

The policy shift towards more intensive monitoring of domestic violence perpetrators

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This policy report is not so much a report outlining a recommended policy as much a report on a significant shift on HM Government policy, currently found in a draft Bill laid before Parliament for legislative scrutiny¹. In January 2019, long-awaited government policy proposals began to be clarified by HM Government, in relation to the monitoring of potential and known domestic violence perpetrators. This clarification related to two main proposals; for GPS tracking of offenders and abusers; and for the use of notification requirements (a 'domestic abusers register'), both as part of newly proposed powers for the courts. Under new legislative proposals contained in the draft Domestic Violence and Abuse Bill, a maximum of 1,000 offenders in England and Wales at any one time, who were subject to orders designed to better protect victims of domestic abuse of stalking², would be 'tagged' with 24-7, GPS-based electronic monitoring devices. The draft Bill, when enacted, would see the creation of Domestic Abuse Protection Orders, and part of the legislation that outlines their scope would then give a statutory underpinning to this particular public protection surveillance measure. These orders would also be used to require offenders to report to the police, to notify officers of their personal details as part of a 'domestic abuser register' system of risk management.

In relation to the GPS tracking proposals, the Ministry of Justice and the Home Office together observed in their consultation response report, and in launching the draft Bill, that:

"We will legislate to provide for the new [domestic abuse protection notice] and [domestic abuse protection order]. We recognise that the new order introduces some untested ideas, for example in relation to the effectiveness of electronic monitoring in this context, and we want to continue to work with expert professionals from the police, courts and specialist domestic abuse sector to ensure that these new orders work on the ground. To this end, we will pilot the DAPN and DAPO in a number of police force areas. To support the introduction of the orders we will issue statutory guidance which will be accompanied by a programme of training and practical toolkits for professionals."³

GPS tracking could be used to enforce exclusion zones around a victim's place of residence, or place of work, for example; and other forms of electronic monitoring devices could be used to enforce elements of a DAPO that entail the prohibition of an offender from drinking alcohol, as part of a more holistic risk-management approach. As the joint Home Office and Ministry of Justice report on the draft Bill notes:

¹ As the UK Parliament website states: "The Government publishes a number of Draft Bills during each parliamentary session. A Draft Bill is published to enable consultation and pre-legislative scrutiny. After consultation and pre-legislative scrutiny has taken place, the Draft Bill may be introduced formally in the House of Commons or the House of Lords." See: <https://www.parliament.uk/business/bills-and-legislation/draft-bills/> (accessed at 27.02.2019).

² See: <https://www.bbc.co.uk/news/uk-47256515>.

³ HM Government, *Transforming the Response to Domestic Abuse: Consultation Response and Draft Bill*, January 2019, CP 15, from: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/772247/Transforming_the_response_to_domestic_abuse_-_consultation_response_and_draft_bill_-_print.pdf (accessed at 20.02.2019), p.26.

"Electronic monitoring is not just restricted to GPS tracking. The type of electronic monitoring used would depend on the conditions of the order and may include location monitoring to ensure compliance with an exclusion zone, radio frequency monitoring to ensure compliance with a curfew, or alcohol monitoring to comply with a positive requirement to attend an alcohol course."⁴

As a public protection premise, the police can monitor through GPS-enabled tracking those strongly suspected of, or at least those already charged/convicted of domestic violence offences and/or stalking. But as a piece of public policy this would, under the workings of the rule of law in the UK, require legislative effort to create a means by which the private life of such an offender could be interfered with 'in accordance with the law', and only when necessary and proportionate⁵.

This policy approach would indeed likely require new legislation, on top of considerable investment in the electronic monitoring of offenders who are, for example, serial domestic violence perpetrators. In terms of such a constitutional preference for fresh and dedicated statutory provisions, the European Court of Human Rights has maintained in *MM v UK* [2012] ECHR 1906 at para. 193 that:

"The requirement that any interference must be 'in accordance with the law' under Article 8.2 means that the impugned measure must have some basis in domestic law and be compatible with the rule of law, which is expressly mentioned in the preamble to the Convention and inherent in the object and purpose of Article 8. The law must thus be adequately accessible and foreseeable, that is, formulated with sufficient precision to enable the individual – if need be with appropriate advice – to regulate his conduct. For domestic law to meet these requirements, it must afford adequate legal protection against arbitrariness and accordingly indicate with sufficient clarity the scope of discretion conferred on the competent authorities and the manner of its exercise..."

