reintegration into the community under the Department's supervision. Where the sentence is between one and two years, standard conditions automatically apply on their release, as well as any special release conditions imposed by the court at sentencing. Section 93(2B) of the Sentencing Act 2002 explicitly prevents the courts from imposing EM or residential restrictions as one of these conditions.

Advantages of authorising EM	Risks and disadvantages of authorising EM
<p>Considerable potential to improve public safety, given the high risk to others posed by certain short-servers who could be suitable for GPS monitoring.</p> <p>Information collected by GPS can provide evidence of offences committed while subject to conditions.</p> <p>Without EM:</p> <ul style="list-style-type: none"><li>• whereabouts conditions can be difficult to enforce</li><li>• limited incentives for the offender to avoid areas associated with their risk of re-offending</li><li>• Department's ability to protect the public and perform its statutory duties is compromised.</li></ul>	<p>Potentially significant increase in scale of GPS monitoring operation, with direct costs to the Department (in the region of \$3,500 per offender, based on current EM contract) and potential for net-widening.</p> <p>As GPS monitoring improves our ability to detect re-offending, some risk that it would result in higher rates of re-conviction and increase costs to the Justice Sector. (Difficult to predict, based on international studies, whether this would be offset by the deterrence of re-offending.)</p> <p>As Department's perceived ability to prevent serious re-offending is improved, risk to its reputation may increase.</p> <p>Legislative change necessary.</p>

- 13 Offenders serving short prison sentences are re-convicted at a higher rate than offenders serving any other sentence or order. Therefore, removing this legislative barrier could greatly improve the Department's ability to keep the public safe with limited further expenditure. Given the high volume of short-servers, there is some potential for the scale of GPS monitoring to increase beyond fiscal constraints. However, we assess this risk as low, given the narrow statutory purpose of EM (relating to conditions that restrict the offender's whereabouts) and the principle that restrictions on the offender's liberty and privacy be proportionate (i.e. to the risk they mitigate).
- 14 On this basis, it is **recommended** that legislative change be pursued to provide for the EM of offenders released on conditions from a short prison sentence.



## EM as a post-detention condition following completion of home detention

- 15 On sentencing an offender to home detention, a court may impose standard and special post-detention conditions which apply, for up to 12 months, on completion of the sentence. Home detention was introduced in 2007 as an alternative to a short-term prison sentence and has the same maximum term of detention and conditions applying after detention, which are aimed at facilitating the offender's reintegration into the community. The Sentencing Act 2002 explicitly prevents the courts from imposing any form of EM as a special post-detention condition.

Advantages of authorising EM	Risks and disadvantages of authorising EM
<p>Some, though limited, potential to improve public safety, given the relatively low risk to public safety posed by offenders serving PDC after successfully completing home detention.</p> <p>Information collected by GPS can provide evidence of offences committed while subject to conditions.</p> <p>Without EM:</p> <ul style="list-style-type: none"><li>• whereabouts conditions can be difficult to enforce</li><li>• limited incentives for the offender to avoid areas associated with their risk of re-offending</li><li>• Department's ability to protect the public and perform its statutory duties is compromised.</li></ul>	<p>Small increase in scale of GPS monitoring operation, with direct costs to the Department (in the region of \$3,500 per offender, based on current EM contract).</p> <p>Likely to have difficulty in passing legislation created by conflict with human rights, given that:</p> <ul style="list-style-type: none"><li>• offenders on PDC have just completed an EM sentence</li><li>• GPS monitoring does not obviously contribute to the reintegrative purpose of PDC</li><li>• difficult to argue that EM is a proportionate response to the risk of an offender who has complied with home detention.</li></ul> <p>As Department's perceived ability to prevent serious re-offending is improved, risk to its reputation may increase.</p> <p>Legislative change necessary.</p>

- 16 There are very few offenders serving PDC who might pose a risk to the public that could be better managed by GPS monitoring. Offenders serving PDC will generally have completed their sentence of home detention without serious non-compliance. This makes it difficult to argue that they pose an ongoing risk to public safety that would warrant extended EM.
- 17 Offenders may feel they are being required to 'do their time' twice (which could be injurious to their successful reintegration), by submitting to EM again during the PDC. For these reasons, and because the purpose of PDC is essentially reintegrative, it is hard to see how GPS monitoring might be justified in the case of offenders serving PDC.
- 18 The benefits of removing this barrier are considered minimal and, on balance, do not outweigh these concerns. Therefore, it is **not recommended** that legislation be amended to provide for the EM of offenders serving PDC.

## EM as a condition of a sentence of supervision

Advantages of authorising EM	Risks and disadvantages of authorising EM
<p>Some potential to improve public safety, given the high risk to public safety posed by some offenders serving supervision.</p> <p>Information collected by GPS can provide evidence of offences committed while subject to conditions.</p> <p>Without EM:</p> <ul style="list-style-type: none"> <li>• whereabouts conditions can be difficult to enforce</li> <li>• limited incentives for the offender to avoid areas associated with their risk of re-offending</li> <li>• Department's ability to protect the public and perform its statutory duties is compromised.</li> </ul>	<p>Potentially significant increase in scale of GPS monitoring operation, with direct costs to the Department (in the region of \$3,500 per offender, based on current EM contract) and high potential for net-widening.</p> <p>Supervision is very low in the hierarchy of sentences under the Sentencing Act 2002 (same as community work), so difficult to justify limitation of offender's privacy</p> <p><b>and</b></p> <p>GPS monitoring could also be considered inconsistent with the rehabilitative purpose of supervision</p> <p><b>both meaning</b></p> <p>potential difficulty in justifying use of GPS to monitor these offenders and in passing legislation.</p> <p>Some risk of increasing rate of technical breaches.</p> <p>As the Department's perceived ability to prevent serious re-offending is improved, risk to its reputation may increase.</p> <p>Legislative change necessary.</p>

