

**Replacing the ASBO:
An opportunity to stem the flow into the criminal justice system**
Andrew Millie

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Professor Andrew Millie
Department of Law and Criminology
Edge Hill University
Ormskirk, Lancashire, L39 4QP
Andrew.millie@edgehill.ac.uk

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Introduction

Over the past two decades there has been growing political and legislative emphasis in Britain on tackling antisocial behaviour. This essay outlines the expanded focus on antisocial behaviour which has resulted in a confusing array of enforcement powers, the most high profile of which was the Antisocial Behaviour Order (ASBO). Evidence is presented that a consequence of this expansion has been an increased flow of people – especially young people – into the criminal justice system and, ultimately, into prison. At a time when the prison population is at a record high the wisdom of sending people to prison for committing antisocial behaviour (rather than serious criminality) is questioned. In 2011 the Coalition government outlined proposals for a new approach to antisocial behaviour that would see legislative powers simplified and the ASBO replaced. In May 2012 the antisocial behaviour White Paper entitled *Putting Victims First* (Home Office, 2012) was published. The proposals outlined in the White Paper are for England (and in some instances also apply to Wales).

In this essay it is contended that the 2012 White Paper and the replacement of the ASBO could be an opportunity to stem the flow of people into the criminal justice system for committing antisocial behaviour. There are grounds for optimism; but the essay also highlights areas of concern – in particular, with proposals for speedier and easier sanctions and increased discretionary powers that may result in further criminalisation of 'suspect' populations. The essay concludes by outlining priorities for policy and research.

Antisocial behaviour has grown as an agenda, especially since the introduction of the ASBO with the Crime and Disorder Act 1998. However it is clearly not a new problem, with records of the types of behaviours currently labelled as 'antisocial' – nuisance, unrest, incivility, persistent petty offending etc. – stretching far back into history (e.g. Cohen, 1972; Elias, 1978; Pearson, 1983). As Smith et al. (2010:1) note, 'there has always been talk of poor public behaviour, of increasingly unruly streets and of the decline and fall of good manners.' Yet as a political construct, antisocial behaviour is a recent phenomenon (Burney, 2005; Millie, 2009a), occurring initially within the area of social housing policy but expanding substantially until, according to Crawford (2009:5), 'education, parenting, youth services, city centre management, environmental planning, social housing and traditional policing

increasingly [could all] be said to be governed through a preoccupation with “antisocial behaviour”.¹ This expansion was tracked by Waiton:

...in the 1980s a couple of articles a year were printed in the UK discussing antisocial behaviour, whereas in January 2004 alone, there were over 1000 such articles. Not even the most pessimistic social critic would suggest a parallel increase in problem behaviour.

Waiton (2005:23)

Indeed, by the mid-2000s Britain was described as an ‘ASBO Nation’ (Millie, 2008; Squires, 2008).

The origins of antisocial behaviour as a legislative and policy focus lie with the Public Order Act 1986 introduced by the then Conservative government. The label antisocial behaviour was not used in this instance; however the Act talked of words or behaviour likely to cause ‘harassment, alarm or distress.’ The first time the term ‘antisocial behaviour’ appeared in legislation was in the Housing Act 1996 (again, brought in by the Conservative government of the time) where it was equated with ‘nuisance or annoyance.’ For New Labour’s Crime and Disorder Act 1998, antisocial behaviour had become defined as ‘harassment, alarm or distress’:

...that the person has acted...in a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself.

(Crime and Disorder Act, 1998, section 1(a))

The term ‘harassment’ had only recently been covered by criminal legislation under the Protection from Harassment Act 1997, yet was seen as a constituent element of antisocial behaviour. The Crime and Disorder Act definition formed the legal basis for ASBO applications despite being both broad and vague. The vagueness was seen by some as an advantage. For instance, according to influential New Labour government advisor Louise Casey¹ (2005), ‘the legal definition of antisocial behaviour is wide. And rightly so.’ That said, this lack of clarity has also been criticised widely (Ashworth et al., 1998; Ramsey, 2004; Macdonald, 2006; Millie, 2009a), as what causes one person harassment, alarm or distress might be different for someone else, and what is considered to be antisocial may change depending on context. For the legal definition of antisocial behaviour the phrase ‘likely to cause’ emphasises the subjectivity of the behaviour in question. Various influences on perceptions of antisocial behaviour have been suggested, including: direct or personal experience (Mackenzie et al., 2010); media influence (Wisniewska et al., 2006); location (Millie, 2007); experiences and/or perceptions of harm (von Hirsch and Simester, 2006); expectations for the look and feel of public spaces (Millie, 2008) and moral beliefs concerning civility and respect (Millie, 2009b).

