

# Legal and ethical implications of electronic monitoring in the supervision of low-risk probationers: Insights from South African legal practitioners

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## Abstract

The study explored the perceptions of South African legal practitioners (i.e., magistrates and attorneys) on the legal and ethical implications regarding the use of electronic monitoring in the supervision of low-risk probationers. Drawing from telephonic interviews with the participants ( $n = 18$ ), it was determined that they consider a sentence of probation with electronic monitoring as a less intrusive alternative to incarceration. Privacy and data protection were seen as less severe than the limitations imposed by imprisonment. Moreover, electronic monitoring was considered broadly consistent with Section 36 of the South African Constitution. However, the participants raised the potential stigmatising nature of electronic monitoring and the expansion of penal surveillance on those who would have otherwise completed their sentence and involvement in the criminal justice system without electronic monitoring. The implications of the study highlight the need for legislative reforms, including alignment with the Protection of Personal Information (POPI) Act 4 of 2013, to uphold the constitutional rights of offenders.

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criminal justice system, electronic monitoring, ethical considerations, legal implications, offenders' rights, offender supervision, probation

**Introduction**

South Africa's rising crime rates and mandatory sentencing legislation addressing violent and sexual offences have resulted in massive overcrowding of the correctional system (Criminal Law Amendment Act 105 of 1997). On 31 March 2024, the South African Department of Correctional Services (DCS) recorded a total number of 157,056 inmates against the approved bed space of 107,582, resulting in an excess of 49,474 inmates (DCS, 2024: 15). This translates to South African prisons being 46% overcrowded (DCS, 2024: 15). As a result, the DCS continues to experience an increase in overcrowding levels from 46% during 2022/2023 to 48% in 2023/2024 (DCS, 2024: 15). One way to reduce prison overcrowding in South Africa is to sentence a person to a period of probation with electronic monitoring. Thus, while electronic monitoring offers the advantage of reducing overcrowding, its use in South Africa raises significant legal and ethical concerns. Additionally, Bülow (2014: 510) warns that monitoring programmes must strike a balance between public safety and the rights and dignity of offenders to prevent excessive penal control and social stigmatisation. Although current legislation in South Africa does not allow for the sentencing of offenders to probation with electronic monitoring, the authors wanted to explore the perspectives of legal practitioners regarding the legal and ethical aspects of electronic monitoring in future consideration of this sentence option.

***Background to probation and electronic monitoring in South Africa***

In South Africa, probation is a non-custodial sentence that is governed by the Probation Services Act 116 of 1991 (Bello, 2017: 26). Probation is commonly used for low-risk offenders, and a probationer is an offender convicted of a crime but allowed by the court to serve their sentence in the community instead of prison (DCS, 2017: 6; Viglione and Taxman, 2018: 1819). In the context of this study, the term low-risk offender is defined in accordance with the South African DCS Procedure Manual on Supervision, which refers to a low-risk offender as an individual who has committed a non-violent offence that did not result in bodily harm to the victim and who poses a minimal risk of reoffending (DCS, 2017: 185). Probation in South Africa is firmly based upon the philosophy of restorative justice, in that it attempts to facilitate rehabilitation and reintegration (Mpofu et al., 2024: 15). Probationers are required to comply with specific conditions of their sentence, which may include regular check-ins from a probation officer, community service, house arrest, victim compensation, attending counselling or rehabilitation programmes and avoiding certain places and people (DCS, 2025; Norman et al., 2022: 473). The authors argue that electronic monitoring would facilitate the supervision of low-risk probationers and

help monitor their adherence to such conditions. Punishment has traditionally been associated with incarceration. However, the literature also acknowledges that punishment extends beyond imprisonment and is embedded in community-based sanctions such as electronic monitoring (Palermo, 2015: 911; Richter et al., 2021: 270). Notably, the disadvantages of electronic monitoring have been linked to the pains of supervision, which refer to the emotional stress, social isolation and family strain that can arise from continuous surveillance, strict curfews and exclusion zones (McNeill, 2017: 105). Furthermore, Weisburd (2022: 147–150) characterises electronic monitoring as a form of punitive surveillance that blurs the distinction between freedom and confinement, thus contributing to the phenomenon of e-carceration.

