

Release's response to the Home Office Consultation: 'More Effective Responses to Anti-Social Behaviour' (hereinafter 'the Consultation Paper')

Release is the national centre of expertise on drugs and drugs law – providing free and confidential specialist advice to the public and professionals. Release also campaigns for changes to UK drug policy to bring about a fairer and more compassionate legal framework to manage drug use in our society.

Release provides eight legal surgeries in some of the poorest communities in London, advising between 1500 - 1700 clients a year. The organisation also provides a national helpline providing expert legal and drugs advice. Many of those accessing our services have been subject to some form of anti-social behaviour order ('ASBO'). In particular, Release's legal advisors have seen the negative impact of ASBOs and 'crack house' closure orders on our client group. Invariably, those subject to such orders are generally from poor and marginalised backgrounds and the effects of such orders can have devastating consequences.

Release welcomes the Home Office's review of ASBO legislation and powers but we do have some concerns that lessons learnt from the current regime are not reflected in the consultation paper – these concerns are outlined in detail below. This response will address the policy generally.

The Executive Summary clearly states that where anti-social behaviour is considered criminal 'it should be dealt with as such'. Release supports this position and would encourage that in cases involving drugs and drug dealing, the use of civil orders is not appropriate. In respect of the proposals outlined, it should not be the case that a criminal activity is pursued through a civil process simply because it is easier to reach the standard of proof and, that the evidential burden required is lower to that in criminal proceedings. Furthermore, preventative civil orders for cases involving 'long running campaigns of intimidation or harassment' should not be sought. Instead, in such cases prosecutions should be brought under the Protection of Harassment Act 1997. In general it is Release's position that criminal acts should be subject to the criminal law however we recognise that the Government intends to bring in a new

regime for dealing with anti-social behaviour, and as such we will respond to the details contained in the Consultation Paper.

Reviewing the Toolkit (Section 3)

The analysis of the current system shows a decline in the number of ASBOs obtained since 2005, in particular 'Stand Alone' ASBOs are less likely to be used than those ASBOs attached to a criminal conviction (CRASBO). The high breach rate outlined in the Consultation Paper underpins the problem with the majority of ASBOs issued – the terms of the orders are often unrealistic when measured against the needs of the offender. In particular, Release has had a significant number of clients who have been placed on ASBOs where the terms attached to the Order are simply unrealistic; these clients are often 'set up to fail'. Examples include:

- A number of our clients use drugs problematically and are homeless. Those that have been subject to an ASBO (the vast majority of these orders are usually Stand Alone and not CRASBOs) have been subject to conditions which include moving the client out of the area. For many of those based in Central London this has seen them being banned from entering the boroughs of Camden, Islington & Westminster where most of their support systems are in place. This can place an already vulnerable group at greater risk.
- Prevention of possession of drug paraphernalia is often a condition of an ASBO where the person misuses drugs. This goes against public health policies especially in relation to needles used for the injecting of heroin and other drugs. Release has had cases of individuals subject to such conditions leaving needle exchanges and being arrested by the police for breach of their Order. The impact of such action means that often people will avoid going to collect clean syringes, this increases the risk to the individual and the community in terms of controlling the spread of blood borne viruses.
- Another condition that is routinely applied to many of our clients is that being found in possession of controlled drugs will be a breach of an Order. The perverse effect of this is that if they were caught in possession of a controlled

drug and prosecuted under the Misuse of Drugs Act, s5, they would inevitably be given a community sentence or fine. However, where this constitutes a breach of an ASBO they will receive a custodial sentence. Clearly, someone who uses drugs problematically should be recognised as having a health issue and should not be treated more punitively as is the case outlined above.

- The application of 'Crack House' closures has seen many vulnerable clients being forced into temporary accommodation whilst their premises are 'closed' (Part 1 Anti-Social Behaviour Act 2003). The vast majority of our clients who have been subject to this regime have been preyed upon and their homes have been taken over by predatory individuals. Often they will be unable to meet their rent obligations whilst being housed in temporary accommodation and this will result in their landlord issuing a notice seeking possession and subsequent proceedings being brought. Some clients have been made homeless as a result of this procedure, again placing vulnerable individuals in situations where they are at even greater risk.

It should be recognised that the vast majority of those who use drugs problematically have complex needs – many have mental health problems or a history of trauma usually physical or sexual abuse. We would urge the Coalition Government to ensure that any new regime adopted in respect of anti-social behaviour recognises this principle and that clear guidance is given that such individuals should not be subject to any proposed orders.

