Striking the right balance

Maya Sikand, a barrister at Garden Court Chambers, outlines how the operation of ASBOs in recent years should serve as a warning about the consequences of the unfettered use of other civil orders

I am writing this article exactly seven years to the day since the introduction of the *Human Rights Act 1998* (HRA). Although both the *Crime and Disorder Act 1998* (which gave birth to ASBOs) and the HRA were enacted in 1998, the *Crime and Disorder Act 1998* came into force on 1 April 1999 while the HRA didn't come into force until 2 October 2000. And while the HRA has had an important effect in other arenas, its impact in the arena of criminal justice has been fairly muted. Certainly it would not be inaccurate to say that the HRA has had little or no direct impact on the government's approach to the policing of antisocial behaviour. The government's consultation paper, *Strengthening Powers to Tackle Antisocial Behaviour,* sets out proposals to reform and extend existing antisocial behaviour legislation. The avowed goal is a 'simpler, swifter, fairer and more effective system.'[1] The proposals are apparently based on the expressed needs of frontline police officers and other professionals who may come into contact with behaviour that is deemed 'antisocial'. Strikingly, there is no mention whatsoever in the consultation paper of how these policies should be viewed in relation to the *European Convention on Human Rights* or the HRA.

The proposals include 'new frontline powers to deter and prevent antisocial behaviour', the introduction of a deferred fixed penalty notice system, and the widening of the existing crack house closure order regime to include the power to close down premises on which antisocial behaviour takes place. It is quite clear from even a cursory reading of these proposals that the government has paid little heed to both recent and historical examples of the litigation that has inevitably resulted when the police are vested with extremely wide discretionary powers. The proposals not only give frontline police officers greater discretion than they already have, they lack the kind of judicial safeguard that is always necessary when discretionary powers which affect the liberty of the subject are being exercised. Some of the proposals already appear in the new *Criminal Justice and Immigration Bill* and no doubt, in due course, will become the law of the land.

It is clear that our current government is hell-bent on continuing its love affair with the ASBO-type order (civil orders imposed in the criminal courts). Breaches of these result in a heavy penal sanction: breaking an ASBO, for example, can involve a maximum sentence of five years. More importantly, the safeguards normally associated with criminal trials do not apply. Ever since the House of Lords ruled that ASBOs were preventive and not punitive measures and therefore civil not criminal,[2] the government has rolled out a brand new ASBO-type civil order every few years. The majority of these powers have been introduced to tackle what is now commonly referred to as antisocial behaviour. If one examines the number and range of these powers, the result is quite astonishing.

The range of quasi-criminal powers available

The use of civil orders to prevent criminal and quasi-criminal activity is not a new invention. Local authorities have had a statutory power to 'promote or protect the rights of inhabitants in their area' by way of injunctive relief since 1972.[3] This power has been commonly used to tackle begging, prostitution and kerb-crawling, thereby invoking the assistance of the civil courts in aid of the criminal law. Exclusion orders to counteract football hooliganism (more recently in the form of 'football banning orders') have been available in one form or another in the criminal courts since 1986.[4] Breach of them constitutes a criminal offence.

These powers have widened and grown enormously over the last few years, in particular with the introduction of the *Crime and Disorder Act 1998*, the *Police Reform Act 2002* and the *Antisocial Behaviour Act 2003*. The *Crime and Disorder Act 1998* introduced not only ASBOs (limited to the criminal courts at that stage) but also parenting orders, sex offender orders, child curfew orders and child safety orders. The *Police Reform Act 2002* introduced ASBOs in the county court and increased their availability generally. The *Antisocial Behaviour Act 2003* further widened existing powers and brought in a raft of new measures including crack house closure orders, dispersal orders and new powers to tackle fly posting, graffiti, waste and litter.

As the popularity of ASBOs increased, the *Serious Organised Crime and Police Act 2005* gave the

Secretary of State the power to extend the list of authorities that can apply for ASBOs. The list of relevant bodies that can apply for ASBOs (traditionally the police, local authorities and social landlords) was widened to include Transport for London, the Environment Agency and most recently, residents' groups. In addition, the *Criminal Justice Act 2003* introduced individual support orders and the *Drugs Act 2005* introduced intervention orders, although these can only be made in addition to an ASBO.

A few more recent additions...

