

Reinforcing restraining orders using electronic monitoring

Brå – a centre of knowledge on crime and measures to combat it

The Swedish National Council for Crime Prevention (Brottsförebyggande rådet – Brå) works to reduce crime and increase levels of safety within society. This is done by producing data and disseminating knowledge on crime, crime prevention work and the justice system's responses to crime.

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Foreword

Electronic monitoring has been used for over two decades in connection with coercive criminal procedural measures or the sanctioning of criminal activity. In Sweden, electronic monitoring has been in use since 1994, firstly as an alternative to a short prison term (front door), and now also as a means of helping inmates to make the transition back to life in the community at the end of a term in prison (back door). Monitoring is based on voluntary participation in the programme, but is backed with the threat of incarceration if the regulations associated with the electronic monitoring programme are breached.

Over the years, the technology has been further developed. From only providing the opportunity to check whether an individual is present at or absent from specific places, satellite technology is now available that allows for continuous monitoring of the movements made by any given individual. The emergence of these new technological advances created an interest in using electronic monitoring for other objectives within the penal justice system. One such objective involves reinforcing restraining orders. However, caution is needed when it comes to the use of electronic monitoring for new purposes. At the request of the Swedish Government, the National Council for Crime Prevention (*Brottsförebyggande rådet – Brå*) has examined the possibility of using electronic monitoring to reinforce restraining orders. This document presents the technical and legal factors that should be taken into consideration when contemplating the use of electronic monitoring for crime prevention purposes.

Annika Pallvik Fransson, legal adviser at the National Council, has authored the document. Valuable observations have been made by an external reference group comprising Kjell Carlsson of the National Prison and Probation Administration (*Kriminalvårdsstyrelsen*), Bo Hägglund, of the National Police Board (*Rikspolisstyrelsen*) and Peter Broberg, of the Public Prosecutor's Office (*Åklagarmyndigheten*). Study visits to a trial project in Manchester in the UK, and to the *Comunidad de Madrid* in Spain have been made. *The Conférence Permanente Européenne de la Probation (CEP)*, the 4th Conference on Electronic Monitoring in 2005 has offered a particularly important platform for information and discussion. Professor Yifang Ban and the researcher Milan Horemuz of The Royal Institute of Technology (*Kungliga tekniska högskolan*) in Stockholm have assisted the National Council in describing the satellite tracking technology.

A Swedish version is published at the National Council's website www.bra.se.

Stockholm, November 2005

Jan Andersson
Director General

Outline

Breaches of restraining orders in Sweden

Evaluations made by the National Council for Crime Prevention show that one in three restraining orders is breached. Often, the police lack the strategy to follow up restraining orders and to give the victim the additional protection that is needed. In the first chapter, these evaluations are briefly reviewed and the regulation of restraining orders in Sweden is described.

Stationary monitoring and tracking

Electronic monitoring encompasses either stationary monitoring, i.e. tagging, or satellite tracking. These techniques are described in chapter two. Further, it is stated that electronic monitoring does not in itself provide any form of protection. Instead it constitutes no more than a means of facilitating the gathering of information on a person's whereabouts. Thus, monitoring requires well-organised supervision and a constant readiness to respond to an alarm. Some reflections on organisational issues are therefore also presented in this chapter.

Tracking in the USA and Europe

In chapter three, the result of the National Council's exposition of electronic monitoring is presented. It shows that the use of tracking for crime prevention purposes is still in its infancy. When electronic monitoring is used, for the most part it is used as an alternative means of monitoring suspected and convicted individuals during time that would otherwise be spent in custody. Monitoring is also used as a complement to certain sanctions served in the community. Initiatives to use tracking to protect a person deemed to be at risk have been taken on a small scale in a few states in the USA, in a trial project in Great Britain and in Madrid in Spain. Even in these initiatives, monitoring is used as an alternative form of custody for an individual who is suspected or has been convicted of a crime. None of the initiatives have yet been evaluated.

Legal considerations

The National Council's exposition also shows that there is no established legal answer to the question of using electronic monitoring for crime prevention. In the fourth chapter, attention is drawn to legal factors that need to be taken into consideration when it is intended to use electronic monitoring as a means of reinforcing restraining orders. A total of eight alternative legal solutions are presented and discussed.

Trial project – to learn and avoid mistakes

Although a small number of initiatives have been taken using electronic monitoring to protect a specific, identified victim, we know very little about the effects of this method. In the fifth and final chapter, the National Council therefore emphasises that special precautionary measures should be taken when electronic monitoring is considered to reinforce restraining orders. It is only on the basis of a well-conducted evaluation that the advantages and disadvantages of electronic monitoring can be understood, the effectiveness of various measures assessed, advances documented, economic decisions relating to the work taken, and unexpected effects identified. The National Council suggests that a trial project of this kind is carried out in two stages;

- the first stage should involve evaluating the technique and how potentially the monitoring could be organised,
- the second stage should study the effects of the programme.

Breaches of restraining orders in Sweden

The Restraining Order Act

The possibility of issuing a restraining order is regulated by the Restraining Order Act (*Lagen (1988:688) om besöksförbud*). If there is a risk that a person may commit crimes against someone, or seriously harass another person in some other way, a restraining order may be issued. Therefore, a restraining order can be issued even where no crime has been committed. Restraining orders neither constitute a coercive measure within the framework of the penal system, nor a form of penal sanction. Instead, the restraining order is a measure that can be taken for preventive and protective purposes.

