Anti-Social Behaviour, Crime and Policing Bill

Briefing on House of Commons, Second Reading

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Introduction

1. JUSTICE is an independent all-party legal and human rights organisation which aims to improve British justice through law reform and policy work, publications and training. Its mission is to advance access to justice, human rights and the rule of law. It is the UK section of the International Commission of Jurists.

2. This briefing focuses upon the creation of the Injunction to Prevent Nuisance and Annoyance (Part 1), the Criminal Behaviour Order (Part 2), and the Dispersal Power (Part 3) since these are the proposals with which our organisation has most concern at this stage.[1] Silence as to any other part of the Bill should not be taken as approval of the proposed reforms.

3. Whilst not the focus of this briefing, we note that the proposals in Part 4 to create powers to issue Community Protection Notices (Chapter 1), Public Spaces Protection Orders (Chapter 2) and Closure Notices for premises associated with nuisance or disorder (Chapter 3) raise important issues and have attracted the concern of other organisations. We intend to comment on Parts 11 (Extradition) and 12 (Criminal Justice and Court Fees) in a subsequent briefing.

4. We welcome the recognition by Government in last year's White Paper[2] that anti-social behaviour is a local issue which needs local responses and where possible this should avoid the criminal or civil justice systems. We also welcome the intention to tackle the drivers of anti-social behaviour which in our view cannot be solved by imposing draconian, restrictive orders, but need to be resolved through treatment and support.

Summary

5. JUSTICE has longstanding concerns about the breadth of anti-social behaviour orders, and other similar civil orders, and the scope for them to be used inappropriately.

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[1] JUSTICE welcomed the Home Affairs Committee's pre-legislative scrutiny of the draft Anti-Social Behaviour Bill. This briefing is largely based upon our response to the Committee. We previously responded to the Home Office consultation: *More Effective Responses to Anti-Social Behaviour* (2011) in similar terms.

[2] Home Office, *Putting Victims First: More Effective Responses to Anti-Social Behaviour, Cm 8367* (May 2012)

6. We believe that it is appropriate and indeed desirable for public authorities to apply for civil orders to restrain illegal acts causing injury to the community and/or vulnerable individuals. However, these should only be available to restrain unlawful behaviour, rather than acts that are merely, or likely to be, distressing or irritating. Furthermore, any such order should be limited in scope. In particular, in the context of criminal orders, they should not become equivalent to community sentences available upon conviction. They should contain only prohibitions and (perhaps rarely) positive injunctions closely linked to the unlawful behaviour itself and necessary to prevent it. The overall restriction of a person's liberty should be proportionate to the seriousness of the illegality that the order seeks to restrain and to the status of the order as a civil preventative measure. The orders should be time-limited and regularly reviewed. Finally, the powers available upon breach of an order should reflect the nature of the breach and the context in which it occurred. The most concerning development over the last decade with regard to attempts to curb anti-social behaviour has been the consequential imprisonment of people who have not committed a criminal offence upon breach of an injunctive order they were almost certainly going to fail to keep.

7. We support the use of informal and out of court disposals in tackling anti-social behaviour that keep people from being drawn into the criminal justice system and believe that restorative approaches should be used in reducing anti-social behaviour for both children and adults. We recommend that Acceptable Behaviour Agreements, neighbourhood mediation and support for families is used in preference to coercive orders. JUSTICE has long argued for such an approach, most recently in our report *Time for a New Hearing* which details how restorative justice could be fully incorporated into the youth justice system of England and Wales.[3] We therefore welcome the focus in Part 6 of the Bill on restorative justice and out of court disposals. In particular the Community Remedy has the potential to provide a positive means of addressing anti-social behaviour outside of the court system.

8. However, we are disappointed that the government has not taken the opportunity in this Bill to conduct a comprehensive reform of the anti-social behaviour regime. There is a lack of imagination and innovation in the reforms and for the most part what has

[3] JUSTICE and The Police Foundation, *Time for a New Hearing* (Independent Commission on Youth Crime and Antisocial Behaviour, 2010) available at: http://www.justice.org.uk/data/files/resources/22/Time-for-a-New-Hearing.pdf

been proposed simply tinkers with labels, while framing the proposed orders to cover even wider categories of behaviour than the existing measures. 'Criminal Behaviour Orders' and 'Injunctions to Prevent Nuisance and Annoyance' risk creating individual community sentences for people who have not committed any crime. 'Dispersal Powers' will allow people to be dismissed from public places without sufficient safeguards for people to explain their presence and could be used inappropriately against protestors and young people.