Just when we thought we had enough orders, the *Violent Crime and Reduction Act 2006* was enacted early this year. It introduced drinking banning orders modelled on the ASBO which can be issued on a stand-alone or post-conviction basis. Like ASBOs, breach of such an order is considered a criminal offence. In addition, in January 2007 we saw the publication of the *Serious Crime Bill* which seeks to introduce serious crime prevention orders (already colloquially known as the 'Super ASBO'). This order would prohibit or restrict an individual's financial dealings, working arrangements or access to premises for up to five years, without the individual having been convicted of any offence. The High Court would only need to have reasonable grounds to believe that the order would protect the public by preventing, restricting or disrupting involvement by the person in serious crime; crown court judges would have similar powers but on conviction of a defendant. Once more, this is a civil order with the potential for extremely restrictive prohibitions. Breach of it would constitute a criminal offence, punishable on indictment for up to five years plus the power of forfeiture.

Plus more proposals for the future...

Despite the steadily rising prison population, which has undoubtedly been exacerbated by an increasing number of people being sent to prison for breaching one of the many civil orders described here, the *Criminal Justice and Immigration Bill* is proposing the introduction of violent offender orders. The advent of the violent offender order, which can be described as a post-conviction ASBO for those convicted of serious crime, suggests that officials have concluded that a prison sentence and licence conditions are not sufficient punishment for individuals convicted of certain violent offences.

In order to understand why this ever-increasing list of orders should be feared, one only has to look more closely at the way ASBOs have operated over the last eight years.

Overuse and abuse

It has often been said by the government that civil liberties organisations or individuals that campaign against ASBOs are out of touch or unaware of the plight of those whose lives are deeply affected by antisocial behaviour. There are indeed those who are affected by the unacceptable behaviour of others and who are accordingly entitled to protection from persistent exposure to certain types of behaviour which cannot be effectively prosecuted in criminal courts due to evidentiary requirements. But the ASBO regime has not always focused on the plight of those people and has often been misused by those who have the power to apply for ASBOs. The overuse and, in some cases, the abuse of ASBO powers has meant that the orders have been ridiculed by the media and considered a 'badge of honour' by some disaffected young people.[5] Some of the ways in which ASBOs are perceived to be misused are discussed below.

ASBOs - 'made to be breached'

There is a spectrum of behaviour in society which can be defined as dysfunctional, compulsive or disordered. Calling 999 repeatedly and pretending to faint when ambulance staff turn up; faking a heart attack to get into an operating theatre; having a fetish for medical supplies and hanging around hospitals; pretending to be a werewolf and howling loudly: these are all real examples of behaviour that has been subject to ASBOs. There is no doubt that some of this behaviour is alarming, perhaps even distressing, but one thing it ought not to lead to is a 'two-stop criminal offence'.[6]

Obtaining ASBOs against people with behavioural difficulties and/or obsessive compulsive disorders is unlikely to make them desist from this behaviour.[7] In effect, all it does is catapult vulnerable people into the criminal justice system and, in the event of a breach, into already overflowing prisons. This is where government-speak about rights and responsibilities breaks down. People in this category are not always able to take responsibility for their actions precisely because they suffer from a disorder that may need psychiatric or other specialist treatment or support. It may well be that the disorder is untreatable or has gone undiagnosed.

Geographical inconsistencies

There is no doubt that the use of ASBOs varies across Britain. Because of these geographical inconsistencies, there is a perception that if you live in a particular part of the country, you are more likely to have an ASBO imposed upon you for behaviour which in another part of the country would be dealt with by some other means, if at all. A glance at the Home Office statistics reveals that Greater Manchester reported 1,045 ASBOs between April 1999 and September 2005 – by far the largest number of applications in the period. Manchester was followed by Greater London which reported 749, the West Midlands 554, and West Yorkshire 550. It would seem that the

use of ASBOs is directly related to the political priorities and resources of a particular local authority and not necessarily to the level of antisocial behaviour, which could lead to the criminalisation of particular communities.

A fast track to prison?

The minimum age for an ASBO recipient is 10 years old. Between 1 April 1999 and the end of December 2005, a total of 9,853 ASBOs were issued across England and Wales, at least 3,997 of which had been imposed on 10 to 17 year olds (over 40%).[8] A closer look at the statistics reveals that in 2003 almost half of all ASBOs applied for were against 10 to 17 year olds while in 2004 and 2005, this figure decreased to approximately 40%.[9] Worryingly, government statistics from 2004-05 revealed that 42% of ASBOs were breached, 55% of breaches were punished with a custodial term and 46% of young people who received an ASBO were immediately placed in custody for a breach.[10] Young people are most likely to breach ASBO terms which involve geographical restrictions and restrictions on association with others (the terms most commonly imposed on young people) and most breaches will occur in the first quarter of the ASBO term.[11] As the number of applications for ASBOs increases, given the high success rate in obtaining them (see below) it follows that more ASBOs will be breached. This in turn will continue to have an impact on our prison system and, ultimately, the society we live in.