In certain cases, the restraining order may also involve prohibition to enter a joint domicile. Where necessary, the restraining order may also be extended to include prohibition to enter the vicinity of the protected individual's place of residence, workplace or any other place where the person spends time on a regular basis. If an extended restraining order of this kind is breached, an additional prohibition may be issued as a so-called specially extended restraining order. This type of order covers one or more areas linked to the type of places referred to above. A restraining order must always be limited to a fixed period of time, but may be extended. Questions asked in relation to restraining orders are decided by the prosecutor and may be appealed to a court.¹ Responsibility for preventing breaches of restraining orders lies with the police. An individual acting in breach of a restraining order may be fined or receive a prison sentence not exceeding one year.

In 2004, there were 8,536 applications for restraining orders submitted to the Public Prosecutor's Office (*Åklagarmyndigheten*), of which 4,060 were granted. Almost all of these (97 per cent) comprised what are referred to as regular restraining orders. Over the course of the year, a total of 33 restraining orders were issued relating to a joint domicile, and 74 were extended restraining orders. No specially extended restraining orders were issued.²

At least one in three restraining orders is breached

It is estimated that at least a third of restraining orders are breached. Of the 1,230 persons reported for breaching such an order in 2004, almost 40 per

¹ A court may also constitute the first instance to make a decision on the issuance of a restraining order in divorce cases (Swedish Marriage Code – *Äktenskapsbalken*).

² Brå, 2005a.

cent were suspected of repeated infringements. Of these, 26 individuals were responsible for almost one third of the total number of reported breaches. The most common infringement involves telephone harassment. However, physical contact is not uncommon. Based on a study of 376 reported infringements, it was found that 41 per cent of these involved such contact.³

A restraining order is a crime prevention measure. Evaluations made by the National Council show, however, that restraining orders are not always used for this purpose by the police.⁴ In most cases, the person applying for a restraining order has been subjected to a criminal offence before the Restraining Order is granted. Police and prosecutors do not always follow up on the restraining order, nor do they use the order as a point of departure for the introduction of additional protective measures. The National Council concluded in 2003 that the majority of police authorities lacked a strategy for preventing crime when a restraining order had been issued. Only 7 out of 21 police authorities had sufficiently well prepared routines in place for actively and continuously following up restraining orders issued in their area. In addition, the majority of police authorities lacked routines to provide access to decisions relating to restraining orders within the agency itself. Many of the people that the restraining orders were intended to protect felt that they had not received clear and complete information as to what the restraining order involved. Even though initiatives have since been introduced to put standard routines and guidelines in place, a follow-up in 2005 shows that the number of police authorities with routines in place for following up restraining orders has not increased to any great extent.

³ Brå, 2005a.

⁴ Brå, 1989; Brå 1995; Brå 2003 and Brå 2005a.

Stationary monitoring and tracking

Electronic monitoring⁵ encompasses either stationary monitoring, i.e. the electronic ankle-bracelet (“tag”), or satellite tracking. In this chapter, the different techniques are described.

Stationary monitoring

The stationary technique, based on radio communication (Radio Frequency, RF), has come to be known as first-generation electronic monitoring. The stationary technique registers the monitored individual’s presence at or absence from a specific place. It is therefore the most commonly used technique for monitoring house arrest and other forms of curfew.

The individual being monitored carries a battery-operated transmitter, also known as an ankle-bracelet or “tag”, which communicates by means of radio signals with a receiver located at the place where the individual’s presence (or absence) is to be monitored, often the individual’s home (this receiver will hereinafter be referred to as the home-component). The home-component registers the signal from the ankle-bracelet when this is located within the reception area covered by the receiver. Therefore, an individual is only monitored when he or she is located within this area, and is required to regularly spend time at the place where the home-component is located. Information is transmitted to a monitoring centre via either the land-based or the mobile telephone network. Information on attempts to tamper with the equipment is also registered and transmitted, as are technical problems and other similar events.

BILATERAL MONITORING

Techniques have also been developed to provide a warning if the monitored individual approaches a certain place or a certain person. This technique is sometimes referred to as bilateral monitoring, since the monitoring affects two individuals: the person being monitored and the person being protected. The person being protected has a home-component installed in their home which provides a warning when the individual being monitored comes within a certain distance. The safe distance can be determined on a case-by-case basis up to 150 metres. (Developments are underway to increase this distance.) Further, an alarm may also be sent automatically to the monitoring centre when the home-component registers the presence of the monitored individual in the vicinity. This alarm is transmitted via either the land-based or mobile telephone network. When the home-component is

⁵ In this document, the term electronic monitoring applies to monitoring within the framework of the penal system or to a crime prevention measure, conducted using technical aids that either check whether a person is present at or absent from a place decided upon in advance, or which check the whereabouts of a given individual.

activated, a recording device can also be triggered to record what is happening in the home. The individual being protected may also be equipped with a mobile receiver which will provide a warning if the monitored individual comes within the safety distance.

REVIEW OF BILATERAL MONITORING

The possibility of using bilateral monitoring with restraining orders has been described in some detail by the National Council in its memorandum *Elektronisk övervakning vid besöksförbud – teknikens möjligheter och begränsningar*, (1999). The Council noted that the greatest advantages associated with the technique are that the protected individual and the police are automatically warned when the person being monitored approaches the person being protected, and that the technique serves to clarify whether or not a breach of the Restraining Order Act has been committed. Bilateral monitoring may also serve as a deterrent for those being monitored, and as a reminder of the serious nature of the restraining order. However, the equipment does not provide any guarantee of increased safety. The safety distance range is very short and this form of monitoring only works as long as the monitored individual is at home at certain specified times and does not tamper with the equipment.