Behaviours commonly regarded as antisocial have been divided into three overlapping types (Millie et al., 2005:9); these being ‘interpersonal or malicious’ (such as threats to neighbours or hoax calls), ‘environmental’ (such as graffiti, noise nuisance or fly-tipping) and ‘restricting

¹ Casey went on to head New Labour’s antisocial behaviour-centred Respect Task Force (Millie, 2009b). Although New Labour left office in 2010, Casey’s influence continues, initially employed by the Coalition as ‘victim’s tsar’, but more recently in 2011 to head the government response to the August 2011 riots and looting in a somewhat stigmatising Troubled Families Programme (see Casey, 2012).

access to public spaces' (such as intimidation by groups of young people on the street, aggressive begging, street drinking and open drug use). The same categories are adopted in the current White Paper (Home Office, 2012:14), simplified as: personal threat antisocial behaviour, environmental antisocial behaviour and public nuisance antisocial behaviour. They are behaviours on the boundaries of criminality including some obvious crimes (e.g. drug use) and some less clearly criminal behaviours, perceived as antisocial (e.g. being intimidated by groups of youths). What seems to make these behaviours antisocial is their repetition and cumulative impact (Campbell, 2002; Millie et al., 2005; Bottoms, 2006).

New Labour legislation and policy history

The New Labour government introduced a wide range of measures designed to tackle antisocial behaviour. The measures included what the 2012 White Paper (Home Office, 2012:23) has called an 'alphabet soup' of legislative powers, including ASBOs; DOs (Dispersal Orders); POs (Parenting Orders); ASBIs (Antisocial Behaviour Injunctions); DPPOs (Designated Public Place Orders); FPNs (Fixed Penalty Notices); PNDs (Penalty Notices for Disorder) and NANs (Noise Abatement Notices) etc. New Labour actively promoted the use of these powers through centrally coordinated campaigns and taskforces including: the Together campaign (2002–6); Respect Taskforce (2006–7); Youth Taskforce (2007–9); and the Tackling not Tolerating campaign (2009–10). The initial focus for New Labour policy was to promote use of the various enforcement tools. As Tony Blair (2003) put it: 'We've given you the powers, and it's time to use them.' It was the language of action, of getting things done (Millie et al., 2005).

For Blair (2003) antisocial behaviour was 'for many the number one item of concern right on their doorstep.' Yet there is evidence that the problem was overestimated (Millie, 2007). While antisocial behaviour could certainly be a major concern for some and was apparent in many deprived and/or inner city neighbourhoods, for the rest of the country it was less of an issue. According to the British Crime Survey² only a minority saw antisocial behaviour as a major problem where they lived. When asked about seven different measures for antisocial behaviour, in 2001–2 only 18.7 per cent perceived them to be a 'fairly big' or 'very big' problem in their area. In 2002–3 this was up to 20.7 per cent, but by 2010–11 had fallen to 13.7 per cent (Innes, 2011). Clearly, for the majority, antisocial behaviour was not the major concern we had been told. Furthermore, New Labour's focus on enforcing standards of behaviour through legislation may have missed the public mood. In a national survey of public opinion on antisocial behaviour respondents were asked:

If there was more money to spend in your local area on tackling antisocial behaviour, should this be spent on tough action against perpetrators, or preventive action to deal with the causes?

(Millie et al., 2005:13).

Only a fifth opted for 'tough action' whereas two-thirds chose prevention (and 11 per cent said both prevention and tough action). The conclusion of this research was that there needed to be a more balanced approach to tackling antisocial behaviour and that enforcement should only be part of any solution.

Since the initial push for enforcement there has been increasing awareness among many local practitioners that a balanced approach is preferable (Hodgkinson and Tilley, 2007; Clarke et

² The BCS has since been more accurately renamed as the Crime Survey for England and Wales (CSEW).

al., 2011; Hoffman and Macdonald, 2011). Often a tiered approach is adopted, with the ASBO regarded as a last resort (Millie, 2009a; Hoffman and Macdonald, 2011; Home Office, 2011a; Crawford et al., 2012). Central government was also shifting in its view that enforcement was the best way to deal with antisocial behaviour. For New Labour, Ed Balls stated:

It's a failure every time a young person gets an ASBO. It's necessary – but it's not right ... I want to live in the kind of society that puts ASBOs behind us.

(cited in Blackman, 2007)

Yet, with this softer rhetoric came parallel talk of getting tough with perpetrators. Soon after Ed Balls' statement, the New Labour government was again declaring it would get tough:

We are ... sending a clear message that the behaviour of the minority will not be tolerated at the expense of the majority. All young people should play by the rules and will be dealt with appropriately when they do not.