9. All of the proposed powers are, we believe, likely to be used disproportionately against children and young people and particular care is needed to avoid locking children into the criminal justice system as a result. Evidence for this can be found in the current regime where 38% of anti-social behaviour orders have been issued to 10-17 year olds, despite them comprising only around 13% of the population.[4]

Part 1: Injunctions to Prevent Nuisance and Annoyance

10. Part 1 of the Bill creates a new civil order to replace, inter alia, the Anti-Social Behaviour Order on application (ASBO) issued under s1 Crime and Disorder Act 1998 (CDA), and the currently limited Anti-Social Behaviour Injunction (ASBI) pursuant to the Anti-social Behaviour Act 2003.

General concerns

11. We do not support the use of ASBO's for under 18s and are therefore concerned at the proposed continued application of the replacement Injunction to Prevent Nuisance and Annoyance (IPNA) to children aged 10 to 17.

12. In their proposed form, the criminal standard of proof should apply to IPNAs, as should the guarantees of a fair trial. This is because the injunctions are ASBOs in all but name but attract much milder behaviour, without the safeguards that are currently available before the criminal courts and applying criminal evidential standards. Unless our suggested amendments below were to be considered, in our view, the civil standard is not appropriate and applications should continue to be dealt with before the criminal courts. Irrespective, the defence of reasonable conduct available to defendants in

[4] Ministry of Justice, *Anti-Social Behaviour Order Statistics - England and Wales 2011* (2012), Table 1.

response to an ASBO application should remain,[5] to ensure an opportunity to explain any behaviour or conduct. Legal aid should also be available for representation at the hearing, for both adults and children.

Clause 1 - Threshold Test

13. We welcome the move away from criminalising conduct which the IPNA provides, and that the detention periods for breach would be shorter than those available in ASBO breach proceedings. However, we are concerned that the IPNA would be available in circumstances where no pre-existing civil wrong has been committed and that the scope of the order could result in wide-ranging restrictions upon a person's liberty which are both disproportionate to and insufficiently closely connected with the wrong giving rise to the injunction.

14. We are concerned that the 'nuisance or annoyance' test is far too low a threshold for their application. Whilst this test currently applies in ASBIs[6], these are only available to social landlords and must relate to housing management functions and behaviour against persons within that neighbourhood. Further, ASBIs only allow prevention of engagement in conduct causing nuisance and annoyance. The proposed IPNAs would afford wide ranging terms to be imposed for very broad types of behaviour occurring anywhere. The test of 'behaviour causing or likely to cause harassment, alarm or distress' which is currently applied for ASBOs should continue to be applied for the proposed injunctions to ensure that minor problems are not brought into the courts. Whilst nuisance and annoyance may be considered the appropriate test in housing related disputes because people are in close proximity and affecting each other's enjoyment of their private lives and property rights, this is not the case for wide ranging anti-social behaviour.

15. Equally, a test of 'necessity' as required for ASBOs[7] should continue to be applied, to ensure that courts assess whether the impact upon the Article 8 European Convention on Human Rights (ECHR) rights of the respondent to respect for their private and family life is proportionate in all the circumstances.

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[5] Pursuant to section 1(5) CDA.

[6] Section 153A Housing Act 1996

[7] Section 1(1)(b) CDA: 'that such an order is necessary to protect relevant persons from further anti-social acts by him'.

Clause 1(4) –(5) and Clause 2 - Injunctive Terms

16. Clause 1(4)(b) of the draft Bill introduces positive requirements into the IPNA. It is our view that if positive requirements are to be included in an order as non-specific and easily available as an IPNA, it is essential that some limitations are placed upon the types of requirements that can be imposed and the degree to which they can occupy the respondent's time, and place restrictions upon his liberty, in order that individual rights are protected, that they remain proportionate to the behaviour that they seek to prevent and that breach does not become almost inevitable.

