The Law and (Anti-Social Behaviour) Order Campaign in Western Australia

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Abstract

As part of the 'Law and Order' campaign in the run up to the 2008 State elections in Western Australia, the Liberal Party of WA proposed the introduction of 'Prohibited Behaviour Orders' to combat the alleged rapidly falling standards of behaviour and increasing feeling of insecurity in the community. These orders, which were introduced in December 2010, are civil in nature and constrain a person from any behaviour that a court considers likely to increase the chances of a person committing an offence with an anti-social element. The orders are based on a variant of the United Kingdom's 'Anti-Social Behaviour Order' model, which the UK Government is now planning to scrap because they are considered to be ineffective and to criminalise otherwise lawful behaviour. This article examines the problems associated with this model of crime and disorder control in the UK and the extent to which the changes made to this model in WA are sufficient to avert the problems identified.

Introduction

'Law and Order' featured heavily in the election campaign of the Liberal Party in the run up to the 2008 State elections in Western Australia (WA). Claims were made that after seven years of Labor, 'the average Western Australian citizen is now more likely to be affected by criminal offending which has an anti-social element than ever before' (Liberal Party WA 2008). To combat the alleged rapidly falling standards of behaviour and the increasing feeling of insecurity in the community, the Liberal Party pledged that it would introduce 'Prohibited Behaviour Orders' ('PBOs') based on a version of the UK's 'Anti-Social Behaviour Order' ('ASBO') model. Having been in office since September 2008, the Attorney-General of WA, the Honourable Christian Porter, feels that enough has been done by the Liberal-National Government to combat serious offending and it is now time to turn attention to 'lower level, higher volume anti-social criminal offending' (2010:4671). The PBOs are, therefore, directed at behaviour that has a significant cumulative impact on the community, even though each instance of anti-social offending may not be very grave. Following through on the election promise the Prohibited Behaviour Orders Bill 2010 (WA) ('the PBO Bill') was introduced into the Parliament of WA in June 2010 and passed in December 2010 to become the *Prohibited Behaviour Orders Act 2010* (WA) ('the PBO Act').

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Within a month of the PBO Bill being introduced into the WA Parliament Teresa May, the UK Home Secretary, has interestingly, and somewhat surprisingly, indicated that the Conservative-Democrat Government plans to abandon anti-social behaviour orders because the new Government considers that '[a]nti-social behaviour orders promised so much but, … have delivered so little' (BBC News 2010). The orders are thought to be ineffective and criminalising: ineffective because of the high rate at which they are breached; and criminalising because, although the orders are civil in nature, a breach turns behaviour that would otherwise be perfectly legal into a criminal offence. Such a turnaround in the birthplace of the ASBO might lead to the expectation that the PBO scheme would have been abandoned in WA. However, unperturbed by such criticism of the UK model, the Attorney-General of WA remains convinced that PBOs are necessary and will be effective in WA. He comments that the UK legislation has been studied, lessons have been learned and the best features of the UK model have been taken to form the basis of the PBO model (Porter 2010a). Accordingly, adaptations have been made to ensure the effectiveness of PBOs in combating the worst anti-social offenders in WA.

In order to assess whether the PBOs are likely to be effective in combating anti-social behaviour in WA, this article will examine and contrast the ASBO and the PBO models. It will then discuss the concerns that have been raised in the UK in relation to ASBOs and assess whether lessons have be learned and sufficient changes have been made to avert the problems identified arising in WA.

What is a Prohibited Behaviour Order?

The PBOs are based on a variant of the ASBO model operating in the UK, initially introduced in England and Wales though the *Crime and Disorder Act 1998* (UK) ('CD Act'). Anti-Social Behaviour Orders are civil orders—akin to an injunction—that prohibit a person from engaging in certain behaviour. They can be ordered where a person aged 10 years and above[1] has displayed anti-social behaviour in the previous six months and the Court considers that an order is necessary to protect the public from such behaviour.[2] Anti-social behaviour is defined as behaviour that causes or is likely to cause harassment, alarm or distress to one or more persons not in the same household as the person (CD Act s 1(1)(a)). In making an ASBO, the Court can impose any terms it considers necessary to protect the public from further anti-social behaviour. Despite being civil in nature, a breach of the terms of the order without reasonable excuse is a criminal offence with a maximum penalty of five years' imprisonment. In 2002, a second form of ASBO, often referred to as a CRASBO, was introduced by the *Police Reform Act 2002* (UK). The difference between these orders relates merely to the proceedings in which the orders are made. The latter are made after conviction for a criminal offence. Such orders are not designed to be an additional punishment for the offence, but are aimed at preventing anti-social behaviour of a type that led to the original conviction.