(HM Government, 2008:17)

When the current Coalition government took office in 2010 it was clear that a new approach to antisocial behaviour was to be adopted (Millie, 2011). The Home Secretary Theresa May (2010) declared that 'it's time to move beyond the ASBO'; and in the White Paper the need for a balanced approach was acknowledged:

Practitioners have told us what works in tackling antisocial behaviour... they know that a balanced response, incorporating elements of both enforcement and prevention is essential...especially for the most persistent perpetrators.

(Home Office, 2012:23)

Yet, emphasis was also on speedier justice and what the Home Secretary had earlier called '[s]impler sanctions, which are easier to obtain and to enforce' (May, 2010). There would also be increased police discretion.

Fitting in with broader 'big society' and 'localism' agendas (e.g. Newlove, 2011), the Coalition promised greater 'bottom-up' influence on policy, with local communities having greater say. For Theresa May (2010), 'as with so much [New Labour] did, their top-down, bureaucratic, gimmick-laden approach just got in the way of the police, other professionals and the people themselves from taking action.' In February 2011 the Coalition presented their plans for consultation, followed by the White Paper in May 2012.

The ASBO

At the time of writing, in England and Wales an ASBO can be granted for anyone aged ten or above.³ The ASBO acts as a two-step prohibition: in the first instance it is a civil order, yet breach of the order is a criminal offence (Simester and von Hirsch, 2006). Following House of Lords' ruling⁴, a criminal standard of proof is required despite the ASBO being a civil order (Macdonald, 2003). That said, hearsay evidence is also admissible. The mixing of civil and criminal law was controversial from the start, with, for example, Gardner et al. (1998) calling it 'hybrid law from hell.' The ASBO was introduced as civil law as the New Labour

³ In Scotland it is anyone aged 12 or above.

⁴ Clingham and McCann [2002] UKHL 39.

government saw the criminal justice system as slow and ineffective (Millie, 2009a). It was assumed the complexities of the system could be bypassed, leading to speedier justice. A major concern was that by making breach a criminal offence the universality of criminal law was ignored.

Despite being in response to behaviour deemed to be antisocial, the ASBO was designed to prevent future antisocial behaviour (rather than to punish the past). In order to prevent behaviour, powerful restrictions on liberty are given in the form of various geographical, temporal, non-association, and other behavioural conditions on each order issued. For instance, an ASBO recipient may be restricted on what streets can be visited and at what times. There may be restrictions on whom the recipient may associate with, or maybe on using certain forms of public transport if this is relevant to patterns of antisocial behaviour. The result is that using public transport, visiting certain streets or being out after a certain hour becomes criminalised for that individual when for the rest of society it is entirely legal activity. According to the European Commissioner for Human Rights (Gil-Robles, 2005), ‘such orders look rather like personalised penal codes, where non-criminal behaviour becomes criminal for individuals who have incurred the wrath of the community.’ The significance of these ‘personalised penal codes’ is that the punishment for breach is such that adults can receive up to five years in prison, and those under 18 can be given a Detention and Training Order of up to two years. The high maximum tariff has attracted criticism for being disproportionate to the original behaviour (Ashworth, 2005; Hewitt, 2007). Someone on an ASBO can be imprisoned for behaviour that is legal for everyone else.

Following the Police Reform Act 2002 and the Serious Organised Crime and Police Act 2005, the scope of the ASBO was expanded with the introduction of interim-ASBOs that acted as a stop-gap measure put in place prior to a full hearing, and ASBOs granted post-criminal conviction in order to prevent future criminal behaviour (also known as Criminal ASBOs or CrASBOs). In effect, three main forms of ASBO were created:

- interim ASBOs
- standalone ASBOs (also known as ASBOs on application)
- post-conviction ASBOs, or CrASBOs (there are also interim CrASBOs).

The ASBO system is supposed to include support for the perpetrator, especially if they are a young person. Following the Criminal Justice Act 2003, courts are obliged to grant an Individual Support Order (ISO) alongside an ASBO for young people aged between 10 and 17 years providing certain conditions are met. Yet since 2004, only 11 per cent of ASBOs granted to those aged 10–17 have had an ISO attached (Home Office, 2011b).

The ASBO and imprisonment

As noted in the introduction, the extent that ASBOs have led to imprisonment is considerable (Home Office, 2011b). Evidence of this is given in Table 4.1 which shows that between 2000 and 2009, 59 per cent of adults who breached their ASBO were given custody. This represented over 4,000 people entering an already overcrowded prison system. In terms of young people on ASBOs, according to the Sentencing Guidelines Council (2009:10), ‘in most cases of breach by a young offender convicted after a trial, the appropriate sentence will be a community sentence.’ However, while 46 percent of 10–17 year-olds received a community sentence as their maximum penalty, 40 percent received custody for breach of their ASBO. This amounted to over 1,300 young people entering custody. The average sentence length for juveniles given custody was 6.3 months and 4.9 months for adults.

