



Anti-Social Behaviour Order (ASBO) Consultation Results

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Context

The South Australian State Government has sought to make radical changes throughout the legal system in recent years including creating tougher penalties, increasing sentences, cracking down on repeat offenders and targeting groups such as bikies through new wide-reaching legislation. However within contemporary society, populist 'crime prevention' measures are often trundled out to appeal to the masses and are simply used as fodder for sensationalist media outlets. Anti – Social Behaviour Orders (ASBOs) are a measure the Attorney Generals' Department is considering as a solution to the oft-cited 'crime wave' — a 'wave' not supported by reported crime rate figures.

In the British experience, ASBOs are described as "civil orders to protect the public from behaviour that causes or is likely to cause harassment, alarm or distress". When an order is placed on an 'offender' it contains conditions which prohibit the individual from either carrying out specific acts or entering defined geographical areas. The conditions contained within an ASBO are effective for a minimum of two years (Home Office, 2006), although they can last indefinitely (Youth Justice Board, 2006).

The introduction in Britain of ASBOs has essentially created the legal provisions that can render certain lawful behavioural acts illegal under specific conditions. While constrained by an ASBO, individuals can face the full force of the criminal law if they participate in one of these 'acts'. The legal provisions that outline the behaviour that can attract the imposing of an ASBO are contained within the *Crime and Disorder Act 1998* (UK). The Act reads:

"(a) that the person has acted, since the commencement date, in an anti-social manner, that is to say, 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; and"

"(b) that such an order is necessary to protect persons in the local government area in which the harassment, alarm or distress was caused or was likely to be caused from further anti-social acts by him".

The ambiguity, subjectivity and breadth of behaviour that can now be considered 'anti-social', as well as the unrealistic conditions that make up such orders, has led to an overabundance of breaches in the UK. In 2005 almost half of the ASBOs issued in England and Wales between 2001 and 2005 were breached¹ (Home Office, 2005). Breaching an ASBO can be affected by simply being seen by authorities in the same geographical area as someone with whom you have been ordered not to associate, or engaging in specific behaviour which could be as trivial as swearing or playing with a football. The plethora of breaches is an implicit indication of the failings of a system which seeks only to curb behaviour that is viewed by some as anti-social, without a commitment to changing the environments that contribute to such behaviour. It is also testament to the unrealistic and ambiguous conditions contained within these orders.

Geographical exclusions are the most problematical of the conditions contained within ASBOs. While it is acknowledged that the primary purpose of geographical exclusion conditions is to punish and isolate offenders from people and areas that the courts contend will result in re-offending, young people and their parents/carers report that this

¹ The total number of ASBOs issued in England and Wales between 2001 and 2005 was 9749. The number of total breaches (at least one time) for the corresponding period was 4568. This equates to 47 per cent.

exclusion has led to further damaging disengagement and disconnection from the community and larger society around them (Youth Justice Board, 2006).

With the available research regarding the perceived success of ASBOs in the British experience demonstrating a high level of breaches (in 2002 the breaches amounted to a third of orders, compared to almost half in 2005), SACOSS argues strongly against their proposed effectiveness and the logic behind the inception of such a contested measure in South Australia.

Are ASBOs necessary in South Australia?

What has been the impetus for the government considering the implementation of a serious measure such as ASBOs within South Australia? Has our crime rate (particularly youth crime rate) increased in recent years? The crime statistics in South Australia simply do not demand the gravity of imposing legislation and processes with the potential to criminalise behaviour not normally considered criminal, and to needlessly introduce young people into the criminal justice system. In fact, in South Australia from 1994 to 2004 the number of overall police apprehensions involving youth dropped from 9,661 to 6,482 (Select Committee on the Youth Justice System, 2005). In 2005 the figure had decreased even further to 6,127 police apprehension reports. This is a drop of 5.5% and a significant drop of 39.4% lower than the peak of 10,118 reports recorded in 1995. The 2005 police apprehension statistics are the lowest achieved in the twelve years that have been analysed (Office of Crime Statistics and Research, 2006). Statistics clearly confirm that reported juvenile crime figures have either remained static or decreased over the last decade.

Prevention and Early Intervention

ASBOs will contribute to a retributive criminal justice system that seems to be more concerned with fulfilling anachronistic societal expectations of punishment rather than adding to an exploration of the social determinants of offending. Clear links have been made to generational poverty, unemployment, disadvantage, inequities in education, child abuse, substance abuse and lack of access to social support as significant contributors to offending behaviour.

Strategies that encompass early intervention and primary prevention have shown that in the long term, they are more cost effective than conventional retributive approaches to crime. The recommendations contained within the Select Committee report on the Youth Justice System (2005) assert that the justice system should be based upon early intervention and restorative justice strategies that serve to limit the engagement that young people have with the justice system.

