

## Electronic Monitoring in Ireland: Disruptive Innovation, Affordance, or a Technology in Search of a Rationale?

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**Summary:** This paper explores the history and development of Electronic Monitoring (EM) of offenders in Ireland, from policy and legislation to its slow and limited implementation in practice. It considers the potential for and likelihood of its future use, particularly as a condition of bail and pre-trial, as well as its extended use as a post-release supervision measure, specifically for those convicted for sex offences. The paper will consider why implementation of EM in practice has been so cautious and slow given that it was introduced in legislation over 15 years ago. Implementation in other jurisdictions, as well as different conceptualisations of EM, and other factors, are explored, and conclusions drawn for the future. To understand the trajectory of Irish penal policy, in this case having regard to EM, it is important, as always, to consider gaps between law and policy, on the one hand, and implementation and practice, on the other.

**Keywords:** Electronic monitoring (EM),<sup>1</sup> technology, tagging, surveillance, community sanctions, supervision, probation, bail, early release, custody.

### Introduction

Electronic Monitoring (EM) of offenders in the international context has been well documented (e.g. Hucklesby, Beyens and Boone, 2020; Nellis *et al.*, 2013; Nellis, 2016a; Simon, 2013). The proliferation of EM in Europe in the late twentieth and early twenty-first century was followed by the introduction of Council of Europe (2014) standards on EM, further elaborated on by Nellis

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Declaration of Interest: The author was directly involved in a number of the events and developments described through this article, during his time in the Probation Service, both as Director and in a number of earlier roles.

<sup>1</sup> While 'Electronic Monitoring' (EM) is the generally used 'official' term for what is described here, the measure is also sometimes referred to, in media reports for example, as 'electronic tagging' or simply 'tagging'.

(2015) and others. According to Simon (2013, p. 80), EM is ‘...designed to enforce spatialized exclusion on those deemed low enough risk to be out in public either on a pre-trial release, or as part of a sentence of parole following imprisonment, or on probation as an alternative to imprisonment.’ Nellis (2014, p. 217) has stated that ‘Electronic Monitoring (EM) is the use of remote surveillance technologies to pinpoint the locations and/or movements of offenders and/or defendants’; and that EM ‘...was first used in Europe a quarter of a century ago, and has become an established — although by no means ubiquitous or dominant — feature of the continent’s collective “penal imaginary”.’ According to Hucklesby and Holdsworth (2016, p. 3):

England and Wales was the first European jurisdiction to deploy electronic monitoring (EM) technology in 1989 and its use has since grown both in terms of numbers and modalities. England and Wales remains one of the largest and most enthusiastic users of EM in the world.

EM was subsequently introduced in Scotland in 1998, and in Northern Ireland in 2009 (Best, 2009). Laurie and Maglione (2019) have noted that:

Most of the criminological literature on the electronic monitoring (EM) of offenders centres on its financial and technical implications, its historical roots and its impact on reoffending, as well as on its place within criminal justice systems across the world.

They suggest that:

Overall, EM policy presents itself as an attempt to address two main and interlinked problems: the risk of reoffending (described as inherited from previous governments) and the limited public confidence when offenders are released back into the community (assumed as a crucial issue for community penalties or early release).

Nellis (2016b) analysed the development and future of EM, specifically in Britain, using a number of useful analytical conceptualisations. These included viewing EM as an *affordance*<sup>2</sup> (Nellis, 2016b; pp 113 and 123), or a *disruptive*

<sup>2</sup> ‘Affordances’ have been defined as a use or purpose that a thing can have, that people notice as part of the way they see or experience it: In design, perceived affordance is important — that is, our implicit understanding of how to interact with an object (Cambridge Dictionary, online: <https://dictionary.cambridge.org/dictionary/english/affordance> accessed 20 April 2020).

*innovation*,<sup>3</sup> both of which are useful conceptualisations when considering the development and use of EM.

## Developments in Ireland

While EM has become an established part of the *collective penal imaginary* (Nellis, 2014, p. 217) in Europe, reflected in its widespread adoption, its practical use in Ireland has been slower and more recent. That is despite the fact that EM has been a recurring feature of Irish political and penal policy debate and media attention. Rogan (2011, pp 177–91) describes the 1990s as ‘the crucial decade’ for Irish penal policy because it was a ‘time of change in Irish prison policy that was matched only by the 1960s’. In June 1996, Irish society was rocked by the killings of investigative journalist Veronica Guerin and Detective Jerry McCabe, in two separate shootings. The widespread outpouring of anger that followed these homicides became a penal policy watershed and ‘gave rise to a massive growth in law and order rhetoric’ (O’Donnell and O’Sullivan, 2001, p. 32), reflecting a ‘textbook case of moral panic’ (Kilcommins et al., 2004, p. 137). ‘Tough on crime’ and ‘zero tolerance’ terminology established itself in the Irish policy and political narrative. These terms became policy mantras, as they had in other jurisdictions around the same time (O’Donnell and O’Sullivan, 2001, pp 35–46; Rogan, 2011, pp 187–98), significantly influencing the relevant policy debate.

Two major criminal justice policy documents published ‘post-1996’ by the Department of Justice (1997) and by the National Crime Forum (1998) did not refer to EM as part of the planned modernisation of the country’s criminal justice system. This may have been due, at least in part, to the then ‘unquestioned public position among the majority of penal policymakers that increased prison spaces offered a solution to the problems of crime and that to resist penal expansion was politically risky’ Rogan (2011, p. 187). The Expert Group on the Probation and Welfare Service (1999),<sup>4</sup> in its *Final Report* (pp 52–3), *did*, however, consider the possibility of introducing EM, pointing out that EM in Britain was still at a pilot stage of implementation and concluding that:

<sup>3</sup> As referenced in Nellis (2016b), ‘disruptive innovation’ has been described in the following terms: ‘Disruption’ describes a process whereby a smaller company with fewer resources is able successfully to challenge established incumbent businesses (see Christensen et al., 2015).

