The Anti-social Behaviour, Crime and Policing Bill

OPINION

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[Annotated by The Christian Institute – yellow highlights]

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OPINION

1. I am instructed by my clients, the Christian Institute, to consider the implications of two Parts of the *Antisocial Behaviour, Crime and Policing Bill*; and in particular the implications for freedom of speech, assembly, religion and other rights of the proposed Injunctions to Prevent Nuisance and Annoyance ('IPNAs') and of Dispersal Powers set out in those Parts.

2. Concerns as to the lawfulness and appropriateness of these proposals mirror to a significant extent the concerns provoked by the government's written objections to the recent proposal to remove the word "*insulting*" from *section 5* of the *Public Order Act 1986.* The government of course, finally withdrew those objections after it was heavily defeated in the House of Lords last year in a debate about the extent to which the criminalisation of the use of insulting words in the *Public Order Act 1986* risked a gross interference in free expression rights.

3. There is no doubt that anti-social behaviour can be a source of great anxiety and distress to the community, and that the current toolkit of measures has often provided protection and comfort to those affected by such conduct. However, the proposal to sweep away those tailored measures and to replace them with what appears to be a much broader regime, including very wide dispersal powers, may represent a further and, perhaps worse, risk to core rights.

4. As the Home Secretary stated when she informed Parliament of the government's decision to not challenge the amendment removing the word '*insulting'* from section 5 of *the Public Order Act*:

> "*There is always a careful balance to be struck between protecting our proud tradition of free speech and taking action against those who cause widespread offence with their actions*"[1]

5. The same must be true of the balance to be drawn between protecting such fundamental rights, and measures designed to protect the victims of anti-social behaviour. The way in which anti-social behaviour is defined, moreover, is critical to ensuring that legal certainty is preserved, and to minimise any arbitrary interference on the part of the State in daily life. That is particularly the case where the conduct at issue may be low-level, non-criminal and non-tortious,

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and yet the effect upon the subject of the orders is, or may be, potentially very high.

6. It is necessary to begin any consideration of the powers set out in this Bill by underlining the role of freedom of expression (and indeed of assembly and of religion) in a democracy. As the European Court of Human Rights stressed in *Handyside v the United Kingdom* [1979-80] 1 E.H.R.R. 737:

> "*Freedom of expression constitutes one of the essential foundations of (democratic) society, one of the basic conditions for its progress and for the development of every man. Subject to Article 10 (2), it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'.*"

7. Tolerance, of low-level non-criminal behaviour that may be capable of causing some person annoyance or nuisance, is an important feature of an open and democratic society governed by the rule of law. The understandable and important drive to protect individuals from genuinely distressing behaviour should not lead to the importation of highly subjective and broad concepts into a framework which permits or even encourages deep interference in core rights. The balance must be properly struck to ensure the civil law protects rather than damages basic freedoms.

PART 1: THE IPNA

The current anti-social behaviour 'toolkit'

8. As Jackson LJ explained in the case of *Birmingham City Council v James* [2013] EWCA Civ 552, in recent years Parliament has provided three important procedures for pre-empting violent or other conduct considered unacceptable, if there is good reason to anticipate such conduct. They are:

i) an application for an anti-social behaviour injunction ("ASBI") under chapter 3 of Part 5 of the Housing Act 1996 ("HA 1996");
ii) an application for an anti-social behaviour order ("ASBO") under Part 1 of the Crime and Disorder Act 1998 ("CDA 1998") and
iii) an application for an injunction to restrain gang-related violence ("IRGV") under Part 4 of the Policing and Crime Act 2009 ("PCA 2009").

ASBIs

9. The ASBI is strictly confined to the context of 'housing-related' anti-social behaviour.

10. Section 153A of the Housing Act 1996 permits a "*relevant landlord*" to apply to the Court for an anti-social behaviour injunction against an individual. Such an injunction may be for specified period or until further order, and prohibits that individual from "*engaging in housing-related anti-social conduct".*

11. This is a two-part definition: the kind of conduct the individual will be prohibited from engaging in must be both "*anti-social*" and "*housing related*". The first of these is defined in very broad terms as conduct "*capable of causing nuisance or annoyance to some person (who need not be a particular identified person)".* However, that breadth is mitigated by the definition of the second as conduct "*directly or indirectly relating to or affecting the housing management functions of a relevant landlord*".

12. As a civil injunction, any breach of the prohibitions may lead to committal, but it is not a criminal offence, although power of arrest may be attached to the injunction where there is violence involved or a significant risk of harm to certain persons.