Table 4.1 ASBOs proven at court to have been breached by type of sentence received and age, 1 June 2000* to 31 December 2009

Age at appearance in court		By severest type of sentence received during period					Total ASBOs breached
		Discharge	Fine	Community sentence	Custody	Other**	
10-17	N=	83	158	1,505	1,332	220	3,298
	%	3	5	46	40	7	
18+	N=	114	558	1,215	4,187	1,008	7,082
	%	2	8	17	59	14	
All ages	N=	197	716	2,720	5,519	1,228	10,380
	%	2	7	26	53	12	

Source: Home Office (2011b) Anti-Social Behaviour Order Statistics - England and Wales 2009, Table 12
 Note: Figures for England and Wales - excludes data for Cardiff magistrates' court for April, July, and August 2008

*104 ASBOs were issued prior to June 2000 - however, full details of these were not recorded

** 'Other' includes: one day in police cells, Disqualification Order, Restraining Order, Confiscation Order, Travel Restriction Order, Disqualification from Driving, and Recommendation for deportation and other miscellaneous disposals

It is possible that some of these breaches were for criminal activity that would ordinarily receive a custodial sentence, especially following the introduction of post-conviction ASBOs or CrASBOs. In 2002 just one CrASBO was issued; however from 2003 to 2009, on average 62 per cent of ASBOs issued were CrASBOs. From 2002 to 2009 there were over 900 standalone ASBOs per year and 1,600 CrASBOs per year (Home Office, 2011b). From the available data it is not known which form of ASBO is more likely to be breached, and what the breach is for.⁵ That said, a survey of Youth Offending Teams by Brogan and PA Consulting (2005) provides some limited information on reason for breach. According to this survey, for young people on ASBOs, 'in terms of the named reasons, the principle restrictions breached [were] non-association and the geographic restrictions' (Brogan and PA Consulting, 2005:26). What the available evidence shows is that many ASBOs were being breached and a large proportion of these breaches resulted in custodial sentences. Furthermore, many breaches were for behaviours that would otherwise be non-criminal (such as breaking non-association and geographic restrictions).

Criminalising the comparatively trivial and trivialising the seriously criminal

The imprisonment of people for behaviour that is legal for the rest of society leads to some confusion over seriousness of offences. Furthermore, the use of ASBOs and CrASBOs to cover a range of behaviours from the upsetting (but not criminal) through to the seriously criminal has stretched the term 'antisocial behaviour'. At its extremes 'antisocial behaviour' has been used to describe littering through to serious harassment and violence. In effect, the term criminalises the comparatively trivial yet also trivialises the serious criminal (Millie, 2009a).

⁵ Breach could be for breaking ASBO conditions and/or committing a criminal offence.

In media and political discourse two cases are frequently cited as examples of how serious a problem antisocial behaviour is; yet both are examples of serious harassment and criminality and perhaps ought not be seen as merely 'antisocial' behaviour. These are the cases of Garry Newlove and Fiona Pilkington. In 2007 Newlove was murdered after he confronted a group of young people who had been vandalising his car. The vandalism was the type of behaviour often regarded as antisocial behaviour, although also criminal damage. The subsequent murder was clearly something more serious. In the case of Fiona Pilkington, she and her family had been repeated targets for harassment and intimidation, with 33 related calls to local police from 1997 to 2007 – with calls coming from Fiona Pilkington, her mother and from other local residents (IPCC, 2009:23). The police classed most of these incidents as antisocial behaviour or assault. Many were targeted at Pilkington's disabled daughter. According to a typical police incident log for 24 June 2004:

The police received a call from Fiona Pilkington who reported an ongoing problem with local youths ... who were currently outside her house and were taunting her 15 year old disabled daughter. Fiona Pilkington informed the call taker she had asked the youths to move on but was verbally abused, one youth was carrying a house brick and she was unsure of the youth's intentions.

(IPCC, 2009:41–42)

In 2007 Fiona Pilkington killed herself and her disabled daughter. The harassment that led to this incident was reported as antisocial behaviour (e.g. *Daily Mirror*, 2009) and soon after the inquest the then Home Secretary for New Labour, Alan Johnson, stated:

Fiona Pilkington and her daughter weren't rescued and despair led to the terrible events we've been hearing about. It's an exceptional case but it's one that should never have happened...this case tragically exposes the insufficient response to public anxiety that still exists in some parts of the country and we need to guarantee consistent standards for dealing with antisocial behaviour everywhere.