17. We note that clause 1(5) of the draft Bill places only limited restrictions on the range of positive requirements that may be imposed. This list must be extended to include any caring obligations towards children or dependants. We believe that legislation should specify the maximum number of hours per week that positive requirements can last, to prevent them becoming unmanageable and at risk of breach. We also consider that the types of requirements to be included should be exhaustively identified in legislation to prevent widely divergent approaches across the country.

18. Clause 2 sets out conditions for the imposition of a requirement, but in fact only seeks evidence about suitability and enforceability to be given by the person or organisation responsible for supervising the requirement, and other demands upon how they must carry out that function. We consider that the legislation must expressly require the imposing court to be satisfied that a requirement is suitable and enforceable, bearing in mind that positive requirements are always more intrusive than prohibitive ones, and more difficult to formulate. Indeed, in order to comply with Article 8 ECHR, we consider a proportionality check must be carried out by the court for the imposition of any term in the injunction, be it preventive or mandatory. The current proposal does not require the court to do anything but assess whether the injunction is 'just and convenient' (clause 1(3)). The court must also be required to assess whether the terms of the injunction are proportionate. We also believe in the case of children that this order should only be available in circumstances where informal support and an acceptable behaviour agreement has been tried and has failed.

19. Although we support measures that may assist a respondent to resolve underlying problems such as drug dependency or anger management, we are concerned that positive requirements may be difficult for people to comply with and that imposing such

requirements may be setting people up to fail. We propose that, while prohibitive elements should take into account the views of the complainant, society and the respondent, positive requirements should be focussed on rehabilitation. Sufficient resources must be made available to ensure that the respondent can comply with the requirements that are imposed and be properly supported in order to do so.[8]

Clause 1(6) - Duration

20. We are concerned that the Bill does not provide a maximum duration for the IPNA, leaving this to the discretion of the courts. An indicative maximum duration must be given to prevent wide divergence in approach. Because these orders are more wide ranging and likely to be more restrictive than other civil injunctions, in our view IPNA's should last for a maximum of two years and should be reviewable during that period. We welcome the inclusion in clause 1(6) of a maximum period of 12 months where an injunction is imposed on a respondent before they reach the age of 18 years.

Clause 4(1)(c) - Applicants

21. We do not consider it appropriate that the police be able to apply for a civil injunction. Police officers have a unique responsibility to fight crime and should only engage these powers in the criminal context and in relation to criminal conduct. If the government seeks to reduce anti-social behaviour by dealing with it at a community level, it is not appropriate to involve police forces unless there is a breach. Moreover, the inclusion of the police as applicants risks criminal conduct being included in an application for causing nuisance and annoyance rather than being properly prosecuted through the criminal courts because the standard of proof is lower and the evidential rules are not as restrictive. Where clear criminal conduct is alleged, this should be properly investigated and prosecuted in accordance with fair trial standards.

Clause 11 and Schedule 2 - Sanctions for Breach

22. Whist we welcome the acknowledgment that children should be dealt with differently to adults in relation to breach, we do not consider that detention should be available in any circumstances where children breach an injunction. If detention remains available,

[8] This is particularly relevant given the intention behind the Offender Rehabilitation Bill, currently before the House of Lords.

this should not be possible for a first breach of an injunction, when it would be highly unusual for detention to be ordered by a criminal court upon a first offence, unless the offence was particularly grave. Equally we consider that the referral order is the most appropriate response to a first breach rather than moving immediately to a supervision order. Children in breach of an order need additional support, not a draconian and criminalising response.

Clauses 17 and 22(8)(a) - Reporting restrictions

23. We share the concerns of the Standing Committee for Youth Justice (SCYJ) regarding the continued presumption in favour of naming children subject to anti-social behaviour proceedings.[9] The Bill states that section 49 Children and Young Persons Act 1933, which restricts reports on proceedings in which young people are concerned, does not apply to proceedings involving IPNAs or CBOs.

24. Not only is this contrary to the approach in the youth justice system where young people are given anonymity, it is our view that reporting is unnecessary and that the presumed justification that naming young people would help members of the community spot and report anti-social behaviour is outweighed by the detrimental impact upon young people and their rehabilitation. We support the SCYJ recommendation of a presumption *against* the reporting of court proceedings involving persons under 18.