Despite these disadvantages, scholars argue that traditional imprisonment remains a significantly harsher penalty for criminal behaviour. For example, Agboola (2016: 21) highlights the inhumane conditions in prisons, including inadequate bedding, poor sanitation and the prevalence of disease. Furthermore, Carcedo et al. (2019: 6–7) and Skarbek (2020: 7) emphasise the lack of safety in prison environments, where inmates are frequently exposed to violence, exploitation and the constant threat of physical harm. Given these realities, electronic monitoring is often considered a more humane alternative, allowing offenders to remain in their communities and maintain family and social ties while serving their sentence (Agboola, 2016: 21). The potential for electronic monitoring to serve as a less punitive yet effective alternative to incarceration has led to growing interest in how it might enhance community-based sentencing systems such as probation (Jolliffe and Hedderman, 2015: 1065). While probationers are required to comply with the conditions of their sentence, the probation system also carries a responsibility of providing ethically grounded supervision (Dominey and Canton, 2022: 417). Although electronic monitoring is designed to ensure that offenders adhere to the conditions of non-custodial sentences such as probation, currently in South Africa probation officers depend on manual supervision methods, including in-person visits at the home or work of the probationer and regular reporting of probationers to the community corrections office (DCS Strategic Plan, 2022: 89; Yeh, 2015: 61). While electronic monitoring is not used in South Africa as a sentence option, in theory, electronic monitoring could complement probation by allowing authorities to track the movements of probationers.

### *Legal and ethical challenges with the implementation of electronic monitoring*

Electronic monitoring has emerged as a viable alternative to incarceration, offering cost-effective supervision while allowing low-risk offenders to be placed on probation and remain within their communities. However, its implementation presents both legal and ethical challenges that must be carefully evaluated to ensure compliance with human rights, fairness and public safety (Al-Wahedi, 2019: 226; Bülow, 2014: 512; Maphosa et al., 2022: 4). When imposing a sentence such as probation with electronic monitoring, legal implications, including constitutional compliance, statutory obligations and data protection, must be considered (Van Zyl Smit and Ballard, 2018: 2). In South Africa, the legal implications of electronic monitoring mean ensuring that electronic monitoring aligns with the South African Constitution. The ethical implications of electronic

monitoring centre on how it impacts the dignity, autonomy and emotional well-being of offenders (Maphosa et al., 2022: 4). This includes assessing whether it allows for rehabilitation, reintegration and humane treatment of offenders (Mpfu et al., 2024: 15). Central to the debates in the literature, electronic monitoring raises concerns around the privacy of the probationer and barriers to the fair and inclusive implementation of electronic monitoring (Laurie and Maglione, 2020: 685; Palermo, 2015: 911). Al-Wahedi (2019: 226), along with Laurie and Maglione (2020: 691), argued that electronic monitoring poses a risk to offenders' constitutional rights, including their right to privacy and human dignity. According to Faiver (2017: 8), human dignity encompasses the right to be treated with respect, to maintain a sense of self-worth and to exercise control over one's personal and social environment.

In addressing another ethical challenge pertaining to electronic monitoring, Weisburd (2019: 719) referred to the constant surveillance and intrusion into the privacy of offenders, including their loss of control over personal space and freedom of movement. Closely related to this is the issue of stigmatisation, as the electronic device may reveal that the individual wearing the device is an offender. According to Kilgour (2020: 131), there is no visual distinction between the types of electronic monitoring tools used for different offenders; therefore, it is difficult to differentiate between offenders not yet convicted, low- and high-risk offenders, and those from outside the criminal justice system, for example people who have been released from immigration detention centres (Kilgour, 2020: 139). People who wear electronic ankle monitors may wear clothing that covers the ankle monitor and/or avoid activities that require clothing or movement that would visually reveal the monitor, as they are either embarrassed or humiliated by wearing a monitoring device (Jones, 2014: 483; Kilgour, 2020: 139; Payne et al., 2014: 136). It is argued by Kilgour (2020: 131) that the visibility of electronic monitoring, in the wearing of the device, may lead to stigmatisation by the public, and the offender may be subjected to discriminatory treatment. However, the stigma does not originate solely from the general public. Moore et al. (2018: 1) conducted a study on electronic monitoring among offenders and discovered that offenders also experience self-stigma. This self-stigmatisation is a process in which criminal stereotypes are internalised and result in adverse psychological and behavioural outcomes (Moore et al., 2018: 2). It has also been argued that electronic monitoring invades the privacy of the offender's families and home life (Bülow, 2014: 512; Weisburd, 2022: 166). According to Payne et al. (2014: 137), electronic monitoring may cause family dysfunction due to late-night compliance checks, frequent location verifications and disruptions in household routines. Ultimately, this may lead to a strained relationship between the offender and their partner, children and friends (Bales et al., 2012: 89; Wodahl et al., 2015: 244). These arguments highlight the wider ethical challenge of using electronic monitoring, particularly the effects on family dynamics, which need to be weighed carefully when determining the overall efficacy and ethical implications of electronic monitoring. Additionally, Laurie and Maglione (2020: 690) as well as Nellis (2015b: 39) highlighted that electronic monitoring generates detailed and retrievable records or information about offenders' movements, which should be safeguarded by the staff responsible for offender supervision and relevant stakeholders, such as their live location and address.

