

Grayling's failings on electronic monitoring: after the fiasco, what next?

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Foreword

This briefing by Professor Mike Nellis scrutinises the chaotic attempts by the Ministry of Justice (MoJ) to commission a new generation of satellite-enabled tags for monitoring those under a criminal sanction in England and Wales.

Drawing on the recent forensic analysis by the National Audit Office (NAO), Professor Nellis, one of the foremost experts on electronic monitoring, highlights the 'massive waste of public money' and the 'hubris and incompetence' that has dogged the programme.

But as Professor Nellis points out, the electronic monitoring fiasco was more than just a story of unrealistic plans, shifting specifications and incompetent management. It was also the story of a politically-driven attempt, particularly by the former Justice Secretary Chris Grayling, to reshape aspects of the justice system along market lines.

A 'lot of what Grayling pushed through during his tenure', Professor Nellis writes, makes sense if one abandons the idea that it had a primarily penal rationale. Every move he made... was designed... to make established state agencies dysfunctional so that a certain kind of market model could be imposed on them'. The probation service was subjected to a damaging part-privatisation from which it has not recovered. In the new satellite enabled tags, Grayling thought his department was developing world-leading technology that it could sell around the world. Instead it wasted large amounts of time and money on a scheme that many had suspected would fail.

Looking ahead, Professor Nellis calls for the House of Commons Public Accounts Committee to review what happened and hold those who made the key decisions to account. He also argues that the MoJ should draw on the 'abundant expertise in England and Wales' to help develop any new programmes, and consider a more localised approach to contracting. And he throws down a challenge to penal reform organisations to play an active role in shaping future developments. Electronic monitoring technologies, he argues, 'will never be used wisely and well anywhere unless they are embedded in decent and properly resourced pre-trial, community supervision and resettlement services'. It is up to penal reform organisations and others to make this case.

Richard Garside
Director

¹ Comptroller and Auditor General, *The new generation electronic monitoring programme*, Session 2017-2019, HC 242, National Audit Office, July 2017. All references in the text are to the relevant paragraph in the report.

Introduction

Some of us have known for a while that the implementation of the MoJ 2012 'New World' strategy for electronic monitoring (EM) – the centrepiece of its 'third contract' with commercial EM suppliers since 1999 – has been an utter fiasco. At the heart of it was a plan in which allegedly 'obsolete' radio frequency (RF) tags were to be superseded by much larger scale use of 'world beating' global positioning satellite (GPS) tracking technology by 2017, delivered by a consortium of commercial suppliers (a hitherto untried model) contracted to central government. Not only did the transition to an all-GPS system not happen, but the actual use of RF tagging declined during the period in which the MoJ's grand plan was (not) being implemented.

There is no reason to regret the failure of the misconceived GPS plan, or for that matter the decline of largely standalone uses of RF EM curfews, although there are grounds for outrage about the vast sums of money endlessly wasted on EM. Both illustrate the lamentable and longstanding failure of the MoJ to come up with an intelligent, integrated strategy for using EM technologies in a way that could *modestly contribute* – no more than that – to an overdue reduction in the use of imprisonment in England and Wales.

Only now do we have a better-late-than-never official version of what went wrong with 'New World' – or rather a *partial* official version, because the NAO, which has written it,¹ only ever has a remit to appraise the pros and cons (and costs) of policy implementation, not to question the wisdom and legitimacy of a policy (such as privatisation) itself. So, while useful new information and insights are revealed here, and some redress belatedly given to injured parties, this is by no means a full political account of what went wrong. By not identifying all relevant players and circumstances the report lets off the hook people who should be held accountable for it. The EM fiasco – astonishing in its doctrinaire incompetence – also has numerous lessons for other aspects of public (and especially penal) policy-making, which, if given the same level of scrutiny as EM, would be found equally wanting.

The National Audit Office report

In fact, in this instance, the NAO helpfully comes close to exceeding its mandate and condemning MoJ policy outright, calling the hubristically named 'New World' strategy 'overambitious', all the more so because of a total absence of interest in developing an evidence-base to underpin the large scale use of GPS, and a total failure to make a proper penal case with relevant constituencies (sentencers, probation, police) for its introduction. Its tight timescale – setting 'New World' infrastructure in place by the end of 2014 – was unachievable, even without the contingencies that arose and further delayed it. Its long drawn-out pursuit of a bespoke supertag (combining GPS and RF capability) and its constant changing of the required technical specifications, (rather than buying an off-the-shelf model from one of the many global suppliers) was misconceived, and led the MoJ to let go of Buddi, the specialist British GPS company it had originally contracted to manufacture it, after only two years.