While the notion of increased criminality stemming from an early introduction to the criminal justice system is not a recent concept, within the current report 'Juvenile Justice in Australia 2005-06' it was revealed that the younger people were when they entered their first supervision period (either community based or state detention), the more likely they were to re-enter juvenile justice supervision during subsequent years.

Additionally, the report found that approximately 70% of young people who began their first period of supervision by the age of 13 had completed at least two other supervision

periods by the time they were 18 years. This is compared with 14% recidivism rate for those whose initial supervision periods did not occur until they were 17 years old.

The cost benefits of early intervention and prevention programs include:

- Reductions in welfare assistance
- Decreased need for special education
- Reduced operational costs to the criminal justice system
- Reduced cost to victims (Homel et al. 2006, cited in AIC, 2006)

International Rights

Particularly in regards to juvenile crime, increasing police and court powers to deal with youth offenders in more harsh and punitive ways - including the use of ASBOs - not only goes against the notion of child and youth rights but also clearly contravenes some of the basic provisions contained within the United Nations Convention of the Rights of The Child (White 1996). Article 37 of the United Nations Convention on the Rights of the Child dictates that no child should be deprived of their liberty arbitrarily and that detention should only be used as a last resort. Juvenile justice measures like ASBOs that give police power to restrict the access of young people to public spaces is also inconsistent with Article 9 of the International Covenant on Civil and Political Rights, which states "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention". In addition, Article 12 states that "Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence". Justice measures that deny access to public spaces or endanger the liberty of young people simply for being visible in their communities does not conform to the provisions of this convention.

'Upping the Anti' Forum

SACOSS and the Youth Affairs Council of SA (YACSA), in partnership with Shelter SA and Homelessness SA, hosted this half-day workshop on the 24th of August 2007, to enable a discussion of ASBOs, their use in managing disruptive behaviour, and their appropriateness in the South Australian context.

Guest speakers included Caroline Hunter, Guest Scholar, School of Law, Flinders University and Senior Lecturer in Housing Law, Sheffield Hallam University, UK. The forum enabled the presentation of important information surrounding the operation of ASBOs in the United Kingdom as well as enabling an exchange of ideas regarding the impacts of their implementation.

Subsequent to the forum, the attendees were all emailed a set of questions regarding ASBOs and their proposed implementation in South Australia. They were then asked to complete the questions and return their feedback to SACOSS. A discussion is provided below that identifies the common themes contained within the feedback that we received.

1. *What is the problem in South Australia that ASBOs are intended to address?*

ASBOS are intended to address and ameliorate behaviour considered 'anti-social'. Unfortunately anti-social behaviour is a vastly subjective area and what someone may believe is anti-social behaviour may not be viewed in the same way by another. Where ASBOs have been implemented previously (such as the UK) the problem they are attempting to address is anti-social behavior in the community. Much of the emphasis has been on "youth gangs", "youth crime", vandalism and other 'abusive behavior'.

Several participants felt that all of the forms of anti-social behaviour targeted by ASBOS in the UK are already covered under current South Australian legislation such as The Young Offenders Act 1993, the Criminal Law (Sentencing) Act 1988, the Criminal Law Consolidation Act 1935, the Shop Theft (Alternative Enforcement) Act 2000 and the Controlled Substances Act 1984. With regard to questions of tenancy related disruption complaints, landlords and neighbours (if all other avenues have been exhausted), can apply for an eviction subject to Section 90 of the Residential Tenancies Act 1997. While many people who responded to the questions felt that forms of anti-social behaviour are already adequately covered under current legislation, the resources necessary to successfully undertake the measures contained within the legislations is not adequate or sustainable. Other problems regarding under-resourcing that contribute to ineffectiveness of current legislation include court systems being clogged, the South Australian Police being underfunded, and limited funding being provided for interventions to achieve sustainable outcomes.

2. What evidence is there to demonstrate the existence of this problem?

It is clear when researching current crime statistics (statistics presented under the heading "Are ASBOs necessary in South Australia?", above) that reported crime figures have remained relatively unchanged over the past decade. In fact, recent figures show that there have been modest falls in the rates of reported crime figures in South Australia (similar to a national and worldwide trend due to booming economic times). Therefore, with relatively static or reducing crime figures in South Australia it would seem that there is little justification for implementing ASBOs.

3. *What definition of anti-social behaviour should be applied?*

Current definitions of what constitutes anti-social behaviour are far too subjective. With the very real potential for people being needlessly introduced into the justice system, what is considered anti-social behaviour should not be up for personal interpretation or subjectivity. If ASBOs are to become a feature of our laws here in Australia a clear definition should be included into common law.