Part 2: Criminal Behaviour Orders

25. Part 2 of the Bill creates the Criminal Behaviour Order, which a court can impose upon a person convicted of any offence. This replaces the current post-conviction ASBO issued under s1C CDA.

General concerns

[9] SCYJ, *Anti-Social Behaviour, Crime and Policing Bill*, House of Commons Second Reading (10 June 2013), http://www.scyj.org.uk/files/ASB_Crime_Policing_Bill_second_reading_briefing_June_5_2013.pdf

26. We are opposed to the creation of a Criminal Behaviour Order (CBO), and fail to see how the order is necessary or appropriate in the criminal context. The use of post-conviction ASBOs has fallen in recent years by almost two thirds from 2,271 in 2004 to 863 in 2011[10] and it can therefore be assumed to be of limited effectiveness in comparison to the many community sentencing options available to the courts. The CBO would become available because a person has been convicted of an offence; however it will not comprise the sentence for the offence but rather an additional injunctive measure to the sentence that will be imposed. In our view, if the behaviour being targeted by the CBO forms the subject of the conviction, the existing sentencing options available to a court are sufficient, and the defendant should not be sentenced twice for the same offence. If the behaviour is unconnected to the offence, then this should be dealt with separately using an IPNA (as amended by our above suggestions).

27. The CBO has, we believe, an undesirable mixture of criminal and civil aspects. Its name, the fact that it becomes available because of a criminal conviction and the breadth of obligations and prohibitions that can be imposed suggest that it is criminal in character; however, it is available on the civil standard of proof. We believe that if the order is to be available in this form, the criminal standard of proof should apply, as should the guarantees of a fair trial in criminal proceedings pursuant to Article 6 ECHR.

Clause 21(7) - Applicants

28. Although clause 21(7) provides that a court may make a CBO only on the application of the prosecution, we are concerned that there is a risk that CBOs would be sought by the police and local authorities as a means of placing additional restrictions on individuals by the back door rather than following the application procedure for an IPNA.

Clause 21(3) and (4) - Threshold Test

29. The threshold for making a CBO is that the court a) is satisfied that the offender has engaged in behaviour that caused or was likely to cause harassment, alarm or distress to a person, and b) considers that making the order 'will help in preventing the offender from engaging in such behaviour'. This test is broader than the current power in which

[10] Ministry of Justice, *Anti-Social Behaviour Order Statistics - England and Wales 2011* (2012), Table 3.

the court considers whether the order is 'necessary to protect persons from further anti-social acts by the offender'.[11]

30. We are concerned that the second limb of the test is much lower than the current threshold and is far too vague to be a meaningful restriction on the making of such orders. The test of 'necessity to protect persons' is the appropriate test to ensure legal certainty and justification for the restriction, and should continue to apply if CBOs are introduced.

Clause 21(5) - Injunctive Terms

31. Clause 21(5)(b) of the Bill introduces positive requirements into the CBO. This again marks a change from the current regime. We repeat our concerns outlined above with regard to positive requirements in relation to IPNAs.

32. Further, there should be no 'double sentencing' – the CBO should be taken into account when calculating the overall restriction on liberty imposed by the community sentence for the offence that has been committed (which could encompass a curfew, restraining or exclusion order and requirements to attend at a specific location), and CBO in total to ensure proportionality. Moreover, its relationship with licence conditions if imposed in conjunction with a custodial sentence should be considered so as to avoid duplication.

Children

33. We do not support the use of CBOs for children and young people under 18; They will act as an accelerator into the criminal justice system and therefore into custody. Recent data provided by the Ministry of Justice for the period 1999 to 2011 reveals that the overall breach rate by children and young people subject to ASBOs is 68% compared to 52% of adults.[12] Custody has been used as a sanction for breach by 10-17 year olds in 38% of cases.[13] Moreover research published by the Prison Reform Trust highlights specific problems faced by children and young people in complying

[11] Section 1C(2)(b) CDA 1998

[12] Ministry of Justice, *Anti-Social Behaviour Order Statistics - England and Wales 2011* (2012), Table 11.