It is revealed here for the first time that the small British defence company, Steatite, who were brought in to replace Buddi, 'had scored below the minimum benchmark in the procurement' (paragraph 3.8) but by then was the only bidder left in the game. The other bidder – not named here – dropped out because of 'concerns that the MoJ would own the intellectual property of the tags' (paragraph 3.8). When the MoJ finally accepted that the supertag was a design impossibility Steatite were paid off with – we now learn – a £4.4 million termination fee, on top of the £3.3 million it was paid for its fruitless development work.

The NAO's breakdown of costs is not as clear as it might have been, and some relevant figures, which ought to be in the public domain, may still be protected by the commercial confidentiality requirements of the contractors. It does not give the full cost of procuring (as opposed to implementing) the 'third contract' (and then having to re-procure key elements of it) and seems to take at face value MoJ claims that long term savings would be made on the previous contracts, of £9 million per year, rising to £30 million per year over the programme's lifetime. The MoJ, it is said, budgeted £130 million from the start of the programme to 2016-2017 to create the 'New World' service, of which £60 million has already been spent on 'programme management, payments to suppliers to compensate them for delays

and elements of a dispute settlement with Capita...

The expected cost of running the monitoring service from 2017-18 to 2024-25, including service payments and contract management, is £470m' (paragraph 1.5, emphasis added)

The report nonetheless states, unequivocally, that the MoJ 'has not delivered the intended benefits' and 'so far failed to achieve value for money' (paragraph 17), which in NAO-speak are as absolute as indictments get. Meanwhile, over the same period, out in the actually existing justice system, the use of RF EM noticeably declined (40 per cent between 2012 and 2015, paragraph 2.21). This is *possibly* (although the NAO does not explore this) because of a loss of sentencer confidence in the enforcement of orders now that the National Probation Service has more discretion in determining and prosecuting breach.

Many of the MoJ's original projected cost-savings were to come from the peculiar consortium delivery model that the MoJ devised for the 'third contract', to replace the regional, end-to-end service delivery by G4S and Serco in the previous 'second contract'. At the time, no one – least of all in the commercial sector – thought the new model would work well, and it contravened the design protocols of the Government Digital Service itself (paragraph 3.14). The NAO (for some reason) calls it a 'tower' model, in which one company functions as service provider (staff and monitoring centres) and system integrator, while three other companies provide equipment and technical services. Capita became the service provider and system integrator, Airbus (a defence contractor) the provider of mapping software, Buddi the supplier of trackers and Telefonica the provider of telephony services.

The NAO reveals, also for the first time, that elementary mistakes were made in getting these companies to work effectively together – mutual expectations were unclear, obvious difficulties were simply not foreseen – and too little done to resolve problems as they arose before they escalated into serious conflicts. Capita and the MoJ fell out over how to build (and bear costs for) an electronic link which transferred data from the old to the new monitoring centres. Capita, following a government specification, began building a data centre that was not compatible with the software specifications required by Airbus. Buddi (which had sensibly tendered to

provide both hardware and software, but was picked as preferred bidder only for the hardware) was reluctant to share intellectual property with Airbus – who might, in another tender for another contract, be a competitor rather than a collaborator. Despite formally being the system integrator Capita never had authority to coordinate the work of the other companies. A more flawed delivery model would be hard to imagine.

What is missing?

The NAO has done its job, within its lights, exposing a massive waste of public money (although yet more detail would help) and a staggering degree of hubris and incompetence in the MoJ. But for a full understanding of what this fiasco was rooted in, we need more information and a more sophisticated analysis of how policy was being made. Like all NAO reports, this one itemises technical failures of conception, planning, costing and implementation (and reiterates previously made criticisms of procurement and contract management in relation to EM) while studiously ignoring the not-hard-to-find ideological commitments and political aspirations which drove these unfortunate developments.

First of all, the crucial role of the right-of-centre think tank Policy Exchange, in 2012, in stimulating the MoJ (and the Crown Office) to claim that RF was obsolete and that GPS was an obvious and essential upgrade, is missing. The rudiments of the 'third contract' (in which, quite sensibly, GPS was always going to be introduced, but not at the expense of RF) had been devised under New Labour, before 2010. Ken Clarke, the first Coalition government Justice Minister, showed no interest in EM (or in privatising probation) and it was on Chris Grayling's watch that Policy Exchange's idea of large scale GPS use was quietly – indeed, let's be honest, secretly – taken up. The intention was to achieve between 160,000-220,000 'new starts' on tracking in 2016-2017 (paragraph 2.21) – a potential doubling of monitored subjects from 2012, and a policy shift of such magnitude that to contemplate its pursuit without engaging criminal justice partners in open and detailed debate about its desirability and feasibility could only mean that a matchless condescension towards existing professional expertise was at large in the MoJ.