There were also concerns that ASBOs would unfairly target people who are already marginalised and vulnerable due to illness or circumstances. There must also be clauses contained within any ASBO legislation that recognise and allow for behaviour attributable to physical illness, mental illness, physical or intellectual disability or brain injury.

4. *What evidence base and what standard of proof should be required before an ASBO can be issued to an individual?*

Commonly it was considered that the standard of proof for the imposition of an ASBO should be the quantum of proof necessary in a criminal trial. The reason for this position is explained in the nature of ASBOs. ASBOs while being civil orders contain criminal sanctions for breaches. This means that individuals can face goal terms for breaching a civil order. Therefore evidence that leads to the imposition of ASBOs should be factual; they should involve a police investigation including the writing of a police report, and because of their serious nature should not be applied on hearsay evidence or on reports collected by the managers of delegated legislation such as local councils.

5. *Who should be responsible for applying for ASBOs, monitoring adherence to ASBOs, supporting people subject to ASBOs and applying for further penalty of an ASBO is breached?*

For consistency of application, regulatory transparency and appropriateness of application, one (State) government department should be responsible for defining parameters, applying, monitoring, supporting and penalising people who are subject to an ASBO. This responsibility should not sit within the Magistrates Court, local councils or the South Australian Police.

It was considered that support for people who are subject to an ASBO including the consequences of incarceration for breaches would probably come from the community sector, case managers, social workers and community workers.

6. *What should be an appropriate time duration for an ASBO?*

Due to questions of social and community exclusion and the appropriateness of exclusions applied for civil orders, it was generally considered that there should not be a standard time frame imposed for an ASBO, such as a two year minimum in the case of the UK, but the time frame should be individualised based upon the extenuating circumstances of the individual, the seriousness of the offence and the likelihood or recidivism. The periods of time identified by respondents ranged from one month to periods that should not exceed six months.

7. *What consequences might be appropriate for an individual who breaches their ASBO? In the event that criminal sanctions are a possibility, how should consequences be balanced against the fact that anti-social*

behaviour is a non-criminal behaviour and that any criminal action comes only by virtue of the breach?

Generally it was considered that imposing goal terms for breaching civil orders was not only unbalanced but also patently inappropriate. Respondents indicated that the State Government needs to honour their prior commitments to diversionary and restorative justice principles to minimise stigma, social exclusion and the chances of young people familiarising themselves with the criminal justice system unnecessarily. Family conferencing (used within restorative justice proceedings) could be introduced for breaches that involved the relevant parties discussing the issues involved.

On reflection it was felt that the breaches for an ASBO should not contain a criminal element as the behaviour that attracted the ASBO was not in itself a criminal act. If criminal behaviour had occurred then the appropriate steps would have been made by authorities to pursue it through the criminal justice system. Therefore a civil law consequence (including fines) should be introduced to deal with breaches to ASBOs. A breach to civil law has its own set of consequences and in South Australia ASBOs would be issued under our civil law.

8. *What are the implications of a 'name and shame' policy and, particularly as it related to young people, how does that relate to the current approach of our juvenile justice system which recognises that more constructive outcomes are achieved by avoiding stigmatization of young people through such a mechanism?*

As has been indicated, ASBOs may be used in dealing with anti-social behaviour in youth, and many respondents were concerned regarding the consequences of 'naming and shaming', particularly in the effects that this measure would have on normal psychological and identity development. Through a 'name and shame' element, it would be further reinforced to young people that they are not worthwhile, are separate to the rest of society and not accepted. This would not only further their belief that "nobody" cares, but it could also develop into a badge of honour. It could be used as a tool to fit into 'negative' groups with other disenfranchised young people.

Respondents were concerned regarding how this measure would reconcile itself with the measures put in place by the Juvenile Court that seek to protect the identity of young offenders. The Juvenile Court in SA is very protective of juvenile privacy in order to minimise the chances of social disconnection and the stigma that is attracted within the community. It was identified that around 85% of juvenile offending cases in SA only ever appear once, so the process of naming and shaming would be very detrimental to them.

Further, international juvenile justice agreements to which Australia has been a signatory for over 20 years expressly direct that the privacy and public anonymity is of the utmost importance and should be respected throughout their contact with the juvenile justice system. The reason for this provision is that the courts recognise that most offending committed by young people is transitory, with the vast majority of young people maturing out of criminal or anti-social behaviour. Labeling young people as deviant or criminal combined with the potential for increased contact with the criminal justice system can only contribute feeling of disassociation and feeling of difference.