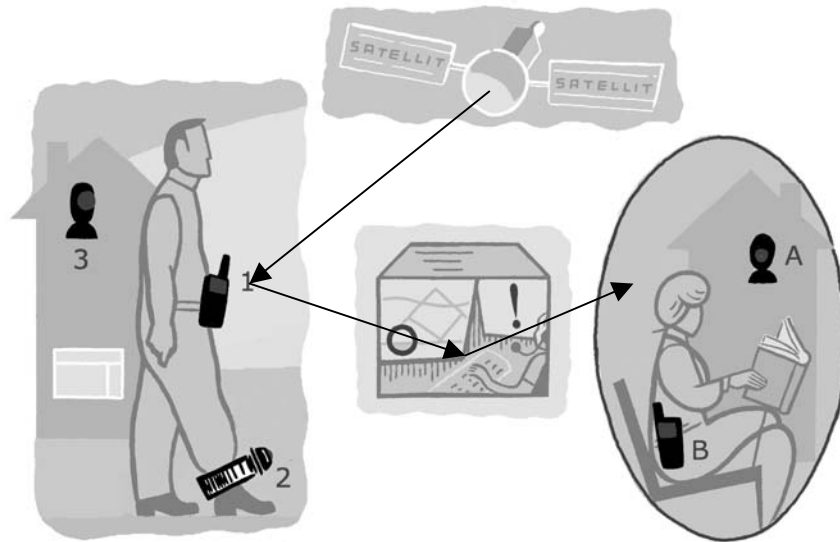
In a study by Edna Erez and Peter R. Ibarra (2004), 30 individuals who had been protected by electronically monitored restraining orders in the USA were asked about their experiences. In summary, the study found that they experienced monitoring as something positive and that the monitoring helped them regain control over their lives. Several felt however that they placed too much faith in the technology, and perhaps did not always take the necessary supplementary steps to protect themselves. Others reported that they became dependent on the technology. In addition, individuals protected by the equipment who received a large number of false alarms reported that they found this distressing.

Tracking

In order to be able to monitor a person continuously rather than just being able to register their presence at or absence from a specific place, the stationary technology may be supplemented with tracking technology, which has come to be known as second-generation electronic monitoring. Tracking makes it possible to continuously follow the movements of the monitored individual either in real-time or retrospectively. This form of monitoring makes use of the GPS-system (Global Positioning Satellites). The system was developed by the American defence sector and has been in use since the 1970s.⁶ Twenty-four satellites orbit the globe and transmit signals received by portable receivers. The tracking is achieved by calculating the distance between a number of these satellites and the receiver. This positioning is very precise, with a margin of error of no more than a few metres.

⁶ A European satellite system, Galileo, is currently being developed, but has yet to be taken into use.

The technique requires an uninterrupted line-of-sight to at least three satellites simultaneously. The positioning may be completely nullified indoors and in metropolitan environments with a high density of buildings. There are therefore systems on the market that employ the GSM-network (the Global System for Mobile Communication) as a back-up. This technique can, however, only position a receiver to the area in which it is located, and it is dependent on the number of tele-masts located within the area. In urban environments, this may involve areas with a radius of up to 500 metres, and in rural areas of up to five kilometres. In addition, there are techniques for reading whether the GPS-receiver moves during periods when the satellite signals do not reach the receiver. In this way, the monitoring centre can collect information on whether the individual being monitored is moving.



The tracking technology complements stationary monitoring. In addition to the ankle-bracelet, the person being monitored has to carry a detachable GPS-receiver that with today's technology is somewhat larger than a mobile phone. The ankle-bracelet serves as a guarantee that the receiver is being carried by the individual being monitored since the GPS-receiver registers the signal emitted by the ankle-bracelet. A home-component allows the monitored individual to be at home without having to carry the GPS-receiver, when the receiver's battery needs charging.

The batteries on the market today can last for just over a day before they need recharging. This capacity is reduced when communication is frequent. Thus this type of monitoring also requires a daily restriction whereby the monitored individual is required to be in a place specified in advance for a few hours each day (battery charging normally takes four to six hours).

Information on the position of the GPS-receiver is transmitted to a monitoring centre via the mobile telephone network, and charted there on a map. Since this form of monitoring is dependent on information being sent

via the mobile telephone network, its use is limited to areas where there is sufficient network coverage.

RETROSPECTIVE MONITORING

Information can be stored in the GPS-receiver and then transmitted to the monitoring centre once a day. This technique is referred to as retrospective or passive monitoring and is probably most appropriate in cases where infringements do not require an immediate response. Thus, retrospective monitoring is less appropriate with regard to attempts to reinforce restraining orders.

CONTINUOUS MONITORING

Information can also be transmitted at very short intervals, almost in real-time. This kind of monitoring is called continuous tracking or active monitoring and is very resource-intensive as a result of both the constant flow of information and the need for extensive personnel resources to receive and evaluate the information.

HYBRID MONITORING WITH EXCLUSION ZONES

Hybrid monitoring is a method that combines these two techniques. This kind of monitoring system identifies areas considered to be exclusion zones around one or more places where the monitored individual is not allowed to be. These might for example include an area around the protected individual's home and place of work. If the individual being monitored enters an exclusion zone, an alarm is transmitted to the monitoring centre. An alarm can also be sent if the monitored individual tampers with or neglects the equipment or disregards programme conditions, which may constitute an early indication that the individual is showing insufficient respect for the restraining order and the monitoring system, and that measures therefore must be taken.

The advantage of hybrid monitoring is that it can be implemented retrospectively as long as the person being monitored acts in accordance with stipulated conditions, but can shift to continuous monitoring if he or she tampers with the equipment or enters an exclusion zone. Technically, these areas can be made sufficiently large so that an alarm triggered by the monitored individual entering one of them will give the protected individual time to react and the police the opportunity to intervene. Hybrid monitoring is probably most suited to the task of reinforcing restraining orders.