Nellis (2015a: 203) opined that all forms of punishment affect personal privacy. While electronic monitoring limits surveillance to location tracking, imprisonment involves a far greater invasion of privacy, including searches, cell inspections, routine checks of personal belongings and overcrowded living conditions (Bülow, 2014: 509). Compared to prison, electronic monitoring is less invasive, as it does not record activities or events within the offender's home, workplace or community service sites (Bülow, 2014: 509; Poonyarith et al., 2016: 27). In sum, given that offenders serving prison sentences experience infringements on their rights to privacy and human dignity, electronic monitoring should likewise be assessed with equal scrutiny.

Beyond concerns about privacy and human dignity, electronic monitoring raises notable legal implications (Al-Wahedi, 2019: 226; Bülow, 2014: 509; Laurie and Maglione, 2020: 686; Palermo, 2015: 911). A significant legal concern is the lack of clear policies ensuring equitable access to the electronic monitoring programme (Laurie and Maglione, 2020: 685). Offenders from disadvantaged backgrounds may struggle due to financial constraints or technological limitations (Palermo, 2015: 911), as electronic monitoring requires stable electricity, a smartphone, internet access and a verifiable and stable address (Laurie and Maglione, 2020: 687). In South Africa, these requirements disadvantage those in informal settlements or poor housing, undermining the fairness and legitimacy of electronic monitoring. Net-widening is another concern where monitored individuals would have otherwise completed their sentence and exited the criminal justice system if it were not for the electronic monitoring condition (Belur et al., 2020: 4). Increased surveillance of individuals released from prisons and placed under electronic monitoring or probationers serving a sentence with electronic monitoring may increase technical violations such as missing curfew deadlines or false-positive alerts related to loss of signal and the battery life of the electronic device (Al-Wahedi, 2019: 222; Belur et al., 2020: 6). The result is that those on probation may be at risk of a re-arrest and subsequent incarceration for violating the terms of their sentence.

## Research methods

The study utilised the interpretivist paradigm to explore the perceptions of legal practitioners regarding the legal and ethical implications of electronic monitoring in the supervision of probationers. In line with the interpretivist paradigm, the qualitative research approach was deemed most suitable to gain an in-depth understanding into the phenomenon (Alharahsheh and Pius, 2020: 41). A collective case study design guided this study as the authors used multiple cases (i.e., magistrates and attorneys) to investigate the phenomenon (Adams et al., 2014: 3). During the pilot study, a semi-structured telephonic interview was conducted with one magistrate and one attorney.

## Sampling

Non-probability sampling, specifically volunteer sampling, was used in the study. In volunteer sampling, magistrates and attorneys were asked to come forward as participants (Strydom, 2021: 386). According to Sharma (2017: 752), volunteer sampling can be

described as self-selection sampling, which ensures the participants' freedom to participate in research on their own accord instead of being approached by the researcher directly. In this study, the principal researcher requested the Office of the Secretary of the Magistrates Commission of the Republic of South Africa and the Office of the Executive Director of the Law Society of South Africa to act as an intermediary in the research process. Representatives from these Offices were asked to distribute an internal 'Call for Participation in Research' via e-mail. Potential participants were provided with information about the study and the researcher's contact details. Potential participants (volunteers) were then contacted directly by the researcher, and further communication continued only with those who expressed interest. In the end, the sample comprised magistrates ( $n=10$ ) from all nine provinces (i.e., regions) and attorneys ( $n=8$ ) from eight provinces in South Africa. The sample size of 18 participants, while small in relation to the total population of magistrates and attorneys in South Africa, is consistent with qualitative research approaches that prioritise depth of insight over statistical generalisability (Boddy, 2016: 427; Subedi, 2021: 7). As such, the perceptions presented in the study do not fully capture the range of opinions within the broader legal community. Furthermore, the findings of this study cannot be generalised due to the small sample size. These limitations do not diminish the value of the findings but rather highlight the need for caution in interpreting them as representative.

