

Digital Domestic Abuse: The need for International Laws and Protections

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Partner David Hodson OBE draws attention to the urgent need for international laws for cross-border recognition and enforcement of domestic violence orders, particularly in the digital context.

Executive summary

There is urgent need for cross-border protection from digital domestic abuse. Existing laws in respect of cross-border domestic abuse protections are patchy, confined to a few countries and relatively rarely enforced. Specifically, they anticipate domestic abuse will be of a physical or verbal threatening nature. However domestic violence or other physical domestic abuse is often accompanied by, or just is, digital abuse of various forms. Bullying, stalking and other domestic abuse is increasingly found online. This is sometimes by the perpetrator from the safety of their home, their keyboard, in another country in circumstances where the parties may have lived abroad or met abroad or have other international connections. National protection orders are powerless. But it is domestic abuse all the same. International laws are needed to give cross-border protection through recognition and enforcement of orders. This article looks at the present position and what is needed.

The problem

A domestic protection order is made by the courts in one country with the intention of having effect in that country. Unless exceptional, it has no cross-border reach. If there is a breach of the order and the perpetrator leaves the country and subsequently returns, he or she will then be liable for enforcement action. But being outside the country where the order was made is invariably sufficient to avoid the effectiveness of the order. Countries with open land borders are particularly prone to perpetrators fleeing across the border, perhaps even living on the other side of the border with the victim nearby albeit separated by an open border. Even so, the victim has the benefit of a protection order with the opportunity of the police services coming to their aid if the perpetrator physically returns, comes close to the victim if there is a zonal order, so that there can be enforcement and appropriate protection.

This is not possible when the domestic abuse is online or in any other digital fashion. Yet this is now the increasing experience either solely or accompanying other domestic abuse. Indeed, where the parties are geographically separated, the abuse is far more likely to be of a digital form.

New research was conducted by the Molly Dragiewicz and Bridget Harris from Queensland University of Technology^[1] in a study funded by the Australian Communications and Consumer Action Network (ACCAN) and dated June 2019. They found that 100% of survivors abused by an intimate partner reported tech abuse began or escalated at separation. It was found to be a common complaint of those who had experienced coercion and control in domestic relationships. It could include tracking devices, hacking into social media accounts, obvious monitoring of social media presence including with other people and continued bullying through digital messaging.

They found domestic violence had significant social and economic costs each year in Australia. Information and communications technologies (ICTs) played an increasingly important role in this abuse. ICT security and privacy were essential to domestic violence victims but are often compromised.

They said of course that digital technologies played an increasingly important role in everyday life. The ubiquity of these technologies, combined with factors like with GPS tracking, cloud-based storage, and platform integration, presented significant challenges to personal security and privacy. This was particularly true for domestic violence survivors. The control and fear that characterise experiences of domestic violence had an expanding technological dimension as perpetrators weave technology into patterns of abuse. It is certainly the case that ICTs offered domestic violence survivors' vital opportunities for communication, help-seeking and support. But domestic violence victims are a uniquely vulnerable population of consumers who face risks including loss of access to and control of their telecommunications accounts, privacy rights, personal security, and physical safety when technology is abused. This study extends the emerging research on technology-facilitated coercive control together deeply contextualised qualitative evidence from survivors. The findings allowed the authors to better understand technology use in the context of domestic violence, the resources currently available, and how to improve responses to this type of abuse. Their findings indicated that domestic violence created an intimate threat model requiring innovative cybersecurity responses. This exploratory study elicited four key recommendations for future policy and practice. These were more training and education about technology facilitated coercive control and tools to combat it. Enhanced affordability of telecommunication devices and service for domestic violence survivors. Expansion of existing resources. Regulations require monitoring and enforcement.

This is a vital study looking at the impact of technology on domestic violence and protection and help for the victims.