However, the technology available on the market today is for the most part only suited to use with exclusion zones that are either circular or oval in shape. Users of hybrid monitoring have expressed that these areas must be definable in such a way that it is clear to the monitored individual where the boundaries lie between areas he or she may or may not enter. Developments are underway in this respect.

Organisational points of departure

Unlike alarm telephones and other technical means of assistance, electronic monitoring requires continuous supervision. The technique is best viewed as an aid for gathering information about a person's activities. This information must subsequently be received, evaluated and must lead to an adequate response. Investigating the surrounding organisational conditions is therefore as important as examining the technical possibilities.

TRACKING VERY RESOURCE INTENSIVE

Relatively speaking, international experience indicates that tracking is very resource-intensive. The monitoring centre receiving the positioning information has to be staffed around the clock. Further, there are limits to the number of monitored individuals that a staff member can handle simultaneously. This is particularly true for monitoring that takes place in real-time, and hybrid monitoring, since every alarm has to be evaluated without delay and an adequate response initiated. In addition, there are the staff required to install and maintain the technical equipment and staff within the police or prison and probation services with special responsibilities for maintaining contact with those who are subject to monitoring and for following up on infringements.

Experiences from the Swedish use of stationary monitoring in place of short prison sentences (front door) and as intensive supervision during the final part of a long prison term (back door) is that one alarm in ten involves some form of actual breach of prescribed conditions.⁷ In the case of monitoring using tracking technology, the information flow is also affected by all of the technical hitches associated with the GPS-system. Every time the GPS-receiver fails to receive the necessary signals from the satellites, or is too far from the ankle-bracelet, every time the battery level gets too low or some other technical problem arises, the monitoring centre should receive an alarm. It is therefore reasonable to assume that the number of such alarms will be substantially greater than is the case with stationary monitoring.

PRIVATE ACTORS A COMMON ELEMENT IN MONITORING PROGRAMMES

Monitoring can be organised in different ways depending on the goals of the monitoring programme, the resources available and a given country's traditions in relation to the organisation of measures within the penal system. The private sector company that provides the monitoring equipment may for example also assume responsibility for monitoring and its installation, maintenance, and the task of sanctioning infringements etc.

The question of which actor should bear responsibility for responding to alarms relating to neglect or infringements of programme conditions may also depend on the objective of a specific monitoring programme. If the electronic monitoring constitutes a coercive criminal procedural measure or

⁷ Communication with Kjell Carlsson, the National Prison and Probation Administration.

sanction, it may be best to assign responsibility for the monitoring programme to the prison and/or the probation service. If, on the other hand, the primary objective is to reinforce restraining orders and protect a victim, it may be better to assign responsibility for this form of electronic monitoring to the police.

Tracking in the USA and Europe

As described in the previous chapter, electronic monitoring encompasses RF-based stationary technology, which registers a person's presence at or absence from a place specified in advance, and the GPS-technique that allows for a continuous positioning of the monitored individual.

At present, there is no collected information on the use of electronic monitoring in general, nor on the use of electronic monitoring in association with restraining orders in particular. It is therefore difficult to develop a precise concept of the extent of electronic monitoring internationally, or of the variations in its use.⁸ Marc Renzema & Evan Mayo-Wilson concluded recently that electronic monitoring is either in use or has been piloted on every inhabited continent.⁹ Approximately 100,000 people are currently being monitored electronically in the USA (accounting for approximately three per cent of the prison population). By the middle of 2004, over 150,000 people were estimated to have been electronically monitored in Europe.

The National Council's exposition of electronic monitoring shows that electronic monitoring is, for the most part, used as a means of providing suspected or convicted individuals with an alternative to time spent in custody or prison, or as a complement to probationary sentences. The use of electronic monitoring for protecting a person deemed to be at risk is rare. Even in these cases, however, the monitoring is being used as an alternative form of custody for an individual who is suspected or has been convicted of a crime.

Florida – the largest user of tracking

The majority of electronic monitoring programmes employ the stationary technique, and the use of tracking is still in its infancy. Florida, in the USA, was the first state to begin using tracking within a justice system framework in 1998. Florida remains the largest user, with 470 persons under surveillance at the same time.¹⁰ The technique is used first and foremost in relation to non-custodial sentences (probation) or parole releases from prison. In those cases where there is an identified victim in need of protection, exclusion zones may be established around the victim's home and place of work. The victim is also equipped with a pager with which he or she may be contacted if the individual being monitored should enter one of these zones. This bilateral monitoring is employed first and foremost when the individual being monitored has committed a sexual offence and has been prohib-

⁸ In the state of Washington, USA, work is currently underway to collect information on the use of electronic monitoring in the USA. This work is to be concluded no later than December 31st 2005.

⁹ Renzema & Mayo-Wilson (2005).

¹⁰ This figure relates to 30th June 2004.

ited from approaching previous victims by order of the court.¹¹ The initiative to use tracking in domestic violence cases is also taken, in South Carolina and Massachusetts for example.