13. In order to be empowered to make such an injunction, the Court must be satisfied on the balance of probabilities that certain conditions (set out in s.153A(3)) are met.

14. The Court must find as a matter of proven fact that the person concerned either is engaging, has been engaging, or "*threatens to*" engage in "*housing-related conduct capable of causing a nuisance or annoyance to*" a list of defined individuals. These all have a defined link to the landlord's functions, including residence in the neighbourhood or properties that landlord owns, and engaging in unlawful activity in the area of such accommodation.

15. The otherwise potentially broad jurisdiction to grant an ASBI in the face of actual or threatened activity capable of causing nuisance or annoyance is thus narrowed, first by the concept of conduct which directly or indirectly relates to or affects the housing management functions of the relevant landlord, as explained by Rix LJ in *Swindon Borough Council v Redpath* [2009] EWCA Civ 943 [2010] P.T.S.R. 904 (at [36]). There must exist a factual nexus between the proven conduct engaged in or threatened, and the applicant's housing management functions, however "*loose and broad*" (as per Rix LJ at [38]). Second, it is further confined by the requirement that the potential victims must belong

to a specified class, even if that is described generally and encompasses a broad range of persons. As Lord Neuberger observed in *Redpath*:

> "*It would, of course, be wrong to interpret legislation such as section 153A of the 1996 Act in an artificially wide or impractical way or so as to be oppressive to those who are alleged to be behaving offensively: even if they are behaving offensively, such persons have rights as well*" [67].

ASBOs

16. The ASBO regime is very different. An application for such an order is open to any relevant authority under s.1 CDA 1998. For it to be granted, the court must be satisfied that two conditions are met:

> *(a) that the person has acted…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 relevant persons from further anti-social acts by him*

17. Thus, <u>first</u>, there is no limitation on the context in which the conduct must have occurred – it can be in any place - and <u>second</u>, the only limitation on the class of victim is that they be of a different household.

18. This is mitigated however by a far higher threshold in terms of the kind of behaviour which must be proven than that for an ASBI: there must be conduct which either did cause, or was likely to cause "*harassment alarm or distress",* rather than merely being capable of causing "*nuisance or annoyance*". As explained in *R (McCann) v Crown Court at Manchester* [2002] UKHL 39, [2003] 1 A.C. 787: this "*is not meant to be used in cases of minor unacceptable behaviour but in cases which satisfy the threshold of persistent and serious anti-social behaviour*"[25].

19. Further, the standard of proof to be applied in considering whether the individual has acted in this serious way, for pragmatic reasons, is the criminal standard of beyond reasonable doubt (*McCann*).

20. Importantly, the Court must also consider and determine whether the order is in fact "*necessary*". This is a critical safeguard against disproportionate interference in the individual's rights.

21. A further safeguard against disproportionate interference with core rights lies in the provision in s.1(5) for the individual to show that his conduct was "*reasonable in the circumstances*" and should thus be subject to no sanction.

22. Finally, the content of the ASBO itself is limited by statute to prohibitions, which are strictly necessary, made for the purpose of protecting persons from further anti-social acts by the defendant. Breach of those prohibitions without reasonable excuse is a criminal offence.

The New IPNA

23. Part 1 of the draft bill would replace these and other anti-social behaviour tools with a wide-ranging injunction that is much more widely drawn and contains none of the safeguards of the existing regime.

Jurisdiction

24. Section 1 of the Bill sets out when the Court has the power to grant an IPNA.

25. First, the Court must be satisfied "*on the balance of probabilities, that the respondent has engaged, or threatens to engage in conduct capable of causing nuisance or annoyance to any person*"(s.1(2)).

26. Second, the Court must consider it "*just and convenient to grant the injunction for the purpose of preventing the respondent from engaging in anti-social behaviour*".

Condition one: the threshold test

27. As will be immediately obvious, the conduct which must be proven - that "*capable of causing nuisance and annoyance*" - appears to mirror the first element of the threshold test for granting an ASBI. Indeed, the government described the test here as "*taken from*" that statute in its evidence to the JCHR[2]. The government further explained that it considered this test therefore to be "*supported by 15 years of case law*" and thus *"readily understandable*" by courts and practitioners.

28. In my view, this is plainly wrong. That expertise is specifically confined to the housing sector and civil cases there arising, in a context where nuisance and annoyance may be particularly penetrating and demanding of resolution. Divorced from that context, and from the existing second threshold requirement for proven anti-social behaviour to be "housing related" before the law is

[2] JCHR fourth report of session 2013-2014 HC paper 56 p.76-77

engaged, there is no readily understandable pre-existing body of authority to assist the Courts in giving this phrase an objective interpretation.

