New ASBOs for old?

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**Legislation**

Housing Act 1996, ss. 152(1), 152(3); Protection from Harassment Act 1997, s. 7(2); Crime and Disorder Act 1998, ss. 1(1), 1(5); Police Reform Act 2002, s. 64; Anti-Social Behaviour Act 2003, s. 13(3); Criminal Justice Act 2003, s. 322; Police and Justice Act 2006, s. 64; Anti-social Behaviour, Crime and Policing Act 2014, ss. 1(2), 1(3), 14(1), 22(3), 22(5), 23(2), 30(1), 104; The Anti-social Behaviour, Crime and Policing Act 2014 (Commencement No. 8, Saving and Transitional Provisions) Order 2015, s. 4(a).

**Cases**

*Chief Constable of Lancashire* v *Potter* [2003] EWHC 2272 (Admin); *R* v *Boness and Others* [2006] 1 Cr App R (S) 120; *R* v *Braxton* [2004] EWCA Crim 1374; *R (McCann and others)* v *Crown Court at Manchester* [2002] UKHL 39; *R* v *Tripp* [2005] EWCA Crim 2253.

**Abstract**

The Anti-Social Behaviour Order (ASBO) was designed as a civil/criminal hybrid, preventive in structure and with a largely undefined object. After 2002, legal challenges to the ASBO led to the use of justificatory arguments from cumulative effect, and to the introduction of new measures which offered to regulate anti-social behaviour in more legally-acceptable forms. In 2014 the Coalition government replaced the ASBO with two new instruments: a post-conviction Criminal Behaviour Order (CBO) and a wholly-civil anti-social behaviour injunction (ASB Injunction). While the CBO and the ASB Injunction build on this history, it is argued that they do not represent a new approach to anti-social behaviour so much as a continuation of the ASBO by other means.

**Keywords**

Anti-social behaviour, ASBO, behaviour regulation, chronic crime, harassment

In creating the ASBO, the Crime and Disorder Act 1998 empowered a magistrate to impose a range of prohibitions, requested by a police officer or local authority representative, on an individual who had engaged in an undefined range of behaviours which had either caused or had the potential to cause offence. These prohibitions did not address the offending behaviour directly but were designed to prevent the opportunity for offensive behaviour from arising. Any breach of the prohibitions was a criminal offence, potentially attracting a substantial custodial sentence, irrespective of whether the offensive behaviour itself had been repeated. These three characteristics - the undefined nature of anti-social behaviour; the combination of civil and criminal law used to address it; the preventive regulatory structure of the ASBO; were novel individually; taken together they presented legal and logical challenges, whose working-out dominates the history of the ASBO.

The undefined nature of anti-social behaviour, firstly, was emphasised in parliamentary debates on what would be the Crime and Disorder Act 1998: Home Office minister Alun Michael insisted on a loose definition, arguing that '[a] narrower formulation would permit the defendant to circumvent the order by subtly changing the anti-social activity in question'.[1] Under the terms of the Act, an ASBO could be applied for on the grounds that the recipient had acted 'in an anti-social manner, that is to say, 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'.[2] The phrasing echoed both the Public Order Act 1986 offence of 'harassment, alarm or distress' and the phrasing of the Protection from Harassment Act 1997,

which specified that 'harassing' a person covered 'alarming the person or causing the person distress'.[3] In all other respects the behaviour concerned was undefined: any activity could be classified as anti-social on the basis of its effects on a given occasion.

This refusal of specificity is supported by multiple omissions. There was no requirement that the behaviour must have been engaged in either intentionally or recklessly. Moreover, the legislation specifically covered actions which were not claimed to have caused harassment, alarm or distress, but only *to be likely* to have this effect. The legislation thus gave a privileged status, not merely to the subjective experience of harassment, alarm and distress, but also to official judgments of likely effect. The only substantive limit on the implicit definition of anti-social behaviour was provided by the stipulation that the acts involved must be unreasonable: in determining whether anti-social behaviour has taken place, 'the court shall disregard any act of the defendant which he shows was reasonable in the circumstances'.[4] This could have little if any protective value for defendants: an individual who had inadvertently caused offence would face the more demanding test of persuading the court that the action causing the offence was itself 'reasonable'. In parliamentary debate, Michael stressed this point explicitly: 'if an individual who is habitally drunk or on drugs or who simply does not care can plead that his behaviour was reasonable in the circumstances, an order cannot be made. If it is not reasonable in the circumstances, it is exactly the kind of behaviour that needs to be dealt with and prevented in the future.'[5]

The hybrid structure of the ASBO, secondly, meant that claims of anti-social behaviour leading to the imposition of an ASBO needed only to meet the civil standard of proof, while the breach of the ASBO would be a criminal offence. While the breach was to be proved beyond reasonable doubt, what had to be proved at this stage was not that anti-social

behaviour had taken place, but only that one or more of the prohibitions imposed by the ASBO had been breached. Since these prohibitions were designed to forestall anti-social behaviour, the prohibited activities might be considerably more broadly defined - and easier to prove - than the objectionable behaviour itself. In short, the hybrid nature of the ASBO made it difficult to challenge assertions that anti-social behaviour had taken place when applying for an ASBO, and easy to prove that the conditions of the ASBO had been breached. This approach was justified in terms of the need to assert the authority of the courts and the government: in Michael's words, 'the Government want to send the clear message that people should not mess with the courts when the courts have imposed anti-social behaviour orders'.[6] This argument suggests that the criminal penalty imposed for breach of an ASBO was envisaged as punishing the offender's defiance of the court and the authority by which the ASBO had been imposed - and as deterring others from similar defiance.