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1 CD Act s 1(1). In Scotland, orders can only be made against a person aged 16 years or over, see CD Act s 19(1). For a discussion of some of the differences between ASBOs in England and Wales and Scotland, see Macdonald and Telford (2007).

2 Despite the civil nature of the order, these requirements must be proven to the criminal standard: *Clingham v Royal Borough of Kensington and Chelsea, R (McCann) v Manchester Crown Court* [2003] 1 AC 787.

The latter variant has been chosen as the model for WA because it will allow police and courts to focus on 'the persistent group of offenders who are responsible for a disproportionate amount of antisocial behaviour' (Porter 2010b:4672). A PBO may be made on application of the Prosecution or at the discretion of the Court where a person aged 16 or over has been convicted of a relevant offence more than once within three years and the Court considers that the person is likely to commit a further relevant offence unless constrained from certain otherwise lawful activities (PBO Act ss 6, 8). A relevant offence is one involving anti-social behaviour, which is defined in similar terms to the UK but is extended to include damaging property (PBO Act s 3). The Government does not intend to limit the types of offences which are considered to have an anti-social element. It is, however, planned that a non-exhaustive list of offences that are presumed to have an anti-social element will be included in regulations (Porter 2010b:4673). Thus, where a person commits an offence on the list, it will (without further inquiry) be deemed to be an anti-social offence in the absence of proof to the contrary.

A PBO will allow a court to prohibit a person from engaging in a broad range of behaviour that the Court regards to be preparatory to an offence or which increases the chances that the person will commit an offence with an anti-social element. The PBO Act (s 10(3)) gives a non-exhaustive list of the types of constraints that may be imposed on a person:

> (a) entering or remaining on, or being near, specified premises or a specified locality or place;
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> (b) engaging in behaviour of a specified kind, either at all or in a specified place, at a specified time or in a specified manner;
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> (c) approaching within a specified distance of a specified person;
>
> (d) communicating, or attempting to communicate, (by a specified means or by whatever means) with a specified person;
>
> (e) being in possession of a specified thing or a specified class of thing;
>
> (f) causing another person to engage in conduct of a type referred to in paragraphs (a) to (e).

These constraints can be absolute or attached to other conditions as the Court sees fit. This allows far-reaching prohibitions on a range of otherwise normal and perfectly legal behaviour. The types of constraint envisaged include: a person who is found guilty of a graffiti related offence being prohibited from possessing items related to such offending (eg spray cans); a person who has committed an alcohol-related assault being prohibited from drinking alcohol for the duration of the order; or a person who has threatened others on public transport being prohibited from using a particular train line or public transport as a whole.

In determining whether to impose a PBO, the Court must give primary consideration to the desirability of protecting people and property from relevant offences, and must also consider the degree of hardship that a person subjected to a PBO may suffer (PBO Act s 9(1)-(2)). The Court may also have regard to any factors it considers relevant, including: other proceedings involving the person; any sentence imposed on the person; criminal record; similar previous anti-social behaviour; and previous compliance with a PBO. Generally, the orders should last for a minimum of six months to a maximum of two years (PBO Act s 12). A further feature of the PBO model is that details of the orders are to be published. The Chief Executive Officer of the WA Department of the Attorney-General is required to publish details of the person subjected to an order (photograph, name, suburb,

constraints applied) on a departmental website, even in the case of a juvenile (PBO Act s 34(2)).

PBO proceedings are civil in nature and the orders made are not designed as punishment. As a result, the laws of evidence applicable only in criminal proceedings do not apply (PBO Act s 27(3)) and the standard of proof in relation to proceedings for a PBO is the balance of probabilities (PBO Act s 27(4)). Despite their civil character, breach of a PBO amounts to a criminal offence, with a maximum penalty of five years and/or $10,000 if the order is made by the District or Supreme Court, or two years and/or $6,000 if the order is made by the Magistrates Court, or $2,000 and/or imprisonment for two years where the order is made by the Children's Court (PBO Act s 35(1)).