<sup>4</sup> As the agency was then known, up to a rebranding in mid-2006, since when it has been known officially as the ‘Probation Service’ and relevant staff members came to be known as ‘Probation Officers’, as opposed to their previous designation as ‘Probation and Welfare Officers’.

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The Group does not recommend that electronic tagging be introduced at this stage. Given the limitations of the technology ... and the continuing development of more sophisticated mechanisms of monitoring, the Group recommends awaiting the introduction of third generation systems and continued monitoring of the extension of the existing systems in Europe and elsewhere.

A subsequent value-for-money examination of the Probation and Welfare Service, undertaken by the Comptroller and Auditor General (2004), reviewed actions taken on the Expert Group's 1999 recommendations. It found, unsurprisingly, in relation to the Expert Review Group's recommendation regarding EM, that 'no action' was required (p. 60).

In this context, the potential for introducing EM in Ireland was considered — if it were to be used at all — as a possible 'adjunct' to probation supervision. Its 'postponement' by the Expert Group on Probation may have reflected a certain level of general reticence, or caution, regarding EM among those involved in the Group, who included the Principal Probation and Welfare Officer. While the Group framed its position in the context of awaiting a more definitive outcome from the British EM pilots, there may also have been a view, as Nellis (2016a, pp 224–5) described, of a tendency for EM to be seen as a cheap, commercial threat to 'traditional' probation supervision and a 'slippery slope' (p. 225) to devaluing established probation work.<sup>5</sup> The Expert Group's recommendation may similarly have been indicative of a 'constructive resistance' (Nellis, 2016b), within the Expert Group, to implementing EM. This caution became a recurring feature in the subsequent consideration of EM in Ireland.

By 2004, while EM was already in use in many jurisdictions, Ireland had not yet even signalled<sup>6</sup> any such planned usage. Then, in May 2004, the then Minister for Justice, Michael McDowell TD, announced, in a speech to the annual conference of the (Irish) Prison Officers Association (POA), that he intended to introduce 'electronic tagging of criminals ... as an alternative to custodial sentences, to free up prison places'. One media report of this speech (Lally, 2004) quoted the Minister stating that electronic tagging in other jurisdictions was so advanced that 'it could now be properly evaluated ... and [that the Minister was] assured of its value' as 'a useful means of having a non-custodial sentence for a first-time offender'. McDowell cited the

<sup>5</sup> See also Mair and Nellis (2013) for a description of the British experience in this regard.

<sup>6</sup> For example, in departmental or agency strategic plans, including the 1998 and 2001 departmental strategic plans.

value of EM, that he favoured the greater use of non-custodial measures, including EM, particularly for first-time offenders and relatively minor offending, such as public order offences, as well as its potential, in conjunction with other community sanctions, to 'take pressure off the prison system, which [was] "silting up" with greater numbers of inmates', and concluded that 'tagging systems may be provided here [Ireland] by the private sector... however State agencies, such as the probation services, would respond if criminals broke the conditions of their tagging.'

The day after the Minister's speech, the then Executive Director of the Irish Penal Reform Trust (IPRT) (Lines, 2004), criticised Minister McDowell's EM proposals. Taking issue with the argument, firstly 'that tagging offers an alternative to prison and will therefore reduce prison numbers and prison budgets', and secondly 'that tagging can reduce recidivism', Lines proposed that neither argument stood up to research-based scrutiny, arguing that EM is often applied internationally to low-level and low-risk offenders, that the measure can in fact be relatively expensive, and that it had not been shown, of itself, to have reduced recidivism. Lines concluded that: 'Far from being a solution to our prison problems, electronic tagging is a technology in search of a rationale'. Nevertheless, that 2004 Ministerial commitment to implement EM was given legislative effect through, first, the Criminal Justice Act, 2006, making provision for EM of offenders as part of a supervised community sanction or as a condition of early release from a prison sentence; and second, the Criminal Justice Act, 2007, which provided for EM as a condition of bail. For the purposes of the present paper, EM in Ireland will be discussed in terms of its different uses, rather than following a strictly time-bound chronology of developments.

### **EM as part of a community sanction and of early release**

From time to time, various stakeholders concerned with offender management have sought to influence the trajectory of EM and its use. The Probation Service is one such 'stakeholder'. A founding member of the Confederation of European Probation (CEP), the Probation Service has been represented at most, if not all, of the CEP's biennial EM conferences. The present author, while a member of the senior management team — including in the role of Director — of the Probation Service, participated in a number of these conferences. Following attendance at the 2005 CEP conference, the author<sup>7</sup>

<sup>7</sup> Then a Regional Manager; later (2006–12) Director of Operations, and (2012–19) Director of the Irish Probation Service.

— in conjunction with two management colleagues — submitted a draft paper<sup>8</sup> on the possibility and potential for use of EM as part of a community sanction (at court/sentencing stage, or post-release from prison) managed by the Probation Service. That paper explored the positive potential of EM as part of probation supervision and against the backdrop of the Minister's statement of some months previously; it was submitted by the then Principal Probation and Welfare Officer to the Department of Justice. It is unclear what, if any, impact this paper may have had on EM policy formulation.