As a preventive measure, lastly, an ASBO would typically contain prohibitions targeting legal and innocuous activities; these would be criminalised for the ASBO recipient, not because they were themselves anti-social but because they had been judged to be precursors to anti-social behaviour, in the case of that individual. As the Court of Appeal commented in *Boness*, 'The aim of an ASBO is to prevent anti-social behaviour. To prevent it the police or other authorities need to be able to take action before the anti-social behaviour it is designed to prevent takes place.'[7] The scope of the ASBO was also left undefined, but for a double invocation of necessity: if an order was necessary in order to protect others from the effects of an individual's anti-social behaviour, then the court could impose any prohibitions which were necessary to do so. This is the logic of 'pre-crime', aiming to 'anticipate and forestall that which has not yet occurred'.[8] The conjunction of this preventive logic with the undefined nature of anti-social behaviour made the ASBO unusually powerful and flexible. Zedner

argues that the over-arching goal of the pre-crime mentality is the 'pursuit of security' - where security can be considered 'the indefinite pursuit of the unattainable'.[9] The open texture of the concept of anti-social behaviour makes security in this context an especially elusive target. In the context of political appeals to security, this elusiveness could make partial successes, and the tools which made them possible, seem particularly valuable.

The ASBO as passed into law was thus an all-purpose mechanism for imposing a tailored regime of behavioural regulation on any individual whose past activity had been identified as problematic. The anti-social nature of a particular action was given partly by its effects (actual or potential) and partly by its 'reasonableness', as judged by the police and courts. Where actions were 'reasonable' an ASBO could not be obtained, even if alarm or distress had demonstrably been caused. Where actions were 'unreasonable', alarm or distress could be assumed to have been 'likely'.

**The ASBO and the courts**

The ASBO became available in April 1999. Initial takeup was slow and geographically patchy: by the end of 2001 a total of 518 applications had been made, to the disappointment of government ministers, who had envisaged up to 5,000 applications annually.[10] Following the General Election of 2002, the government put forward a policy agenda focusing on 'respect'.[11] The poorest in society would be offered new opportunities through public sector reforms, but these would be conditional on a revival of reciprocity and mutual respect.[12] This conditionality would be enforced through the criminal justice and welfare systems, with the ASBO a key instrument for modifying disrespectful behaviour; a Home Office campaign against anti-social behaviour launched in 2003 took 'Respect' as its title.

Between 2002 and 2006, two main trends are visible in the development of the ASBO: trends which embody contradictions both within and between themselves. On one hand, the 'Respect' agenda marked a concerted drive by the Home Office to expand the use of the ASBO. For practical purposes, this entailed addressing the lack of definition of anti-social behaviour, clarifying and making explicit the working definitions of anti-social behaviour used by practitioners. This trend towards explicit definition was accompanied, and to some extent undercut, by a stress on the protean nature of anti-social behaviour and the need for an instrument with the flexibility and lack of definition offered by the ASBO, in order to prevent it taking place in any form.

At the same time, the hybridity of the ASBO was increasingly coming into question; the courts were not satisfied with Jack Straw's confident assertion that the ASBO combined 'the best of civil and of criminal law'.[13] These concerns culminated in the 2002 *McCann* judgment, which drove a wedge between the ASBO's civil and criminal elements; the courts' response to *McCann*, however, evinced a continuing commitment to the ASBO as a criminal as well as a civil instrument. The contradictions posed by both these trends - one pushing for the ASBO to be used more freely to address a narrower range of behaviour; one placing limits on the ASBO but searching for ways to circumvent them - were both partially and unsatisfactorily resolved by appeals to cumulative effect. A longer-term solution was the introduction in 2003 of the Anti-social Behaviour Injunction (ASBI): an instrument which avoids many of the problematic elements of the ASBO.

In 2003, as a curtain-raiser for the Respect initiative, the Home Office carried out the Anti-Social Behaviour Day Count. This effectively put the issue of anti-social behaviour on

the news agenda, not least by assigning it an estimated annual cost of over £2 billion. The Day Count was noteworthy for using a uniform survey frame: participants representing agencies responsible for dealing with anti-social behaviour were asked to tally occurrences of a list of specified behaviours, itself derived from Home Office focus group research. The list used by the Day Count is strikingly miscellaneous: both serious and trivial criminal offences appear alongside legal but heavily policed behaviours such as prostitution and begging, as well as entirely legal activities with the potential to cause annoyance (e.g. 'rowdy behaviour').[14] However, the heterogeneity of its key measurable makes the intervention represented by the Day Count more rather than less significant. However arbitrary it might seem to add incidents of stalking, begging, litter and children riding bicycles on the pavement into a single total, the classification of these and many other activities as 'anti-social behaviour' reflected a growing consensus among practitioners as to how anti-social behaviour should be defined - and the population groups most likely to carry it out. It also signalled the confidence that any single incident of anti-social behaviour, however trivial, could be seen as a local manifestation of a single, serious problem - and one which could be addressed through 'discipline, regulation and punishment'.[15]

A significant court ruling in 2003 showed a similar confidence in official ability to identify anti-social behaviour, irrespective of the effect which any specific incident had or did not have on any identifiable individual. In the case of *Chief Constable of Lancashire* v *Potter*, the Appeal Court held that the defendant's behaviour (the lawful activity of soliciting for prostitution in the street) could validly be described as anti-social on the grounds that she was working in a residential area where several other sex workers were also active: 'the cumulative effect of street prostitutes operating in residential areas would, *as a matter of common sense*, have caused or have been likely to cause harassment, alarm or distress to *at*

*least some* of the broad range of residents of and visitors to those areas'.[16] An activity carried out by one individual on one occasion could be taken to constitute anti-social behaviour on the basis of offence which was assumed to have been caused, not by the actions of the individual herself but as the cumulative effect of other similar actions carried out by other people; moreover, this offence is assumed to have been caused to 'at least some' unidentified individuals living in or passing through the area.

