

**Transforming anti-social behaviour: ASBOs, injunctions and cross-cutting criminal justice concerns**

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## **Transforming Anti-Social Behaviour: ASBOs, Injunctions and Cross-Cutting Criminal Justice**

### **Concerns**

#### **Abstract**

The Coalition Government has recently made the most substantial changes to anti-social behaviour (ASB) legislation since it was enacted in 1998. New Labour's flagship Anti-Social Behaviour Order (ASBO) has been replaced as part of a raft of reforms to streamline the tools and powers available to tackle ASB. This paper examines the legislative changes to ASBOs and the proposed impact of these changes by considering the turbulent development of their replacement: the Injunction. ASBO reforms are subsequently analysed within broader transformative processes currently being undertaken in the criminal justice system, with specific reference to the *Transforming Rehabilitation* agenda and the probation service. A lack of evidence-based policy; rushed changes, payment incentives and marketisation are highlighted in this paper as cross-cutting concerns between these two different, but ultimately interconnected policy domains. Ultimately the changes to ASB legislation are deemed to be superficial, although it appears the foundations are being laid for more radical changes in the future.

**Key words:** Anti-social behaviour; Coalition; ASBOs; Injunctions; Transforming Rehabilitation

#### **Introduction**

The Coalition took up office in 2010 with the promise to take 'radical action to reform our criminal justice system' (HM Government, 2010: 13). This proposal is examined here in light of recent changes to anti-social behaviour (ASB) legislation, situating these adjustments in relation to broader reformative processes being undertaken to community justice and probation through the Coalition's Transforming Rehabilitation (TR) agenda. The purpose of this paper is to question whether the changes to ASB legislation are as *radical* as initially suggested and to explore a number of cross-

cutting criminal justice policy concerns highlighted in volume 11:2/3 of the British Journal of Community Justice entitled '*Transforming Rehabilitation - Under the Microscope*'. It appears the ideological and practical concerns provoked by the TR agenda are evident, albeit to a lesser extent, in the developments to ASB legislation.

The paper begins with an appraisal of the changes to ASB legislation proposed by the Coalition in the form of the *ASB, Crime and Policing Bill*; specifically focusing on the reforms to Anti-Social Behaviour Orders (ASBOs) to create the Injunction. The passage of the Bill through Parliament is then considered, examining the tensions that arose when it reached the House of Lords and the subsequent amendments. The implications of these changes are then discussed in relation to broader criminal justice policy concerns that have been highlighted by plans to implement TR, determining the extent to which the changes in ASB legislation have been radical.

### **Legislative Changes**

ASB legislation has remained fairly static since its inception in 1998 through the *Crime and Disorder Act* and the extended powers provided by the *Anti-Social Behaviour Act* of 2003. Reflecting different politically populist themes, New Labour's ASB agenda demonstrated evolving policy foci; for example nuisance neighbours in New Labour's first term, environmental ASB in the second and youth intervention in the third<sup>1</sup>. The Coalition Agreement (HM Government, 2010), where the commitment to radical change was stated, sets out nineteen specific criminal justice reforms, albeit none relating to ASB. However, since 2011 the Coalition has pursued the legislative reform of ASB with the primary objective of jettisoning the ASBO. Arguably the most well-known ASB sanction, ASBOs can be sought by the relevant authorities to hand down to anyone over the age of 10 to prevent behaviour that causes or is likely to cause *harassment, alarm or distress*. They operate for a minimum period of two years with the potential to operate indefinitely. There is no restriction on

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<sup>1</sup> A full account of New Labour's ASB agenda and the challenges faced by the Coalition government can be found in Hodgkinson and Tilley (2011).

the type(s) or numbers of behaviour ASBOs sanction. Breaching the terms of an ASBO constitutes a criminal offence punishable by up to five years' imprisonment for adults and a two year detention and training order for young people, or a fine of up to £5000.