[13] Ibid, Table 12.

with orders and the negative effects that breach has (including accelerating them into custody).[14] This is likely to occur with CBOs more than with post-conviction ASBOs due to the inclusion of positive requirements, which may be more easily breached as it is more onerous to require that something be done than something be avoided.

34. We believe that, instead, informal measures such as Acceptable Behaviour Agreements and more dedicated support for children and families should be offered to prevent genuine anti-social behaviour. However, if CBOs are to be used against defendants of this age then it is essential that their personal circumstances and care arrangements are assessed before the order is imposed. The assessment should cover factors including (but not limited to) mental health, learning and communication difficulties (all of which can affect ability to participate in the proceedings, understanding of the order and ability to comply with its terms), parental supervision and home environment. Clause 21(9), which specifies that any requirements must avoid conflict with religious beliefs; times of work or education; and other court orders, does not in our view afford sufficient discretion to the courts to consider the factors impacting upon children.

Part 3: Dispersal Powers

35. The removal of the requirement in the Anti-Social Behaviour Act 2003 that a dispersal area should be subject to a prior authorisation on the grounds of persistent anti-social behaviour and the link to alcohol in the Violent Crime Reduction Act 2006 (both in themselves overbroad powers) means that this power could be very widely and inappropriately used in violation of Article 11 ECHR (protecting freedom of assembly, and requiring safeguards against arbitrary interferences with that right).

36. The new dispersal power enables a constable to direct a person to leave an area, in contrast to the current prior authorisation requirement. The current regime requires the dispersal to be in the context of anti-social behaviour that is a significant and persistent problem in the locality, whereas the proposed power would be available simply in relation to members of the public being harassed, alarmed or distressed, or the occurrence of crime and disorder. Without the existing parameters, the power available

[14] D. Hart, *Into the Breach: the enforcement of statutory orders in the youth justice system,* (Prison Reform Trust, 2011), available at: http://www.prisonreformtrust.org.uk/Portals/0/Documents/Into%20the%20Breach.pdf

in the proposed amendments could have wide ranging effect. Furthermore, inappropriate use of the power will be difficult to restrain because subsequent litigation will depend upon funding arrangements and willingness of individuals to bring proceedings. In any event, inappropriate use of the power will be difficult to prove because of the breadth of the provision.

37. We do not consider that the power should be available to disperse the commission of general 'crime'. If a criminal offence has been committed for which the person is suspected, they should either be arrested and conveyed to a police station for investigation, or summarily dealt with by an out of court disposal as appropriate. The power should be limited to causing harassment, alarm or distress, or disorder in the locality.

Clause 32 – Length of dispersal

38. A dispersal order may, under the current regime, not exceed 24 hours. We do not consider that there is any justification for extending a direction to 48 hours. Twenty four hours is a sufficient period without evidence to demonstrate otherwise.

Clause 34 – Restrictions

39. Whilst the proposal includes a number of important restrictions in clause 34, which we welcome, we would include a further restriction that the constable must not give a direction for a person or group to disperse where a reasonable excuse has been put forward for their conduct. This would reduce the danger of arbitrary use of the power, and ensure that the requirement of necessity set out in clause 32(3) is properly engaged.

Clause 37 – Offences

40. We are particularly concerned that non-compliance with the new direction will constitute a criminal offence and carry a maximum penalty of three months' imprisonment. Given that the dispersal is an alternative to pursuing a conventional response to offending, where a person returns and continues to commit the same type of behaviour in spite of the dispersal power, they should then be processed or investigated for the offence. If disorder is engaged, a penalty notice could be administered, pursuant to section 1 Criminal Justice and Police Act 2001. This

encompasses a wide range of disorderly conduct. For children and young people for whom penalty notices are not appropriate; an out-of-court youth restorative disposal should be used. Anything more serious should be properly investigated and charged if sufficient evidence of a crime is made out. We do not consider it appropriate or necessary to create a new offence in this context, particularly one with a custodial term attached.

Clause 38 – Powers of community support officers

41. The proposal will allow Police Community Support Officers (PCSOs) to direct a dispersal with the same powers as constables once an authorisation has been given. Whilst this power is available under the 2003 Act, we nevertheless consider that PCSOs should not be able to carry out law enforcement powers which require the exercise of a broad discretion, such as this. This is a role for qualified police officers.

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