Trial project in Great Britain

The first attempt at employing tracking on any larger scale within the framework of the justice system in Europe was initiated in Great Britain. Since September 2004, a trial project involving the monitoring of convicted persons by means of GPS technology has been underway in Greater Manchester, the West Midlands and Hampshire. The target group comprises people referred to as prolific offenders, and offenders sentenced for violent offences against women. In Greater Manchester, the target group also includes sex offenders. Monitoring constitutes a condition of either a sanction served within the probation service, or of a prison parole release. The objective of the monitoring is to ensure that the conditions associated with the probationary sentence or the parole release are followed. In the case of parole releases, monitoring may also follow the person's activities around the clock. The electronic monitoring may also be combined with prohibition to enter certain areas (an exclusion order), such as shopping centres, the neighbourhood in which the home of a previous victim is located etc. Both retrospective and hybrid monitoring are employed.¹²

New initiative in Spain

In October 2004, a new provision was adopted in the Spanish penal code (Código Penal), which allows the use of electronic monitoring in connection with restraining orders. The provision constitutes one of several measures adopted in Spain recently as a means of combating violence against women by men. It is estimated that the technique will be put into practice in Madrid during 2005. The reinforced restraining order constitutes a penal sanction for domestic violence that can result in a prison term of up to three years. In practice, this means that those most likely to become a subject of the monitoring programme are persons who would otherwise be at risk of receiving a prison sentence, but who have not previously been convicted of a crime. If the restraining order is breached, or if an individual refuses to use the monitoring equipment, the sanction is replaced by a term in prison. The woman involved must also accept that the subject is to be sentenced to the monitoring programme. The hope is that the system can be used to its full capacity within three years, and that 300 individuals then will be able to be monitored simultaneously.¹³

¹¹ Communication with Mr. Murray G. Brooks, Chief of Bureau of Community Programs, Florida Department of Corrections, USA. For further information, visit Florida department of corrections' website <http://www.dc.state.fl.us/pub/gpsrf/2004/index.html>.

¹² For further information, visit the Home Office's website <http://www.probation.homeoffice.gov.uk/files/pdf/EMT%20Guidance%20Doc.pdf>.

¹³ Communication with Mr. Alfredo Prada Presa, Vicepresidente Segundo, Comunidad de Madrid, Spain.

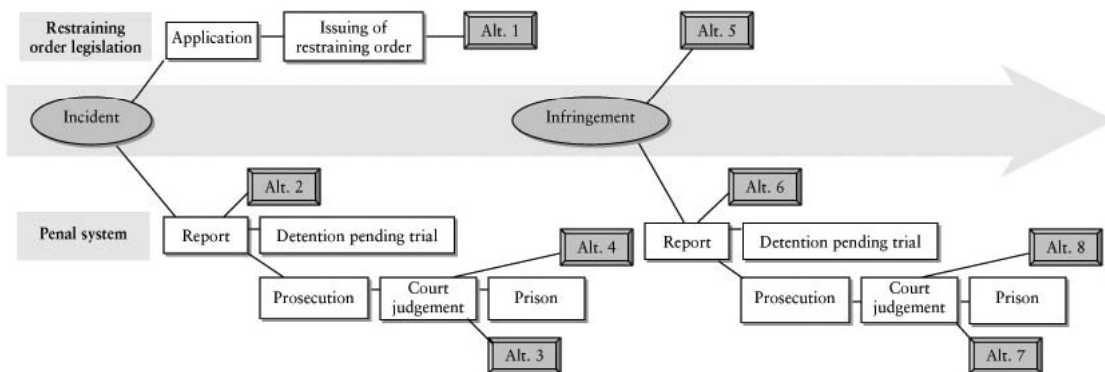
Legal considerations

When electronic monitoring is used in association with restraining orders in other countries, the monitoring constitutes a coercive criminal procedural measure, a penal sanction or some other legal consequence of crime. The objective is primarily to enable persons convicted of acts of violence against persons to be included in electronic monitoring programmes. Therefore, there is no obvious legal solution regarding the use of electronic monitoring for the purposes of crime prevention.

If electronic monitoring is to be used in conjunction with restraining orders, the point of departure must be that it meets requirements for protection of legal rights. In addition to technical and organisational considerations, it is therefore also essential to attend to the legal conditions for employing electronic monitoring as a means of reinforcing restraining orders. This chapter presents factors that should be taken into consideration when the intention is to use electronic monitoring for crime prevention. A total of eight alternative legal solutions are presented.

Eight legal alternatives

Two of the alternatives (numbers 1 and 5) lie within the framework of the Restraining Order Act. The remainder lie within the remit of the penal system.¹⁴



ALTERNATIVE 1. THE PRESCRIPTION OF ELECTRONIC MONITORING IN ACCORDANCE WITH THE RESTRAINING ORDER ACT

The first alternative involves the availability of electronic monitoring as an option that may be chosen within the framework of the Restraining Order Act. Special consideration is to be given to whether there is a substantial risk that the individual will act in breach of the restraining order.

¹⁴ Alternatives 1, 3-5 and 7-8 have previously been considered in the departmental memorandum entitled Ytterligare åtgärder för att motverka våld i nära relationer (Ds 2001:73).

ALTERNATIVE 2. ELECTRONIC MONITORING AS A COERCIVE CRIMINAL PROCEDURAL MEASURE

The second alternative does not include the prescription of electronic monitoring within the framework of the Restraining Order Act, but rather constitutes it as a special coercive criminal procedural measure. Here, monitoring is used when a person is suspected of having committed an offence and where the conditions required to issue a restraining order in accordance with the Restraining Order Act are met, but where the conditions required to place an individual in custody awaiting trial are not met. Therefore, monitoring becomes an alternative to detention on remand due to the re-offending risk.

ALTERNATIVE 3. THE PRESCRIPTION OF ELECTRONIC MONITORING IN ASSOCIATION WITH A NON-CUSTODIAL SENTENCE

Probation is a non-custodial sanction, which involves the convicted individual being placed under supervision in order to restrain him or her from continued involvement in crime. This third alternative involves the possibility of combining a probationary sentence with electronic monitoring. For such a combination to be an option, the conditions required to issue a restraining order must be met and the convicted individual must be deemed unlikely to act in breach of this order if electronic monitoring is prescribed.