Ideas of cumulative effect had featured strongly in early discussions of anti-social behaviour.[17] It had been argued that anti-social behaviour might be considered as a 'chronic crime', in which a series of individually trivial incidents could be treated as amounting to a single offence on the basis of their cumulative effect. While this model had had no place in the legislative definition of anti-social behaviour - which allowed for a single action to be considered anti-social - the rhetoric of cumulative effect continued to be used to justify a draconian response to individually trivial actions. Thus the Labour MP Frank Field argued in 2003 that 'the distinguishing mark of ASB is that each single instance does not by itself warrant a counter legal challenge. It is in its regularity that ASB wields its destructive force'.[18] The *Potter* ruling suggests an appeal to cumulative effect in a new form, allowing a single incident to be classed as offensive on the grounds of the cumulative effect of other similar incidents which are arbitrarily grouped together with it. The result is to extend the logic of cumulative effect across the whole of an identifiable social group, making it possible to impose regulatory measures on an individual member of the group on the basis of the offence which might be assumed to have been caused, to other unidentified individuals, by the cumulative effect of their activities. The anti-social effect justifying the regulation of a particular individual is the cumulative effect which the activities of that individual's social group generally tend to have on the public. The implicit definition of anti-social behaviour is

both broadened and narrowed: any activity can qualify as anti-social, as long as the person carrying it out is a member of a group whose activities ('as a matter of common sense') are likely to cause offence.

While these developments tended to broaden the scope of the ASBO and erode safeguards against its misuse, concerns about the civil/criminal hybridity of the ASBO were growing. In 2002 the House of Lords judgment in *McCann*[19] ruled that, despite the civil nature of the ASBO itself, the imposition of criminal penalties for breach made the civil standard of proof inappropriate in hearing ASBO applications; instead, 'the heightened civil standard of proof, indistinguishable from the criminal standard of proof' should be applied.[20] The judgment also emphasised the civil classification of proceedings for the imposition of an ASBO. This entailed that evidence brought forward when an ASBO is applied for would not be used in any (criminal) prosecution for the breach of the ASBO: if the defendant was found guilty of breaching an ASBO, sentence should be passed on the basis of the breach itself and the actions leading up to it, rather than reflecting the pattern of behaviour leading up to the original imposition of the ASBO.[21]

The formal divorce of the breach from the behaviour which had led to the imposition of the ASBO created serious difficulties in justifying sentences for the breach of an ASBO. If the actions leading up to the breach had not involved the commission of an offence, criminal punishment for those actions would be inappropriate; if an offence had been committed, on the other hand, that offence would already have its own sentencing range. Either way, it was hard to see why a breach of this particular type of court order should be treated as a criminal offence.

This difficulty also led to invocations of the logic of cumulative effect in the sentencing context. In the 2003 *Braxton* case, the court reduced the sentence passed for breach of an ASBO, suggesting that the sentencing court might have inappropriately taken into account the behaviour which had given rise to the ASBO, but upheld the principle that a custodial sentence should be given despite the relatively trivial nature of individual breaches. The court held that 'what [the defendant] might consider as trivial in his case, because of the persistence of his conduct, is now treated seriously, specifically to protect the public'.[22] Not only would multiple breaches of an ASBO amount cumulatively to a criminal offence, however trivial the actions occasioning the breaches might be; the persistence which could be inferred from the repeated breaches would be construed as an anti-social disposition, threatening the public and ultimately justifying imprisonment for public protection.

In the Appeal Court's 2005 ruling on the *Tripp* case the logic of cumulative effect was applied even more broadly, evoking the overall effect of the entire problem of anti-social behaviour as a reason for punitive sentencing in an individual case: 'the anti-social behaviour order provisions were a response by Parliament to increasing concerns about the impact on the public of anti-social behaviour in its many forms. That concern must therefore be reflected by the courts in the sentences which it imposes for breaches'.[23] The argument casually stated here is that a court passing sentence for the breach of a specific injunction, prohibiting actions likely to be precursors to renewed anti-social behaviour, should take into account public concern about the effect of anti-social behaviour as a whole. The *Tripp* ruling thus extends the doctrine of cumulative effect to the scale of society, and uses it as an invitation to exemplary sentencing.

The assumption in *Braxton* that repeated breaches of an ASBO manifested an anti-social disposition, and hence justified punishment, is clearly not generalisable given the vast range of prohibitions which might be imposed as part of an ASBO - and the range of otherwise legal activities which could consequently amount to the breach of an ASBO. The argument in *Tripp* for exemplary sentencing suffers for similar reasons: given the wide range of activities which could attract an ASBO - and the elusiveness of any prospect of security from anti-social behaviour - this was exemplary sentencing without any clear deterrent rationale. In MacDonald's words, these rulings exemplify 'a confused body of case law, as the courts have struggled to make sense of the maximum sentence for breaching an ASBO'.[24] The court's confusion seems to stem from a settled conviction of the seriousness and urgency of anti-social behaviour as a problem and the appropriateness of the ASBO as a tool for dealing with it, despite the obstacles which *McCann* had put in its way - obstacles which derived ultimately from the lack of any definition of anti-social behaviour, and from the civil/criminal hybridity designed into the ASBO.