Rubber-stamping by the courts

The other real concern about ASBOs is the degree and quality of judicial supervision at the time of imposition. In the first six years of the ASBO regime (between 1 April 1999 and 31 March 2005), 5,557 ASBOs were applied for in England and Wales, and only 58 refused by the courts (in Wales, all of the 211 applied for were granted).[12] That translates as a 99% success rate. There is an absence of data as to whether the orders are granted in the terms applied for. The absence of any data in relation to how many ASBOs are appealed, and to which court, makes it difficult to judge whether or not the 99% success rate is an accurate statistic for all localities. However, the high level of breaches to date may very well indicate that either ASBOs are not appealed very often or that they are not successfully appealed. Even if they are appealed, it may be too late given that a large number of ASBOs, particularly against young people, are breached in the very early stages.[13] The dramatic increase in the body of case law on ASBOs in the last few years may well mean that there is a changing climate, both in terms of a greater willingness by lawyers to challenge ASBOs, as well as a recognition by the higher courts that the arbitrary application and granting of ASBOs has had a serious impact upon our prison population over the last eight years.

Finding a new definition for antisocial behaviour

The other fundamental problem with ASBOs is the vague definition of antisocial behaviour. The current definition, for the purposes of obtaining an ASBO, is boundless and, it would seem, deliberately so. According to the *Crime and Disorder Act 1998*, antisocial behaviour is 'behaviour which causes or is likely to cause harassment, alarm or distress to one or more persons who are not in the same household as the perpetrator'. In short, the test is whether others have been, or are likely to be, upset by it. The consequences of such a definition are that the state may end up regulating behaviour which does not necessarily amount to a crime or indeed even a civil wrong-doing.

There are endless examples of behaviour which could cause harassment, alarm or distress. Some of them are arguably part and parcel of urban living. Some of them may materially affect the quality of life of a group of individuals in a particular locality. As Gil-Robles, the European Commissioner for Human Rights, has noted, because ASBOs (unlike civil injunctions) are intended to protect not just specific individuals, but entire communities, 'the determination of what constitutes antisocial behaviour becomes conditional on the subjective views of any given collective'.[14] This in turn makes it extremely difficult to define terms of orders in such a way that 'does not invite inevitable breach'.[15] In other words, there is a real danger of ASBOs (and similar civil orders) being preventive in form alone and truly punitive in substance.

Editor's note Some of this material was first published by Legal Action Group in *ASBOs: A practitioner's guide to defending antisocial behaviour* by Maya Sikand and is reproduced by agreement with the publishers.

Notes

1 Home Office (2006) *Strengthening Powers to Tackle Antisocial Behaviour* London: Home Office
2 *McCann and Ors v Crown Court at Manchester; Clingham v K and C Royal Borough Council* [2002] UKHL 39, [2002] 3 WLR 1313, [2002] 4 All ER 593, HL
3 Section 222 of the *Local Government Act 1972*
4 See in particular the *Football (Spectators) Act 1989* (as amended by the *Football ((Disorder)) Act 2000*)
5 Solanki A, Bateman T, Boswell G and Hill E (2006) *Antisocial Behaviour Orders* London: Youth Justice Board
6 Gil-Robles A (2005) *Report by Mr Alvaro Gil-Robles, Commissioner for Human Rights, on his visit to the UK 4-12 November 2004* Strasbourg: Council of Europe
7 The British Institute for Brain Injured Children and the National Autistic Society have been highlighting the plight of those with autism, ADHD and other disorders against whom ASBOs have been obtained.
8 This figure comes from the antisocial behaviour statistics compiled by the Home Office, which can be found at www.crimereduction.gov.uk/asbos2.htm (note: no age figures available for period April 1999–May 2000).
9 www.crimereduction.gov.uk/asbos2.htm
10 Select Committee on Home Affairs (2005) *The 5th Report from the Home Affairs Committee Session 2004-2005 – Antisocial Behaviour* London: Home Office
11 Youth Justice Board (2005) *Antisocial Behaviour Orders: An assessment of current management information systems and the scale of antisocial behaviour order breaches resulting in custody* London: Youth Justice Board
12 The figures for the number of ASBOs applied for between April 2005 and December 2005 were not available.
13 www.crimereduction.gov.uk/asbos2.htm
14 Gil Robles A (2005) *Report by Mr Alvaro Gil-Robles*
15 *ibid*