The Criminal Justice Act, 2006 was a significant addition to statute law and included the first legal provision for electronically monitored restriction on movement orders, envisaging two types of EM:

- (1) as an alternative to imprisonment, and
- (2) as a condition of early release from a custodial sentence.

The Act provides for electronic monitoring of *restriction of movement* orders, as an alternative to imprisonment for specifically scheduled offences, including certain public order,<sup>9</sup> and relatively minor violent offences,<sup>10</sup> following conviction of a person aged eighteen years or more, with the consent of the offender and of other adult/s living with them, and where the court was considering a custodial sentence of at least three months. Those subject to EM could be required to wear a 'tag' for the duration (up to six months) of the court order, but could not be required to remain in one place (e.g. in a home-detention curfew context) for more than twelve hours in any one day. A sentencing court considering such an order must request a Probation Officer's written report regarding the offender's suitability; and assign an 'authorised person responsible for monitoring the offender's compliance'. An 'authorised person' was defined as someone 'appointed in writing by the Minister, or a person who is one of a class of persons which is prescribed, to be an authorised person'. This would appear to allow for Probation Officers, or such other person or 'class of person', potentially including employees of a commercial enterprise<sup>11</sup> or other designated organisation, to supervise restriction on movement orders, or aspects of such orders.

<sup>8</sup> In the author's personal papers.

<sup>9</sup> Using threatening, abusive or insulting behaviour in a public place, failure to comply with the directions of a police officer, trespass, affray, and assault or obstruction of a peace officer.

<sup>10</sup> Including assault, assault causing harm, coercion or harassment.

<sup>11</sup> So far, commercial companies have only ever been used for provision of EM equipment, fitting devices to supervisees and monitoring the operation of appliances and reporting any breaches to the Irish Prison Service.

The global economic crash and resulting financial crisis, from around 2008 onwards, had a significant influence across all public service provision in Ireland, including the Criminal Justice System, resulting in budgetary cuts and spending reviews. The Programme for National Recovery (Government of Ireland, 2011) contained a commitment 'to review the proposal to build a new prison at Thornton Hall and to consider alternatives, if any, to avoid the costs yet to be incurred<sup>12</sup> by the State in building such a new prison'. What became known as the Thornton Hall Project Review Group was established by Minister for Justice Alan Shatter TD, in April 2011, with the Group's report (Department of Justice and Equality, 2011) completed that July.

The Thornton Hall Review (Department of Justice and Equality, 2011, p. 62) recommended the use of 'alternative forms of detention', including 'home detention' that 'may involve electronic monitoring'. The Review also recommended (pp 62–3 and 71) the introduction of a new scheme of 'Earned Temporary Release' with a requirement to do community service, which 'could also provide for an electronic monitoring requirement'. This new early-release proposal was progressed as a matter of urgency, through an interagency working group, chaired by the Department of Justice and Equality, and including representatives of the Prison and Probation Services.<sup>13</sup> The resulting Community Return programme (Probation Service/Irish Prison Service, 2014), commenced in October 2011, is still running and has been successful in resettling prisoners, serving between one and eight years' imprisonment, on early release. These prisoners are supervised by the Probation Service in the community and have community-service hours substituted for outstanding prison time, as part of their reintegration programme. The Thornton Hall Review recommendation to consider incorporating an EM component in the Community Return programme was not considered to add significant value to the scheme and was not introduced when the scheme was established.<sup>14</sup>

While not necessarily the case in other jurisdictions, it is not unusual in Ireland for (enabling) legislation to be enacted but not commenced in practice for some time. Frequently, implementation of primary legislative provisions can be achieved by the introduction of Ministerial regulation, or Statutory Instrument. Implementation of EM as part of court-ordered

<sup>12</sup> The site for the new prison, at Thornton Hall in North County Dublin, had already been purchased for this Irish Prison Service building project.

<sup>13</sup> The present author represented the Probation Service on this group.

<sup>14</sup> Although EM was not initially used with prisoners released on Community Return, in the context of the somewhat ad-hoc evolution of its usage, EM was included in later years as a condition of Temporary Release for some participants on this programme (see below).

probation supervision has not, thus far, been so regulated, unlike the provisions of the 2006 Act<sup>15</sup> allowing for the use of electronic monitoring as a condition of early release from a custodial sentence ('Temporary Release', as provided for under the Criminal Justice Act, 1960, as amended), for up to six months after release. These latter provisions, regarding the use of EM as a condition of early release, have been commenced.

This initially came about as a short, time-limited pilot, from August to December 2010, initiated at the behest of then Minister for Justice and Law Reform, Dermot Ahern TD.<sup>16</sup> The pilot was overseen by a multi-agency Project Board, chaired by the present author, and included representatives of the Prison Service, Probation Service, An Garda Síochána and the Department of Justice. This pilot had its origins in an earlier multi-agency working group that considered the potential application of EM: at the court/bail stage, for early release from prison and for sex offenders, post-release. That earlier working group had proposed that the first application of EM in Ireland should target early release from prison and that it should be piloted for up to 300 participants. That proposal was scaled back to the much smaller number that took part in the *actual* pilot, on the basis that selecting the higher number, as originally envisaged, might potentially result in the overall risk level of those released being elevated, and not adding value to the supervision of those who might have been given early release anyway.