Concerns about Prohibited Behaviour Orders

Given that the PBO Act was only enacted in December 2010, it is too soon to evaluate the effects of introducing PBOs in WA. Therefore, the following discussion examines concerns that have been raised in relation to ASBOs in the UK. This will include consideration of the degree to which the PBO model is likely to raise similar issues and the extent to which these concerns may be averted or lessened in WA due to the differences between both models.

The Definition of Anti-Social Behaviour is Vague

Since the introduction of ASBOs, the UK has continually wrestled with a definition of what behaviour should be regarded as sufficient to trigger the issuance of an ASBO (Macdonald 2006). According to s 1(1)(a) of the CD Act, anti-social behaviour is that which 'causes or is likely to cause harassment, alarm or distress' to others. Far from being unintended this unclear definition of anti-social behaviour was a deliberate policy decision to allow ASBOs 'flexibility to respond to local needs' (Michael 1998: col 46).

There are, however, serious concerns with this vague definition. Firstly, it fails to give citizens a 'fair warning' of what sort of behaviour could lead to being subjected to an ASBO (von Hirsch et al 1995). This lack of warning undermines the purpose of the orders because a person cannot be expected to be deterred from certain behaviour if they do not know from which behaviour they are supposed to refrain. More fundamentally, the vague definition of something that 'is likely to cause harassment, alarm or distress' makes no reference to an objective standard and centres decisions on whether the behaviour is anti-social on public perception the central criterion for determining (Crawford 2008:758). This means that 'virtually any activity can be anti-social depending on a range of factors, such as the context in which it occurs, the location, people's tolerance levels and expectations about the quality of life in the area' (Whitehead, Stockdale and Razzu 2003:4–5). The problem is compounded in urban spaces where people with different living expectations use the same public spaces, which can lead to conflicting ideas of what is acceptable and what is anti-social (Millie 2006). Thus, a group of young people hanging around a skate park will be considered normal behaviour and tolerated because that is the accepted use for that space. However, when there are different expectations from a public space, such as a shopping centre, conflicts may arise. Here shoppers and young people 'may all have legitimate, but competing claims to use that particular space' (Millie 2008:383). There is, however, no allowance in the definition of anti-social behaviour for differences in tolerance levels and there are no safeguards within the legislation to eliminate cases where a victim is oversensitive or bigoted (Macdonald 2006:189). Therefore, any behaviour that displeases

others or does not fit the particular cultural and social understandings of norms of behaviour for that place and time may be considered anti-social (Millie 2008:383). Furthermore, relying on subjective perceptions means that the focus may easily shift from whether the behaviour in itself is *actually causing* harassment, distress or alarm to the perception that the behaviour *might become* anti-social. Thus, simply being in a certain place, rather than engaging in any particular behaviour, may be seen to fit the definition because of the anxiety it creates about what might happen.

The vagueness of the triggering criteria for an ASBO and the reliance on the subjective perception of a person's behaviour means that people whose behaviour skirts on the edges of accepted cultural and social norms may be viewed as anti-social. During debate on the Crime and Disorder Bill (UK) in 1998, Lord Dholakia (1998:col 536–7) expressed the concern that '[u]nless we identify in the clause that we mean by serious alarm and distress, the authorities could use it to target particular communities'. It is not, however, merely those groups in society which have traditionally been identified as liable to discriminatory treatment (eg groups identified by race, ethnicity, gender, sexuality, disability) that may be unfairly subjected to these orders, but other less clearly identified groups and individuals who are at risk (eg 'loners', 'losers', 'weirdos' etc) (see Ashworth et al 1998:7). The (former) UK Government was not, however, concerned that such a wide definition could lead to unusual, unpopular or merely eccentric behaviour being caught by an ASBO. The view was that there was no need to narrow down the definition because enforcement agencies and the courts could be trusted to be able to identify behaviour deserving of an ASBO (see Macdonald 2006:191–3).