(Johnson, 2009)

Rather than describing such cases as antisocial behaviour, they ought to be seen as the serious criminality that they are – in the Pilkington case, criminal harassment.⁶ Furthermore this is the kind of case that ought to be flagged as 'disability hate crime' (IPCC, 2009). According to the Crown Prosecution Service (2007:7) disability hate crime is defined as '...any incident, which is perceived to be based upon prejudice towards or hatred of the victim because of their disability or so perceived by the victim or any other person.'

Politicians still link these cases to antisocial behaviour. For example, the Coalition Home Secretary Theresa May has cited both the Newlove and Pilkington cases to demonstrate that antisocial behaviour can have serious consequences:

Antisocial behaviour ruins neighbourhoods and can escalate into serious criminality, destroying good people's lives. People like...Garry Newlove, who was attacked and brutally murdered after having the courage to confront a group of drunken vandals. People like Fiona Pilkington, who was terrorised and tormented by a gang of youths

⁶ The 1997 Protection from Harassment Act has already been mentioned.

for many years, crying out for help on no fewer than 33 occasions before, finally, she could take no more.

Theresa May (2010)

Fortunately these cases are uncommon. The danger is that, by linking such cases to antisocial behaviour – by saying they are examples of antisocial behaviour (Alan Johnson) or that antisocial behaviour leads to more serious crime (Theresa May) – it trivialises serious crime. Conversely, the response to more frequent but less serious cases of antisocial behaviour may become ever more punitive.

Coalition plans for antisocial behaviour

In the forward to the Coalition's White Paper on antisocial behaviour, Theresa May claims 'the current powers do not work as well as they should' (Home Office, 2012:3). The question is whether the proposed changes are any better. There are a number of proposals in the White Paper. Following antisocial behaviour call-handling trials (Home Office and ACPO, 2012) one priority is better call handling to identify vulnerable and repeat victims in an attempt to address issues raised by the Pilkington case.⁷ The White Paper also proposes use of 'Community Harm Statements' in court and the introduction of a 'Community Trigger' for intervention, giving 'victims and communities the right to require action' (Home Office, 2012:7). Action will be guaranteed if there have been:

- three or more complaints from one individual about the same problem, where no action has been taken; or
- five individuals complaining about the same problem where no action has been taken by relevant agencies (Home Office, 2012:19).

The proposal fits in with the Coalition's emphases on the 'big society' and localism and is also a clear response to the Pilkington case. In the case of vulnerable victims, 'the trigger can be initiated by a third party' (2012:19) such as a carer or relative. Further emphasising the Coalition's focus on local solutions, the White Paper promises use of restorative approaches in new 'Neighbourhood Justice Panels' involving community representatives⁸ in cases where a criminal sanction is not required. The aim of the panel is to agree an outcome, including reparation to the victim (2012:22). Other proposals include tackling underlying issues of antisocial behaviour, improved measurement of antisocial behaviour, increased police discretion and speedier evictions for antisocial tenants. The highest profile proposals are the demise of the ASBO and simplification of enforcement options.

In 2011 the Coalition promised a 'radical streamlining' of antisocial behaviour powers (Home Office, 2011a:5). According to the 2012 White Paper, this simplification will result in replacing 19 enforcement measures with six. The headline is the demise of the ASBO (and associated CrASBO). The standalone ASBO will be replaced by a 'Crime Prevention Injunction' (CPI) whereas the CrASBO will become a 'Criminal Behaviour Order' (CBO). There are elements of political rebranding (Millie, 2011), in that the ASBO was New Labour's baby and therefore anything that was not an ASBO was required. However just a glance at New Labour's 'alphabet soup' of measures hints that simplification may be a good thing. The full list of changes is outlined in Table 4.2.

⁷ Multi-agency Risk Assessment Conferences (MAROCs) are also proposed to improve inter-agency working.

⁸ It is not clear who will sit on these panels and who the 'community representatives' will be.

Table 4.2 Proposed Coalition government changes to ASB enforcement

Existing system	Proposed changes
ASBO on conviction (CrASBO) Drinking Banning Order (DBO) on conviction	Criminal Behaviour Order (CBO)
ASBO on application (stand-alone ASBO) Anti-Social Behaviour Injunction (ASBI) Drinking Banning Order (DBO) on application Individual Support Order (ISO) Intervention Order	Crime Prevention Injunction (CPI)
Litter Clearing Notice Street Litter Control Notice Defacement Removal Notices	Community Protection Notice (CPN)
Designated Public Place Order (DPPO) Gating Order Dog Control Orders	Community Protection Order (CPO Open Space)
Premises Closure Order Crack House Closure Order Noisy Premises Closure Order s161 Closure Order	Community Protection Order (CPO Closure)
Dispersal Order (DO) (s30 of the 2003 ASB Act) Direction to leave (s27 2006 Violent Crime reduction Act)	Direction Power

