NEW ZEALAND LAW SOCIETY

NZLS EST 1869

Electronic Monitoring of Offenders Legislation Bill

30/07/2015

SUBMISSION ON THE ELECTRONIC MONITORING OF OFFENDERS LEGISLATION BILL

Summary

1. The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the Electronic Monitoring of Offenders Legislation Bill (Bill).

2. The Law Society considers that insufficient justification has been given for removing the legislative prohibition against electronic monitoring conditions for offenders sentenced to intensive supervision and short terms of imprisonment. Intensive supervision and short sentences do not warrant the significant and ongoing restrictions on liberty that electronic monitoring would impose. A stronger case needs to be made to justify the intrusion on fundamental rights protected by the New Zealand Bill of Rights Act 1990.

3. The Law Society submits that the Bill should not proceed. If it is to proceed, the Law Society recommends amendments to minimise the rights infringements and to better align the Bill with current sentencing legislation and practice.

Purpose of the Bill

4. The Bill removes prohibitions in the Sentencing Act 2002 (Act) on electronic monitoring of:

   - offenders released from a prison sentence of two years or less (short sentences); and
   - offenders sentenced to intensive supervision.

5. Electronic monitoring (EM) will enable monitoring of an offender's compliance with a 'whereabouts' condition, which is a condition prohibiting the offender "from entering or remaining in specified places or areas at specified times or at all times" (clauses 7, 8). The Explanatory Note to the Bill gives an example of a whereabouts condition as a prohibition on going to an ex-partner's home.

6. The Bill requires the court at sentencing, prior to imposing an EM condition on the two categories of offenders identified above, to have regard to the opinion of the Chief Executive of the Department of Corrections in the pre-sentence report as to whether a whereabouts condition would facilitate or promote the objectives of reducing the risk of reoffending and of rehabilitating or reintegrating the offender, and whether this warrants imposing an EM condition to monitor compliance with the whereabouts condition.

Inconsistency with the New Zealand Bill of Rights Act 1990

7. The Attorney-General reported to the House under section 7 of the New Zealand Bill of Rights Act 1990 (Bill of Rights) that the Bill constitutes an unjustified limitation of the rights against double jeopardy, unreasonable search and seizure and of freedom of movement affirmed in the Bill of Rights. The Law Society shares the concerns expressed in the Attorney-General's report.[1]

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[1] See previous NZLS submissions on the Extended Supervision Orders regime: submission 20.2.04 on the Parole (Extended Supervision) and Sentencing Amendment Bill, and submission 28.10.14 on the Parole (Extended Supervision Orders) Amendment Bill, available at http://www.lawsociety.org.nz/__data/assets/pdf_file/0003/84162/Parole-Extended-Supervision-Orders-Amendment-Bill-28.10.14.pdf.

8. In relation to the right of freedom of movement, the Attorney-General said:[2]

> "Section 18(1) of the Bill of Rights Act affirms the right of everyone lawfully in New Zealand to move and reside freely within this country.
>
> Electronic monitoring does not restrict an offender's movements. It may, however, indirectly limit the freedom of movement because it necessarily enables the state to constantly track those movements. This constant tracking may discourage offenders from fully and freely exercising their freedom of movement, within the confines of any other conditions as to their whereabouts. **While this limitation is indirect I do not consider it to be insignificant**."

9. The Law Society agrees with that statement and considers that the extension of electronic monitoring to offenders sentenced to intensive supervision and short terms of imprisonment is an unjustified limitation of the right to freedom of movement affirmed in the Bill of Rights.

10. In the Law Society's view, the case made in the Regulatory Impact Statement (RIS) for removing the restrictions on EM for offenders sentenced to intensive supervision and short terms of imprisonment is inadequate.[3] The RIS does not explain why the Sentencing Act 2002 originally prohibited EM for offenders released on conditions from short sentences or intensive supervision, nor why those prohibitions are considered to be no longer required.

11. The RIS notes (at [20]) that EM "… is a restrictive measure which increases the severity of a sentence … and may have limited rehabilitative benefit to the offender". It is further noted (at [22]) that it is difficult to justify EM given the rehabilitative purpose of sentences of intensive supervision. The Law Society agrees with this assessment. It understands that EM is currently prohibited for sentences of intensive supervision and supervision for this reason.

12. Nevertheless, the RIS concludes (at [23]) that "… 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**" (emphasis added). The reason given for this conclusion is that 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". However that conclusion presumably applies only to offenders who are highly motivated to avoid re-offending. There is also no reference to the caveat (at page 1 of the RIS) that the analysis of options is constrained by the "limited evidence … of the effect electronic monitoring (GPS monitoring in particular) has on the rate and seriousness of re-offending".

13. The rationale for removing the prohibition against EM for offenders serving short sentences is that these offenders are re-convicted at a higher rate than any other sentence or order, so public safety

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2 Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Electronic Monitoring of Offenders Legislation Bill, 4 May 2015, at [4] – [5], emphasis added.