**From regulative criminalisation to punitive regulation: the ASBI**

The government's renewed attention to anti-social behaviour led to the creation of a new instrument which offered to resolve the contradictions which had beset the ASBO. The Housing Act 1996 had given social landlords the power to apply for injunctions prohibiting 'conduct causing or likely to cause a nuisance or annoyance' to residents or visitors, although injunctions could only be applied for on the grounds of actual or threatened violence.[25] In 2003 the Anti-Social Behaviour Act introduced the Anti-Social Behaviour Injunction (ASBI), designed to extend this injunctive power so as to address a broader range of anti-social behaviour in social housing. The ASBI could be applied for by local authorities and

registered social landlords without any consultation requirement. Like the earlier injunctions, ASBIs were to be applied for in the county court.

The test for the anti-social behaviour to be controlled by an ASBI follows the wording of the Housing Act 1996, and is even more permissive than the wording of the Crime and Disorder Act 1998: an ASBI may be sought on the grounds that the individual in question 'is engaging, has engaged or threatens to engage in' conduct 'capable of causing nuisance or annoyance to any person'.[26] There is no requirement for sustained or malicious nuisance, or for any annoyance to have been caused - or indeed for any anti-social behaviour to have actually taken place, unless the threat of nuisance behaviour is understood as anti-social in itself. Unlike the ASBO, the ASBI was a wholly civil instrument rather than a civil/criminal hybrid; the capacious list of actually or potentially offensive behaviours which could justify an ASBI need only be proved to the civil standard. The ASBI was redrafted by the Police and Justice Act 2006; the main new provision was an increase in the flexibility with which the people putatively suffering nuisance or annoyance could be specified. Echoing the logic of the *Potter* judgment, victims of anti-social behaviour could now be specified individually, by a group description or by a reference to 'persons generally'.[27]

While the conditions which may give rise to an ASBI application are defined very broadly, the prohibitions of an ASBI are significantly narrower than those of an ASBO, being defined by reference to past conduct: '[a]n anti-social behaviour injunction prohibits the person in respect of whom it is granted from engaging in conduct to which this section applies.'[28] It is also striking that the ASBI does not follow the preventive structure of the ASBO: where an ASBO imposes prohibitions so as to forestall anti-social behaviour in any form, an ASBI

responds to the nuisance caused by particular actions, and prohibits those actions. Breach of an ASBI was a contempt of court rather than a criminal offence in its own right.

The ASBI was complemented by the provision in the Police Reform Act 2002 for ASBOs to be imposed by a court in conjunction with a criminal penalty or a conditional discharge. The Police Reform Act follows the wording of the Crime and Disorder Act in defining anti-social behaviour, although without the 'reasonable in the circumstances' stipulation.[29] As with ASBOs on application, ASBOs on conviction must be necessary to prevent a recurrence of anti-social behaviour, and may contain any provisions thought necessary to do so.

The ASBO on conviction became available at the end of 2002; the ASBI in July 2004. Both were enthusiastically taken up, rapidly outstripping the numbers of ASBOs on application; for details see Table 1. Data on ASBIs is only available for 2008, 2009 and 2010; in each of those years over 1100 ASBIs were granted in England[30]. Assuming that this trend was maintained, by 2013 ASBOs on application - the ASBO in its original form - only accounted for one in five of all ASB injunctions.

TABLE 1[31]

*ASBOs on application, ASBOs on conviction and ASBIs granted in England and Wales, 2002-13*

| | ASBOs | | |
|---|---|---|---|
| | **on application** | **on conviction** | **Total** |
| **2002** | 426 | 1 | 427 |
| **2003** | 687 | 663 | 1350 |
| **2004** | 1208 | 2271 | 3479 |
| **2005** | 1277 | 2845 | 4122 |
| **2006** | 886 | 1819 | 2705 |
| **2007** | 941 | 1358 | 2299 |
| **2008** | 737 | 1290 | 2027 |
| **2009** | 698 | 973 | 1671 |
| **2010** | 696 | 968 | 1664 |
| **2011** | 551 | 863 | 1414 |
| **2012** | 484 | 845 | 1329 |
| **2013** | 469 | 880 | 1349 |
| **Total** | 9060 | 14776 | 23836 |

The influences on the development of the ASBO (and related instruments) in this period had multiple authors, who had different - and in some cases opposed - objectives. However, two trends can be identified. One is a divergence between civil remedies and criminal penalties. The contrast between the ASBI (punishable only as contempt of court) and the ASBO on conviction (imposed in addition to a criminal sentence) suggests an incipient divergence between civil and criminal approaches to anti-social behaviour.

At the same time, there was a consistent trend towards expanding the (already broad) scope of the behaviours covered by anti-social behaviour orders. The ASBI as redesigned was a flexible and easily-applied instrument for the repression of any activity with the capacity to annoy anyone, provided it was carried out in the vicinity of local authority housing. While the ASBO retained the more demanding test of likelihood to cause harassment, alarm or distress, here too the *Potter* judgment had introduced a high degree of flexibility. The effect of that judgment was twofold, lifting the burden of proof on two points: whether the behaviour at

issue had caused offence, or even had the potential to cause offence, to any identifiable individuals; and whether the behaviour of the defendant him- or herself had offended or had the potential to offend. An ASBO could be granted on application (or imposed on conviction) on the basis of common-sense assumptions about the offence likely to be caused to the local community in general, as the cumulative effect of unwanted contact with members of the defendant's social group.

While the ASBI and the ASBO on conviction both followed the original design of the ASBO in not including an exemption for unintentional or inadvertent behaviour, the newer measures both also omitted any 'reasonable in the circumstances' clause. This may have reflected the consensus which had developed since 1998 - and in particular since the Day Count - as to which activities should be considered anti-social. However, the effect was to leave respondents with no recourse against inappropriate ASBI/ASBO applications other than relying on the good sense of the court. In short, the drift away from the experiment of a civil/criminal hybrid was accompanied by an expansion of the scope of the ASBO and ASBI and a whittling-away of remaining safeguards.