ALTERNATIVE 4. ELECTRONIC MONITORING AS A SPECIAL LEGAL CONSEQUENCE OF CRIME

The fourth alternative involves the court making a decision to use electronic monitoring as a special legal consequence of the offence in connection with an individual being convicted of a crime. An order of this kind may be issued only if the accused is sentenced to a term in prison and the conditions required to issue a restraining order in accordance with Restraining Order Act are met. A further requirement is that given consideration for all of the circumstances in the case, there is a risk that the individual to whom the restraining order has been issued will act in breach of this order.

ALTERNATIVES 5-8. PRESCRIPTION OF ELECTRONIC MONITORING, , COERCIVE CRIMINAL PROCEDURAL MEASURE, SPECIAL LEGAL CONSEQUENCE OF CRIME, OR AS A PRESCRIPTION ISSUED IN CONNECTION WITH A NON-CUSTODIAL SANCTION FOLLOWING A BREACH OF A RESTRAINING ORDER

Alternatives 5-8 correspond to alternatives 1-4 but with the restriction that for electronic monitoring to be an option, the individual to be monitored must first have acted in breach of the restraining order.

Ensuring the protection of legal rights

EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

When questioning the use of electronic monitoring in connection with restraining orders has previously been discussed in Sweden, the difficulties associated with finding an appropriate solution to the legal issues involved

have been viewed as substantial. One of the reasons for this is that the monitored individual is required to be at home at certain times so that the technical equipment can be checked, i.e. it has been necessary to combine monitoring with a curfew. Restraining orders however constitute a preventive and protective measure that may be put in place even without a criminal offence having been committed. Introducing a restriction on an individual's liberty, without it having a basis in a criminal court judgement, was deemed to be incompatible with Article 5 of the European Convention of 4th November 1950 for the Protection of Human Rights and Fundamental Freedoms (hereafter simply referred to as the European Convention).¹⁵

Even though the technique has since been developed, it still requires that the individual being monitored will be subject to certain restrictions on their individual liberty. Further, the monitoring itself and also the installation of the equipment in the home and on the body must be regarded as a measure that infringes upon the personal integrity of the individual concerned. Therefore, electronic monitoring prescribed within the framework of the Restraining Order Act (alternative 1) with no link to the penal system, and without a requirement that it be linked to a criminal court judgement, could be perceived as being in contravention of the European Convention. If this is the case, it seems more reasonable to view alternative 5, i.e. where monitoring is prescribed in association with restraining orders following a breach of such an order and as being linked to a sanctionable act since the breach itself constitutes a criminal offence. Further, by acting in breach of the restraining order, the individual has shown that he is not prepared to comply with the order that has been issued, which may be interpreted as indicating that the order in itself was inadequate as a means of ensuring that the individual stays away from the person who needs protecting. A custodial sentence may then be the only alternative measure available.

A legal solution of this kind whereby detention is made possible for preventive purposes has not however been tested to date, and may be viewed as constituting a very far-reaching step. It is likely that a solution of this kind would also, upon closer scrutiny, be found to contravene the requirements of a link to a criminal court sentence set out in the European Convention. In all of the foreign programmes examined by the National Council, the electronic monitoring instead constitutes either a form of alternative coercive criminal procedural measure during the period leading up to the conclusion of the case in the criminal court, or a penal law sanction following a conviction in court.

MONITORING REQUIRES ADDITIONAL CUSTODIAL SANCTIONS - INCENTIVES

The complicity of the person to be monitored plays an important role in relation to the acceptance and implementation of electronic monitoring. The monitored individual is not only required to wear the equipment, but also to maintain it. This requires some form of incentive to encourage an individual to submit to monitoring and the restrictions it entails. It is

¹⁵ Justitiedepartementet, 2001.

probably unavoidable that such an incentive must in many cases be linked to the risk of having to submit to a less desirable alternative, and that this alternative will often involve a custodial sentence. This alternative must also meet the requirements of due process and of basic human rights and fundamental freedoms.

When electronic monitoring is used instead of a period in custody awaiting trial (alternatives 2 and 6) or as a form of sanction (alternatives 3 and 7), a custodial alternative exists automatically. If by contrast monitoring was used instead as a prescription in accordance with the Restraining Order Act based on an assessment of the risk that the individual to be monitored will act in breach of the order (alternatives 1 and 5), there is no less desirable alternative to fall back on. In this case, the absence of consent in itself must either be criminalised so that a custodial sentence could replace monitoring, or viewed as a reason for pre-trial detention. A solution of this kind is likely to require special consideration.

It should also be mentioned in this context that since an alternative custodial sentence is required in order to provide the individual with an incentive to participate in the programme, the person is in reality given an opportunity to make a choice. This might be perceived that electronic monitoring constitutes an “easy option” for the monitored individual and not a reinforcement of the restraining order – since he or she would otherwise have been subject to a term in custody. This could also affect the choice of legal solution, and the credibility of the monitoring programme.

MONITORING REQUIRES ADDITIONAL CUSTODIAL SANCTIONS - RESPONSE

Adequate and severe alternatives are required so that individuals are given an incentive to participate. The same should be true when an individual agrees to participate in a monitoring programme, but then subsequently fails to abide by the conditions laid down by the programme, or acts in breach of the restraining order. Therefore, the legal regulation of the monitoring programme must provide an adequate and proportional response both for relatively minor infringements of programme conditions and for tampering with the monitoring equipment, and also for breaches of the restraining order. In the international programmes studied by the National Council, systems of verbal or written warnings are used in connection with relatively minor infringements. For more serious infringements, the custodial options for which monitoring has constituted an alternative come into play. When electronic monitoring is employed within the framework of the penal system, it can quickly be replaced by a custodial placement if the individual being monitored shows signs that he or she is not giving the requisite respect for the conditions of the programme.