Policy Exchange's report on EM – at the time the most thorough examination of EM use in England and Wales yet produced – was in fact a mixed bag. Its misplaced, techno-utopian optimism about the merit of mass GPS monitoring (originating in the US momentum towards replacing RF with GPS, and possibly in Buddi's own enthusiasm for this) was its worst feature. But it also made shrewd observations about the continued overpricing of EM in England and Wales, as well as sensible proposals for localised contracting arrangements, based on existing GPS use in police-probation Integrated Offender Management (IOM) projects (and one NHS project) which had been emerging since 2010. Grayling simply ignored this, but it did not help, at the time, that none of the established penal reform groups in England and Wales engaged with it either, or seemed to care what the MoJ might be planning for GPS, let alone exposing the secrecy which surrounded it.

The NAO's focus on the technical at the expense of the political inevitably gives the impression that civil servants were at fault for the failure of 'New World'. Some may have been, but at least as many were dismayed by what Grayling was doing and merely went through the motions. The report notes that key staff were pulled off 'New World', implying it did not get the sustained organisational attention it deserved, in order to address problems 'in higher priority programmes such as the Transforming Rehabilitation reforms' (paragraph 3.29). The deeper implication that 'New World' was not itself part of the overarching Transforming Rehabilitation strategy is odd, but, if true, is indicative of a continuing, longstanding refusal in the MoJ to integrate creative uses of EM in existing forms of penal practice. Rather, the MoJ continues to see it as something above and apart from it.

What was Grayling doing, exactly? The NAO has no mandate to do critical political analysis, but the ideological milieu in which operational decisions were made is not hard to ascertain. Always among the more doctrinaire neoliberals in the cabinet, a lot of what Grayling pushed through during his tenure at the MoJ makes sense if one abandons the idea that it had a primarily penal rationale. Every move he made – the part-privatisation of probation was the starkest example – was designed to damage and disrupt established patterns of public service, to make established state agencies dysfunctional so

that a certain kind of market model could be imposed on them. Policy Exchange's naïve techno-utopianism inspired him to create a new 'world beating' market model of EM – the best tech, the biggest numbers (but not, ironically, Policy Exchange's own view of what market model would work best!) – regardless of its actual penal value. As such, he was not interested in garnering an evidence-base for GPS tracking because he thought he was creating something so novel and transformative that nowhere else could possibly have lessons for him. Furthermore, he wanted the MoJ to hold the intellectual property rights for the 'supertag' so that the commercial arm of NOMS, Just Solutions International (JSI), which he had created, could sell it around the world. Wisely, Michael Gove, who briefly succeeded Grayling as Justice Secretary, closed JSI down.

The NAO shows some sympathy for the commercial suppliers (from whom it took evidence) regarding the problems the MoJ created for them, but is neither critical enough of large-scale commercial agendas in EM, nor cognisant enough of the diversity of individual staff views within private companies. England and Wales has long been perceived as a 'treasure island' by the global EM industry, a place with endless market potential, and while the recent fiasco may dent its reputation for a while, the government's cynical/strategic openness to business should be challenged. At the same time, more should be done to capitalise on the accumulated expertise on the merits and limitations of using EM evinced by some, if not all, private sector employees, whose hard-won common sense, and practical imaginations, do not always align exactly with their companies' brand, mission or ethos.

Thus, while some surprise and outrage was expressed last month over G4S being appointed by the MoJ as the equipment provider – mostly RF, but with some GPS down the line – because it is still under Serious Fraud Office investigation for overbilling on its second EM contract, not all its staff should be tarnished by its generally justified bad reputation. G4S's original EM billing arrangements were set in place by senior staff at some remove from the technical staff and operational managers who ran EM, many of whom were equally outraged by the rip-off perpetrated by the company (one of whom turned whistleblower). Just as there are civil servants who do not deserve to take the rap for what were ministerial decisions, so there are people in G4S

(and formerly in Serco) whose decency, hard work and intelligence were travestied by the greed and duplicity of their superiors.