The ASBO had been designed as an instrument of pre-emptive and potentially punitive behaviour regulation. The intention was to eliminate anti-social behaviour by applying tailored regulation to the activities of the individuals responsible for it, enforced by the threat of criminal sanctions. Governed by an individualised behavioural regime, an ASBO recipient would no longer have the opportunity to engage in anti-social behaviour. In Michael's words, 'Orders will succeed when they make punishment unnecessary for the people on whom they are imposed. Those people will no longer be a nuisance to the public'.[32] The assumption that a coercive behavioural regime was appropriate for people causing a nuisance to the public -

and that those people could be reliably identified - was further underlined by the criminal sanction for breach of an ASBO; this was justified on the grounds that breach would represent defiance of the authority of the ASBO regime, which itself would deserve punishment.

By 2005 the regulatory landscape looked very different. The ASBI in particular harks back to the origins of anti-social behaviour legislation, both in its social housing setting and in the focus on 'nuisance or annoyance' rather than 'harassment, alarm or distress'; as such, the scope of behaviours to be controlled is even broader than in the case of the ASBO. At the same time, the ASBI abandons the preventive logic of the ASBO. The ASBO imposes a tailored set of regulations designed to channel the recipient's behaviour away from occasions for anti-social behaviour, backed by the authority of the criminal law. The ASBI serves notice on the recipient that their behaviour has caused annoyance, and warns them not to repeat the offending activities. The recipient's behaviour is only regulated to the extent that they are required to refrain from identified nuisance behaviours; breach will lead to adverse consequences, possibly extending to eviction, but will not lead to a criminal record. The ASBO regulates innocuous activities so as to forestall nuisance behaviour, the regulation being backed by the threat of criminalisation; compliance with an ASBO steers the recipient's activities into a course where anti-social behaviour is not possible. The ASBI imposes regulations directly prohibiting undesirable activities; compliance with an ASBI represents a guided but genuine choice to desist from nuisance behaviour. The ASBI deters; the ASBO incapacitates.

The wholly civil status of the ASBI - making breach contempt of court rather than a criminal offence - gives it a number of benefits. Courts have flexibility in sentencing for contempt;

although brief custodial sentences for the contempt represented by the breach of an ASBI are far from unknown, custodial sentencing is not mandatory. Contempt proceedings also have the symbolic or communicative merit of not giving the contemnor a criminal record. (By contrast, government guidelines in 2006 stressed that breach of an ASBO should not be treated as 'just another minor offence'.[33]) ASBIs are applied for in the county court rather than a magistrate's court, which - it can be assumed - brings a higher level of legal expertise to bear on applications. It is noteworthy that Hoffman and MacDonald drew on these features of the ASBI in their proposal for a 'civilized' ASBO, although they envisaged the ASBI continuing in operation for social housing management purposes.[34]

**Beyond the ASBO - back to the future?**

In 2014, after lengthy consultation, the Coalition government introduced replacements for the ASBO and ASBI. A new ASB Injunction - initially referred to as a 'Crime Prevention Injunction'[35] and later as an Injunction to Prevent Nuisance and Annoyance (IPNA)[36] - replaces both the ASBO on application and the ASBI; a Criminal Behaviour Order (CBO) replaces the ASBO on conviction. The ASB Injunction[37] came into force in March 2015. In its details, the Injunction more closely resembles its namesake the ASBI than it does the ASBO. It is a purely civil order, applied for in a county court, and with breach treated as contempt of court. The ASB Injunction can be applied for by a range of bodies. In an oddly-worded and permissive provision, the applicant is required to inform 'any ... body or individual the applicant thinks appropriate' before making the application; the only binding requirement is for consultation with the local Youth Offending Team in cases where the application is in respect of a minor[38]. There is a twofold test: 'that the court is satisfied, on the balance of probabilities, that the respondent has engaged or threatens to engage in anti-

social behaviour' and that 'the court considers it just and convenient to grant the injunction'.[39] The first test echoes the relevant provisions for the ASBI; it is not clear what weight the second test would have in practice.

Reflecting the different definitions used in the Crime and Disorder Act and the Anti-social Behaviour Act, anti-social behaviour is in three ways: as 'conduct that has caused, or is likely to cause, harassment, alarm or distress to any person'; as 'conduct capable of causing nuisance or annoyance to a person in relation to that person's occupation of residential premise'; and as 'conduct capable of causing housing-related nuisance or annoyance to any person'. The Act goes on to specify that the second of these formulations only obtains where an injunction is being applied for by a housing provider, a local authority or a chief officer of police, while the reference to 'housing-related' nuisance in the third formulation is to be read as relating to social housing[40]. These provisions, together with the nuisance-based definition of anti-social behaviour, are clearly designed to incorporate the functionality of the ASBI into the new injunction. Unlike the ASBI, however, the new Injunction is 'tenure-neutral' by design; it 'could be used to deal with any anti-social individual [sic], regardless of where they lived'.[41] Unlike the ASBI - but like the ASBO - it may also be applied for in respect of a minor (aged ten years or above). The terms of the ASB Injunction may include any 'prohibitions or requirements that assist in the prevention of future anti-social behaviour'.[42] The lack of reference to necessity in this formulation is striking, suggesting an even more permissive approach to the formulation of orders than has applied under the ASBO. This broad preventive approach is augmented further by the scope to impose positive requirements, hitherto only available for young offenders in the form of Individual Support Orders (introduced by the Criminal Justice Act 2003).[43]

The CBO retains the 'harassment, alarm or distress' wording: an order may be made if 'the court is satisfied, beyond reasonable doubt, that the offender has engaged in behaviour that caused or was likely to cause harassment, alarm or distress to any person.'.[44] As with the Injunction, there is no requirement that the potential or actual victim of anti-social behaviour should be of another household than the offender. Evidence to support the imposition of a CBO may include evidence that would have been inadmissible in the case in which the individual was convicted, e.g. hearsay[45]. Breach of a CBO is defined as a criminal offence[46]. Like the Injunction, the CBO may include positive requirements as well as prohibitions[47].