On 2 Feb 2020, the US Norton LifeLock^[2] released their findings from its Online Creeping Survey^[3] after interviewing more than 2,000 US adults which revealed the

following:

- 46% of Americans admit to 'stalking' an ex or current partner online by checking in on them without their knowledge or consent.
- The most common forms of online stalking included:
 - Checking their current or former partner's phone (29%)
 - Reviewing their partner's search history on one of their devices (21%) without their knowledge or consent.
- Nearly one in ten Americans created a fake profile to check on ex or current partners on social media (9%) or tracked their physical activity via their phone or health app (8%).
- 10% admitted to using an app to monitor an ex or current partner's text messages, phone calls, direct messages, emails and photos, with men being much more likely than women (15% versus 6%) to engage in this behaviour.

Online creeping, an Americanism meaning to follow someone persistently or stealthily online, is typically benign behaviour. However, when that becomes a pattern of behaviour or escalates to using the same technology and tactics to harass someone online, it is cyber stalking; in a domestic relationship, many family lawyers would call it domestic abuse. It can take many forms, but the common denominator is that it is unwanted, obsessive and sometimes illegal.

The authors of the report identified since 2017 more than 1,000 apps that could allow someone to 'stalk' current or former significant others and detected roughly 1,250 infected mobile devices monthly.

It was also found the differences in behaviours and attitudes between men and women were pronounced. Overall, 35% of Americans said they don't care if they are being stalked online by a current or former partner as long as they are not being stalked in person, but men were far more likely to agree with this sentiment (43% versus 27% of women). Men are more likely than women to track a current or former partner's location (20% versus 13%) and physical activity (11% versus 6%) online. Men are more likely than women to condone 'online stalking' behaviour if one or both partners have cheated or are suspected of cheating (34% versus 27%).

Perhaps predictably, younger adults are far more likely to engage in online stalking behaviour and believe it to be harmless. 65% of 18 - 34 year olds and 68% of 35 - 44 year olds say they have checked in on a current or former significant other while only 53% of 45 - 54 year olds, 25% of 55 - 64 year olds, and 10% of those 65 and older report such behaviours. Additionally, nearly half of Americans aged 18 - 34 (45%) find online stalking to be harmless (compared to 27% of 45 - 54 year olds, 19% of 55 - 64 year olds and 13% of those 65 and older).

There are other studies along similar lines around the world.

In this context, domestic abuse needs protection in the online digital environment. There must be a protection which, within the digital environment, doesn't know, and is not defeated by, national borders. It must protect even when the domestic abuse is occurring from abroad. This is a high priority and one which must be tackled by international and national legislatures together.

Existing International Laws

These are primarily twofold, and both are in Europe, where the concern about open land borders is great. They are from the EU and the Council of Europe, respectively.

The EU has carried out a significant amount of work in respect of domestic abuse protections. The Lisbon Treaty created explicit EU competence to legislate on the rights of victims of crime, to include domestic violence. The European Parliament in November 2009 passed a resolution on the elimination of violence against women calling on member states to improve their national laws and policies to combat all forms of violence against women. The EU created the incredibly impressive Daphne program, awarding substantial funding for information, research and education.

The EU then passed separate Directive and Regulation. The Directive^[4] deals with cross-border recognition and enforcement of criminal law measures in respect of domestic violence, encouraging member states to bring into force their own legislation for implementation. The Regulations^[5], binding on member states, provide for the cross-border recognition and enforcement of civil domestic protection orders made in a member state. There is intergovernmental assistance. Legal aid is available. All rights of enforcement available in the state in which the enforcement is to occur can be used by the victim even if not available in their own country where they obtained the original protection order.

The protection measure is defined^[6]. It prohibits or regulates first the entering of a place where the protected person resides, works, regularly visits or stays, secondly contact in any form including by telephone, electronic or ordinary mail, fax or other means and thirdly approaching closer than a prescribed distance, a so-called zonal order. It is of course the second which is crucial in the context of digital domestic abuse. So, this EU law gives digital domestic protection. It can prevent various forms of digital abuse, stalking and bullying. It would be applicable against a perpetrator in another member state.