### *Data collection*

Due to the participants being geographically dispersed, the data were collected via semi-structured telephonic interviews. The interviews were conducted in English, and every interview was recorded with the participant's prior consent. An interview guide that comprised pre-determined questions was used to allow for flexibility with follow-up questions and the order in which the researcher asked the questions (Geyer, 2021: 358).

### *Data analysis and trustworthiness*

The data were analysed using Braun and Clarke's six-phase reflexive thematic analysis process, which emphasises the need for researchers to acknowledge and reflect on their subjective position, thereby being aware of how their personal experiences and assumptions shape the coding process (Braun & Clarke, 2022: 8; Byrne, 2022: 1393). The principal researcher, who conducted the interviews, approached the study as an outsider since she is not a legal practitioner. Consequently, during data analysis, she maintained a reflective stance on the participants' professional backgrounds. This assisted in recognising any assumptions or preconceptions the researcher might bring to the data. The six phases comprised familiarisation with the data, generating initial codes, constructing or generating themes, reviewing potential themes, defining and naming themes, and finally producing the report (Braun and Clarke, 2021: 4; Byrne, 2022: 1392). Trustworthiness was ensured by means of dependability, credibility, transferability and confirmability (Kynge et al., 2020: 41).

## *Ethical considerations*

Ethics was an essential part of the study, and the following ethical considerations were considered: voluntary participation by informed consent, confidentiality and permission to conduct the research. Before the start of an interview, the principal researcher read the content of the informed consent form to the participant, to which they verbally consented to participate in the study. While conducting the semi-structured telephonic interviews and reporting on the findings, the key participants (KP) were assigned pseudonyms, namely their designation (magistrate or attorney) and a number. Magistrates were referred to as KP M1–10, and attorneys were referred to as KP A1–8. Full ethical clearance was secured from the institution's Research Ethics Committee, where the authors are affiliated (Protocol Number HUM009/0222). The authors also received ethical clearance from the Magistrates Commission of the Republic of South Africa and the Law Society of South Africa.

## **Findings**

In the following section, the authors present some of the main findings about participants' perceptions regarding the legal and ethical implications of electronic monitoring in the supervision of low-risk probationers.

### *Stigmatising nature of electronic monitoring and the expansion of penal surveillance*

Legal practitioners highlighted the stigmatising nature of electronic monitoring, particularly the visibility of the device worn by offenders in the community. They expressed concern about how the ankle bracelet functions as a public symbol of criminalisation, drawing unwanted attention and potentially leading to misinformed or unwarranted assumptions about the individual wearing it. The legal practitioners remarked that even someone unfamiliar with the monitored person would immediately notice the device and associate it with serious offending. They elaborated:

You know if you have someone coming out of prison with this device, everyone, even if I do not know that person. I will see this thing around the ankle ... There will always be that issue with stigma, you know ... because of that thing, that bracelet will not say, no, I'm wearing this thing because of shoplifting. You know, people might think, hey, this one is a murderer. (KP-M4)

The main disadvantage is the potential for stigmatisation, especially in communities that may not understand the purpose of the monitoring device. It could lead to labelling and victimisation, which might have negative social and psychological impacts on the offender. (KP-A7)

In townships (informal settlements), people might misinterpret the monitoring system, leading to stigmatisation. This can be problematic because cultural and social factors can influence how monitoring is perceived and accepted. (KP-A5)

KP-M8 further explained that electronic monitoring may serve as a flexible alternative to fines or suspended sentences, particularly in cases where offenders are unable to pay a fine. However, this framing may unintentionally normalise the extension of penal control to individuals who would not have otherwise been subject to such intensive supervision, thus causing net-widening.