29. Indeed, when applied to the threat of conduct in any place, directed at any person, lacking even that limitation to persons of a different household contained in the ASBO legislation, it is difficult to imagine a broader concept than causing 'nuisance' or 'annoyance'. The phrase is apt to catch a vast range of everyday behaviours to an extent that may have serious implications for the rule of law.

30. This is because both the common law and the core articles of the ECHR demand legal certainty. Any restrictions to core rights such as freedom of assembly and expression in articles 10 and 11 (described as "*an essential foundation of democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment*" by the European Court in *Steel v UK* (2005) 41 EHRR 22[3]) must be, "*prescribed by law*", mirroring the similar requirement for interference with private life rights under article 8 to be "*in accordance with the law*".

31. To satisfy this condition, any restrictions to these rights must be sufficiently clear and precise to enable individuals to regulate their conduct and to foresee the consequences of their actions. The rule of law demands that, generally, people must "*be able to know in advance what are the legal consequences that will flow from*"[4] a course of action and "*be able to know with some confidence where the boundaries of legality may lie*."[5]

32. The question is whether conduct "*capable of causing nuisance or annoyance*" "*permit(s) of ready comprehension*" and "*convey(s)…a meaning which the ordinary citizen can well understand*"[6]? In my view, the IPNA threshold, uncoupled from the housing context and unbounded by class of victim or any other limitation, is clearly "*so ambiguous or so vague as to be beyond the understanding of the ordinary person*"[7]. It fails the quality of the law and legal certainty tests on any sensible measure.

33. A lone individual standing outside the entrance to a bank holding a sign objecting to its role in the financial crisis, a busker outside a shopping centre, or a street

[3] Cited by Lord Bingham in *R. (on the application of Laporte) v Chief Constable of Gloucestershire* [2006] UKHL 55; [2007] 2 A.C. 105

[4] *Black Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] A.C. 591; [1975] 2 W.L.R. 513 at 638 as per Lord Diplock

[5] *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 [p78F]

[6] see *Brutus v Cozens* and *Evans*[2004] EWCA Crim 3102

[7] A phrase employed by Lord Dyson in *Evans*

preacher proclaiming the end of days to passers-by may all be capable of causing nuisance and annoyance to some person, but the question is whether they should be subject to such broad legislative intervention as is proposed in this Bill.

The standard of proof, intent and previous acts

34. Unlike the ASBO regime for general anti-social behaviour, which requires the criminal standard of proof, the Bill proposes that the lower civil standard should apply in the case of an IPNA. The government makes a virtue of the fact that this means IPNAs will be easier to obtain; the counter argument is that there is a greater danger that the measure will be applied in inappropriate circumstances.

35. This is particularly so in circumstances where the threshold under the Bill does not require the Court to identify anything more than the "*threat*" of relevant conduct. There is no need to prove intention, previous civil wrongs, deliberate anti-social activity or any other concerning behaviour. It will apparently suffice for a Court to conclude on the balance of probabilities that there is an objective threat of a person even inadvertently behaving in a way that others could find objectionable in the future. Hearsay evidence will be admissible to evidence that, on the balance of probabilities, the mere threat of such a loosely defined and possibly quite unintentional result exists, so that the law is engaged.

36. In my view, the combination of a low and vague threshold for the behavioural trigger, coupled with the civil standard of proof, creates an unacceptable risk that individuals will inappropriately be made subject of a highly intrusive measure that may greatly impact on their fundamental rights. While it is true to say - as the government did in its response to the Joint Committee on Human Rights- that the breach of an IPNA, unlike the breach of an ASBO, will not be a criminal offence, it may still lead, through committal, to imprisonment in certain circumstances.

The potential applicants

37. Unlike ASBIs, IPNAs will be available to a range of bodies and persons (such as Head Teachers) and to much broader groups than can currently apply for ASBOs. Apart from in the case of housing providers, there is no need for an applicant to demonstrate sufficient interest in the respondent's behaviour, or indeed any factual nexus between that applicant's particular functions and the behaviour in question.

38. This broadening out of availability mirrors the broadening out of the threshold test, and appears to compound the danger that IPNAs will be sought, and may be granted, in an extraordinarily wide range of circumstances, causing serious and unforeseeable interferences in individual rights, to the greater public detriment.

The absence of a 'reasonable in the circumstances' defence

39. Nor does the Bill provide any potential for an individual to defend their conduct, or the threat of it, by satisfying the Court that their behaviour is reasonable in the circumstances. This important ASBO safeguard helps to minimise the risk that low level or otherwise understandable behaviour will inappropriately be met with an injunction. In my view, the lack of such a defence in the present Bill is stark.