In the recent tender to find a replacement hardware supplier for Buddi and Steatite, G4S probably became preferred bidder because a) there were too few companies left willing to risk working with the palpably incompetent MoJ, b) because it has a long track record of providing reliable RF technology, and c) because Capita were already using it. To have changed the supplier at this stage would have involved yet more expense.

While Buddi's own probable complicity in persuading the MoJ of an all-GPS future for EM – this was after all the only product it wanted to sell – made it an impossible contender for the new hardware contract, its exceptional expertise and track record of working with police practitioners in the IOM and (now several) NHS schemes should still be learned from by anyone seriously interested in EM's future. The police schemes – whilst not perfect (they are too unregulated, and unethical practices probably are occurring in some of them) – illustrate a far better, ground-up, way of introducing EM than anything the top-down MoJ has ever contemplated. They involve practitioners working with tech providers to integrate GPS with human services and to evolve practice which solves problems, learning as they go how offenders accommodate (and resist) it, and how to adapt and refine the technology when difficulties arise. In the absence of external scrutiny the Buddi/police IOM schemes may move away from the (good) 'assisting desistance' model towards a (more dubious, depending who it is applied to) 'data gathering and analysis' model in which monitoring is an end in itself rather than a means of help and support. These schemes are outwith the NAO's remit, as are the alcohol monitoring and upcoming GPS projects run by the Mayor's Office for Crime and Policing in London. But there is a core lesson to all of these – about giving local practitioners a role in shaping the way technology is used – that may yet mean a better, integrated future for EM despite the wrecking-ball incompetence of the MoJ.

Where Now?

The NAO makes it clear that the initial ambitions of the third contract are dead in the water and damns with faint praise the MoJ's claims to now

be on track with a more modest programme. There are still 'major risks' (paragraph 18), it says, without specifying exactly what. Presumably it means the continued reliance on the 'tower' delivery model, but it doesn't spell this out. The fact that the MoJ has now taken over the system integrator function from Capita, leaving it with only a service delivery role, while making sense at the project design level, hardly inspires confidence. The NAO still doubts the MoJ's capabilities in this respect, while wanly acknowledging 'some clear signs of progress' (paragraph 3.24). Restricted by its overarching remit, the NAO seems unduly deferential to the MoJ in this respect. Despite ample evidence to warrant it, it nowhere questions the continued viability of central contracting, and says nothing of the potential merits of local EM contracting arrangements because it is not allowed to suggest alternative policies, only to suggest improvements to existing policies.

It is not yet clear if the House of Commons Public Accounts Committee is going to pick up the NAO report – it should! – and interrogate the key players more robustly. It would be delightful to see Chris Grayling (now heading the Ministry of Transport) hauled before it and held accountable for his part in this vast waste of time, energy and money when an easier and better way, without the chimerical 'supertag', was available to him. As Justice Secretary, not only did he disregard the merits of locally contracting EM with probation services and police forces, with only light touch central control (relating to practice standards and technical specifications) he made local contracting permanently harder to achieve, by partially privatising the locally-based probation service, destabilising it to no valid purpose, and setting back the pursuit of good professional practice in community supervision by decades.

Once upon a time, it could all have been so different. The fiasco described by the NAO is all the more shocking and disappointing because there has been abundant expertise in England and Wales, for years, spread across the commercial, statutory and third sectors, for devising and managing a sensible and effective EM programme making modest use of RF, GPS, voice verification and alcohol monitoring technologies. From 2010 onwards, the MoJ could and should (in principle) have facilitated this, consulting widely (and transparently) with probation services, penal reform groups and sentencers, commissioning

research, taking best advice from abroad, listening to commercial tech companies and think tanks, whilst remaining alert to the ease with which business and political agendas can deform penal agendas. If only.

The reason the MoJ failed so comprehensively with 'New World' is not only because of specific incompetence about EM (although there was that), but because their entire penal policy – straining court services by closures, starving the prison service of resources, part-privatising (but completely restructuring) the probation service – was malevolent and incompetent. Attempting to upgrade EM while simultaneously downgrading probation, in particular, ruined the chances of a creating a properly integrated approach. EM technologies will never be used wisely and well anywhere unless they are embedded in decent and properly resourced pre-trial, community supervision and resettlement services: they have a real contribution to make but only a modest one.

There is no way that technological surveillance can (or, more to the point, *should*) displace the caring, supportive, educative and offence-challenging services that only trained and committed human supervisors can provide. There is no way that EM will ever make serious financial savings unless the technologies are used as *part* of a strategy – not the *centrepiece* of a strategy – to reduce the prison population and it is the MoJ's implacable hostility, under all ministers from Grayling onwards, to contemplate doing that, that underlies so many of its other misjudgements and failings. It is precisely because EM technologies, if used sensibly, could help to support a prison reduction strategy, that they should long ago have been taken up by penal reform organisations and probation interest groups, and turned, both practically and symbolically, against government policy on prison numbers.