With ASBOs (and ASB in general) regarded as a steadfastly New Labour creation, designing new tools and powers to sanction ASB presented an opportunity for the Coalition to markedly change a policy area that both constituent Coalition parties (the Conservatives and the Liberal Democrats) fiercely criticised whilst in opposition (BBC News, 2006). The 2012 White Paper *Putting Victims First - More Effective Responses to Anti-Social Behaviour* outlines the Coalition's vision to streamline the existing 19 sanctions to just 6, with ASBOs being replaced by Crime Prevention Injunctions. Despite conflating the issues of crime and ASB, these injunctions intended to offer speedy redress to those suffering ASB by being both handed down and sanctioned through civil law. The Home Office (2012a: 24) states 'our injunction will build on the success of the ASB Injunction, which social landlords use effectively to stop problems and protect victims, and which is faster and easier to use than the ASBO.' Specifically for use by social housing providers, Anti-Social Behaviour Injunctions (ASBIs) can sanction *nuisance and annoyance* that affects the housing management function of the landlord. With this much looser definition of troublesome behaviour, ASBIs became popular with practitioners seeking speedy remedies for ASB (Heap, 2010), with their use surpassing ASBOs in some locations (Clarke et al, 2011).

What the White Paper fails to clarify is how the ASBI utilises a different ASB definition to ASBOs; 'nuisance and annoyance', compared to 'harassment, alarm or distress'. The failure of the Home Office to explicitly detail this difference at the outset, perhaps assuming their readership would be familiar with the finer points of ASB and housing law, had stark consequences when the White Paper eventually progressed into the Bill at the House of Lords. Fundamentally, replacing the ASBO with an Injunction that implements the nuisance and annoyance definition further widens the pre-

existing broad range of behaviours considered under the ASBO's harassment, alarm or distress definition. Despite providing the opportunity to sanction troublesome *low-level* nuisance (as the White Paper promises), there is the very real danger that legitimate behaviour conducted by marginalised groups could suffer at the behest of persistent complainers. For example, young people playing football in the street may not be deemed to cause harassment, alarm or distress, but the repetitive thud of footballs could well be considered to cause nuisance and annoyance. The broad nature of the proposed definition could encompass almost *any* annoying behaviour; as such the new injunctions could technically be used to curb people: mowing the lawn at 9am on a Sunday, trick or treating at Halloween and talking loudly on mobile phones whilst using public transport.

Flippancy aside, this is problematic from a human rights perspective as it reprises and exacerbates the original criticisms levelled at ASBOs by Ashworth et al. (1998) and Pearson (2006) in relation to Article 5 (liberty and security of the person), Article 6 (right to a fair and public hearing) and Article 8 (right to a private and family life) of the European Convention for Human Rights. An even broader definition creates the possibility that more people will be brought under the jurisdiction of the criminal justice system, amplifying the net-widening and mesh-thinning concerns brought about by ASBOs (Cracknell, 2000; Brown, 2004). The nuisance and annoyance definition could also facilitate the extended use of the injunctions by the authorities to sanction difficult and/or persistent offenders instead of prosecution, in the knowledge that a breach will result in an easier prosecution (Burney, 2009). The swift application procedure would also prove more favourable to practitioners in this instance.

The White Paper also emphasises a fresh policy focus on victims. The heightening of ASB victims' needs coincides with a number of tragic high-profile cases, such as Fiona Pilkington and Suzanne Dow who both took their own lives (and in the case of Pilkington also the life of her disabled daughter) as a consequence suffering persistent ASB that was not adequately addressed by the

authorities. This marks a completely new direction for ASB; very little attention has been paid specifically towards victims in the past as previous legislation and policy has focused heavily on tough enforcement (Millie, 2009; Duggan and Heap, 2014). As an overall strategy, this coalesces with broader Coalition criminal justice policy modifications, with the prioritisation of victims also evident in hate crime (for example; *Challenge it, Report it, Stop it: The Government's Plan to Tackle Hate Crime* (HM Government, 2012)) and domestic violence domains (the Domestic Violence Disclosure Scheme (House of Commons Library, 2013)). The heightened regard for victims' needs espoused by the Coalition is considered a vote-winning tactic and has been discussed elsewhere (see Duggan and Heap, 2013; Duggan and Heap, 2014). ASB itself is suggested to serve a political function (Bannister et al., 2006), with evidence to show New Labour pursued ASB innovations around the time of general elections as a vote-winner (Heap, 2010). A proposition reconsidered later in this paper's analysis.