The short 2010 EM pilot included 31 prisoners, with a maximum of 18 being on early release, with EM,<sup>17</sup> at any one time, primarily subject to home-detention curfews. EM was used as a specific condition of Temporary Release,<sup>18</sup> itself granted under the terms of the Criminal Justice Act, 1960 and the Criminal Justice (Temporary Release of Prisoners) Act, 2003, as amended. The pilot was reviewed by the project oversight group, and deemed a success with reference to all indicators, particularly the management and behaviour of participants and the efficacy of the technology. The pilot evaluation report (Irish Prison Service, 2011) concluded that EM delivered some (albeit small-scale) additional value to the management of offenders, post-release in Ireland, and was useful in such

<sup>15</sup> Sections 108–10.

<sup>16</sup> Minister Ahern had also made the relevant Ministerial Order commencing the relevant (EM) provisions of the 2006 Act, for 'a restriction of movement condition applying to the granting of temporary release' (see the following Minister, Alan Shatter's, contribution to Dáil Éireann Debate vol. 754, no. 3, 70 on 7 February 2011 — accessed 20 February 2020).

<sup>17</sup> The pilot used GPS technology to monitor compliance with (mostly) home-detention curfew, and exclusion-zone compliance (in some cases).

<sup>18</sup> For the general background to the introduction of 'Temporary Release' as a measure, see Rogan (2011, pp 92–4).



cases. It recommended a further, two-year trial of EM, for a limited number of prisoners on Temporary Release, including (as appropriate) those in hospitals or nursing homes,<sup>19</sup> as well as those for whom — on a case-by-case basis — EM might be indicated as offering added value in terms of public protection and/or supporting compliance with Temporary Release. The report also recommended that the number on EM at any one time be ‘capped’ to a daily maximum of 30–40 prisoners. The Minister for Justice and Equality, Alan Shatter TD, in a reply to a Parliamentary Question in February 2012,<sup>20</sup> referred to the 2010 pilot programme, stating that the issue of expanding the implementation of EM would be considered by ‘a group to carry out an all-encompassing strategic review of penal policy.... We are not looking at it [EM] in isolation’, and that: ‘The Probation Service engages with a considerable number of prisoners before they are released’, and while EM ‘might have a role in the future ... no final decision has been made as to whether we will proceed further with tagging in 2012 or 2013 or whether priority will be given to other forms of intervention.’

The Irish Prison Service subsequently decided to implement EM on an expanded but still limited basis, issuing an EU request for tenders in early 2014, with the contract for the provision of up to 50 ‘tags’ at any one time awarded in May 2014. This contract incorporated some new features, including the use of GPS, GSM and RF<sup>21</sup> technology, using one-piece, waterproof units. Monitoring was to be ‘24:7’, with ‘real time’ update reports provided daily, and tags being fitted by the contracted service-provider within 48 hours of request. Up to the end of September 2016, 62 prisoners on Temporary Release had EM as one of their release conditions. Of these, 23 were ‘tagged’ while attending hospital outside prison, 31 had been on home-detention curfew, and eight had been released early on the Community Return or Community Support<sup>22</sup> programmes.

A Joint Committee on Justice and Equality review of penal reform and sentencing (2018) undertook wide-ranging discussions and contributions, including from the present author, and reported without referencing EM in

<sup>19</sup> Who might otherwise require expensive, and unnecessary (from a public protection perspective), round-the-clock escorts by Prison Officers.

<sup>20</sup> Dáil Éireann Debates, vol. 754, no. 3, p. 70, available at: <https://www.oireachtas.ie/en/debates/debate/dail/2012-02-07/9/> (accessed 24 September 2019).

<sup>21</sup> Global Positioning System, Global System for Mobile communication, and Radio Frequency technology.

<sup>22</sup> Community Support is structured early release for prisoners serving sentences of up to twelve-months. Whereas post-release supervision under the Community Return scheme is provided by the Probation Service, resettlement assistance and mentoring are provided to those on the Community Support programme by community and voluntary-sector organisations funded by the Probation and Prison Services.

either its discussions or recommendations. The following year, it was reported by one media outlet<sup>23</sup> that: 'A tender issued by the Irish Prison Service shows that €680,000' had been 'set aside for the tagging and monitoring of prisoners who are on temporary release', for potentially 'up to 50 prisoners [being] tagged at any one time'. On 29 March 2018,<sup>24</sup> the Minister for Justice and Equality, Charlie Flanagan TD, confirmed that the Prison Service's EM contract commenced in 2014, was 'used to monitor prisoners who have been granted Temporary Release' including as part of the Community Return/Community Support scheme, as well as being used 'to monitor some hospital in-patients who have been granted Temporary Release from prison'. The Minister confirmed: 'During 2017, there were 59 prisoners electronically monitored while on Temporary Release', with the total cost in 2017 being €166,117. 'Electronic tagging devices were deployed 4,616 times, involving 59 prisoners at an average cost of €36 per deployment,' according to the Minister.

An Irish Prison Service (2017) document sets out the organisational policy on EM, including the aim, purpose and scope of EM, qualifying criteria and implementation procedures, listing eligible prisoner categories, and including a copy of the relevant consent form and a 'user guide.' Eligible prisoners include: hospital in-patients, prolific offenders, prisoners who, due to the nature of their offence and history of offending, may require additional controls to ensure that they obey the conditions of their Temporary Release. Nevertheless, there is no reference to EM in a number of recent and current strategy documents and annual reports published by the Irish Prison and Probation Services, regarding current usage, nor future plans. Furthermore, the interagency action plan for the management of offenders (Department of Justice and Equality, 2019) contains no reference to EM.