Grayling personally wanted a 'world-beating' EM programme (specifically, 'world-beating' EM *technology* whose profitable intellectual property the MoJ owned). In the wider world of community supervision and EM use England and Wales must now – and rightly so – be a laughing stock. Other European countries have used EM far more sensibly than we have, mostly integrating it in probation services from the start, eschewing private sector delivery in principle, let alone the absurdities of the 'tower' model, and never having more than modest ambitions for it. Many have added GPS use to their existing RF platforms

without fuss or fanfare, or such massive loss to the public purse. There is much to be learned from how European countries use EM, but even less chance now, as we get mired in Brexit, that the MoJ will play the slightest attention to it. The problem – the tragedy – is that we are way past the point when good European lessons on EM could be grafted into the impoverished and degenerating infrastructure of the English penal system. There is no good future for EM in England and Wales outwith a root and branch redesign and improvement of the whole system, and it is pointless of the MoJ to plan for one as if EM stood apart from everything else. The NAO rightly recommends that future EM policy making is more consultative, especially with sentencers (although sentencers themselves need to up their game on what EM – technologies could help them achieve). But that itself will be nowhere near enough in the context of all that needs to be done.

So this is a good moment for penal reform organisations, who do grasp the bigger picture, to claim a voice in shaping the future use of EM in the proper context of needful wider reforms. The MoJ has repeatedly proved itself incompetent at devising a sensible EM strategy. Others should now try. Intellectual authority on the matter should never have been ceded to think tanks like Policy Exchange and Reform, but the wilful silence of the penal reform organisations allowed this to happen. So now is the time to convene a 'symposium on EM' to which everyone but government (except the NAO) would be invited, in order to develop a vision and set standards and limits on the use of EM technologies, a symbolic, common sense benchmark that would make any future attempt to revive 'New World's grandiosity seem abstruse and ridiculous?

The NAO is right that 'New Word' has been abandoned for now, but who knows for the future, especially if the lessons from its report are not widely learned and hammered home? The potential for revival remains. EM systems are nothing more than agglomerations of commonplace digital technologies customised for use in a penal context, or a healthcare context and – coming soon – an immigration context. There is zero likelihood that the demand for and impact of digital connectivity – of which EM is a coercive kind – will grow less in any walk of life. The MoJ has shown quite spectacularly that just because 'the digital' is politically and economically alluring

there is never a frictionless way of institutionalising it. Systems have to be designed, negotiated and built ('socially constructed', as some theorists say), and there are, as the MoJ has learned to its cost, demonstrably better and worse ways of doing this. In the present political conjuncture, and in the cultural backwash from emerging developments in automation and robotics, there will be intensified commercial and governmental pressure to adopt 'automated socio-technical systems' and to denigrate and undermine 'wasteful' human public services. In

this context, penal practitioners, especially, must become more adept and assertive than they have ever been in specifying the forms, scale and duration of 'coercive connectivity' with defendants and offenders that they can ethically live with (and, as importantly, those they cannot). To refuse to engage, to pretend that innovative digital technologies in criminal justice can simply be sidelined (rather than actively sifting the good from them and learning to block the bad) is tragically 'retrotopian', and will leave the way clear for the MoJ to overreach itself again.

About the author

Mike Nellis is Emeritus Professor of Criminal and Community Justice in the Law School, University of Strathclyde. Formerly a social worker with young offenders in London, he has a PhD from the Institute of Criminology in Cambridge, and was long involved in the training of probation officers at the University of Birmingham.

He has written widely on the probation service, alternatives to imprisonment and particularly the electronic monitoring (EM) of offenders. He was actively involved between 2005 and 2014 in the organisation of the European Probation Organisation's (CEP) EM conferences, and has

just been made an honorary member of CEP for his services. Between 2011 and 2014 he acted as an expert adviser to a Council of Europe committee which drew up an ethical recommendation on EM

He co-edited *Electronically Monitored Punishment: International and Critical Perspectives*, with Belgian colleagues Kristel Beyens and Dan Kaminski in 2013, and served on the Scottish Government's EM Working Party, 2014-2016. He is the international editor of the *Journal of Offender Monitoring*. He teaches a Master's degree course on 'surveillance, technology and crime control' at Strathclyde.

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