The White Paper evolved into the *Draft Anti-Social Behaviour, Crime and Policing Bill* (2012), which began its passage through Parliament in May 2013. This reflects a relatively slow progression from the initial mooted of legislative changes by the Home Secretary in 2010 (May, 2010), followed by the consultation in early 2011 (Home Office, 2011) and the White Paper in 2012. During this time the Crime Prevention Injunction had morphed into the newly titled Injunction to Prevent Nuisance or Annoyance (IPNA). The full remit of the IPNA is generally similar to the ASBO, with the relevant authorities given powers to apply for an injunction applicable to anyone over the age of 10 who 'has engaged or threatens to engage in conduct capable of causing nuisance and annoyance to any person' (Great Britain, Parliament, House of Lords 2013).

The IPNA process is conducted in the civil courts (County Court for adults and the Youth Court for young people) rendering the burden of proof to be based on the balance of probabilities. The original ASBO began with a civil burden of proof, until a successful legal challenge ensured future

ASBOs were based on the higher burden of proof of beyond reasonable doubt. The consequences for IPNA breach are slightly blurry, with the Home Office Draft Guidance (2013: 27) proclaiming:

‘breach of an IPNA is not a criminal offence. However, due to the potential severity of the penalties which the court can impose on respondents, the criminal standard of proof - “beyond reasonable doubt” - is applied in breach proceedings.’

The criminalisation comes from breaching the injunction which is a civil contempt of court. The penalties for breach are slightly less severe than ASBOs, with adults facing up to two years imprisonment and/or an unlimited fine. Sanctions for juveniles include Supervision Orders and in more serious cases a Detention and Training Order. The terminology surrounding IPNA breach is potentially problematic for both offenders and victims. Unless well-versed in the complexities of civil law, the implications for breach appear unclear. Breaching the Injunction is not a criminal offence unlike the ASBO, but the evidence required to punish a breach must be scrutinised to the criminal standard of proof. This does little to resolve the criticism levelled at ASBOs for containing elements that recipients find difficult to understand (Fletcher, 2005), with this issue compounded for those with mental health problems and/or learning difficulties (British Institute for Brain Injured Children, 2005).

In turn, if the penalties for breach are not criminal, a tension arises between putting victims first and fuelling criminalisation through net-widening. One of the rationales provided by the Home Secretary for pursuing changes to ASB legislation was to ensure the new sanctions ‘act as a real deterrent’ (Home Office, 2011: 1). However if the sanctions for breaching IPNAs are not criminal, it is questionable whether perpetrators are going to be deterred from committing ASB. This is underlined by the fact that the effectiveness of ASBOs, which were criminal upon breach, was questioned by the Home Office (2011) because of increasing breach rates. Home Office and Ministry of Justice data

shows 58% of ASBOs between 2000-2012 were breached at least once, with the average number of breaches per ASBO totalling 4.9 (HM Government, 2013). The likelihood may be that IPNAs will be breached just as much as ASBOs. Furthermore if the new sanctions are not stopping and preventing ASB, victims' needs are not being 'put first' as espoused by the political rhetoric. Research already suggests victims do not consider ASB sanctions harsh enough (Heap, 2010), therefore IPNAs are unlikely to bolster confidence in victims that their needs will be met.

The element of IPNAs that definitively sets them apart from ASBOs is the ability to include positive as well as prohibitive conditions. This means recipients can be required to do something to address the underlying causes of their behaviour. Theoretically this is a positive step for ASB legislation, which as a whole has been criticised for failing to address the causes of ASB and being too enforcement led (Hodgkinson and Tilley, 2011). An example of a positive requirement could mean nuisance neighbours attending mediation sessions or receiving drug/alcohol treatment. However, the failure to comply with any positive requirements also results in a breach of the Injunction similar to prohibitive conditions. Consequently, even if the ASB has been stopped by the prohibitive conditions, the failure to meet the requirements of the IPNA's positive condition(s) *could* result in the perpetrator receiving a prison sentence. This means an individual could be imprisoned for *failing* to commit an act, even when the act in question is legal. Furthermore, this reductivist logic assumes a causal relationship between the completion of the positive condition and the ASB stopping; rather, the interplay of a wide range of variables could occur to ameliorate the problem behaviour. ASBOs were renowned for their potential to imprison someone for breaching non-criminal prohibitions such as swearing in the street, but legislating to allow a potential custodial sentence for failing to conduct positive behaviour extends criminalisation to a whole new level.