It seems, however, that the fears that this vague definition would mean that certain groups in society would be targeted were actually well-founded. Research confirms that ASBOs are unequally applied—with the young, the homeless, the mentally ill, sex workers and those already known to the police being disproportionately affected by ASBOs (Millie 2008:384). A Home Office study conducted in 2002 revealed that between April 1999 and September 2001 74 per cent of all ASBOs were issued to people aged 21 years and under, with just under half of these being issued to children aged 16 years and under (Campbell 2002:8). This is despite the fact that, originally, it was not planned that ASBOs would be used against the young at all. In fact, Home Office (1998:para 2.1) Guidance noted that: 'It is unlikely that there will be many cases where it would be appropriate to apply for an order against a 10–11 year old although an order may be the right response where the juvenile has been involved in anti-social behaviour with adults'. The same research from 2002 also revealed that 60 per cent of all ASBO recipients were suffering from mitigating factors such as mental distress, addiction or learning difficulties (Campbell 2002:17). Despite Home Office guidelines recommending that support be provided primarily by social services in such cases, more recent research has found that ASBOs have continued to be applied to those with mental health problems (Rutherford 2010:71–3). Other research has also shown that ASBOs are used to 'cleanse' urban streets of sex-workers (Sagar 2007) and the homeless (Johnsen and Fitzpatrick 2008).

There is every reason to fear that such problems will also arise in WA because the WA definition of anti-social behaviour is almost identical to the UK definition (see PBO Act s 3(1)). Nothing has been added to the definition of anti-social behaviour to eliminate the danger that orders are triggered by unreasonable or biased perceptions of what constitutes anti-social behaviour. As in the UK, this leads to the danger that people will be targeted because of who they are and how they appear rather than what they are actually doing. Such

a trend has been noted already in Australia in relation to the issuance of move-on notices to young people (Spooner 2001:30). In a WA context, there is a very real danger that the behaviour of young people, and especially indigenous youth, will readily be viewed as anti-social (see Iveson 2007:158). Indigenous youth congregate in public spaces for a number of reasons including a spiritual and cultural connection with a place, safety, kinship and absence of appropriate recreational activities (Taylor and Walsh 2007:170). Also as shopping malls increasingly dominate the streetscape, indigenous youth, who may not be shopping, but instead using the malls as recreational spaces are likely to be seen as nuisances or threats. This combined with '[t]heir extreme visibility and membership of a problem group, marks them off as targets for heavy street policing' (Blagg 2008:59). The absence of any test of reasonableness in the definition of anti-social behaviour and community perceptions of indigenous youth as a major a law and order issue (Hil and Dawes 2000:312), all suggest that indigenous youth may be subjected to PBOs for doing nothing more than socialising.

The only significant change made to the UK model is that in WA, before a PBO can be issued a person must have been convicted of an offence with an anti-social element on at least one other previous occasion within the preceding three years. This is designed to capture the worst sort of repeat offenders. However, this requirement hardly singles the person out as a persistent offender. More worryingly, if a person commits an offence that is on the prescribed list of anti-social offences it will be presumed to be a relevant offence and there will be no further inquiry into whether this offence did actually have an anti-social element. Therefore, the person will presumably carry the onus of rebutting the presumption that the offence was anti-social, which will be a difficult task given the indistinct definition of anti-social behaviour.

The Orders are Invasive and Ineffective

In the UK, the conditions imposed range from the more pedestrian and expected to conditions that are astoundingly invasive and extraordinary. The more usual and, on the face of it, less problematic conditions include, for example, prohibitions on: entering certain areas; associating with certain people; and engaging in certain behaviour, such as using abusive language or purchasing alcohol. A collection of more worrying conditions have been noted by the National Association of Probation Officers (NAPO). These include, for example, a 13-year-old being banned from using the word 'grass' anywhere in the UK; a 16-year-old boy being banned from showing his tattoos, wearing a single golf glove, or wearing a balaclava in public anywhere in the country; an 87-year-old being forbidden from being sarcastic to his neighbours; a 26-year-old being banned from 'playing loud music, stamping his feet and dropping objects' and a sex worker being prohibited from carrying condoms within a given area (NAPO 2005).