Source: Home Office (2012: 46-47)

Replacing the ASBO with a Crime Prevention Injunction (CPI)

The replacement for the standalone ASBO is the proposed ‘Crime Prevention Injunction’ (CPI). The CPI also replaces the Antisocial Behaviour Injunction (ASBI).⁹ Similar to the ASBI, the test for antisocial behaviour will be whether ‘the person has engaged in conduct

⁹Also replacing the Drinking Banning Order on application, Intervention Order and Individual Support Order.

which is capable of causing nuisance or annoyance to any person' (2012:48). It is a shift from the ASBO's focus on 'harassment, alarm or distress'; however 'nuisance or annoyance' are similarly difficult to define and highly subjective.

Like the ASBI and the ASBO, the CPI will be a civil power. According to the White Paper, civil law is useful as it gives the police 'an alternative to criminal charges in cases where it is difficult to prove that an offence had been committed or where victims are afraid to give evidence' (Home Office, 2012:24). This is very much like the justification originally given for the ASBO. However, as noted, following House of Lords' ruling, a criminal standard of proof is required for an ASBO (despite being civil law). The CPI will be secured using a civil burden of proof (balance of probabilities rather than beyond reasonable doubt). The aim is for CPIs to be granted quickly, 'in a matter of days or even hours' (Ibid.). For an ASBO, a breach is a criminal offence requiring a criminal standard of proof. For the CPI, breach will be treated as contempt of court, again in an attempt to provide speedy justice. The emphasis on speed may be problematic as it puts in danger procedural checks that make a fair and proportionate response more likely. For instance, according to Tyler (2006) the benefits of procedural justice are in processes that are seen to be both fair and respectful resulting in greater trust in the justice system. Emphasising speedy justice may make this more difficult.

A benefit of the approach adopted for the CPI is that it will – ordinarily – be civil throughout. Breach of an ASBO leaves the perpetrator with a criminal record and the prospect of imprisonment. According to the 2012 White Paper, 'sanctions for breach [of a CPI] are civil not criminal, which prevents people getting a criminal record unnecessarily' (Home Office, 2012: 46). Confusingly, it is also claimed that 'breach by an adult would be contempt of court, punishable in the usual way for the County Court by up to two years in prison or an unlimited fine'¹⁰ (Ibid.). Presumably, receiving a prison sentence will be for criminal contempt rather than civil? For juveniles aged 10 to 17, the punishment options for breach would include:

curfew, activity or supervision requirement, or as a very last resort, repeated breach causing serious harm could result in custody for up to three months for someone aged 14 to 17 years old.

(Home Office, 2012: 49)

Again, custody is presumably restricted to breaches that will be classed as criminal contempt rather than civil. It was acknowledged that the appropriateness of custody for breach was an issue raised during consultation. However, it was stated that the government 'is committed to ensuring the judiciary have tough powers at their disposal on breach, but also that custody is used in a proportionate way' (Ibid.).

To make the injunctions widely available a long list of state and non-state agencies will be able to apply for a CPI, including the police, British Transport Police, local authorities, NHS Protect, Transport for London, the Environment Agency and 'private registered providers of social housing'. This is similar to an ASBO (and ASBI); and the inclusion of private companies/charities – such as social housing providers – continues to blur boundaries between state and non-state organisations that may have quite different priorities. Ease of use is further emphasised by minimising need for wider consultation with other agencies, with formal consultation being restricted to cases involving under-18s – which will need to

¹⁰ Contempt of Court Act 1981.

involve the local Youth Offending Team. Interim injunctions will be available requiring no consultation.

Despite maybe too much emphasis on ease of use, speed and toughness, the proposals are encouraging as they should result in fewer people entering the criminal justice system and will hopefully result in prison being restricted to those committing criminal (rather than merely antisocial) activity. Furthermore, positive requirements attached to the CPI will include support for the recipient – replacing the underused Individual Support Order (ISO). However, just like the ASBO, the CPI will have powerful restrictions on the person's liberty in the form of 'any prohibitions or requirements that assist in the prevention of future anti-social behaviour' (2012: 48). As with the ASBO (Macdonald, 2006), the risk is that these will be disproportionate or ill thought through.