## **Amending the Changes - Back to ASBOs?**

The *ASB, Crime and Policing Act* received royal assent in March 2014, but despite experiencing a relatively smooth passage through the House of Commons, its progress through the House of Lords was turbulent. This section will examine some of the concerns raised by the Lords and how their intervention resulted in amendments to the Bill, which profoundly altered the IPNA.

The House of Lords raised two key concerns with the IPNA provisions. Firstly, there was apprehension about the civil burden of proof being too low, with a prediction of numerous IPNAs being handed down for relatively innocuous behaviours ranging from carol singing to nudism (HL Debate 13/14). Subsequently, an amendment was tabled to revise the threshold from the balance of probabilities to beyond reasonable doubt. If successful, this would have re-aligned the IPNA to the ASBO, giving it less resemblance to the ASBI upon which it was based. Social housing providers and victims' advocates were against these proposals due to the increased time required to secure an IPNA at the higher threshold and the necessity for (often frightened) victims to have to appear in court for instances of minor ASB (Social Landlords Crime and Nuisance Group, 2014). After much debate, the Lords were unsuccessful in passing this amendment, which further highlights the tension between balancing victims' needs and potential broadening criminalisation.

The ultimately successful second amendment opposed the nuisance and annoyance definition. Lord Dear tabled an amendment for the definition to be reinstated as harassment, alarm or distress, the same as ASBOs. This move was 'concerned with the legal requirement that the law should be precise and not undermine fundamental human freedoms' (HL Debate 13/14), which ultimately reflects some of the net-widening and mesh-thinning apprehensions outlined in the previous section. However, another amendment re-shaped the proposed legislation further still. This split IPNA provisions into housing and non-housing related categories. The housing IPNA retains the same housing management functions outlined in the old ASBI, but the powers have been extended

to include provision for private landlords and residents. It will retain the nuisance and annoyance definition, essentially creating a tenure-neutral ASBI. This does not abate concerns surrounding the potential for increased criminalisation associated with the nuisance and annoyance definition; however it does create a more equitable situation because the sanctions are no longer targeted at social housing tenants alone, which contrasts the broader penalisation of poverty used to manage those at the lower end of the class structure (Wacquant, 2001). Nevertheless, it is yet to be determined how provision for private tenants and residents will translate into practice, with the latest government Spending Round projecting a further £11.5 billion of public funds need to be saved (HM Treasury, 2013).

The other aspect of the IPNA covers everything apart from housing, it is a civil injunction based on the balance of probabilities, with the definition relating to harassment, alarm or distress; strikingly similar to the traditional ASBO, aside from the potential to include a positive requirement. To an extent this addresses some of the concerns about the Coalition's net-widening agenda, as most types of ASB will be considered under the tighter definition. In essence, this is principally an ASBO with a new name. Indeed the name of these sanctions proved problematic once the over-arching nuisance and annoyance definition was removed. Since the Bill received royal assent, a decision was taken to refer to these sanctions simply as 'Injunctions', with this wording now evident in the published Act (Great Britain, 2014). It remains unclear how the Injunctions will be referred to in popular discourse; a bland title may remove the 'badge of honour' status attributed to ASBOs, although some distinction will be required demarcate this Injunction from other injunctive provisions.

### **Implications and Cross-Cutting Concerns**

It is clear the action taken to reform ASB powers has been far from radical. This assertion is not new, with Hodgkinson and Tilley (2011) suggesting an early incarnation of the proposals simply amounted

to rebranding. However, the amendments pursued by the House of Lords have made this legislation even more like the original ASBO than the initial consultation first suggested. This demonstrates how the Coalition's management of ASB policy is deficient, allowing parallels to be drawn to other areas of criminal justice experiencing change, specifically the TR agenda and changes to the probation service.