When first announced, the new measures were accompanied by proposals for a 'Community Trigger', whereby local authorities, police, healthcare providers and social landlords would be under a statutory duty to respond to repeated complaints of anti-social behaviour. Draft proposals envisaged that the threshold for the 'trigger' could be defined in terms of either multiple complaints or multiple complainants: the requirement would be that local agencies had received five complaints from separate households about a single issue, or three complaints from a single individual, without taking any action.[48] The 2004 report of the European Commissioner for Human Rights had expressed concern that ASBOs 'look rather like personalised penal codes' and could impose selective criminalisation on 'individuals who have incurred the wrath of the community'.[49] While the ASB Injunction would not criminalise, the Community Trigger seems designed to articulate and focus 'the wrath of the community' without the mediating influence of the police or local authority.

Following a mixed response to the Community Trigger proposal, the government proposed to devolve the detailed implementation of the 'trigger' to local authorities, which would be required to define and publicise the processes and criteria they used.[50] Between June 2012

and Apriil 2013, pilots of the Community Trigger were carried out in five local authority areas: Manchester, Brighton and Hove, the London borough of Richmond upon Thames, Boston and West Lindsey. Table 2 sums up the different approaches taken by the four pilot areas' Web sites.

TABLE 2[51]
*Community Trigger pilots: definitions and thresholds used*

| | Type of incident | 'Hate crime' cited? | Complaints: number | Complaints: in period | Complainants: number |
|---|---|---|---|---|---|
| **Manchester** | Anti-social behaviour or hate crime | Supporting text | 3 | Six months | 5 |
| **Richmond upon Thames** | Anti-social behaviour | Prompted | 3 | Six months | 5 |
| **Boston** | Anti-social behaviour | No | 3 | Twelve months | 3 |
| **West Lindsey** | Anti-social behaviour | Supporting text | 3 | Twelve months | Not specified |
| **Brighton and Hove** | Anti-social behaviour or hate crime | In definition | 1 | Not specified | 2 |

Manchester and Richmond broadly followed the Home Office recommendations in defining both the 'multiple complaint' and 'multiple complainants' scenarios, both imposing a six-month time window within which the multiple complaints must have been made. The paired Lincolnshire trials of Boston and West Lindsey used a longer time window; Boston required three complainants rather than five, while West Lindsey had no provision for 'multiple complainant' incidents. The most expansive approach was taken by the Brighton and Hove pilot: this required only that more than one household have been affected, or that one complaint have been made in the past, with no time window specified.

Given the undefined nature of anti-social behaviour and the potentially infinite range of complaints which this initiative could elicit, it is also noteworthy that four of the five pilot areas positioned the initiative as a way of addressing hate crime and hate incidents as well as anti-social behaviour. Again, Brighton and Hove's pilot strays furthest from the original

design of the Trigger, specifying that it is to be used to address inadequate responses to 'anti-social behaviour or a hate incident / crime'.[52] While the other four areas' Web sites all focus on anti-social behaviour, all except Boston prompt users, more or less prominently, to consider hate crime as a concern. This suggests a degree of overlap with the campaign to increase reporting of hate crime launched in 2012 by the Home Office and the Association of Chief Police Officers.[53] Given that the Home Office campaign aims to encourage non-reporting victims to make a report, while the Community Trigger is predicated on failure to respond to an initial report, the overlap is potentially problematic. Perhaps reflecting this division of purpose, the Manchester pilot site specifies that in the case of hate crime, only one complaint in the past six months is required. The Richmond pilot site offers less clarity: although users are prompted categorise the issue being reported as 'Anti-social behaviour', 'Hate incidents or crimes', both or neither, the front page of the site carries a prominent reminder that 'The Community Trigger can not be used to report general acts of crime, including hate crime.'[54] However, the evidence from the Community Trigger trials does not demonstrate widespread confusion on this point.

Indeed, perhaps the main fact demonstrated by the Community Trigger trials was their own limited impact, which in turn suggests that there was limited suppressed demand for ASB case reviews. Across the five pilots only 26 'triggers' were received; of these 15 met the specific local authority's threshold for a case review and six led to action being taken. Two of the five pilot areas - both urban - accounted for eighteen of the 26 activations, and for five of the six cases on which action were taken[55]. While the 'trigger' mechanism was duly enacted into law, it is perhaps symptomatic that it appears under the anodyne heading of 'Review of response to complaints'[56].

The ASB Injunction and CBO are perhaps best considered as developments on the ASBI and the ASBO on conviction respectively, superseding the ASBO on application - which is to say, the ASBO as originally drafted. Assessing the new instruments with reference to the three key features of the ASBO identified earlier, we can identify one break and two continuities. The break is with the civil/criminal hybridity of the ASBO - a feature whose utility had been impaired by the *McCann* judgment. The CBO, like the ASBO on conviction, is a supplement to a criminal sentence - a kind of behavioural surcharge on prosecutorial request. By contrast, the ASB Injunction, like the ASBI, is a wholly civil instrument of behaviour regulation. The Labour government's insistence on backing civil behaviour regulation with criminal penalties, the better to 'send [a] clear message'[57] of society's condemnation of anti-social behaviour, has disappeared.