- 19 The most significant concern with the EM of offenders serving supervision is that it would be inconsistent to introduce such a high level of monitoring for a sentence so low in the hierarchy of offences.
- 20 Whereas electronically monitored sentences like home detention and community detention are imposed principally as a form of punishment, sentences of supervision and intensive supervision are rehabilitative; they are imposed so that the offender can address an identified rehabilitative need. EM, on the other hand, is a restrictive measure which increases the severity of a sentence or order and may have limited rehabilitative benefit to the offender. The high volume and relatively low risk of offenders serving supervision also introduces the risk that EM would, through over-use, fail to deliver good public value if legislation made it available.
- 21 Therefore, it is **not recommended** that legislation be amended to provide for the EM of offenders serving supervision.



## EM as a condition of a sentence of intensive supervision

Advantages of authorising EM	Risks and disadvantages of authorising EM
<p>Some potential to improve public safety, given the high risk to public safety posed by some offenders serving intensive supervision.</p> <p>Information collected by GPS can provide evidence of offences committed while subject to conditions.</p> <p>Without EM:</p> <ul style="list-style-type: none"> <li>• whereabouts conditions can be difficult to enforce</li> <li>• limited incentives for the offender to avoid areas associated with their risk of re-offending</li> <li>• Department's ability to protect the public and perform its statutory duties is compromised.</li> </ul>	<p>Increase in scale of GPS monitoring operation, with direct costs to the Department (in the region of \$3,500 per offender, based on current EM contract) and some potential for net-widening.</p> <p>As the Department's perceived ability to prevent serious re-offending is improved, risk to its reputation may increase.</p> <p>GPS monitoring could also be considered inconsistent with the rehabilitative purpose of intensive supervision</p> <p><b>meaning</b></p> <p>potential difficulty in justifying use of GPS to monitor these offenders and in passing legislation.</p>

- 22 Intensive supervision is higher up the sentencing hierarchy than supervision, is generally imposed for more serious crimes, and lasts up to two years. However, it may be difficult to justify providing for GPS monitoring in these cases, given the rehabilitative purpose of intensive supervision. Under the status quo, if a court considers that EM is an appropriate measure for offenders with a rehabilitative need, it would instead impose home detention, a more restrictive sentence which can offer similar rehabilitative opportunities to intensive supervision<sup>1</sup>.
- 23 However, it would be possible to reconcile EM with the nature and purpose of intensive supervision by emphasising the indirect rehabilitative potential of monitoring the movements of offenders by GPS. Intensive supervision can require offenders to attend residential programmes, which (like GPS monitoring) is a restrictive measure, but is justified based on its potential to address rehabilitative needs. On a similar basis, it could be argued that GPS monitoring can contribute to the rehabilitation of offenders where the cause of their offending is associated with certain locations (such as their victim's address or premises licensed under gambling or sale of liquor legislation) and where they are motivated to address a rehabilitative need or limit further opportunities to offend. There is international experience of offenders volunteering to submit to GPS monitoring because the high likelihood of detection provides them with the strong disincentive they need in order to desist. For these reasons, EM could be considered consistent with the court's purpose in sentencing the offender to intensive supervision.
- 24 Overall, the availability of GPS monitoring under intensive supervision could reduce restrictions on offenders and improve their opportunities for employment and participation in the community. This is because GPS makes it possible to monitor the whereabouts of offenders without confining them to an address. Intensive supervision could therefore become a more attractive sentencing option, as an alternative to home detention.

<sup>1</sup> Or, for more than one conviction, it may impose sentences of intensive supervision and community detention to be served concurrently.

- 25 For these reasons, it is **recommended** that legislation be amended to provide for the EM of offenders serving intensive supervision.

## **CONSULTATION**

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- 26 The Ministries of Justice, Social Development, Women's Affairs, and Pacific Island Affairs, The Treasury, the New Zealand Police and the Office of the Privacy Commissioner have been consulted. The Department of the Prime Minister and Cabinet, State Services Commission, and Parliamentary Counsel Office have been informed.

## **CONCLUSION AND RECOMMENDATIONS**

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- 27 For reasons set out in this paper, the options that best fulfil the policy objective are to amend the Sentencing Act 2002 so that GPS can be used to monitor offenders serving:
- release on conditions; and
  - intensive supervision.

## **IMPLEMENTATION**

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- 28 The Department intends to provide the courts with advice on whether offenders are suitable to have their whereabouts restricted and monitored by GPS in pre-sentence reports. In recommending the use of these measures, these pre-sentence reports are likely to target the following sub-populations of offenders sentenced to a short prison sentence or intensive supervision:
- family violence offenders who pose a high risk to their victims
  - gang-affiliated offenders who pose a high risk to public safety
  - high-risk sex offenders.

## **MONITORING, EVALUATION AND REVIEW**

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- 29 The Department would monitor the frequency with which EM is imposed under these proposals, the rate at which offenders subject to these conditions are convicted of breaching the sentence or order and the rate at which they commit other offences.
- 30 We would evaluate the contribution of these proposals to public safety five years after the commencement of legislative changes.