The Coalition's *Transforming Rehabilitation: A Strategy for Reform* consultation response document (Ministry of Justice, 2013a) outlines a range of proposed fundamental reforms to the way offenders are rehabilitated. The key modifications include: extending statutory rehabilitation to offenders sentenced to less than 12 months in custody, creating a nationwide resettlement service, marketising rehabilitation providers (dismantling the current probation service) and implementing new payment incentives (payment by results), and creating a new national probation service. The proposals have been far from well received by academics and probation practitioners alike, with Senior (2013: 1) warning the consequences of these changes include 'fragmentation, loss of expertise, conflicts of interest, inconsistent practices and the danger to public safety that would result from confusion on risk categorisation'. This section will consider cross-cutting concerns in both ASB and probation that relate to practical implications of the changes including: research informed and evidence-based decision making, the rushed nature of the changes, payment incentives and marketisation.

The Coalition's TR proposals have been criticised for being ideologically driven rather than evidence based. Concerns abound from a range of perspectives, including: there being no evidence base for the planned organisational changes, with some proposals even contradicting existing research evidence (Senior, 2013); anxieties around the future use of accredited interventions grounded in evidenced based evaluation (Gilbert, 2013); and the suggestion that future evidence of 'what works' will be closely guarded by private companies motivated by profit (McNeill, 2013). The changes in

ASB policy have also been ideologically driven with a disregard for evidence, albeit in a markedly different manner. Very little evaluative work has been undertaken to ascertain which ASB interventions 'work' as a consequence of inconsistent data collection mechanisms, that are largely a result of local ASB definitions, priorities and practises. The Home Office never evaluated the flagship ASBO (Chambers, 2010). Although Clarke et al. (2011) and Crawford et al. (2012) have assessed the *impact* of ASB tools and powers, both refrained from using the term evaluation. Accordingly the Coalition has had little option but to pursue a non-evidence based framework, although this does not justify merely rebranding the ASBO. The Home Office made it clear they wanted to dispose of the ASBO due to concerns over high breach rates (Home Office, 2011) and there is evidence to show ASBOs declining usage (Clarke et al., 2011). Worrying, there is no suggestion of any impetus to evaluate the new powers, despite the National Audit Office suggesting 'Departments should publish a list of significant evaluation gaps in their evidence base, and should set out and explain their priorities for addressing those gaps'(2013a: 10). Although considering the current situation in probation, it does not seem to matter if there is evidence in place to dictate practise or not. Therefore an overarching disregard for developing evidence based policy is shared across probation and ASB, giving the impression that the Coalition (and to some extent New Labour are guilty here too in relation to ASB) do not care about 'what works'. This generates the proposition that changes in both policy domains were made for the sake of change.

Inherently linked with the notion of deliberate and visible change is the suggestion that these changes were rushed; a criticism which Senior (2013) has already ascribed to the TR plans. The same can be said for the ASB developments, although there are some key differences. As mentioned previously, the build-up to the legislative changes to ASB were relatively slow, with nearly two years passing between the consultation (Home Office, 2011) and the draft Bill (Home Office, 2012b). In contrast the proposals to implement TR arrived quickly, with the initial consultation being held between January and February 2013 (Ministry of Justice, 2013b), with consultation published in May

2013 (Ministry of Justice, 2013a). It was when the *ASB, Crime and Policing Bill* got to Parliament that the pace quickened. In fact, the *ASB, Crime and Policing Bill* and the *Offender Rehabilitation Bill* (legislating the TR plans) both had their first reading on the same day (9 May 2013), in the House of Commons and House of Lords respectively, with both receiving royal assent after eight months on the same day (13 March 2014). However when comparing the parliamentary passage of each Bill, the paths taken were very different. The *ASB, Crime and Policing Bill* was subject to a large number of sittings (15 committee and 2 report in the Commons with 7 committee and 4 report in the Lords) compared to the *Offender Rehabilitation Bill* (2 committee and 1 report in the Lords with 6 committee and 1 report in the Commons). This highlights how the ASB legislation was subject to greater debate and more amendments in an equal amount of time. During the 2013/14 Parliamentary session only two other Bills had a comparable number of debates: the *Care Bill* and the *Energy Bill*, both of which took longer to receive royal assent, taking ten months and thirteen months respectively. There is no set time period for Bills to pass, but it does appear the *ASB, Crime and Policing Bill* was passed very quickly, despite the complexity of the Bill itself. It is surprising Home Office Ministers did not intervene during the periods of debate considering the implications of essentially reverting back to ASBOs, given the justifications for change they made in the first instance. The fact that it is likely to have been politically damaging for the Government to perform any sort of 'U-turn' at such a late stage, may have curtailed any intervention. The populist ASBO-scraping rhetoric will probably continue and likely convince the general public, but ASB stakeholders (including victims) will be aware of the fallacy of these claims. Overall, bulldozing through un-evidenced criminal justice policies is becoming symptomatic of the Coalition, which does little to meet the needs of offenders, victims or practitioners.