Effective targeting – monitoring those at greatest risk of acting in breach of restraining orders

IMPROVED TARGETING WITHOUT REQUIRING THAT AN ACT BE SANCTIONABLE...

As was noted earlier, the majority of the restraining orders are respected. It would therefore not be defensible to combine all restraining orders with electronic monitoring. The legal solution employed ought to serve as an effective means of making monitoring possible in cases where it is needed the most. The question then becomes that of deciding the basis for such an assessment. The most flexible system would be to conduct a risk assessment on the basis of all relevant circumstances, and with no requirement that a sanctionable act has been committed (alternative 1). Acts that are not of a sanctionable nature, but which nonetheless provide good cause for issuing a restraining order, may then provide the grounds for a decision on electronic monitoring, and a problem that might otherwise escalate may be prevented. If there is no requirement that a sanctionable act has been committed, there is no need to wait for criminal proceedings to be initiated. Electronic monitoring could also be used both before and after a judgement in the criminal court. As described earlier, however, proceeding in this way may lead to conflict with the European Convention.

One alternative that would allow for quick intervention would be the use of electronic monitoring in association with restraining orders constituting a coercive criminal procedural measure used where there is a suspicion that an offence has been committed (alternative 2). In this case, however, the possibility of intervening in connection with acts that are not sufficiently serious to be sanctionable disappears. In one way, therefore, this option may be seen as involving a disadvantage.

... BUT IN 130 CASES OUT OF 200, A CRIMINAL INVESTIGATION IS UNDERWAY

On the other hand, electronic monitoring should only be employed in cases where there is a substantial risk that the individual issued with the restraining order is likely to act in breach of this order. One circumstance that is often present when the risk for an infringement is judged to be high is that it can be established that a sanctionable act has been committed. The National Council's 2003 evaluation of the Restraining Order Act showed that of the 200 applications for restraining orders that were examined, a parallel offence report had been made and/or a criminal investigation initiated in 130. Thirty-nine per cent of these involved violent offences.¹⁶ Against this background, the use of electronic monitoring as a coercive criminal procedural measure may be regarded as appropriate. However, exclusively making use of this alternative would make it impossible to use electronic monitoring in cases where a court judgement has been passed and the penal sentence has been served. To be able to use electronic monitoring in cases

¹⁶ Brå, 2003.

where the need is greatest, a very flexible system would be required. A combination of possibilities within the framework of the penal system would be preferable.

REQUIRING AN INFRINGEMENT AGAINST AN EXISTING RESTRAINING ORDER WOULD PRODUCE LESS EFFECTIVE TARGETING

Consideration should also be given to the question of whether there should be a requirement that the individual intended for monitoring should have previously acted in breach of restraining order (alternatives 5-8). The advantage of such an alternative is that the individual subject to a restraining order has clearly indicated that he or she does not intend to act in accordance with this order. Requiring a prior infringement of a restraining order involves a number of disadvantages however. Amongst other things, there is no opportunity to prescribe electronic monitoring where other circumstances indicate that there is a substantial risk that the restraining order will be infringed. Having to “wait” for such an infringement to actually take place may also be counterproductive in relation to the symbolic value and credibility of the electronic monitoring programme.

ASSESSING ELIGIBILITY

Irrespective of how individuals most likely to breach restraining orders are identified, they will constitute a client-group that is likely to be very difficult to cope with. In order for an electronic monitoring programme to be credible, an assessment is therefore also required to determine whether it is possible for the individual intended for monitoring to act in accordance with the restraining order. An eligibility assessment of this kind is of course closely related to the question of whether or not the individual intended for monitoring consents to participate in the programme. Further, certain technical conditions must be met for monitoring to work, such as the monitored individual having a place of residence with access to a telephone. The attitude of the person to be protected towards electronic monitoring is also of central importance to the eligibility assessment.

Electronic monitoring in association with restraining orders in relation to other applications of the technique

In conclusion, a further question should perhaps be addressed, namely that of how this special use of electronic monitoring compares to other areas of application within the framework of the penal system. Framed somewhat differently, the question becomes that of how something can in one context be regarded as involving a serious deprivation of liberty whilst in another context it is viewed as no more than a means of assisting the monitoring of a crime prevention measure. It will not be possible to fully illuminate this question within the framework of the current document, however, and it should be subject to further discussion.

On the one hand, this discussion should proceed on the basis that electronic monitoring in itself constitutes neither a programme nor sanction within the framework of the penal system – but rather only provides a means of assistance. Depending on the conditions and other requirements combined with the monitoring, it can be made intrusive and severe in varying degrees. On the other hand, when electronic monitoring is used in cases where there is an identified victim in need of protection, additional special precautionary measures should be taken. Besides possibly leading to devastating consequences for a specific individual, a failure could have effects in other areas where electronic monitoring is used. The consideration of potential new areas for the application of electronic monitoring should therefore be approached with caution. Therefore, the discussion should also focus on the possible net-widening effects the expansion of the use of electronic monitoring into a new area of application may involve.