Instead of giving someone a suspended sentence or a fine that they may be unable to pay, you could sentence them to community corrections, possibly with an electronic monitoring device attached to them. If they are placed under house arrest by the community corrections service, they will be able to monitor whether the person is at home or out and about, as well as whether they are following the court's sentence conditions. Yes, it will benefit even low-risk offenders. (KP-M8)

### *Infringement on offenders' rights to privacy and movement*

Most legal practitioners did not see electronic monitoring as violating offenders' right to privacy. According to one participant, electronic monitoring does not record conversations or capture video footage, thereby preserving personal privacy.

No, not as far as I can understand how it works. They are not recording conversations, which will interfere with your privacy. They do not have a camera attached, which will, you know, take a video recording or camera of images of what you are busy doing. So, it will not interfere with your right to privacy. We must understand that if a person has been convicted and sentenced to correctional supervision, there are certain things that he must comply with, and then this monitoring system will ensure that the person stays within the paradigm where he is supposed to stay. So, it will definitely not interfere with his right to privacy to that extent. (KP-M1)

KP-M1 highlighted that electronic monitoring may involve some level of privacy sacrifice; however, it offers offenders a choice that is less invasive than the conditions experienced in prisons. The legal practitioners perceived the deprivation of privacy as worse in prisons than under electronic monitoring. A supporting comment is presented below:

So, if you've been convicted of an offence, you can give up certain of your rights to privacy so that you can be monitored. Otherwise, you may then choose to go to prison. It's an alternative to imprisonment. I know it will not interfere with anyone's right to privacy, and if you think of it when you are in prison, you are sharing the space. There's absolutely no privacy. (KP-M1)

Similarly, KP-M8 suggested that while electronic monitoring may entail some infringements on offenders' privacy and rights to movement, it constitutes a more humane and less restrictive alternative to incarceration. However, KP-M8 cautioned that the application of electronic monitoring to low-risk offenders who might not warrant any form of restrictive sentence, such as imprisonment, could infringe on the rights of offenders.

It does violate their right to privacy, movement, and rights of movement. But if someone was to be sent in custody, right? He has basically no movement because he's incarcerated, he's in the cell so I would say all his rights of freedom were already taken away and his rights of movement as well. If they are given community supervision, you're actually giving them more rights, more movement, and more freedom which is better than imprisonment. So, I think, although there's still an infringement of their rights, they are being given more rights to movement, it cannot be an infringement. What I mean is that it's not as bad as it would have been in prison. (KP-M8)

The legal practitioners have also raised the infringement of the right to movement. KP-A4 stated that the outcome of a criminal conviction may lawfully forfeit certain constitutional rights, including the right to freedom of movement. According to the participant, the restriction on offenders' movements is therefore not a violation of rights, but a proportionate response to criminal conduct.

No, I don't think so. I think if you are an offender, at the end of the day, you have committed a crime. And when we use electronic monitoring, it is also a means of punishment. There are certain freedoms that you give up when you commit a crime or have been accused of committing a crime. So, of course, some freedoms will be taken away from you because of your actions. If you commit a crime, you lose your right to freedom of movement because of that crime. So, I do not think that having electronic monitoring goes beyond that. It is perfectly reasonable and does not infringe on their rights excessively. (KP-A4)

One legal practitioner further provided a practical example of how incarceration also removes basic freedoms for offenders, stating:

In prison, he lacks the freedom to travel to town or visit his friends. (KP-M4)

The infringement on the rights to privacy and movement can be summarised with the following quotation:

Once the sentence is handed down, the offender immediately loses his right to freedom; he cannot protest that his right to privacy, freedom of movement, and other rights are being curtailed because he would be in prison if it weren't for the electronic monitoring device on his ankle. (KP-M4)

In sum, the legal practitioners expressed that once an offender is sentenced, certain rights may be lawfully limited with the purpose of enforcing justice. According to the legal practitioners, electronic monitoring does not violate offenders' rights to privacy and movement but instead offers a less restrictive alternative to incarceration.

### *Limitation clause: Section 36 of the South African constitution*

Section 36 of the South African Constitution, also known as the limitation clause, permits the limitation of constitutional rights under certain conditions. However, any limitation

on a right must be both reasonable and proportional. This means that the extent of the limitations must be justifiable in relation to the significance of the objective it seeks to achieve (Republic of South Africa, 1996: 16). In the current study, the participants expressed that the restrictions imposed on probationers through electronic monitoring may be justified under Section 36 of the South African Constitution. The limitation clause mandates a balance between limiting individual rights and advancing the broader safety of society.

