

## **Briefing for Peers - Anti-social Behaviour, Crime and Policing Bill 2013-14 (November 2013)**

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.

This briefing paper outlines Release’s response to the proposals contained within the Anti-social Behaviour, Crime and Policing Bill 2013-14. In particular we will address the proposed legislation that potentially impacts on people who use drugs.

In general, it is important to note that Release has significant concerns about the broad language, definitions and tests within the Bill, especially where these result in a widening of powers without any additional safeguards for those affected by the proposals.

Whilst the current system of anti-social behaviour orders does need significant reform, and often results in vulnerable people being subjected to requirements that are difficult to adhere to, it does afford some protection to those who would be subject to the Orders.

### **Examples of issues that arise under the current regime**

- 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 of harm.
- 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.

Instead of meaningful reform the new regime appears to make Orders easier to obtain and removes many of the existing safeguards. This seems to be as a result of making the process more victim-centred at the expense of those individuals, particularly the vulnerable, who are most likely to have an Order imposed on them.

The main areas of concern are:

### **1. Lack of clarity/precision in drafting**

The lack of legal precision is especially apparent in relation to the tests and standard of proof to be applied for a Criminal Behaviour Order (CBO). In order to make a CBO the court must be ‘satisfied’ that the individual has engaged in the relevant conduct and that making the Order ‘will help’ prevent them engaging in further such behaviour.

It is unclear if the standard of proof to be met is the criminal standard of satisfied so sure, the civil standard, although based on the Government’s consultation it is likely that the civil standard will be applied. This will mean that such orders will be easier to obtain and could be contrary to Article 6 of the ECHR and contrary to the ruling in McCann<sup>1</sup>. Additionally, the aim of the order to help is an extremely low threshold. These issues in drafting will provide difficulties at a later stage if implemented, resulting in protracted litigation to define standards and definitions; this is demonstrative of the broad language used throughout the Bill.

***Release recommends further clarification is provided, identifying the criminal standard as the appropriate one, and that a higher threshold is applied such as the Order being necessary and proportionate to prevent further behaviour.***

### **2. Definition of anti-social behaviour**

There is an inconsistent approach to defining anti-social behaviour throughout the Bill:

- Injunctions to Prevent Nuisance or Annoyance (IPNAs) use ‘conduct which is capable of causing nuisance or annoyance’;
- CBOs use ‘behaviour that caused or is likely to cause harassment, alarm or distress’;
- Community Protection Notices (CPNs) only require that ‘the conduct of an individual or body is having a detrimental effect, of a persistent and continuing nature, on the quality of life of those in the locality and the conduct is unreasonable’

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<sup>1</sup> In *Clingham (formerly C (a minor)) v Royal Borough of Kensington & Chelsea, R v Manchester Crown Court ex parte McCann* [2002] UKHL 39; [2003] 1 AC 787 the House of Lords held that the standard of proof applicable to the determination of whether anti-social behaviour has occurred under section 1(1)(a) CDA, is the equivalent of the criminal standard of beyond reasonable doubt.

- Closure Notices and Orders define anti-social behaviour as the use of particular premises has resulted, or is likely soon to result, in *'nuisance to members of the public'*

There is a serious likelihood that the numbers of people subject to Orders, particularly IPNAs, will be significantly increased if the broader definitions of nuisance and annoyance are applied. Furthermore, 'nuisance' and 'nuisance and annoyance' is subjective and risks injunctions being made based on particular sensitivities of individuals.

***Release recommends that the definition of 'behaviour that caused or is likely to cause harassment, alarm or distress' be applied across the board.***

### **3. Standard of proof**

As discussed at point 1 above, there is a significant lack of clarity about which standard of proof applies when simply the word 'satisfied' is used in relation to the making of a variety of Orders. Of particular concern are those disposals which rely on subjective evidence from members of the public who may be inherently biased, where this cannot necessarily be independently corroborated or tested. A Court hearing is not even required in relation to the issuing of a CPN, so there will be very little in the way of testing the credibility of the evidence.

Release is also extremely concerned by the imposition of Anti-Social Behaviour Orders on the balance of probabilities, particularly where that represents a lowering of the standard to be met currently. As stated at point one this is a potential breach of Article 6 of the ECHR and contrary to the principles laid down in McCann.

***Release recommends that the criminal standard of proof be applied as is the case in the current ASBO regime, at the very least for those orders which contain the power to impose requirements on an individual.*** These have the potential to be extremely onerous and so should only be made if the higher standard has been met.

### **4. Imposition of requirements**

The ability to impose any requirement on an individual to do or desist from doing specified things, as provided for by IPNAs and CPNs, is far too broad, and does not include any provision for reasonableness.

This is especially the case when applied to people who use drugs problematically. Those issuing the Notice may not have any particular experience of dependency and so could easily subject an individual to something which is not in fact reasonable. ***Release recommends that there be a requirement placed on the issuing person/authority to take professional advice regarding requirements to be included.***

Again, the approach is inconsistent across the range of Orders, with IPNAs providing for someone to supervise the requirements (though this is not mandatory) who must give evidence to suitability and enforceability; CPNs do not contain this safeguard and are solely dependent on the person issuing the Notice. This is especially concerning when applied to people who use drugs problematically as those issuing the Notice may not have any particular experience of dependency and so could easily subject an individual to something unreasonable or impossible.