The analysis of the current toolkit shows that only 53% of Penalty Notices for Disorder issued by the police in 2009 were paid. PNDs are also used to deal with small scale cannabis possession, as well as the other offences outlined in section 3. It is our experience that many who are subject to PNDs are simply unable to pay the fine levelled in full. For example, a PND for cannabis possession is £80 and an individual is given 21 days to pay the charge, failure to do so results in the charge increasing by 50%, if not subsequently paid the matter will be referred to the Magistrates' Court. For those in receipt of benefits it is virtually impossible to make such payments and the current system allows for no flexible payments. Many of our clients would be able to

pay the PND if they were given an opportunity to pay in instalments – we would ask the Government to consider a more flexible approach to the payment of PNDs.

The issues highlighted above outline problems associated with the current system, Release proposes that any new system of dealing with anti-social behaviour should consider the lessons learnt and ensure that the effects of the new system do not disproportionately impact on vulnerable groups within our society. In particular, no civil system should result in greater penalties being made available for criminal offences.

Reforming the Toolkit (Section 4)

Released welcomes the Coalition Government's decision to move away from criminalising people through the use of ASBOs.

There are some concerns in terms of the burden of proof being that of the civil burden, that is, 'on the balance of probabilities' but this will be addressed in relation to each of the orders being proposed below.

Release broadly welcomes the use of 'community and restorative solutions' to address anti-social behaviour but believe, despite what the Consultation Paper, states that an escalated approach would be adopted where such interventions are not adhered to.

The Criminal Behaviour Order (Section 4.1)

The Consultation Paper states that an Anti-Social Behaviour Order on Conviction ('CRASBO') does not address the underlying causes of an individual's behaviour. In the case of criminal proceedings where a defendant uses drugs problematically this is not the case as 'Intervention Orders' can be obtained. Intervention Orders were introduced by section 20 of the Drugs Act 2005 which amended section 1 of the Crime and Disorder Act 1998. Such orders go to the heart of preventing further offending where there is a supposed link to drug use and can be applied for a maximum of six months. To date, no assessment has been carried out regarding the effectiveness of such an order, and before the Coalition Government extends these types of orders we would urge that a full assessment of their effectiveness be carried out. Release is particularly

concerned that where such orders are adopted in relation to a health problem, such as problematic drug use, it is tantamount to coerced treatment.

Release is concerned that this Order could potentially be used after a one-off incident because “the offender had acted, at any time, 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/herself”. To impose what are often onerous requirements on someone following one offence, particularly when a punishment has already been delivered via the substantive sentence, is not in the interests of justice.

Release also thinks that the availability of Criminal Behaviour Orders to those aged 10 - 12 should be age appropriate in relation to the conditions applied. For example, Intervention Orders are currently only available to those aged 18 and over.

Release welcomes the proposal that a report is prepared in relation to those aged 16 or under, we would propose that the relevant authority actually be limited to social services. Invariably, children who have become involved in serious anti-social behaviour have significant behavioural or social problems and may in some cases lived in situations of neglect. These children should be viewed as vulnerable and treated accordingly.

In respect of, reporting restrictions Release would advocate that restrictions should automatically be applied to those aged 18 and under; people with mental health conditions and those who use drugs or alcohol problematically.

Conditions attached to a Criminal Behaviour Order should not cause harm to the individual – please see page 2 of this response for current examples of perverse conditions being applied.

Release would strongly advocate that a maximum term is set in law. The issuing of ASBOs for an unlimited duration is not uncommon (approximately 7% of all orders) and is an abuse of civil liberties. It gives no credence to the principle of rehabilitation which goes to the heart of the criminal justice system. Of the range of options outlined Release would support having a minimum and maximum term (with no variation)

applied to a Criminal Behaviour Order. The current minimum term of 2 years is too onerous, especially when applied against children.