## EM and bail

Subsequent to the 2006 legislation, Sections 11–13 of the Criminal Justice Act, 2007 amended the Bail Act, 1997,<sup>25</sup> to enable a court to include EM as a bail condition, in serious offence cases. In 2007, the then Director of the

<sup>23</sup> McCárthaigh, S. (2019), '€680k to be spent on the electronic tagging of prisoners,' *Irish Examiner*, 22 April, at: <https://www.irishexaminer.com/breakingnews/ireland/680k-to-be-spent-on-the-electronic-tagging-of-prisoners-919178.html> (accessed 18 September 2019).

<sup>24</sup> Dáil Éireann Debate, 29 March 2018, Questions 207, 208, 209) at: <https://www.oireachtas.ie/en/debates/question/2018-03-29/208/> (accessed 28 March 2020).

<sup>25</sup> The Bail Act, 1997 gave effect to the sixteenth amendment to the Irish Constitution. The legislation provides that a court can refuse bail to a suspect where it fears that they would commit further offence/s while otherwise at liberty.

Probation Service attended the CEP's EM conference and drafted a paper,<sup>26</sup> summarising potential implications of the development of EM, including a possible role for probation. It is unclear if or how widely that paper was circulated, beyond the Probation Service. Charity (2010) subsequently raised concerns, suggesting that 'the presumption of innocence has been consistently compromised since the introduction of the Bail Act of 1997', and pointed to issues arising from such use of EM in Britain, concluding that it was 'certainly evident that the legislature has envisaged a move towards electronic monitoring' and (citing Grolimund and Durac, 2009<sup>27</sup>) that it appeared 'that the increasing concern of the Oireachtas in reforming the bail system 'is crime control and not the preservation of liberty'. Charity speculated: 'It remains to be seen when the legislation dealing with electronic monitoring [in bail cases] will be commenced and how it will be enforced.'

Five years later, that legislation had not been commenced when, on 23 July 2015, the Minister for Justice and Equality, Frances Fitzgerald TD, announced a further Bail Bill, publishing its General Scheme. The new legislation would, according to the accompanying press release,<sup>28</sup> update and extend the legislative basis for the electronic monitoring of persons on bail, with An Taoiseach describing the initiative as 'the first comprehensive review of Bail law since 1997', and saying that the Bill 'demonstrates this Government's ongoing commitment to crack down on crime'. The Bail (Amendment) Bill would limit the power of the courts to order EM as a bail condition, to cases where the prosecution requests it. While a relatively welcome proposal, from both a parliamentary and public opinion perspective, an Irish Penal Reform Trust (IPRT, 2015) submission expressed concern regarding specific EM provisions of the Bill, referencing the European Convention on Human Rights, and European Court of Human Rights decisions, as well as the Council of Europe (2014) Recommendation on EM. Citing the latter document as 'the first guidance on this [EM] internationally', the IPRT (2015, p. 8) highlighted a number of specific standards, including the need for judicial decision-making regarding EM, the dangers of 'net-widening',<sup>29</sup> proportionality of implementation, potential impact of EM on families and others, the personal circumstances of those subject to EM, potential negative

<sup>26</sup> In the author's personal papers.

<sup>27</sup> Grolimund, M.T. and Durac, L. (2009), 'Counting the cost: Stiffer Irish bail laws and the sacrificing of the principle of liberty', *Irish Criminal Law Journal*, vol. 19, no. 2, p. 55.

<sup>28</sup> See: <http://www.justice.ie/en/JELR/Pages/PR15000430>

<sup>29</sup> The IPRT (2015, p. 8) defined *net-widening* as 'the practice by which instead of electronic monitoring being a genuine alternative to pre-trial detention it instead becomes a widely imposed condition of bail'.

impacts, taking time spent on EM into account in subsequent sentencing decisions, and personal and other data issues. The IPRT (2015, p. 8) concluded that: 'none of these safeguarding factors appear to have been considered' and recommended that: 'any proposed scheme for pre-trial electronic tagging be reviewed for compliance with Council of Europe Recommendation CM/Rec (2014) 4'.

The Department of Justice and Equality's subsequent (2016) strategic plan, reflecting a Programme for Government commitment (Government of Ireland, 2016, p. 100–102), undertook (p. 29) to 'introduce electronic tagging for those on bail, where requested by Gardaí, thereby reducing the risk of reoffending [and] ... to fast-track this legislation'. The purpose of the resulting Criminal Justice Act, 2017, according to the Department of Justice and Equality,<sup>30</sup> was to strengthen the law on bail, including that a court may take persistent serious offending into account in bail decisions, strengthening police powers, hearing victims' views, giving reasons for bail refusal, and including EM as a possible bail condition. A key element of this legislation was that EM could be included as a bail condition, only on the application of the prosecution.

In December that year, Deputy Jim O'Callaghan TD introduced his — private member's — Bail (Amendment) Bill, 2017, which sought to amend the bail laws to enable a court to refuse bail if it considered it 'necessary to prevent the commission of a serious offence by that person'. Burglary-related offending was specifically targeted in the Bill, which would require a court, in admitting someone to bail in such circumstances (of a prior history of such offending) to have 'an electronic monitoring device attached to his or her person, either continuously or for such periods as may be specified'. The Bill was referred to the Joint Committee on Justice and Equality for scrutiny and was discussed there on 5 December 2018.<sup>31</sup> Contributing to that discussion, Dr Mary Rogan, Associate Professor in Law at Trinity College Dublin, suggested that: 'The most important question is what will it [electronic monitoring] be for ... which has not been answered in Ireland, is what the purpose of electronic monitoring is. Is it to reduce pre-trial detention rates or is it something else?'