Such invasive conditions raise serious concerns about respect for human rights. As can be seen from the above examples, the sort of behaviour that can be prohibited is incredibly varied and need not be a criminal or even a civil wrong. Naturally, the community needs protecting against crime and disorder, but these orders show an alarming degree of intolerance toward merely irritating, but unthreatening behaviour. As Lord Goodhart (1998:col 534) comments, '[h]uman rights are not just the right to behave well. … People have a right to be bloody minded; they have a right within reason to make a bit of a nuisance of themselves'. In the UK, ASBOs may conflict with a number of human rights under the European Convention on Human Rights (ECHR), including the right to respect for private and family life (art 8); the right to freedom of expression (art 10) and the right to freedom of

assembly and association (art 11). The orders may breach art 8 and art 11 by preventing a person from associating with certain people or going to certain places and art 10 by prohibiting a person from expressing him or herself in certain ways. These rights are qualified and can be interfered with, for example when it is necessary for the prevention of crime and disorder (arts 8(2), 10(2), 11(2), see also *Leander v Sweden* (1987) 9 EHRR 433). The question is, however, whether the conditions imposed are proportionate to the aim to be achieved (ie community protection). There is serious concern that the condition in such orders 'principally contradicts the "balance of proportionality" inherent in human rights legislation' (Burke and Morrill 2002:13). Of course, the ECHR does not apply in Australia; however, similar rights are protected in the International Covenant on Civil and Political Rights (ICCPR) to which Australia is a party.

Aside from potentially breaching human rights, a more fundamental question is whether using ASBOs is an effective way of combating anti-social behaviour and offending. These orders may well be appealing from a political perspective because they appear more immediate and real than longer term strategies to address the causes of anti-social behaviour (Squires and Stephen 2005:521). ASBOs also fit the underlying responsibilisation approach to crime control (see Garland 1996) adopted by New Labour in the UK. According to this policy, there must be an end to the excuse culture with people, particularly the young, being made to take responsibility for their anti-social behaviour (see Home Office 1997). However, this of course assumes that people do have an unfettered choice to engage in anti-social behaviour and crime; an assumption that simplifies and glides over the fact that crime and anti-social behaviour are not purely the result of choice, but are due to a complex combination of factors (Squires and Stephen 2005:520). Squires and Stephen (2005:517) are particularly critical of the balance struck by the ASBO model between enforcement and support and note that, without the provision of assistance, invasive conditions are likely to fail. For example, it is verging on the naïve to think that ordering an alcoholic not to purchase alcohol will stop them from doing so if the person does not receive appropriate support. This simply sets up a person with alcohol dependency for breach of the order. Worse, compliance with the order may actually 'be medically inappropriate, as an enforced sudden withdrawal from alcohol in the case of an alcoholic can … be dangerous and even result in fatality' (Justice 2005:para 19).

The conclusion that many ASBOs are not effective at controlling behaviour is supported by the high rate at which the orders are breached (Ministry of Justice 2010). This does not mean that orders cannot ever be effective. However, orders must be carefully drafted and combined with appropriate support mechanisms. Also, it should be ensured that such coercive orders are used as a means of last resort when all other attempts to divert a person from anti-social behaviour have been exhausted.

The WA Bill does not fundamentally change the UK model in regard to the conditions contained in a PBO. As such, there are very few limitations on what conditions a court may impose on a person, leaving the Court free to order any constraint it considers reasonably necessary to reduce the likelihood that a person commits another offence with an anti-social element (PBO Act s 10(2)). The non-exhaustive list of constraints in s 10(3) of the PBO Act is very similar to the standard conditions imposed in the UK. Given the lack of limitations in the proposed WA legislation, it can be expected that there will be occasions where courts impose invasive conditions, raising concerns similar to those expressed above in relation to the UK. However, even standard conditions may be culturally insensitive and inappropriate. Orders not to associate with certain people or not to enter certain areas may be difficult for

indigenous people, especially the young, to comply with. In the UK, the majority of ASBO breach cases regarding young people resulted from failure to comply with non-association orders (Macdonald and Telford 2007:617) and it is likely such orders will result in frequent breaches in WA. Issuance of a non-association order would be obtuse to the reality that culturally, it will be difficult for indigenous youth to stay away for months or years from certain people. Aboriginal familial units are materially different from the mainstream community and are based on kinship and extended family structures to provide psychological and emotional support. Kinship determines a person's rights and responsibilities and their behaviour in given circumstances (Bell and Heathcote 1999:3). Similarly, indigenous housing situations often result in multiple families living in the same household for economic reasons. Moreover, such households may be located in high crime neighbourhoods (Walsh 2003:14), where associating with others with criminal records is almost inevitable. Consequently, social and economic factors may make it difficult for an indigenous person to have the capacity to refrain from association with someone determined in the PBO, meaning that they are likely to breach the terms of the PBO and face criminal sanctions.