Payment incentives are already a familiar concept in the ASB sphere, as a result of the introduction of payment by results (PbR) to the Troubled Families Programme (Department for Communities and Local Government, 2012). Although in contrast to probation, it is Local Authorities not private

companies that are incentivised in the criminal justice element of programme (as opposed to the welfare element). Initial findings from the National Audit Office (2013b: 7) demonstrate PbR in this setting remains a work in progress, suggesting 'there is a lack of information on costs and the non-intervention rate (the level of outcomes that would have been achieved without the programmes)', making it difficult to set the correct payment threshold. This reinforces Hedderman's (2013) fears about this precise issue occurring in a probation context. Further concerns have also been raised about the performance level achieved by PbR in the Troubled Families Programme, with lower than anticipated outcomes attained to date. The initial target was to 'turnaround' the lives of 120,000 families by 2015, although as of October 2013 only 22,000 families had been helped in this way (House of Commons Committee of Public Accounts, 2014).

Based on the pervasiveness of PbR in other aspects of the public sector such as National Health Service (National Health Service, 2013), its use in criminal justice was perhaps inevitable given the neoliberal tendencies of the Coalition, whereas opening the market to a range of *new* providers is something new for probation and ASB. The move to introduce new providers to the rehabilitation market has been made explicit in the TR plans. However, subtle shifts towards a marketisation approach in ASB appear to be taking shape. For example, one method proposed to facilitate compliance with the Injunction's positive requirement is that the Injunction must state a person or organisation responsible for ensuring adherence to the positive condition. The causation focused nature of the positive conditions means the individual or organisation taking responsibility is unlikely to be part of the criminal justice system. For example, the individual may be a trained mediator or a drugs worker. This could be seen as the first step in diffusing the responsibility for ASB away from criminal justice practitioners and onto other frontline service providers, who may not have experience of such supervision. There is no indication at this stage that such organisations will receive PbR or be a private company, but taking into account the changes being made to the probation service it may not be too far in the distant future. A further signal we may be heading in

this direction is the news that private security firms, such as Sparta Security in Darlington, are beginning to undertake work tackling nuisance neighbours (The Northern Echo, 2014). This may have profound implications on the way ASB is managed in the future.

### **Conclusion - Future Gazing**

This paper has focused on exploring and reconciling criminal justice reforms in two distinct policy areas. In doing so, it has uncovered matters of cross-cutting concern relating to both the ASB and probation reforms proposed by the Coalition Government. One of the purposes of this paper was to question whether the changes to ASB legislation were *radical* in light of the Coalition's promise of radical criminal justice reform. The evidence presented here suggests that at face value the changes have not been radical at all, in fact the Injunctions passed into law are fundamentally the original ASBO from 1998 with the addition of a positive condition. However, when the ASB reforms are considered against some of the more radical changes proposed to probation; it is evident that the foundations for future radical changes have been laid, particularly in the case of payment incentives and marketisation. ASB stakeholders will undoubtedly follow how the probation changes unravel in practice, with one eye on the future of their own domain. Practice is the area that closely binds the main concerns about the reforms, specifically around changes being rushed in for the sake of change, without a robust evidence base. This illustrates how effective policy implementation has been disregarded by the Coalition, although it will be interesting to observe how the National Audit Office's (2013a) call for departments to address gaps in evaluation translates into reality. The evidence-based policy dream may not come true in the near future, as it appears Coalition priorities are to produce shallow, populist policies that resonate with the electorate, with pre-general election sound bites likely to focus on something along the lines of "*scrapping the useless ASBO*" and "*cutting the cost of probation*".

## Word Count

4758 (excluding references)

5578 (everything included)

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