Some months prior to the Oireachtas Committee discussion of the Bail (Amendment) Bill, the Minister for Justice and Equality, Charlie Flanagan TD,

<sup>30</sup> Statement on the Department's website, at: [http://www.justice.ie/en/JELR/Pages/Criminal\\_Justice\\_Act\\_2017](http://www.justice.ie/en/JELR/Pages/Criminal_Justice_Act_2017) (accessed 8 May 2020).

<sup>31</sup> Joint Committee on Justice and Equality debate, Wednesday, 5 December 2018, available at: [https://www.oireachtas.ie/en/debates/debate/joint\\_committee\\_on\\_justice\\_and\\_equality/2018-12-05/5/](https://www.oireachtas.ie/en/debates/debate/joint_committee_on_justice_and_equality/2018-12-05/5/) (accessed 22 May 2020).

issued a strongly worded statement<sup>32</sup> on it. The Minister, while sharing concerns about serious and repeat offending, including by persons on bail, expressed concerns about the constitutionality of Deputy O'Callaghan's Bill, its potential contravention of 'ECHR<sup>33</sup> case law' and the possible negative impact, given its 'technical flaws', that it might have, stating that:

...electronic monitoring has a valuable role to play in monitoring bail conditions but it must be targeted at those cases where it is most likely to be effective. The mandatory use of electronic monitoring, as proposed by Section 3 of this Bill, would reverse the approach taken in the Criminal Justice Act last year. It is also in breach of the Council of Europe Guidelines on the use of electronic monitoring.

One follow-up media comment<sup>34</sup> to a parliamentary statement by the Justice Minister in 2018 pointed out that: 'Laws to allow electronic tagging as a bail condition have yet to be fully implemented. ... [in 2017], it emerged that 13% of all crimes were committed by people who were out on bail.' This Bail (Amendment) Bill, 2017 lapsed with the dissolution of the Oireachtas in January 2020. The Criminal Justice Act, 2017, providing for EM as a condition of bail, where requested by the prosecution, has not been commenced up to the time of writing. The Justice Minister, in reply to a Dáil Question on 5 March 2019,<sup>35</sup> stated that: 'Extensive preparations are underway to ensure these provisions [for EM of certain persons on bail] can be implemented and more importantly, to ensure they can be effective.'

## EM and sex offenders

A Department of Justice and Equality (2009) discussion document on the management of sex offenders identified EM as one management option, recording (pp 34–6) that EM 'has not yet been implemented in this jurisdiction' that EM 'does not provide a supervisory regime as such but provides a tool that may support a particular regime'. The document described different types of EM and highlighted cost, technical and other

<sup>32</sup> The Minister's statement is available at <http://www.justice.ie/en/JELR/Pages/SP18000214> (accessed 9 May 2020).

<sup>33</sup> European Convention on Human Rights.

<sup>34</sup> MacNamee, G. (2018), 'Electronically tagging 59 prisoners last year cost the State €116,000', *thejournal.ie*, 4 April. Available at <https://www.thejournal.ie/electronic-tags-3938140-Apr2018/> (accessed 28 March 2020).

<sup>35</sup> Dáil Question on 5 March, available at <https://www.oireachtas.ie/en/debates/question/2019-03-05/234/> (accessed 14 April 2020).

implementation challenges, as well as concern regarding serious further offending by a number of those on EM in Britain. It referenced the planned introduction of EM in Northern Ireland and identified the potential value of EM (particularly GPS) for otherwise uncooperative sex offenders. The document suggested that EM could already be imposed on a sex offender, under existing legislation: either as part of a Post-Release Supervision Order under the Sex Offenders Act, 2001, or as a condition of a Part-Suspended Sentence Supervision Order under Section 99 of the Criminal Justice Act, 2006. EM has not been used in either of these ways, to date.

The potential use of EM in supervising sex offenders has been debated in the Oireachtas. In a debate on the Criminal Law (Sexual Offences) Bill, 2015, on 3 November 2016,<sup>36</sup> David Stanton TD, Minister of State at the Department of Justice and Equality, responding to requests 'to enhance the monitoring of sex offenders following release', said: 'Provisions are to be brought forward in a sex offenders (amendment) Bill which will significantly strengthen such monitoring. These will include electronic monitoring of certain sex offenders on release'. The Department of Justice and Equality (2016) strategic plan (p. 29) had undertaken to:

...further enhance the arrangements in place, providing for post-release supervision and if necessary make further amendments to the existing legislation in the area ... to effectively deal with sexual offences including stronger sanctions aimed at protecting children from sexual exploitation.

According to McGee (2018), a draft of the Sex Offenders (Amendment) Bill, including limited provision for EM of sex offenders 'who are deemed to constitute a high risk of reoffending or revictimising' was agreed by Cabinet and was to be referred to the Oireachtas Committee on Justice and Equality. Responding to a Dáil Question the following week, then Justice Minister Charlie Flanagan TD said that:

Electronic tagging is a complex area and there is a significant body of work being undertaken to evaluate the type of technology and resources required to implement and sustain a viable electronic monitoring system in Ireland.... The General Scheme of the Sex Offenders (Amendment) Bill ... provides for the use of electronic monitoring to ensure that [post-release

<sup>36</sup>Dáil Éireann Debate, vol. 927, no. 2, available at <http://oireachtasdebates.oireachtas.ie/Debates%20Authoring/DebatesWebPack.nsf/takes/dail2016110300023?opendocument&highlight=Sex%20offenders%20%28amendment%29%20bill> (accessed 28 April 2019).

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supervision] conditions are not breached ... [and] will now be sent to the OPC<sup>37</sup> for drafting and is being referred to the Oireachtas Joint Committee on Justice and Equality for pre-legislative scrutiny.