Replacing the CrASBO with a Criminal Behaviour Order (CBO)

The Criminal Behaviour Order (CBO) is very similar to the CrASBO it is designed to replace¹¹, in that it will be a civil order available following criminal conviction. Like the CPI, the only formal consultation required will be with the local Youth Offending Team for someone under-18. An interim order will also be available and, like the CrASBO, powerful restrictions on liberty will be available if it is thought the order 'will assist in the prevention of harassment, alarm or distress being caused to any member of the public' (2012: 49). Presumably 'harassment, alarm or distress' defines a CBO, whereas 'nuisance and annoyance' defines a CPI as an indication of more deleterious behaviour. Being more serious, breach of the order will be a criminal offence, making it a two-step prohibition (Simester and von Hirsch, 2006), with all the problems of blurring civil and criminal law as identified for the ASBO and CrASBO. The maximum sentence will be five years in custody (2012:50). An improvement on the old system is that positive requirements will be integral to the Order. However, it seems likely the Order will be used in similar circumstances to the CrASBO and will have minimal impact on reducing the use of imprisonment. That said, by labelling it a Criminal Behaviour Order (rather than merely antisocial) the issue of trivialising criminality identified earlier is potentially lessened. Yet by restricting a person's liberty and imposing various spatial, temporal, associational and other conditions, the CBO applies also to wider behaviour that is not necessarily criminal. The blurring of criminal and antisocial behaviour continues.

Increased police discretion

When introduced in 2003 the Dispersal Order was controversial. The Order defines geographical boundaries where antisocial behaviour is thought to be particularly problematic and where a police officer in uniform can disperse groups of two or more people if their 'presence or behaviour...resulted, or is likely to result, in any members of the public being intimidated, harassed, alarmed or distressed (Antisocial Behaviour Act 2003 section 30(3)). The restrictions are not only on behaviour, but also on *presence* which is deemed unacceptable, or *likely* to be problematic. The police officer's perception is clearly important. The focus on presence also has clear human rights concerns. According to Crawford (2009:19), Dispersal Orders, 'escalate intervention and draw young people more rapidly into the orbit of formal youth justice processes.'

With the 2012 White Paper, the Dispersal Order will be replaced by increased police discretion by strengthening 'Direction to Leave' powers. The Coalition's consultation

¹¹ The CBO will also replace the Drinking Banning Order (on conviction).

document claimed the new power would ‘be dependent on actual behaviour, rather than an individual’s presence in a particular area’ (Home Office, 2011a:22). The Dispersal Order’s emphasis on ‘presence’ was removed for the 2012 White Paper; however, subjectivity remains with a focus on behaviour that is ‘contributing or is likely to contribute’ (Home Office,2012:50) to problematic behaviour. According to the White Paper:

[the test would be] that the constable has reasonable grounds for suspecting that the person’s behaviour is contributing or is likely to contribute to antisocial behaviour or crime or disorder in the area and that the direction is necessary.

(Home, Office, 2012:50)

The new power will apply for 48 hours. It shifts from the Dispersal Order’s control of groups (two or more people) to control of any individual deemed likely to be problematic. The power also broadens to any public location with ‘[n]o designation or consultation’ (2012:50) required, thereby having the potential to criminalise even more young people. The power would similarly apply to ‘common areas of private land with the landowner’s consent’ (2012:51). Further powers include the handover of items such as alcohol and the return of children under 16 to their home. The power to return children to their home was in the original Dispersal Order legislation (section 30(6)), although many forces have been reluctant to use the power¹² (Crawford and Lister, 2007; Millie, 2009a).

The risk with the Coalition plans is in the extension of an already controversial power to remove any individual in any location at any time. Failure to comply with the police’s ‘Direction to Leave’ will be a criminal offence with the prospect of a fine or three months in custody. Failure to hand over confiscated items will also be a criminal offence, with failure to comply possibly leading to a fine or one month in custody. Usage date will be recorded, so some monitoring of implementation will be possible; however, the disproportionate targeting/profiling of certain populations is a distinct possibility. The police do not have a great record with the use of existing stop-and-search powers, being more frequently used against black and minority ethnic groups (Bowling and Phillips, 2007). The risk is that ‘usual suspect’ populations will be targeted, moved on or banished from public spaces (Beckett and Herbert, 2010), including groups of young people, black and minority ethnic populations, the street homeless and street sex workers. This becomes even more likely as the power will be available, not only if the person’s behaviour ‘is contributing’, but also if it is thought ‘likely to contribute to anti-social behaviour or crime or disorder’ (2012: 50). Following the August 2011 riots the temptation to give the police such a power must have been strong. However, the risks of disproportionate use are also strong.

Conclusion

The focus for this essay has been antisocial behaviour legislation and the Coalition government’s proposals for change. It is argued that a result of New Labour’s antisocial behaviour legislation has been an increased flow of people – especially young people – into the criminal justice system by criminalising behaviour that for the rest of society is legal. That many ASBO recipients have ended up in custody for breaching their conditions is cause for concern, especially when the prison population is at a record high. Other antisocial behaviour interventions have worked in a similar criminalising fashion.