Furthermore, as with move-on orders, a PBO that excludes an indigenous youth from certain areas may be difficult to understand and comply with. This is because indigenous youth in WA continue to have poor English literacy skills (WA Department of Indigenous Affairs 2005:127) and may, therefore, have difficulty comprehending the language and terminology contained in the PBO. Already there is evidence in relation to move-on orders that indigenous youth frequently do not understand the content of the order (Eggington and Allingham 2006). Setting the boundaries of an order in terms of street-specific names presumes that the recipient has the background knowledge of street names, which many indigenous people may lack (Eggington and Allingham 2006). Furthermore, if the orders cover too wide an area it may be difficult to comply, especially if the excluded area contains public transport hubs and social services. This is likely to be a very real concern in relation to PBOs given that research by the Aboriginal Legal Service of WA into exclusion areas contained in move-on orders shows that, for the majority of their clients, the prohibited areas were widely drawn to include the whole central business district (CBD) of townships and cities (see Eggington and Allingham 2006).

It is also likely in WA that PBOs will be used to control sex workers. The WA Government has announced that it is in favour of shifting sex work to light industrial areas (ABC News 2010). PBOs may therefore be adopted to ensure the relocation of sex work and the 'cleansing' of residential areas. In the UK it has been noted that rather than address the issues concerning street-based sex work, the application of ASBOs has merely displaced sex work (Hubbard 2004). In this way sex workers are temporarily moved from residential areas to less well-known and more dangerous areas. Not only does this undermine the efficacy of welfare work by cutting workers off from welfare and social assistance (Sagar 2007:160) but such orders also increase the risk of violence and abuse to workers. This is because they either obey the order and move to less populated, less visible areas or they rush negotiations for fear of being caught in a prohibited area, which reduces the ability to assess the client and the risk of danger (Benson and Matthews 1995; Ontario Women's Justice Network 2008). There is also the concern that conditions imposed on sex workers can be counterproductive and damaging to the 'inclusive work that is being done' with sex workers (Sagar 2007:160). For instance, forbidding a sex worker from carrying condoms will discourage the carrying of condoms, which naturally undermines efforts to ensure safer sex practices (Hunter, May and the Drug Strategy Directorate 2004).

The Net-Widening Effect of the Orders

As discussed above, the imposition of invasive conditions without the provision of appropriate support mechanisms means that there is a high chance that ASBOs will be breached. Indeed, UK Ministry of Justice (2010) figures show that 55 per cent of the almost 17,000 ASBOS issued between June 2000 and December 2008 were breached, leading to an immediate custodial sentence in more than half of the cases. These figures reveal that many orders are not only ineffective, but that they are net-widening. Much of the behaviour prohibited by ASBOs would otherwise be perfectly legal, such as purchasing a certain item (eg alcohol), entering certain areas or associating with certain people. The orders are, therefore, criminalising behaviour that would normally not be of concern to the criminal justice system. In other cases, where behaviour is prohibited that would otherwise amount to an offence, there is the concern that ASBOs lead to a sanction that is out of proportion to the behaviour. Indeed, NAPO (2005) notes that: 'the original purpose of the ASBO has been abused in some areas. In many incidents, individuals are receiving a custodial sentence where the original offence was not itself imprisonable'. The result is that there is no proportionality between the triggering behaviour and the sanction, with heavy sanctions being available for relatively trivial behaviour (see Crawford 2009:818).