9. *How should we ensure that ASBOs are not issued to people exhibiting anti-social behaviour as a symptom of illness, injury, disability or brain development?*

As indicated earlier, a greater quantum of proof (as in criminal proceedings if the punishment for breaches will be met within the criminal justice system) and a dedicated State Government department would be necessary, as a foundation to ensure the appropriate and measured application of ASBOs. Decision making regarding whether an ASBO be applied to an individual would need to be made by skilled professionals such as psychiatrists, psychologists, social workers and medical professionals, and psychological and psychiatric assessments would need to be made as a matter of course to ensure appropriateness of application.

10. What supports should be put in place to assist those issued with ASBOs to change their behaviour? Who should be responsible for determining and providing these supports and what would be the cost implications?

It was consistently indicated that if ASBOs were to become a feature of our justice system, a dedicated government department should be established that would be not only responsible for applying the ASBOs but also in supporting people issued with an order. Support is vital in limiting the chances of breaching an order and diverting individuals away from the criminal justice system. Existing government departments were also identified to be involved in supporting people under an order, such as the Education Department, the Department for Families and Communities and various mental health services.

An intervention agenda would also need to be adopted on a 'whole of government' level focusinf on school retention, employment programs and parenting skills. Early intervention and prevention has consistently proven to be more cost effective than measures which seek only to address the societal manifestations of generational disadvantage.

11. It is anticipated that it would take 3-4 years to see the full implications of introduction of ASBOs. What would this mean for the structure of a pilot?

Generally it was thought that a pilot program would need to run for more than four years for the full effects that ASBOs will have on our community to become evident. Throughout the pilot process regular and widespread evaluations, studies and regulation evaluations would be required of the agency/agencies issuing the ASBOs, of the types of support given, of the efficacy of that support, the sanctions imposed and the effect that these measures were having on individuals and their communities.

12. *What should be the method of evaluation for the pilot and against what standards should the success or otherwise of the pilot be measured?*

The evaluation of this measure would need to be undertaken by an independent research and evaluation body and include both quantitative and qualitative data. Further, respondents indicated that it was most important that outcome measures also investigate:

- Whether the incidences of anti-social behaviour have decreased due to the implementation of ASBOs (the standard should be a substantial decrease otherwise it is not worth continuing with such a contested and costly measure).
- The number of ASBOs issued
- What behaviours have attracted ASBOs
- The length of orders
- Demographic information such as age, gender, ethnicity, geographic region, educational attainment, employment status, offending history
- The number of ASBOs that are breached
- The type of sanction used for breaches
- The number of punitive sanctions used for breaches
- Number of recipients who re-offend.
- Supports offered for individuals placed under an order
- Community satisfaction with ASBOs
- Ideas for improvement and ways forward.

The following set of standards should be included in evaluation to determine the efficacy and appropriateness of ASBOs to reduce crime and manage harassing and distressing behaviour:

- Reduction in crime rates
- Reduction in people on remand
- Reduction in incarceration
- Reduction in public housing tenant disputes
- The impact of homelessness due to evictions from public housing.

It is important that the regulations that control the mechanisms for implementation and the support offered to people under an order are evaluated regularly and fully. The potential impacts of this measure have the possibility to be wide-reaching and socially pervasive and the generational impacts of social exclusion, increased exposure to the criminal justice system and increased incarceration should not be underestimated.

Summary

While many of the respondents to the SACOSS/YACSA questionnaire freely advised the best ways in which to implement ASBOs in our community with the least amount of impact on the vulnerable and disadvantaged, the strongest theme throughout the questionnaires was that the introduction of ASBOs is not supported amongst workers and stakeholders in the area of youth affairs and justice. Respondents have noted that ASBOs have not appeared to be a success in the UK, and the implementation of such a contentious measure here in South Australia has the overwhelming potential to further disconnect and marginalise already vulnerable groups.

ASBOs will serve to disproportionately target the homeless, Aboriginal and Torres Strait Islanders, the mentally ill and juveniles and ethnic groups. Of equal concern to the community sector is that ASBOs will also lead to an increase in young people and children needlessly entering the criminal justice system.

SACOSS does not support the use of ASBOs as a feature of the juvenile justice system in South Australia. However, we recommend that if ASBOs are going to become a feature of our criminal justice system then a more targeted and less punitive approach to exclusions, that recognises the rights and innate needs of young people to access public space, would arguably reduce the breaches such as are currently occurring in the UK. We are also concerned at the criminalisation of behaviour that would not normally be considered criminal. Statistics tell us that the earlier young people are introduced to the criminal justice system the greater the chance of re-offending and engaging with that system. As a society it is in our best interest to address the factors that contribute to criminality to prevent offending from occurring in the first instance, rather than merely punishing the behaviour that is the end result of our current iniquitous social environment.

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