The preventive focus of the ASBO is reproduced in the new measures, however, with conditions aimed at forestalling anti-social behaviour. The ASBI had departed from this logic, prohibiting anti-social behaviours directly and hence offering the respondent the choice of not behaving anti-socially. The new measures return to the incapacitatory approach of the ASBO, made potentially still more intrusive by the admission of additional conditions that may be judged to 'assist' in the prevention of anti-social behaviour.

The lack of definition associated with both anti-social behaviour and the ASBO, lastly, is not only maintained but entrenched. Like both the ASBO and ASBI, the new measures do not have an intentionality test or any stipulation that offence should actually have been caused. To obtain a CBO, 'behaviour that caused or was likely to cause harassment, alarm or distress' must be proved beyond reasonable doubt. For an ASB Injunction, by contrast, the conduct to be addressed need only be 'capable of causing nuisance or annoyance', and needs only to be

proved on the balance of probabilities. Hoffman and MacDonald's proposed civil ASBO would have been obtainable only by Crime and Disorder Reduction Partnerships, giving local authorities a central role. The ASB Injunction is to be obtainable by a wider range of agencies than the ASBO and with minimal consultation requirements. Both ASB Injunction and CBO also carry the possibility of imposing positive conditions as well as prohibitions.

The predictable outcome of the replacement of ASBO and ASBI by ASB Injunction and CBO will be that a wider range of people will be subjected more capriciously to more varied behavioural constraints. The fact that the breach of an ASB Injunction will be a contempt of court rather than a criminal offence is only a partial break with the logic of the ASBO; although not backed with criminal sanctions, the ASB Injunction will still aim to control behaviour through selective and pre-emptive prohibition, and a custodial sentence will remain a possibility on breach. Anti-social behaviour is still conceived as a protean menace which can only be managed through pre-emptive behaviour regulation, forcibly schooling those individuals believed likely to act anti-socially in the art of behaving properly.

**Conclusion**

Anti-social behaviour, as the Labour governments of 1997-2010 defined it, could take a plethora of forms, but represented a single social problem. Anti-social behaviour blighted lives and had been ignored for too long; individual instances might be trivial, but all needed to be dealt with decisively and urgently. The ASBO, the instrument designed for the job, was designed to impose preventive conditions, banning innocuous precursor activities on an individual basis; those held to have behaved anti-socially would be forcibly schooled in patterns of behaviour which would not permit anti-social behaviour to arise. Engaging in any

of the forbidden activities was a criminal offence; the sentence this would attract would send a message both to the offender and more widely, educating the community in the importance of respecting society's disapproval of anti-social behaviour.

The troubled history of the ASBO as a civil/criminal hybrid, and the Coalition's declared intention of replacing it, raised hopes of a new approach to anti-social behaviour in general; the focussed and wholly-civil approach of the ASBI suggested a model. However, when Theresa May laid a written statement before the House of Commons announcing the proposed replacements for the ASBO, her language was familiar: 'The term "anti-social behaviour" masks a range of nuisance, disorder and crime which affects people's lives on a daily basis: from vandalism and graffiti; to drunk or rowdy behaviour in public; to intimidation and harassment. All have huge impacts on the lives of millions of people in this country. None is acceptable.'[58]

The ASB Injunction has shed the criminal element of the ASBO; as a result, there is no suggestion that breaching an ASB Injunction would constitute 'mess[ing] with the courts',[59] or that the sentence for a breach should reflect 'the impact on the public of anti-social behaviour in its many forms'.[60] But it may be premature to argue that this change represents a new model of anti-social behaviour and its control, as distinct from a tactical retreat forced by *McCann* and subsequent judgments. The refusal to define anti-social behaviour, the rhetorical recourse to ideas of cumulative effect and the paradoxical demand for urgent and draconian action to prevent minor and non-criminal actions: all remain in place. These features are now backed by a more flexible and powerful toolkit for behaviour regulation, responsive to a wider range of agencies and to the general public. Graffiti, drunkenness, rowdiness: all these things have 'huge impacts' on 'millions'; '[n]one is acceptable'. Anti-social behaviour

remains a high political priority, to be addressed as a matter of urgency and by any means necessary, however trivial a guise any given incident may wear.