The only significant change made in WA to the UK model is that PBOs are designed to ensure that they apply only to people whose repeat anti-social behaviour is a problem. The PBO Act therefore requires that a person has been convicted more than once in three years of an offence with an anti-social element. However, as mentioned above, the fact that a person already has one (other) conviction for a relevant offence in the previous three years hardly marks them out as a persistent hardened offender. Furthermore, even regarding the more persistent offenders, it is unlikely that PBOs will be more effectively complied with than in the UK. After all, if the person has been repeatedly convicted of an offence with an anti-social element, then the threat of the criminal law has had no deterrent effect. It is unlikely then that a civil order will have a better deterrent effect. As Burney (2002:478) notes in relation to ASBOs: '[q]uite obviously, given … that so many recipients are already well entrenched in crime, combined with the lack of any support system attached to the orders, breaches are fairly likely'. The only way in which these orders could act as more of a deterrent than the threat of conviction for a substantive criminal offence is through the ease at which a person can be found to be in breach of the order and through the threat of a penalty that is more severe than the trigging offence would have received. This raises concerns about disproportionate punishment—with penalties for breach being out of proportion to the severity of the behaviour amounting to a breach. As Burney (2002:475) comments, a breach may not be a flagrant violation of the terms of the order (e.g. by repeatedly engaging in anti-social behaviour) but could be a technical breach, such as visiting a prohibited public place.

There is also the question of whether these civil orders give people adequate fair warning of the fact that they face a relatively severe criminal sanction for breach. Certainly, research by the Youth Justice Board of England and Wales (2006) in the UK confirms that the young do not see ASBOs as a deterrent: 'All the young people interviewed were aware of the possibility of breach, but most either did not regard the threat of custody as "real", or did not consider it to be a deterrent'.

The rate of breach in the UK and the lack of changes in WA to ensure that these orders are effective begs the question of whether the WA Government really is convinced that these orders will be effective or whether it regards PBOs as a political tool designed to

convince the public that they are doing something to combat anti-social behaviour. A more worrying conclusion is that these orders will simply make it easier to bring within the reaches of the criminal justice system those whose behaviour has pinpointed them as a problem. As noted by Ashworth (2004:273): '[t]he principal reason why some governments have been devising forms of civil proceedings to deal with anti-social behaviour is that the criminal justice system is thought to present too many barriers to swift and effective outcomes'.

The Adverse Effects of Publicity Connected with the Orders

A final concern with the UK ASBO model is the reliance on publication of details of orders, even in the case of the young. Publication is thought essential to such orders to ensure that they are effectively enforced, they deter anti-social behaviour, and they reassure the public that something is being done about such behaviour (Home Office 2005:2). This aspect of the UK model has also been endorsed in WA. The PBO Act provides that, generally, details of the order will be published on a website of the WA Department of the Attorney-General. Details are to include the name of the person, a photograph, the town or suburb where the person lives and the constraints imposed on the person's activities and behaviour. Publication will be the rule, even in the case of the young, unless the Court finds circumstances that justify an order to suppress publication of some or all of the details. Excluded from publication is: detail allowing the identification of any child other than the constrained person; of the exact address of the person; or of any offence that the person was convicted of in the Children's Court (PBO Act s 34(3)).

This aspect of the PBO model is particularly worrying regarding the young (Crofts and Witzleb 2011). Minors have long been regarded as a group that are particularly susceptible to harm following their public exposure as being concerned in criminal proceedings. Information in the public arena about the child may not only stigmatise them, but harm their chances of rehabilitation by acting as a barrier to future jobs and to community integration. Research shows that having a criminal record is a barrier to employment (Naylor 2005:174–5). As Naylor notes, having employment and accommodation are key factors in reducing recidivism. However, these are the very things that are likely to be held out of reach if potential employers and accommodation providers have received publications identifying the young person as anti-social. Johnson (2002), (then) Acting NSW Privacy Commissioner, also comments that publication is likely to double punish offenders:

> Publication of a child offender's name will effectively add to the sentence imposed by the court, doubly punishing child offenders with lifelong stigmatisation—a constant fear that one day a future employer, or neighbour, or friend or colleague will trawl the internet or newspaper archives and find out about the mistake they made as a 15 year old. Their chances of rehabilitation will be substantially reduced as a result.

Labelling theory also explains why the young should be protected from stigmatisation: 'Stigma has two faces. One is the "stamp" that others attach to a person. The other is one's self-image and role as deviant as defined by others. Secondary deviance is living up to the role "stamped" on one' (Falck 1998:595). Labelling a child as a deviant can cement anti-social behaviour because 'a stigmatised youth, labeled and treated as a criminal, finds the path to further and more violent crimes inviting and often lives up to the expectations of the label' (Blustein 1985:4). This is expressly recognised by the *UN Standard Minimum Rules for the Administration of Juvenile Justice* ('The Beijing Rules'), which clearly refer to the labelling theory and the adverse effects of publishing information about young offenders. Rule 8 states that:

> The juvenile's right to privacy shall be respected at all stages in order to avoid harm being caused to her or him by undue publicity of by the process of labelling. In principle, no information that may lead to the identification of a juvenile offender shall be published.