Worryingly, there is no provision within either IPNAs or CPNs for the individual to agree to the requirements, or to even hear from the individual the injunction or notice is being made against.

This is in complete contrast to the situation when someone is subject to a Drug Rehabilitation Requirement in criminal proceedings, whereby they must agree to this Order being made. There is a real risk of an individual being subjected to something which is not in fact reasonable or possible, and will ultimately be breached. CPNs cause the most concern here as breach will result in an offence being committed – this will be discussed in more detail below.

## **5. Penalties for breach**

As with the current system, Release disagrees with criminalisation of individuals for breaches of civil Orders or other disposals.

Whilst there is provision for an offence not to be committed where a CPN is breached and the behaviour is ‘conduct that the person could not reasonably be expected to control’, it is unclear whether this is intended to relate simply to conduct which is in fact within the control of another, or if it would extend to something that is related to something such as drug use or a mental health condition.

Although breach of an IPNA will be dealt with as contempt of court and not result in a criminal record, this is punishable by up to 2 years imprisonment, which is unacceptable. As with the current problems within the ASBO regime it is worrying that breach of a civil Order will lead to an individual entering the criminal justice system. Release is particularly concerned about the impact of this on young people and echo the points raised in by the Joint Committee on Human Rights in their Fourth Report - Legislative Scrutiny: Anti-social Behaviour, Crime and Policing Bill<sup>2</sup>, in relation to this. ***Release recommends that provisions to deal with breach of an IPNA in the criminal justice system be abandoned.***

## **6. Lack of discretion in relation to dwelling house possession proceedings**

Release’s main concern with these provisions is the fact that there is no discretion in relation to possession proceedings where a specified drug offence has been committed. These include Possession with Intent to Supply and Cultivation of cannabis, both of which cover a wide range of activities. Where someone has perhaps supplied a small amount of drugs on a social basis for no financial gain, or grown 2 cannabis plants for personal (especially medicinal) use, mandatory possession of their home is wholly disproportionate. The ultimate outcome is eviction for an offence which may have attracted a low penalty in the criminal court, or even a Caution at the police station and which has already been dealt with through the criminal justice system. Release has already seen a number of cases where proceedings have been brought against vulnerable individuals in such circumstances, for example:

*The defendant, a tetraplegic (also known as quadriplegic), who used cannabis for medicinal purposes to relieve muscle spasms and chronic pain, was found guilty of growing cannabis plants in his own home. The Court accepted that the plants were for personal use. However, his landlord lodged a claim for possession on the basis that he breached his tenancy agreement. The County Court adjourned the proceedings on the grounds that he agreed not to grow cannabis, as a discretionary ground the Court was able to make this order, however the proposed legislation would prevent the Court from making any order other than eviction.*

Clearly, incredibly vulnerable individuals could be made homeless under the proposed legislation.

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<sup>2</sup> <http://www.publications.parliament.uk/pa/jt201314/jtselect/jtrights/56/5602.htm>

Furthermore, the government's Drug Strategy 2010 recognises the importance of stable accommodation in someone who uses drugs achieving recovery – evicting someone on these grounds is in complete contradiction to that. ***Release recommends that this ground be made discretionary to allow the Court to make a determination on each individual case.***

## **7. Other areas of concern**

- Extended list of bodies who can apply for an IPNA – in conjunction with the lower standard and threshold, there is a real risk of unnecessary interference with behaviour that should not actually be covered.
- Duration of CBO - proposed minimum term of 2 years and maximum indefinite term are, in Release's view, excessive. It should not be the case that any court has the right to subject an individual to an indeterminate order and arguably this could be subject to a challenge under the European Convention on Human Rights.
- Broader power for dispersal powers - no need for a reasonable belief that the public have been harassed or intimidated. This is likely to lead to discrimination and disproportionate targeting of certain individuals and/or groups, especially young people.
- Public Spaces Protection Orders - this could be used to disproportionately target vulnerable groups, particularly homeless people who may be prevented from rough sleeping in certain areas even though they have nowhere else to go. Additionally, using financial penalties as the primary sanction for violation of PSPOs is ill-advised as those subject to them are unlikely to have the means to pay and there will be a subsequent administrative burden in chasing payment.
- Closure of premises when use of premises is '*likely soon to result in nuisance*' – this is unfairly pre-emptive and is essentially sanctioning behaviour that is not in fact causing a nuisance at that time. This is a worrying extension to current powers to which only permits the Notice to be issued where the alleged conduct has actually occurred.
- Extension of Closure Notices - it is unfair and unjustified to allow a Closure Notice to continue for up to a further 48 hours where a Closure Order is not in fact made. This allows a continuing obstruction of the individual's rights even though the requisite standard of proof to make a full Order has not been attained.

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.

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