The government certainly now seem conscious that a specific statutory regime for the more intensive use of different types of electronic monitoring in the ways outlined above would better survive the 'in accordance with the law' test in European human rights law, particularly concerning the right to respect for private and family life under Article 8 ECHR, if it were based in clear statutory provisions. The government report noted that:

"We understand that, without legal powers, the courts are limited in how they can apply electronic monitoring. We think that the courts should have an express power to impose electronic monitoring, and we would also include a set of statutory safeguards to ensure that electronic monitoring is only used when necessary and proportionate..."⁶, [and] "a court will only be able to impose an electronic monitoring requirement where necessary and proportionate to protect a victim of domestic abuse."⁷

In actual fact, the courts have already applied the concept of what is required by the notion of 'in accordance with law' under Article 8 ECJR with some degree of latitude, and in favour of

⁴ n 2, p.30.

⁵ See *R (T) v Secretary of State for the Home Department* [2014] UKSC 35.

⁶ n 2, p.30.

⁷ n 2, p.31.

a public protection perspective, in the context of GPS tracking. In the judgment in the case of *Richards*, from the Court of Appeal in 2015, there was an (unsuccessful) argument that such GPS monitoring was unlawful, as it had no explicit statutory basis⁸. The new legislation would remedy this shortcoming in the statutory landscape of public protection powers and safeguards. But the court in the *Richards* case actually "emphasised that the police did indeed have sufficient (lawful) guidance from ACPO as to the management of "police information" and, furthermore, sufficiently clear (and lawful) guidance as to how this personal data could be both retained and shared for public protection purposes"⁹, and therefore there was no need for specific statutory underpinning for the use of the technology concerned. So the inclusion of a specific statutory basis for such GPS monitoring in the draft Bill in 2019 is perhaps not *strictly* necessary, when there would be an overarching statutory regime to indicate the purpose of the new domestic abuse protection orders. Detailed statutory provisions on GPS tracking of (possible) domestic violence perpetrators, namely those in cl.33 in the draft Bill, are though most welcome from the perspective of ensuring specificity and democratically-rooted accountability in the practice of monitoring dangerous individuals in UK society.

Around the time the *Richards* judgment was handed down, in 2015, police in Northumbria began piloting a voluntary scheme through which offenders would be monitored through GPS devices. These individuals were GPS monitored as to their location in relation to a particular victim or potential victim, who in turn could be alerted through a personal handheld device as to their proximity to the perpetrator concerned¹⁰. Davies and Biddle have highlighted, in a broadly positive evaluation of the efficacy of a (resource-intensive) mix of different multi-agency interventions, that such GPS-enabled monitoring can play a useful role in a 'Domestic Abuse Perpetrator [Management] Toolkit'. The authors explain that:

"[The] Domestic Abuse Proximity System (DAPS)... is a non-statutory two-piece GPS system designed to improve victim safety and confidence. The perpetrator is provided with an ankle tag with a GPS tracking unit, which they wear whenever they leave their home. The victim also carries a device, a handset that uses the same GPS location technologies. Fixed exclusion zones are set up around appropriate locations, which the perpetrator is banned from entering and the victim and monitoring centre is alerted if the perpetrator is within 500 m of them."¹¹

There are of course, too, the possible new notification requirements outlined by HM Government as a new policy direction in managing domestic violence perpetrators, under the proposed DAPOs, and described in cl.37 of the draft Bill. In fact, this is the approach that the Home Affairs Select Committee had recently approved in their October 2018 report on domestic abuse. The Committee report noted that expert witnesses to their inquiry had observed that " ...the Domestic Violence Disclosure Scheme ("Clare's Law") was dependent on an individual asking about an offender's history and recommended that the focus be

⁸ See *R (Richards) v Teesside Magistrates' Court* (2015) EWCA Civ 7.