3 By contrast, the reasons in the RIS why EM is not considered appropriate for other categories of sentences (home detention and supervision) are sound. However, it is worth noting that the restriction on the imposition of the condition for sentences of home detention may be anomalous, particularly as offenders in the last quarter of their sentence can be absent for up to 4 hours a day without a specified purpose. In the case of domestic violence offences, a lower level offender who receives a sentence of intensive supervision can have both whereabouts and EM conditions imposed to prevent them going to the victim's address, and a more serious offender on release conditions may have the same conditions imposed, but an offender in the middle of the sentencing hierarchy who is completing a sentence of home detention or is post-detention cannot.

benefits are gained for limited cost. Fiscal considerations do not provide an adequate justification for the ongoing restrictions on liberty that EM would impose.

14. For offenders serving short sentences, the RIS states (at [12]) that the ability to impose an EM condition at sentencing is an advantage, because some of these offenders pose a high risk. Currently, the Parole Board re-assesses the risk posed by an individual offender prior to release. This takes into account the potential reduction in risk resulting from rehabilitation during imprisonment and better reflects the sentencing principles in the Sentencing Act 2002.

15. In conclusion, intensive supervision or short sentences do not warrant the significant and ongoing restrictions on liberty that EM would impose. A stronger case needs to be made in order to justify the intrusion on fundamental rights.

16. The Law Society also notes that if conditions restricting liberty are to be imposed post-sentence, this will need to be factored in at the time of sentencing – that is, the length of imprisonment should be reduced. The RIS notes (at page 1) that it is unclear how the proposals might affect sentencing outcomes, including "whether offenders might receive shorter custodial sentences due to the availability of GPS on release", but there is no further discussion or analysis about this potentially significant factor.

Recommended amendments to the Bill

17. If the Bill is to proceed, the Law Society recommends a number of changes to ameliorate the rights-inconsistencies and better align the legislation with current sentencing legislation and practice.

18. The Law Society does not support the proposals in clauses 7, 8 and 12 that the Chief Executive of the Department of Corrections provide an opinion on whether the conditions promote the objectives of rehabilitation and reintegration of the offender. The assessment of relevant factors, including rehabilitation and reintegration options, are an integral part of the court's role at sentencing.

19. The proposed amendments to section 26 and proposed new section 26AB (clauses 7, 8) go beyond the current scope of pre-sentence reports, which is to provide information and make recommendations. The justification for this does not change for EM conditions. If the Department's role is limited to making recommendations about appropriate conditions, no amendment to section 26 is necessary as section 26(2)(e) already allows for recommendations about special conditions.

20. Rather than providing for the Chief Executive's opinion as to whether objectives of sentencing warrant EM, the Law Society recommends a threshold test for judicial assessment. There could be an equivalent provision to section 69C(1)(b) (which provides a test for the use of electronically monitored curfews for sentences of community detention), that EM is "appropriate, taking into account the nature and seriousness of the offence and the circumstances and background of the offender". Information to assist the court in making this assessment could be provided in the pre-sentence report, in practice, by specialist personnel under delegation from the Chief Executive of the Department of Corrections. This would provide sufficient oversight, as anticipated in the Bill, whilst ensuring appropriate information is provided.

21. The Law Society also recommends that there be an equivalent provision to section 30C of the Bail Act 2000, that the court must not impose EM if it considers that a less restrictive condition or combination of conditions would be sufficient to meet the purposes of EM conditions.

Evidence of the commission of an offence

22. The Law Society is concerned by the inclusion in the proposed section 54IA(4)(b) and (c) of the Sentencing Act (clause 10), of provision for information obtained through EM to be used to detect and provide evidence of the commission of offences. It is inconsistent with the purposes of the Sentencing Act to include provisions that are essentially evidence-gathering. Logically, the monitoring results would be evidence of breaches of sentences, but whether they are admissible in any other proceeding should involve a weighing up of factors such as those in section 30 of the Evidence Act 2006, taking into account as the starting point that the monitoring itself is a search.

23. The efficacy of EM relies on the reliability of the equipment and on offenders recharging the equipment. Clause 5 makes it an offence to fail to comply with instructions, such as to charge and not to interfere with the equipment. The Bill as currently drafted does not make provision for the possibility of equipment failure resulting in an apparent breach. The Law Society would be concerned if the burden to prove the instructions were not followed fell on the offender if, for example, the equipment was faulty.

Practical issues

24. The efficacy of EM also relies on there being a timely response when a whereabouts condition has been breached. The Law Society understands the Department of Corrections imposes a 50 km radius monitoring area from a particular GPS monitoring base in order for an offender to be considered for a sentence of home detention. The Law Society does not know if this limitation is resource or technology based, and whether this is a comprehensive policy for all GPS monitoring across the country. It would be problematic if the practical constraints of monitoring resulted in inequity for offenders across different parts of the country.

Conclusion

25. The Law Society wishes to be heard.

E J Unsworth

John Unsworth
Vice President
30.7.15