Carr (2018), commenting on the publication of this legislation, pointed to the 'intuitive attraction in the promise of a technological solution to manage those who are considered to present a risk to the public', while cautioning that 'the evidence base on the effectiveness of electronic monitoring is mixed' and 'should be carefully considered'. Carr concluded that 'the best available evidence suggests that monitoring is more effective when it is carefully targeted and integrated with other forms of support and risk management.'

In November 2018, an Oireachtas Joint Committee held pre-legislative scrutiny hearings with a number of bodies, including the Probation Service, regarding the General Scheme of the Sex Offenders (Amendment) Bill, 2018, which was 'intended to update the Sex Offender Act 2001' (Joint Committee on Justice and Equality 2019, p. 14). The Bill included provision for court-ordered EM of convicted sex offenders, as a condition of post-release supervision orders. The Committee's report found support (p. 47) for the efficacy of EM as part of a comprehensive plan for prisoner resettlement, but cautioned against 'seeing EM as a "silver bullet" for preventing reoffending', concluding (p. 51) that: 'Submissions received ... suggest that evidence as to the effectiveness of electronic monitoring generally is mixed', and recommended that:

- Given the financial investment required, the Department [of Justice and Equality] may wish to assess, in light of international evidence, how successful the proposed measures are likely to be in achieving their policy aim (i.e. reducing reoffending),
- That a provision [requiring the consent of persons habitually resident with an offender] be added to the General Scheme, in light of Council of Europe guidance ... and evidence to the effect that electronic monitoring can have significant effects on the family of a sex offender or on others living in the same property, and that
- Electronic monitoring should also be available for monitoring compliance with conditions imposed for a part-suspended sentence under s.99 of the Criminal Justice Act 2006.<sup>38</sup>

<sup>37</sup> The Office of the Parliamentary Counsel to the Government.

<sup>38</sup> As well as part of a Post-Release Supervision Order under the terms of the Sex Offenders Act, 2001.

While this legislation lapsed with the dissolution of the Oireachtas in January 2020, the current Strategy Statement of the Department of Justice (2021, p. 26) includes a goal: 'to ensure that convicted sex offenders are effectively managed and monitored'. Action towards achieving this goal is reflected in the announcement (Gallagher, 2021) in March 2021 by Justice Minister Helen McEntee TD of her intention to publish the Sex Offenders (Amendment) Bill, 'before the end of June [2021]'. The general scheme of this Bill, including provision for the post-release electronic monitoring of sex offenders in specific circumstances, was previously approved by government in 2018 (see above). Up to the end of June 2021, the promised Sex Offenders (Amendment) Bill had not been published, although at the time of writing it was understood<sup>39</sup> to be at an advanced stage of drafting.

### **More recent policy and political consideration of EM in Ireland**

Part of the enduring attractiveness of EM, as suggested by Nellis (2016b), may be attributed to its perception as a 'cool brand' (p. 118), 'self-evidently modern' (p. 115) and part of the 'global ubiquity of computer-mediated action-at-a-distance, real-time communication, digital transparency and connectedness', as summarised by Nellis (2016b). Following the Minister's watershed EM commitment in 2004, given effect in the 2006 legislation, EM has remained consistently on the political agenda. Nevertheless, the 2014 comprehensive review of penal policy, accepted by government, considered the issue of EM and noted (Department of Justice and Equality, 2014, pp 50–51) that EM was already being used on a small scale, in the context of early release from prison, and that EM's potential applicability was limited, concluding that it did not propose to 'recommend extending resources relating to electronic monitoring (EM) to non-custodial sanctions beyond that proposed to be introduced in relation to sex offenders'.

There has been relatively little academic analysis or research on EM in Ireland, with no discussion of it, for example, in the *Handbook of Irish Criminology* (Healy *et al.*, 2016). Moss (2018) concluded (p. 131) that in the context of 'the ongoing use but unclear purpose of EM' and 'the exceptionalism of the Irish criminal justice model', both 'EM purpose, performance and probation oversight' have been 'overlooked in research in Ireland'. Seymour (2006) reviewed community sentencing in Ireland, concluding that 'despite being more expensive than other sentencing

<sup>39</sup> From contact by the author with the Department of Justice.



alternatives, there is extremely limited data to suggest that punitive measures including electronic monitoring are effective in reducing recidivism....' Seymour also expressed concern at EM's (then) planned introduction, and while acknowledging (p. 26) that it 'is an attractive intervention for government because it is a cheap alternative, relative to the costs of custody and serves to allay concerns about the protection of the public', recommended 'that electronic monitoring is not introduced in Ireland'. More recently, O'Donnell (2020) assessed various approaches to reduce reoffending, concluding that EM had *some promise*, citing (pp 73–4) Hucklesby's (2008, p. 67) conclusion that: 'For at least some offenders, curfew orders have the capacity to facilitate desistance during the time the curfew order is active'. O'Donnell further suggests that EM 'may offer limited benefits to offenders who are inclined towards desistance and need support to break criminal habits'. It is difficult to assess what impact such commentary may have on the relevant political debate and policy decisions.

On 30 September 2016, the Department of Justice and Equality hosted an 'open policy debate' in Dublin, attended by representatives of the Department, the Probation Service, Irish Prison Service and An Garda Síochána, and some external experts and stakeholders. The event's keynote speaker, Professor Mike Nellis,<sup>40</sup> recommended the establishment of an interagency working group, to work in parallel with the legislative process already underway (particularly in relation to the Bail Bill), to prepare for and plan the effective operational implementation of EM in Ireland. This recommendation was actioned, and was referenced in a number of responses to Dáil Questions, including on 5 March 2019, when Justice Minister Charlie Flanagan TD stated<sup>41</sup> that, in the context of 'extensive preparations' to implement EM, recommendations from a Departmental working group were being progressed. To date, those preparations have not yet resulted in further implementation of EM.