KP-M7, KP-A7 and KP-A1 stated that while the right to privacy and liberty are constitutionally protected, these rights can be justifiably restricted under certain circumstances, as outlined in Section 36 of the South African Constitution. The participants indicated the following in this regard:

The right to privacy is constitutionally entrenched, but so is the right to liberty and freedom. Constitutionally entrenched rights may, in certain instances, be justifiably restricted, which justifiable restrictions are also catered for in our Constitution (i.e., 'limitation clause'). One would have to consider the right to privacy against the deprivation thereof. Many, if not most, offenders may consent to this type of sentence instead of the alternative of being incarcerated. If implemented, correct checks and balances, as well as measures of accountability, must be put in place for all monitoring authorities. This type of system must be used in a responsible manner and insofar as necessary and in the interests of justice. (KP-M7)

You must remember that Section 36 allows for the limitation of rights. It addresses the limitation of rights. The rights of inmates are already limited. For instance, they don't have the right to privacy or the right to freedom of movement. While it may be said that they have dignity, there's actually no dignity in prison. For example, in trial facilities, inmates have no privacy. The toilet is right in front of everyone; there's no separate room. It's just a seat where you help yourself in front of everyone. Therefore, I don't think electronic monitoring would adversely affect their rights. It would be a better option, even in terms of respecting their rights, particularly the right to dignity. The only thing they would have to deal with is the monitoring device, which is a consequence of their actions. This is a more respectful way to manage their punishment while holding them accountable for their conduct. (KP-A7)

No, I don't think so. Being a convicted prisoner means accepting certain limitations. The mere fact that there's a monitoring system attached to your body does not contradict the Constitution excessively. All rights have limitations. Putting someone in prison is also a limitation on their freedom and dignity. Having an ankle monitor is a minor limitation compared to imprisonment. A court would not find it unacceptable. (KP-A1)

KP-M5 also reinforced the view that electronic monitoring does not constitute a violation of constitutional rights but rather reflects a lawful limitation consistent with Section 36 of the South African Constitution.

No, I don't think so. Because every right in the Constitution can be limited by Section 36 of the Constitution, I don't believe it would be a violation of a right. If we are to argue along those

lines, it would mean incarceration also or staying in prison is a violation of a right. But it is limited in terms of Section 36 because the right to freedom of movement is affected when a person is in prison. So, while the person is outside, his rights are still limited. In terms of Section 36, in terms of movement, for instance, the limitation won't be to a greater extent. It will be to a lesser extent because you can't even visit shops in prison. You can't even go anywhere. Whereas while you are monitored, you may only be restricted from going to certain places at night or to certain places like clubs or taverns. But you still have your movement in terms of other things. So, I don't think it would be a violation of the rights. (KP-M5)

In summary, the responses of the legal practitioners reflect a shared understanding that electronic monitoring, while involving certain limitations on rights, does not amount to a constitutional violation. Instead, electronic monitoring was viewed as a justifiable alternative to incarceration when assessed through the lens of Section 36 of the Constitution.

### *Protection of an offender's personal information*

The legal practitioners emphasised the importance of how personal data, particularly the location information and other sensitive details of offenders under electronic monitoring, is handled. In South Africa, the Protection of Personal Information (POPI) Act 4 of 2013 governs the collection, storage and use of personal data (POPI Act, 4 of 2013: 50). The study found that the POPI Act 4 of 2013 presents a potential legal challenge to the broad application of electronic monitoring in South Africa. KP-M2 raised concerns about the legality of electronic monitoring, particularly about privacy protection under the Constitution and the POPI Act 4 of 2013 and argued that electronic monitoring may face potential legal challenges due to the strong privacy safeguards enshrined in these legal frameworks. KP-M2 also suggested that electronic monitoring may be challenged in the Constitutional Court, the highest court in South Africa, and doubted its ability to withstand such scrutiny.