Trial project – in order to learn and avoid mistakes

As a means of protecting a specific victim, electronic monitoring has only been used in a small number of cases. It is however not uncommon for such projects to be of very limited scope, and no scientific effect studies have been published. To the knowledge of the National Council, monitoring has not been used in conjunction with restraining orders outside the penal system. Further, the technique is subject to a number of limitations, and it has proved very difficult to strike a balance between the effectiveness and credibility of the monitoring programme and the protection of the legal rights of the individual. Any failure could lead to devastating consequences for an individual victim.

If electronic monitoring is to be used to reinforce restraining orders, the point of departure must therefore be that this form of monitoring is first tested in the context of a trial project, which is evaluated before the question of whether to introduce a permanent programme of this kind is taken up for discussion. The evaluation should focus both on issues relating to the forms taken by the work, the subsequent effects, and also on questions directly related to the objectives and goals associated with the use of this technique. It is only on the basis of a well-conducted evaluation that the advantages and disadvantages of this type of monitoring can be understood, the effectiveness of various measures assessed, advances documented, economic decisions relating to the work taken, and unexpected effects identified.

To fully address these tasks, a trial project of this kind should be carried out in two stages; the first stage should involve evaluating the technique and the possible ways in which the monitoring may be organised. The second should study the effects of the programme with regard to any increase in levels of protection.

Evaluating the monitoring technique and organisational factors

Given the vulnerable position of the victims to be protected by this monitoring technique and the devastating consequences unsuccessful monitoring could bring, the monitoring technique and associated organisational factors should not be evaluated in a situation involving a vulnerable victim.

In addition, the question of which agency or actor should assume responsibility for the work should also be subject to evaluation. Electronic monitoring requires that substantial resources be allocated to supervise the monitoring and to ensure that everything required for a rapid and adequate response is in place. It is only once the technique and the surrounding organisation is producing good results that this form of monitoring should be tested in association with restraining orders. It then becomes particularly

important that from the very beginning, the programme formulated in such a way as to allow for its effects to be evaluated.

Evaluation of effects

EFFECTS OF ELECTRONIC MONITORING ARE UNCLEAR

As far as the National Council is aware, no studies have been published on the subject of whether the use of electronic monitoring in association with restraining orders helps prevent crime. We know, however, from studies that have evaluated other uses of electronic monitoring that there are very few cases where participation in an electronic monitoring programme has to be terminated as a result of breaches of programme regulations. In Sweden, the proportion of participants whose time in the programme is terminated for such reasons lies at approximately six per cent.¹⁷ These terminations are rarely the result of re-offending but are rather related to infringements of the conditions associated with participation in the electronic monitoring programme and primarily the prohibition of alcohol consumption. The degree to which monitoring regulations are not observed is of course closely associated with the target group being monitored, the conditions placed upon programme participation, the level of control and the level of tolerance of deviations from these conditions. A substantially higher level of non-observance may thus be expected when electronic monitoring is employed in order to reinforce restraining orders. Caution should therefore be exercised when it comes to drawing sweeping parallels between results from other areas where electronic monitoring has been used and the use of electronic monitoring in association with restraining orders.

Although the primary goal of using electronic monitoring in association with restraining orders is to deter the monitored individual from acting in breach of the restraining order during the monitoring period, it is of course also hoped that the monitored individual will refrain from approaching the person whom the restraining order is intended to protect, even subsequent to the period of monitoring. However, one review of the international research into the use of electronic monitoring in connection with the transition from a long prison term to life in the community on the one hand, and its use in place of a short prison term on the other, showed that at present, there is no evidence to suggest that electronic monitoring can be associated with any kind of general increase or decrease in levels of re-offending in comparison with the alternatives that have been studied.¹⁸ In cases where positive effects on re-offending have been identified, the electronic monitoring programme has included a prohibition on alcohol consumption, for example, or conditions related to employment, participation in treatment or other programmes intended to influence behaviour.

¹⁷ Brå, 2005b.

¹⁸ Renzema & Mayo-Wilson, 2005.

MORE TYPES OF EFFECT SHOULD BE EVALUATED

If electronic monitoring is introduced in association with restraining orders, an evaluation should focus on a number of different effects. What is of most interest is of course being able to evaluate the extent to which electronic monitoring has allowed for the detection and prevention of physical breaches of the restraining order. It is also of interest to look at other effects of this monitoring, such as whether it has led to an increase or decrease in other forms of infringement. The long-term effects of monitoring are particularly important. In addition, attention should also be paid to the perceptions of the person protected by the restraining order, and also to those of the monitored individual.

Measures should be taken to facilitate the collection of the information needed for evaluation and also to ensure that the programme is organised to allow for the use of random samples and/or control groups, as soon as the planning of the monitoring programme is initiated. There are also concerns that amongst other things, the requirements of proportionality and the suitability of individual cases will affect the number of cases that may be appropriate for inclusion in the trial project. Special consideration should therefore be given to the question of the length of the trial project.

THE OBJECTIVE IS TO INCREASE THE LEVEL OF DETECTION AND DECREASE THE NUMBER OF INFRINGEMENTS

Electronic monitoring may lead to the detection of a larger number of infringements. This is true of both actual breaches of a restraining order and also of failure to follow the prescriptions of the monitoring programme itself, such as charging the equipment's batteries, being at a certain place at a certain time, failing to correctly position the receiver when using the GPS equipment etc. Therefore, even if the objective is to reduce the number of infringements, the use of electronic monitoring will probably in actual fact lead to an increase in the number of infringements that are detected. This factor must be taken into consideration when establishing targets for the programme. From a short-term perspective, the goals might include increasing the number of detected infringements, and bringing forward the point at which an intervention is made in connection with such infringements. Reducing the number of infringements should then be a long-term goal. This should also influence a trial project using electronic monitoring in connection with restraining orders.

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