When the UK leaves the EU finally at the end of the transition period, presently 31 December 2020, this EU law will no longer apply e.g. against perpetrators based in the UK for the protection of victims in the EU or against perpetrators in the EU for the protection of UK victims. However at an early stage in the negotiations on leaving the EU, the then Prime Minister, Theresa May, said that the UK would continue to recognise and enforce domestic protection orders made in the EU notwithstanding that the UK was no longer a party to this EU law. This commitment has since been embodied in UK law^[7]. She invited the EU to reciprocate but tragically they have not thus far done so nor indicated they will do so, and they are urged to do so before the end of December 2020.

The other provision is the Istanbul Convention of 2011^[8] by the Council of Europe, far broader membership than the EU. This is akin to an EU Directive in as far as it strongly encourages signatories to bring forward their own domestic legislation. It has been signed by 45 countries and the European Union. By its terms, it limits protection only to women. A number of countries including the UK have made clear that their own response will be gender neutral. One of the potential difficulties is that the Istanbul Convention anticipates orders will have an extraterritorial effect, that is any order will take effect anywhere in the world. Legislatures are shy and nervous of doing so. This is completely different to an order having cross-border recognition and enforcement by agreement with the other country. An order with extraterritorial effect is independent of any agreement with the country where the order is intended to be effective. The UK has introduced such legislation in the context of FGM and forced marriage, being justified as exceptional remedies for exceptional problems. It is argued by some that domestic violence should be of a similar category.

The concern about a country making an order intended to have effect in another country which may not have any bilateral or multilateral agreements with the first country is that it can cause significant jurisdictional and jurisprudential difficulties and comity issues between the countries. The preferred solution is multinational agreements. It is to this which the international family law community must commit and work for effective cross-border laws.

Conclusion

This article is being written during the UK lockdown due to the COVID 19 virus. When confined to homes, the digital life has increased exponentially for most people. The amount of domestic abuse has increased^[9] with many governments providing significant funding and remedies. But the digital abuse will also have increased. Much will have been purely national. Some undoubtedly would have been cross-border. There are now a huge number of families where the former spouses, civil partners or cohabitants are in separate countries, perhaps with children with one parent and with the other parent having difficulty seeing or having any contact with the children. The extent of the cross-border digital domestic abuse is significant and yet national courts are powerless.

The wheels of international legislation turn very slowly. Unless an organisation such as the EU can impose laws on reluctant member states, these wheels turn even more slowly. Yet so many countries around the world have made really meaningful commitments to protect victims of domestic violence with appropriate remedies, availability of refugees, involvement of police and other enforcement agencies, sophisticated use of digital analysis of online stalking and bullying and many family court measures. But national legislatures can no longer take comfort with laws which stop at national borders. National family justice systems are having to deal with domestic abuse in the international context including digital domestic abuse.

There must be early introduction and implementation of quick and effective measures for international laws for cross-border domestic abuse protection, including in the digital context, by way of mutual recognition and enforcement of cross-border protection orders.

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[1] Dragiewicz, M., Harris, B., Woodlock, D., Salter, M., Easton, H., Lynch, A., Campbell, H., Leach, J. & Milne, L., (2019). Domestic violence and communication technology: Survivor experiences of intrusion, surveillance, and identity crime, Australian Communications Consumer Action Network, Sydney. Digital Domestic Abuse

[2] Which would describe itself as a global leader in consumer Cyber Safety

[3] https://investor.nortonlifelock.com/news/default.aspx

[4] <https://investor.nortonlifelock.com/About/Investors/press-releases/press...>

[5] Directive 2011/99 on the European Protection Order in Criminal Matters

[6] Regulation (EU) No. 606/2013 Mutual Recognition of Protection Measures in Civil Matters with an equivalent for civil partnerships

[7] Art 3.1

[8] The Jurisdiction and Judgements (Family) (Amendments etc) (EU exit) Regulations 2019

[9] CETS 210

[10] During the coronavirus lockdown, there was a dramatic increase in calls to domestic violence services. Refuge, the UK domestic abuse charity, reported a 700% increase in calls to its helpline in a single day. The UN chief Antonio Guterres said that there were measures needed to address a “horrifying global surge in domestic violence”. It's not clear how much of this was digital which will need further studies. But undoubtedly there has been a frustration where parents, normally seeing their children from time to time through international travel, have been unable to do so.

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