Release is opposed to 5 years in custody as a maximum response to a breach of a Criminal Behaviour Order. As stated, we are concerned that the proposed Criminal Behaviour Order fails to address the issues that exist with the current CRASBO in relation to the penalty for breach of the Order. For many of the offences for which such an Order may be considered, the appropriate sentence will be a financial penalty or a short Community Order, and certainly not a custodial sentence. In those circumstances, the potential of a maximum 5 year prison sentence for breaching the Order is disproportionate and unfair. There is a risk of the system being manipulated to ensure that offenders are highly likely to breach the Order (perhaps, by placing requirements on the individual which are impossible to adhere to) and receive a tougher sentence than was possible to impose for the substantive offence. As highlighted above, Release have particular experience of clients who have been given an ASBO which includes a condition not to possess drugs – not only is this not feasible for a problematic drug user it is also duplicitous as possession of the drugs is a criminal offence which itself can be punished without the need for further intervention by it being considered a breach of the ASBO.

In a large number of cases there are other measures available to address the issues of anti-social behaviour, which would be more effective. Where a Criminal Behaviour Order is considered to place positive requirements on an individual, a Community Order with specific requirements is a much more useful tool. Not only will this be supervised by the Probation Service, there will also be a maximum amount of time that the Order will last. If that Order is breached there is still the threat of further prosecution, so it is certainly not a soft option.

The Crime Prevention Injunction (Section 4.2)

A Crime Prevention Injunction should not be obtained simply because it is 'difficult to prove a particular criminal offence'. Clearly, where criminal activity has taken place a criminal investigation and proceedings should be brought.

Release does welcome the Government's intention to ensure such orders are not treated as a criminal offence and, therefore, will not form part of a criminal record. However, as stated in the Consultation Paper much of the activities that would be subject to a Crime Prevention Injunction are considered criminal, the notion that evidence of such behaviour is subject to the civil standard of proof undermines the rule of law, it is the criminal law which should be engaged.

The use of hearsay evidence is problematic, in that if the Order was breached it could lead to possible imprisonment as outlined in the Consultation Paper. Whilst the breach itself would have to be proved 'beyond all reasonable doubt', the original case on which the Order was made would be based on second hand information. Where someone is at risk of losing their liberty, especially where unattainable conditions have been made, they should be entitled to properly challenge the evidence brought against them. This is not possible in the case of hearsay evidence. Extreme care must be taken when relying on hearsay evidence, because of the seriousness of the Order that may be made and its consequences. Whilst hearsay is permissible in relation to civil proceedings, Release is of the opinion that an Order should not be made solely on the grounds of this type of evidence as this may lead to an unsafe finding.

In relation to the test adopted by the Court in determining whether to grant a Crime Prevention Injunction it should be of the higher standard as outlined in the Crime and Disorder Act 1998 - notwithstanding the critique of the test outlined in relation to the Crime Behaviour Orders above. The Consultation Paper states that the test currently in place for ASBIs would allow agencies to take a more preventative approach. It is our position that prevention would be better served by out of court tools - court action should be reserved for those cases where such tools have not been successful.

The Consultation Paper states that the use of County Courts to deal with applications for Crime Prevention Orders may not be preferable as they would have 'fewer security provisions'. Where there is a necessity to **routinely** detain individuals, that is, to restrict their liberty the matter should be dealt with by the criminal law not by a civil court. If this Government is to support an approach based in the civil law then the use of the civil courts is appropriate and issues of detention should not be relevant.

Release is fundamentally opposed to the use of Crime Prevention Injunctions in relation to children as young as 10. When ASBOs were initially introduced by the Labour Government in 1998 a firm commitment was made that they would not be routinely used in respect of 10 – 15 year olds¹. In reality, nearly 40% of all ASBOs issued between 1999 – 2009 were to those aged 17 and under². Release would urge the Government to consider alternative positive interventions in relation to young people, and would advocate that children aged under 16 are not subject to this regime.

In relation to the ‘prohibitions and positive requirements’ please refer to the points raised under the Criminal Behaviour Order above. Release is concerned about the attachment of a power of arrest to the prohibitions of any Order. The circumstances in which it is proposed that this could be done, such as “where there was a risk of harm to the victim or the community (e.g. the perpetrator had a history of violence)” are perverse as any violence or other behaviour is likely to lead to the commission of a further offence for which the offender can be arrested and dealt with appropriately - in such circumstances an additional power of arrest is unnecessary. Furthermore, where Orders have been made based on biased evidence there is a risk of manipulation by any victim of the alleged initial behaviour to engineer a further arrest for any perceived behaviour after the Order has been made.

In relation to a breach of the Crime Prevention Injunction Release welcomes the use of the criminal standard in establishing the breach, but would reiterate our concerns that the civil standard being used to obtain the original order goes against the rule of law (please see earlier discussion).