It depends on its purpose. I see a few legal problems in the sense that the POPI Act protects people's privacy. With the POPI Act in operation, protecting a person's privacy, with the Constitution itself, which is the ultimate legislation that you should look at, I think it will not be long before it will be challenged in a constitutional court, and I've got a suspicion it won't stand the test of the Constitution. It will be said that it invades a person's privacy, but it's my opinion. The Constitution and the POPI Act are the most important. (KP-M2)

KP-M9 also expressed reservations about the future constitutional sustainability of electronic monitoring. Referencing POPI Act 4 of 2013, KP-M9 remarked:

Well, I think currently with the POPI Act in operation, protecting a person's privacy, I think it will not be long before this will be challenged in a constitutional court, and I've got a suspicion it won't stand the test of the Constitution. It will be said that it invades a person's privacy, but it's just my personal opinion on the issue. (KP-M9)

The concerns of legal practitioners regarding electronic monitoring, as it pertains to an offender's personal information, indicate that electronic monitoring must align with the South African Constitution and adhere to the provisions of the POPI Act 4 of 2013. This includes establishing clear guidelines on how much data can be collected and how it is used. The study's key findings illustrate diverse viewpoints regarding privacy issues and the rights of offenders under electronic monitoring. Legal practitioners in the study had various views, with some endorsing electronic monitoring and others raising concerns about its impact on privacy.

## **Discussion**

The legal practitioners provided differing views on the ethical and legal considerations around using electronic monitoring for the supervision of probationers. One of the primary concerns raised in the literature is that electronic monitoring has the potential to infringe on offenders' right to privacy. Al-Wahedi (2019: 226) reported that the constitutional and human rights of offenders and their right to privacy may be threatened by electronic monitoring. However, incarcerated offenders may be more deprived of privacy as they partake in activities such as dressing, showering and using the restroom in an open setting in the presence of correctional officials and other inmates (Cihan and Sorensen, 2019: 2414). In this study, the legal practitioners believed that electronic monitoring does not significantly infringe on offenders' privacy as it does not use audio or video surveillance of the offender and their whereabouts. The legal practitioners also provided their views on the potential infringement of the constitutional rights of offenders serving their sentences on electronic monitoring. While there were views that electronic monitoring infringes on offenders' constitutional rights, most legal practitioners expressed that once an offender is convicted, their rights are inherently limited, either through imprisonment or electronic monitoring. Electronic monitoring was, however, viewed to be less invasive on offenders' rights than traditional imprisonment, allowing them more freedom while still imposing necessary restrictions. Similarly, Haverkamp and Woessner (2016: 133) as well as Nellis (2015a: 203) stated that electronic monitoring is a more favourable option than imprisonment, as it allows offenders to retain a certain level of freedom while tracking them in the community. Although offenders on electronic monitoring may have more freedom of movement, electronic monitoring often imposes additional burdens such as social stigma, disrupted family life and psychological stress (Kilgour, 2020: 131; Payne et al., 2014: 136; Weisburd, 2022:166). The findings of this study reveal that legal practitioners remain cautious about the stigmatising nature of electronic monitoring and the expansion of penal surveillance. Legal practitioners raised concerns about the visibility of electronic monitoring. The participants warned that communities may label offenders, exacerbating social stigma on offenders. This echoes the findings of Kilgour (2020: 131–132), who found that electronic monitoring, despite being non-custodial, can reproduce the 'pains of imprisonment' in new and subtle ways, including stigma and social exclusion. The legal practitioners also raised concerns that while traditional imprisonment confines individuals within carceral institutions, electronic monitoring extends penal control, exposes offenders to constant surveillance and public visibility, both of

which can undermine rehabilitation and reintegration. Moreover, the study findings highlighted concerns regarding net-widening, such as using electronic monitoring for offenders unable to pay fines. This may unintentionally subject low-risk individuals to more intensive supervision than necessary, which reflects a broader pattern observed in Sweden, New Zealand, Australia, England and Wales, where expanding community sanctions have not significantly reduced prison populations but instead widened the net of penal control (Bartels & Martinovic, 2017: 84).

The legal practitioners further expressed that offenders under electronic monitoring would avoid the total loss of freedom experienced in prisons and that they would be able to maintain a degree of autonomy and social connection. This finding is supported by Jolliffe and Hedderman (2015: 1065), who stated that electronic monitoring keeps offenders with their families and avoids the criminogenic effects of imprisonment. The legal practitioners also opined that this social connection could improve rehabilitation outcomes. However, Weisburd (2022: 166–165) cautioned that electronic monitoring, as a tool, does not translate to rehabilitation unless it is used with rehabilitative programmes such as counselling, education or restorative justice practices to address the social or psychological factors that contribute to offending. Furthermore, the views of the legal practitioners align with the previous literature on electronic monitoring as a sentencing option. For example, Hucklesby (2014: 235) suggested that electronic monitoring provides a more humane alternative to imprisonment, allowing offenders to reintegrate into society while serving their sentence under supervision. Similarly, Haverkamp and Woessner (2016: 133) argued that electronic monitoring, compared to physical incarceration, offers a better alternative by allowing offenders to maintain some degree of liberty.