While there appears to be little or no appetite currently to revive the court-ordered community-sanction option incorporating EM, the bail and sex-offender supervision options appear set to remain on the political, media and public agenda for some time and are more likely to be implemented in practice, at some stage. The use of EM as a condition of early release — offering an *affordance* that has been recognised and utilised by the Irish Prison Service in its lead role regarding this measure — has continued in

<sup>40</sup> Emeritus Professor of Criminal and Community Justice in the Law School, University of Strathclyde, Glasgow, Scotland.

<sup>41</sup> Dáil Éireann Debate, Tuesday 5 March 2019, Question 234, available at: <https://www.oireachtas.ie/en/debates/question/2019-03-05/234/>

practice. Its future may be uncertain, in a context where numbers on EM are low and wider use with other offender groups has not transpired. Ongoing caution, or 'constructive resistance' (Nellis, 2016)), from relevant agencies, including probation, prisons, police and departmental, may continue to inhibit wider implementation. Although the criticism that EM was a 'technology in search of a rationale' was levelled at the initial Ministerial plan for its introduction, EM could not now be so described, given that it *has* been used, albeit selectively and sparingly, as an adjunct to other measures, with clear practice limits and benefits identified.

There is evidence that EM can add value to established methods of offender management in certain cases. As Beyens and Roosen (2020) concluded: '... EM is not rehabilitative in itself but is able to facilitate other rehabilitative measures'. Fitzalan Howard (2020, pp 32–4), discussing the lived experience of EM, similarly concludes that 'EM seems to have clear, rehabilitative potential', as well as a 'potential to promote compliance and to contribute to rehabilitation and desistance'. Bowen (2021), citing findings from recent research, including:

A recent meta-analysis ... looking at 17 high quality ... studies ... suggests that electronic location monitoring can be successful in suppressing offending during the period in which individuals are monitored...

while urging (p. 14) 'a 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'. Such an approach would also include (Bowen, 2021, p. 5) a more targeted use of EM with specific categories of offenders,<sup>42</sup> and in ways that would afford flexibility to probation officers<sup>43</sup> regarding how EM might be used more effectively, and in a 'smarter' way, so as to achieve 'the most impact to keep our communities safer'.

There are widely identified risks of net-widening and 'mission creep' when employing EM, as well as challenges in implementation, and concerns regarding commercial procurement and management. Of all the community-based sanctions and measures, EM can raise unrealistic expectations among the media, politicians and wider public. At the same time, as Nellis (2016a, p. 238)

<sup>42</sup> Including sex offenders, for example.

<sup>43</sup> At the point when supervision conditions are being set, as well as during the course of supervision in the community.

has stated: 'the forms of EM, the regimes it can be used to create and the scale of its use are amenable to shaping'. This has already been borne out in the Irish context, as evidenced above. Given the clear political and legislative commitment to expand the use of EM, for bail and certain sex offenders, relevant agencies and other bodies might do well to adopt a position, as described by Nellis (2016b, pp 126–7) that '...EM technologies ... can be appropriated and deployed to better, more creative ends than those who control the dominant narratives about them have thus far been prepared to concede.' In Nellis's (2016b, p. 128) view:

The focus must be on constructively resisting excess [emphasis added] in EM — and using it wisely — rather than a wishful, anachronistic belief that it is still simply a discrete and peripheral intervention, easily derided and readily contained, and without capacity to disrupt existing penal arrangements — especially probation services.

## Conclusion

Rogan (2011, pp 214–15) suggested that change in penal policy in Ireland, has traditionally been slow and ad hoc, with 'drifting along' a 'recurrent feature' and change 'being dependent on particularly active or interested ministers or a dyad of minister and civil servant ... where policy is often created by accident rather than by design'. This analysis would seem to capture the evolution of EM. Legislation and policy developments, and wider public debate in relation to EM in Ireland have tended to be stop-start and politicised, impacted by changing cycles of government formation and policy priorities. Both sides of the legislature-executive 'dyad' have demonstrated both innovation/flexibility and caution, in turn, resulting in targeted use of EM at times, as well as slow progress in wider implementation. Various legislative measures have been introduced in Ireland, at different times, to use EM in four different ways. Only the early-release option has been used in practice so far.

As Bowen (2021, p. 5) has stated, 'electronic location monitoring and remote alcohol monitoring are here to stay', a position supported by Nellis (2019) and Hucklesby and Holdsworth (2020), among others. Whatever the future may hold, in relation to the use of EM in Ireland, the cautious manner of its development and limited use to date would seem to point to a technology that has *already* found its rationale, on the basis of adding value to existing sanctions

(such as Temporary Release and post-release supervision of sex offenders). The measure also holds out some possibilities for reducing the once-again rising prison population, through potential reductions in the numbers on remand in custody. Any enduring resistance to its implementation among criminal justice bodies might need to be more constructive and even embracing of the positive affordances of EM, both for strengthened offender supervision and supporting desistance from crime. While EM can hardly be described in the Irish context as a *disruptive innovation*, in the real sense of the term, it does represent, in reality, an *affordance* whose full benefits as an adjunct to more established and 'traditional' forms of offender supervision, have been identified — and even tested in practice — but remain as yet to be fully realised.

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