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[1] SC Deb (B) 30 April 1998.
[2] Crime and Disorder Act 1998, s. 1(1) (a).
[3] Protection from Harassment Act 1997, s. 7(2).
[4] Crime and Disorder Act 1998, s. 1(5).
[5] SC Deb (B) 30 April 1998.
[6] SC Deb (B) 5 May 1998.
[7] *R* v *Boness and Others* [2006] 1 Cr App R (S) 120
[8] L. Zedner, 'Pre-crime and post-criminology?' (2007) 11 *Theoretical Criminology* 261.
[9] *Ibid.*
[10] E. Burney, 'Talking Tough, Acting Coy: What Happened to the Anti-social Behaviour Order?' (2002) 41 *Howard Journal* 5, 469.
[11] P. Edwards, '"Putting the responsible majority back in charge": New Labour's punitive politics of respect', in P. Scott, C. Baker and E. Graham (eds.) *Remoralising Britain* (London: Continuum, 2009).
[12] P. Scraton, 'Streets of Terror: Marginalization, Criminalization, and Authoritarian Renewal' (2004) 31 *Social Justice* 130.
[13] HC Deb 17 Dec 1996 c791.
[14] P. Edwards, 'How the news was made: The Anti-social Behaviour Day Count, newsmaking criminology and the construction of anti-social behaviour' (2012) 21 *Critical Criminology* 2.
[15] Scraton, above, n.12 at 153.
[16] *Chief Constable of Lancashire* v *Potter* [2003] EWHC 2272 (Admin). Emphasis added.
[17] See e.g. Labour Party, *A Quiet Life: Tough Action on Criminal Neighbours* (London: Labour Party, 1995).
[18] Cited in P. Squires, 'The politics of antisocial behaviour' (2008) 3 *British Politics* 300, 311.
[19] *R (McCann and others)* v *Crown Court at Manchester* [2002] UKHL 39.
[20] C. Bakalis, 'Anti-social Behaviour Orders - Criminal Penalties or Civil Injunctions?' (2003) *Cambridge Law Journal* 583.
[21] S. MacDonald, 'The principle of composite sentencing: its centrality to, and implications for, the ASBO' (2006) Crim LR 791, 795.
[22] *R* v *Braxton* [2004] EWCA Crim 1374.
[23] *R* v *Tripp* [2005] EWCA Crim 2253.
[24] MacDonald, above, n.21 at 805.
[25] Housing Act 1996, ss. 152(1), 152(3) (as enacted).
[26] Anti-Social Behaviour Act 2003, s. 13(3).
[27] Police and Justice Act 2006, s. 26.
[28] Anti-Social Behaviour Act 2003, s.13(3).
[29] Police Reform Act 2002, s. 64.
[30] Department for Communities and Local Government, *Local Authority Housing Statistics, England: 2008-09* (The Stationery Office 2009); Department for Communities and Local Government, *Local Authority Housing Statistics, England: 2010-11* (The Stationery Office 2011).
[31] Home Office, *Anti-social Behaviour Order Statistics England and Wales 2013* (The Stationery Office 2014).
[32] SC Deb (B) 5 May 1998.
[33] Home Office, *A guide to Anti-Social Behaviour Orders* (The Stationery Office 2006); quoted in S. Hoffman and S. MacDonald, 'Should ASBOs be civilized?' (2010) Crim LR 457.
[34] Hoffman and MacDonald, above, n.32; see also S. Hoffman and S. MacDonald, 'Substantively uncivilized ASBOs: a response' (2010) Crim LR 764.
[35] Home Office, *Putting Victims First: More Effective Responses to Anti-Social Behaviour* (The Stationery Office 2012) Cm 8367.
[36] Anti-social Behaviour, Crime and Policing Bill (2013) HC Bill 7-EN 55/3.
[37] Throughout this article, 'ASBI' refers to an anti-social behaviour injunction obtainable under the 2003 Act; 'ASB Injunction' is used to refer to the anti-social behaviour injunctions introduced by the 2015 Act.
[38] Anti-social Behaviour, Crime and Policing Act 2014, s. 14(1).
[39] Anti-social Behaviour, Crime and Policing Act 2014, ss. 1(2), 1(3).
[40] Anti-social Behaviour, Crime and Policing Act 2014, ss. 2(1), 2(2), 2(3).
[41] Explanatory Notes to Draft Anti-Social Behaviour Bill (Cm 8495) (2012) at 100.
[42] Explanatory Notes to Anti-social Behaviour, Crime and Policing Act 2014, at 116.
[43] Criminal Justice Act 2003, s. 322.
[44] Anti-social Behaviour, Crime and Policing Act 2014, s. 22(3).

[45] Anti-social Behaviour, Crime and Policing Act 2014, s. 23(2); Explanatory Notes to Anti-social Behaviour, Crime and Policing Act 2014, at 139 (hearsay).
[46] Anti-social Behaviour, Crime and Policing Act 2014, s. 22(5).
[47] Anti-social Behaviour, Crime and Policing Act 2014, s. 30(1).
[48] Home Office, *More effective responses to anti-social behaviour* (Home Office, 2011) at 25.
[49] A. Gil-Robles, *Report by Mr Alvaro Gil-Robles, Commissioner For Human Rights, on his Visit to the United Kingdom 4th-12th November 2004* (Office of the Commissioner for H uman Rights 2011), Commdh(2005)6.
[50] Home Office, above, n. 34 at 18.
[51] Sources: Boston Borough Council, 'Community Trigger' (2012), *http://forms.boston.gov.uk/ShowForm.asp?fm_fid=542* [Accessed 26 November 2013]; Brighton and Hove Council, 'Community Trigger' (2012), *http://www.brighton-hove.gov.uk/index.cfm?request=c1265534* [Accessed 18 January 2013]; London Borough of Richmond-upon-Thames, 'Community Trigger' (2012), *http://www.richmond.gov.uk/home/safer_communities/community_trigger.htm* [Accessed 18 January 2013]; Manchester City Council, 'How can I use the Community Trigger?' (2012), *http://www.manchester.gov.uk/info/98/anti_social_behaviour_and_nuisance/5654/community_trigger/2* [Accessed 14 March 2013]; West Lindsey District Council, 'The Community Trigger for anti-social behaviour' (2012), *http://www.west-lindsey.gov.uk/residents/living-in-your-area/anti-social-behaviour/the-community-trigger-for-anti-social-behaviour/113205.article* [Accessed 18 January 2013].
[52] Brighton and Hove Council, above, n.42.
[53] Home Office, ''Challenge it, report it, stop it' - a plan to tackle hate crime', press release, 14 March 2012; see also Association of Chief Police Officers 'Stop Homophobic, Transphobic, Racial, Religious and Disability Hate Crime - True Vision' (2012), *http://www.report-it.org.uk/home* [Accessed 23 January 2013].
[54] London Borough of Richmond-upon-Thames, above, n.42.
[55] Home Office, *Empowering communities, protecting victims: Summary report on the community trigger trials*, (Home Office 2013).
[56] Anti-social Behaviour, Crime and Policing Act 2014, s. 104.
[57] Michael, above, n.6.
[58] T. May, 'Putting victims first - more effective responses to antisocial behaviour'. Written ministerial statement. HC Deb, 22 May 2012, c59WS.
[59] Michael, above, n.6.
[60] *R* v *Tripp*, above, n. 23.