The study found that offenders' rights can be justifiably restricted under certain circumstances, as outlined in Section 36 of the South African Constitution, which allows for the limitation of constitutional rights in some instances, such as when a person is incarcerated. Thus, while electronic monitoring constitutes certain restrictions or limitations, it still allows offenders to serve their sentences within the community while being monitored. This is supported by Bartels and Martinovic (2017: 95), who argued that electronic monitoring allows offenders to serve their sentence in their communities, which has a positive impact on reducing recidivism while ensuring public safety. Arnett (2019: 641) also indicated that the restrictions on the movements of offenders prioritise the public interest and balance the rights of the offenders with those of victims and society. In this context, electronic monitoring can promote fair, rehabilitative and equitable justice provided it adheres to Section 36 of the Constitution.


Although electronic monitoring is believed to constitute a less intrusive alternative to incarceration, surveillance and data protection remain challenging (Al-Wahedi, 2019: 226; Laurie and Maglione, 2020: 690; Palermo, 2015: 911). The use of electronic monitoring entails retrievable records of an offender's movements, including their addresses (Laurie and Maglione, 2020: 690; Nellis, 2015b: 39). The study identified concerns about the POPI Act 4 of 2013 and found that it is important to implement strict measures regarding how the data that is retrieved through electronic monitoring is managed and protected. According to the authors, this reflects broader concerns about data privacy, ethical oversight and the need for clear measures that regulate the storage, access and sharing of the


offenders' confidential information. If electronic monitoring is to be implemented in South Africa, the authors found that it should be aligned with the POPI Act 4 of 2013, to ensure that offenders' personal data is handled in a manner that upholds their right to privacy. The compliance of electronic monitoring with the POPI Act 4 of 2013 is essential in regulating data collection, storage and sharing. Beyond the legal and ethical considerations, the actual effectiveness of electronic monitoring in achieving its intended goals remains debatable. Bartels and Martinovic (2017: 81) and Jolliffe and Hedderman (2015: 1065) suggest that electronic monitoring can improve compliance with sentencing conditions. However, concerns have been raised that electronic monitoring may function more as a surveillance tool, that does not address the underlying causes of offending, if it is not coupled with meaningful support services (Laurie and Maglione, 2020: 685; Nellis, 2015a: 200). Moreover, without clear eligibility criteria and mechanisms to prevent net-widening, the expansion of the total number of individuals under formal supervision, electronic monitoring could inadvertently widen the carceral net by imposing surveillance on individuals who would otherwise have received non-custodial or even non-penal responses (Bartels and Martinovic, 2017: 83; Belur et al., 2020: 4).

## Conclusion

Electronic monitoring holds significant potential as an offender management tool. While it is widely supported as an alternative to incarceration, legal and ethical concerns must be addressed to ensure its fair and effective implementation. In South Africa, adopting electronic monitoring presents both opportunities and challenges, particularly concerning legal and ethical considerations. This study explored the perceptions of legal practitioners regarding the legal and ethical implications of electronic monitoring in offender supervision. While the findings indicate that legal practitioners perceive electronic monitoring as a potentially viable addition to South Africa's sentencing framework, this support is based on the sampled legal practitioners and not a comprehensive assessment of its long-term impact on offenders and society. However, concerns were raised about legal implications, potential violations of privacy and offenders' rights. The study's findings highlight the need for a clear regulatory framework to balance public safety with offenders' rights. These findings contribute to policy discussions on integrating electronic monitoring within South Africa's criminal justice system in a manner that is both legally and ethically sound.

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## Ethical approval and informed consent statements

The Faculty of Humanities Research Ethics Committee at the University of Pretoria approved our interviews (Approval: Protocol Number HUM009/0222) on 19 April 2023. The Magistrates Commission of South Africa and the Law Society of South Africa granted permission on 9

December 2022 and 25 March 2023, respectively, to conduct interviews with magistrates and attorneys. Respondents gave verbal consent before starting the telephonic interviews.

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