¹² The power was also legally challenged, albeit unsuccessfully (Dobson, 2006)

The Coalition's 2012 White Paper and plans to replace the ASBO are an opportunity to stem this flow of people into the criminal justice system. There are some grounds for optimism. The White Paper proposes that 'custody is used in a proportionate way' (Home Office, 2012:49) and a balanced approach is emphasised incorporating prevention, restorative approaches and support. The replacement of the standalone ASBO with the CPI is also encouraging as it is ordinarily civil throughout and, according to the White Paper, 'prevents people getting a criminal record unnecessarily' (Home Office, 2012:46). However, the emphasis on speedier and easier sanctions is a concern, especially when powerful restrictions on liberty that come with a CPI are considered. The continued muddling of civil and criminal law in relation to breach – as criminal or civil contempt of court – would also need to be clarified. As for the replacement of the CrASBO (the CBO), the relabeling as 'criminal behaviour' rather than 'antisocial' marks the more serious nature of such offences. However, the minimal other changes to this order will likely result in at least as many people gaining custody through breach of conditions.

The other major development is the increase in police discretion with the introduction of universal police 'Direction to Leave' powers (rather than the spatially restricted Dispersal Orders). If Dispersal Orders were controversial on human rights grounds, then the 'Direction to Leave' powers are going to be even more so. There is a strong risk that 'usual suspects' will be targeted as being '*likely to contribute to antisocial behaviour or crime or disorder in the area*' (Home Office, 2012: 50, emphasis added). In daily confrontations between suspect populations and the police – or on occasion between protestors and the police – it is not difficult to imagine cases where the direction to leave an area will be refused – leading to arrest, a criminal record and possible imprisonment.

The 2012 White Paper contains some good news in that it is a simplification of the existing system and that it is claimed the CPI will 'prevent people getting a criminal record unnecessarily' (Home Office, 2012:46). However, other proposals – in particular the CBO and universal direction powers – continue the criminalisation process and will likely result in many people being drawn into the criminal justice system and ultimately into prison. It is worth remembering that, according to the British Crime Survey, it is only a minority of people who see antisocial behaviour as a major problem where they live. The criminalisation and imprisonment of people for criminal activity (as is the case for the CBO) is at least understandable. It is less justifiable for cases where the behaviour is not criminal but antisocial, or for that matter where someone is thought likely to contribute to antisocial behaviour (or crime or disorder) in an area. When the 2012 White Paper becomes law, these are issues that need consideration.

Further research

As the new antisocial behaviour policy and legislative landscape evolves, areas for policy development and further research will become apparent. However, some important priorities can already be identified:

1. If the flow of people in the criminal justice system is to be stemmed then one important area for policy development and research is an informal restorative justice approach to tackling antisocial behaviour. This is proposed by the 2012 White Paper for low-level antisocial behaviour. It will be useful to identify where lessons can be learnt and whether there is scope to adopt such an approach more broadly.

2. The Coalition has emphasised local solutions to problems through the ‘big society’ and localism agendas. As part of this approach, voluntary and community groups are encouraged to be more proactively involved in local issues. A policy and research priority will be to assess the efficacy of such an approach for tackling antisocial behaviour and whether there is a risk that certain ‘outsider’ populations might be disproportionately targeted.
3. When ASBOs were introduced, Ashworth et al. (1998:9) were concerned that they could be used as ‘weapons against other unpopular types. Such as ex-offenders, ‘loners’, ‘losers’, ‘weirdoes’, prostitutes, travellers, addicts, those subject to rumour and gossip, those regarded by the police or neighbours as having ‘got away’ with crimes, etc.’ It is important to consider which groups are most likely to be recipients of antisocial behaviour interventions and to identify any criminalising consequences. There has been limited research that has considered the ethnicity (Isal, 2006) and social and mental health (BIBIC, 2007; Matthews et al., 2007; Nixon et al., 2007) backgrounds of ASBO recipients. A comprehensive investigation will be needed for the new powers when introduced.
4. As noted, one of the motivations for introducing the ASBO was for speedy justice, as a way of bypassing ‘protracted court process, bureaucracy and hassle’ (Blair, 2003). The Coalition plans are similarly for speedy justice; yet much of the ‘bureaucracy and hassle’ is there to ensure fairness. A procedural justice approach may be a useful policy alternative to be investigated, including a procedural justice approach to police encounters with young people.
5. The Coalition proposes increased emphasis on police discretion through greater use of ‘Direction’ powers. In relation to Dispersal Order powers, Crawford (2009:17) has noted that ‘the discretionary nature of the powers leaves considerable scope for inconsistent implementation which further served to undermine young people’s perceptions of fairness.’ With such an emphasis on police officers’ subjective interpretation, research into police perceptions of antisocial behaviour will be useful for policy.

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