In relation to breach proceedings involving under 18s Release would strongly advocate against the use of a detention order. Such orders should be retained for criminal activity, and where a young person has committed such acts they should be dealt with through the criminal justice system.

¹ Hansard HC Deb, vol 314, col 871, 23 June 1998.

² Home Office, Anti-Social Behaviour Order Statistics - England and Wales 2009, Table 2.

The Community Protection Order (Section 4.3)

In relation to Community Protection Orders our response will focus specifically on the elements of the proposal that relate to the closure of premises.

The current system of closure orders in relation to Class A drug use on the premises; brothels and premises where there is nuisance behaviour, are weighed heavily against the individual. The procedure involves the person subject to the order being given a maximum of 48 hours' notice of proceedings by the police; the guidance accompanying ASBA 2003 states that adjournment of proceedings should only be given in exceptional circumstances. This results in very vulnerable individuals not being given an opportunity to obtain legal representation.

Closure orders are made through civil proceedings, upon application by the police, based upon a balance of probabilities in which hearsay evidence is admissible. Breach of a closure order is, however, a criminal offence.

We are deeply concerned by the current proposals which will continue to see the blurring of civil and criminal proceedings.

Release has had much experience of how Closure Orders, obtained under ASBA 2003, impact on those subject to the orders. Many Closure orders are obtained on the most tenuous evidence and, in fact, in our experience the Court will never refuse a police application for a Closure Order. Release has witnessed numerous cases where vulnerable people become displaced, eventually homeless and face the threat of criminal charges.

The legal tests necessary to establish the need for a closure order, both in respect of premises where there is Class A drug use and brothels, are of a very low standard. In the case of drug related closures the prosecution need only establish that there is 'reasonable suspicion of Class A drug use' **and** associated nuisance and disorder.

In relation to premises considered to be a 'brothel' laws are already in place to address this issue. Criminal legislation provides that those who are involved in the running of a brothel can be prosecuted and face up to seven years in prison. Planning regulations

also allow for local authorities to intervene and place restrictions on premises used as brothels.

It should also be noted, the closure of brothels causes serious displacement leading to women and men working in increasingly dangerous environments. The English Collective of Prostitutes has previously highlighted the fact that it is 10 times safer to work indoors than on the street.

All of these points have been raised in previous Government consultations – we would urge this Government to review the use of civil powers resulting in criminal sanctions in respect of all types of closure orders.

The Direction Power (Section 4.4)

The proposal to have one single police power which would provide the police with the power to move people away from an area where they are or are likely to commit anti-social behaviour is a huge blow to civil liberties in England and Wales. The current system is already problematic and discriminates against young people specifically – it also fails to consider that returning a young person to their home if they are out late at night may not be in their best interests because of their home environment. However, at least there is some clarity in how the law is applied and to whom.

To have a broad single power is fraught with difficulties and is open to potential abuse. This proposal could infringe a number of rights including the right of assembly and association. Release strongly opposes this suggestion.

Release would also caution against the optional secondary requirements especially in respect of those who use alcohol or drugs problematically. To allow the surrendering of certain items may be detrimental to an individual's health, for example, drug paraphernalia including needles. We would encourage partnership working with drug agencies in such cases.

Informal Tools and Out of Court Disposals (Section 4.5)

Release supports the use of restorative justice to address anti-social behaviour.

Release would refer the Home Office to the earlier point raised in relation to PNDs.

The Community Trigger (Section 4.6)

Whilst Release broadly supports the community trigger proposal, recognition must be given to the fact that some people will be victimised by their communities or carry out what is perceived as anti-social behaviour because of mental health problems. If introduced, safeguards must be put in place to protect vulnerable individuals and their families against malicious allegations. Many of our clients are ostracised by their communities because as people who use drugs problematically they are subject to negative stereotyping – most of which is unfounded. Release legal advisors have seen the damage done by malicious neighbours whose evidence is preferred over that of our clients, as some courts will automatically presume that those we assist are less credible.

Conclusion

Release welcomes the proposal to introduce Orders that if breached, will not lead to a criminal conviction or criminal record. However, the proposals do not go far enough in protecting the civil liberties of British citizens, and in some cases like the Direction Power, greater interference in those liberties may occur.

Release calls on the Coalition Government to ensure a full impact assessment is carried out in relation to these proposals, and that there is a further chance to consult once the IA and cost benefit analysis has been completed.

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