⁹ Jamie Grace, (2015) "Better information sharing, or "share or be damned"?", *The Journal of Adult Protection*, Vol. 17 Issue: 5, pp.308-320, <https://doi.org/10.1108/JAP-01-2015-0001>, p.315.

¹⁰ Northumbria PCC, 'GPS Proximity Device Launch', from <http://www.northumbria-pcc.gov.uk/gps-proximity-device-launch/> (accessed at 18.02.2019).

¹¹ Pamela Davies and Paul Biddle, 'Implementing a perpetrator-focused partnership approach to tackling domestic abuse: The opportunities and challenges of criminal justice localism', *Criminology & Criminal Justice* (2018) Vol. 18(4) 468–487, 475.

changed so that offenders were tracked as a matter of course by police officers...¹²; leading to their recommendation as a Committee that "... a national register of serial stalkers and domestic violence perpetrators... is introduced as a matter of urgency and that individuals placed on the register should, like registered sex offenders, be managed through multi-agency public protection arrangements (MAPPA)."¹³

In essence HM Government have now concurred with the Home Affairs Select Committee in their own more recent report, observing that they

"... think that the DAPO should include notification requirements. This means that, if it would assist in preventing further abuse, those who are subject to a DAPO would have to register certain personal details with the police. These details might include their address, who they live with, and details of intimate relationships and their access to any associated children. These details would allow the police to make an accurate risk assessment of the danger that person poses."¹⁴

So this is not quite proactive 'tracking', per se, of serial domestic violence perpetrators, but it is a step toward more careful risk management structures and regulation for the policing of domestic violence in England and Wales¹⁵. It will be important, though, for the Home Office and the Ministry of Justice to carefully work these new offender monitoring conditions and other approaches, including GPS monitoring, into the overall policing strategy in relation to the push to use of out-of-court disposals. The latest version of the relevant strategy published by the National Police Chiefs' Council has noted that there should be "greater autonomy in out of court disposal decision making for the police service, specifically for conditional cautions for domestic abuse... if an evidence base is developed showing the benefits of such as approach"¹⁶.

Of course, too, there is a risk that lawful and more creatively-deployed electronic monitoring technologies will be seen as a kind of 'silver bullet' for the management of the risk that domestic violence perpetrators pose. So there are some obvious questions to investigate through the forthcoming piloting process: what about the risk of technical equipment failure in relation to an offender being monitored? What data protection-based challenges will the courts expect to deal with if GPS monitoring data is used in a newer way in some multi-agency setting? What are the overall end-to-end costs of the technology to be chosen and deployed, including human resources and training costs? And what sort of detailed guidance will the police and the courts receive from the Ministry of Justice, respectively, following the forthcoming pilot stage, in terms of how to decide who are the 1,000 riskiest domestic

¹² House of Commons Home Affairs Committee, *Domestic Abuse -Ninth Report of Session 2017-19*, HC 1015, p.12.

¹³ House of Commons Home Affairs Committee, *Domestic Abuse -Ninth Report of Session 2017-19*, HC 1015, p.13.

¹⁴ n 2, p.28.

¹⁵ Soon after the draft Bill was published, however, there were calls for it to contain provisions that would extend new powers and policy to Northern Ireland as well as England and Wales. See: <https://www.independent.co.uk/news/uk/politics/domestic-abuse-bill-northern-ireland-dup-letter-conservatives-stella-creasy-a8785376.html>.

¹⁶ DCC Sara Glen, *Charging and Out of Court Disposals: A National Strategy*, 2017, from: <https://www.npcc.police.uk/Publication/Charging%20and%20Out%20of%20Court%20Disposals%20A%20National%20Strategy.pdf> (accessed at 27.02.2019), p.16.

violence perpetrators nationally who should be placed under GPC monitoring in different ways?

At the time of writing, the Parliamentary Joint Committee on Human Rights has started its legislative scrutiny process of the draft Bill¹⁷, and it remains to be seen as to what the eventual formulation and balance for new powers for the police and the courts will actually be, in terms of monitoring and risk-assessing dangerous offenders in relation to preventing domestic violence and related crimes.

¹⁷See: <https://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/news-parliament-2017/bills-17-19/>.