The official commentary on this rule notes that:

> Rule 8 stresses the importance of the protection of the juvenile's right to privacy. Young persons are particularly susceptible to stigmatization. Criminological research into labelling processes has provided evidence of the detrimental effects (of different kinds) resulting from the permanent identification of young persons as 'delinquent' or 'criminal'.

Alarmingly, the UK experience shows that some already marginalised groups consider the ASBO a 'badge of honour' and, rather than deterring further anti-social behaviour, ASBOs are in fact amplifying anti-social behaviour (Youth Justice Board of England and Wales 2006). The 'badge of honour' attitude may be comparable to the 'rights of passage' mentality of indigenous youth in Australia, where indigenous youth, particularly males, view contact with the criminal justice system as normal (Ogilvie and Van Zyl 2001). There is, therefore, every danger that rather than deter further anti-social behaviour, PBOs will cement such behaviour and accelerate contact with the criminal justice system.

Conclusion

The Liberal-National WA Government has introduced PBOs based on a variant of the UK ASBO model to combat the alleged rise in anti-social offending in WA. The UK experience of over a decade has revealed several problems with this model of crime and disorder control. The vague definition of what amounts to anti-social behaviour means that any behaviour not fitting the social and cultural norms of mainstream society may come into the purview of these orders. This, in turn, has led to certain groups within the community being disproportionately affected by the orders. The wide discretion given to courts to determine what a person may be constrained from doing has raised serious concerns about the invasiveness of imposed conditions and about whether some orders are actually causing more harm than good. Furthermore, ASBOs have not been very effective at combating anti-social behaviour given the relatively high rate at which they are breached (Ministry of Justice 2010). To an extent this was to be expected where orders are invasive and applied to those with mental health or other problems in the absence of support to help a person comply with the order. ASBOs constrain people from behaviour that in other contexts would be quite normal by using the threat of criminal sanction for breach. The orders therefore have a net-widening effect by bringing ordinarily non-criminal behaviour within the reaches of the criminal justice system. Finally, there are serious concerns about the counterproductive nature of publicising details of ASBOs applied to young people. This can harm efforts to rehabilitate the young and actually cement anti-social behaviour.

The Conservative-Democrat UK Government is of the view that ASBOs are ineffective and criminalising and has declared the intention to abandon them. Unperturbed by this recent turnaround in the UK, the WA Liberal-National Government steamed ahead and introduced PBOs. While the Government claims it has sufficiently modified the PBO model to ensure that PBOs will not encounter the same problems as ASBOs in the UK, an analysis of the WA legislation reveals that this is not the case. The definition of what behaviour can trigger a PBO is equally vague and courts are given wide discretion to impose any constraints they consider necessary. The PBO Act is a little more limited and requires that a person must already have at least one other conviction for an anti-social offence within the

previous three years. Nonetheless, this condition does not mark a person out as a persistent hardened criminal (the apparent target of PBOs). Like the UK model, the PBO Act also relies on the publicity of orders to ensure their effectiveness, demonstrating the same worrying move towards the use of shame as a means of crime and disorder control. This is particularly problematic in relation to the young, where the harm from stigmatisation can far outweigh any positive results. Thankfully, the WA Government abandoned initial plans to allow PBOs to be ordered against children from the age of 14 years and it is to be hoped that the minimum age of 16 years will be not be lowered at a future date. Finally, the PBO model also overlooks specific concerns for WA, particularly the danger that indigenous people (particularly indigenous youth) will be disproportionately affected by PBOs, which could lead to further enmeshment within the criminal justice system.

The PBO Act modifications to the ASBO model do not appear to be sufficient to ensure that the UK experience of an invasive instrument lacking effectiveness as a means of crime and disorder control will not be substantially repeated in WA. More cynical observers may wonder whether the PBO legislation is perhaps intended to reassure the public that *something* is being done to combat anti-social behaviour, rather than stemming from a conviction that they will actually be effective at controlling crime and disorder.

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