Necessity

40. The absence of this basic legislative protection becomes critical in circumstances where the second condition the Court must be satisfied of before making an injunction, is not that is it necessary to do so in order to protect the rights of others (the ASBO regime), but simply that it is "*just and convenient*" to make the injunction for the purpose of "*preventing the respondent from engaging in anti-social behaviour*". In effect, a nuanced assessment of the proportionality of the interference is replaced with a far less stringent consideration.

41. This can hardly be compatible with the clear requirement under domestic and Convention law that any interference with relevant convention rights must satisfy the proportionality principle. It is plainly insufficient to state, as the government does, that the *s.6* duty contained in the *Human Rights Act 1998,* mandating that public bodies act compatibly with the Convention, will prevent courts from making disproportionate and unnecessary orders. The fact that the Bill fails to mandate a necessity test, in circumstances where gross state interference in individual rights is a foreseeable outcome, plainly creates a greatly enhanced risk of unnecessary and disproportionate orders being made.

42. Indeed, the pressing question is whether State interference in the context of behaviour that is merely potentially annoying could ever be justifiable or amount to a proportionate interference in those critical rights to freedom of speech, assembly and religion, or indeed to private life.

43. In this context, it is plain that an IPNA has the potential for far more intrusive and wide ranging application than even the s.5 insulting provisions, which the government has removed from the statute book in the face of similar concerns. There appears to be a clear and pressing risk that IPNAs may be used, in the words of the United States Supreme Court in another case, as an inadvertent instrument "*for the suppression of ...vehement, caustic and sometimes unpleasant expression*". Such a risk was there said to be "*unacceptable: in public debate [we]*

must tolerate insulting, and even outrageous speech in order to provide adequate breathing space for the freedoms protected by the first amendment."[8]

The content of an IPNA

44. An IPNA is not restricted to imposing "*prohibitions*" on future antisocial behaviour, as is housing-related conduct under an ASBI, nor even to the far wider ASBO power to "*prohibit*" the subject from doing anything there described. Instead, an IPNA may not only impose prohibitions from "*doing anything described*" in the injunction, but also *"require the respondent to do anything described in the injunction*".

45. In this sense, an IPNA gives courts an extremely broad power to impose positive requirements on the subject, so long as it considers these to be made for the purpose of preventing some future anti-social behaviour. Further, there is no specific obligation to consider the proportionality of the terms of the injunction to any interference with core rights that may result.

46. True, the Bill provides that such requirements and prohibitions must "*so far as practicable"* have some limits, but only where they conflict with the respondent's religious beliefs, caring responsibilities, times of normal work or education, or existing court orders or injunctions in place at the time. These limitations appear to be insufficient.

47. The government has said that the aim of such a broad new power includes getting an individual to "*address the underlying causes of their anti-social behaviour"* and that accompanying Guidance will set out examples of what might be included. But, even setting aside the fact that this Bill creates an obvious danger of highly onerous requirements being imposed on what may be vulnerable and unstable individuals for a significant amount of time, it also appears to anticipate a regime in which very serious interference could be occasioned to peoples' private lives, or to their freedom to speak and to assemble, or to manifest their religion as they wish. Of course political demonstrations, street performers and corner preachers may be 'annoying' to some. They may even, from time to time be a 'nuisance'.

48. The danger in this Bill is that it potentially empowers State interference against such activities in the face of shockingly low safeguards and little apparent acknowledgment of the potential effect of its provisions on the ability of citizens to exercise core rights without undue interference.

[8] *Snyder v Phelps et al* 562 US (2011), decision No.09-751, 2 March 2011

Part 3: DISPERSAL POWERS

49. Part 3 of the Bill creates new dispersal powers, coupled with a power to require the subject of the dispersal direction to surrender property. These new powers, like the IPNA, are far more broadly drawn than existing police powers.

The authorisation stage

50. Until now, dispersal powers under *s.30* of the *Anti-social Behaviour Act 2003* required the authorising 'relevant officer' – defined by *s.36* as one of or above the rank of superintendent - to have "*reasonable grounds for believing*":

> *(a) that any members of the public have been intimidated, harassed, alarmed or distressed as a result of the presence or behaviour of groups of two or more persons in public places in any locality in his police area (the "relevant locality"), and*
> *(b) that anti-social behaviour is a significant and persistent problem in the relevant locality.*

51. Further, under *s 31*, any such authorisation requires not only prior "*consent of the local authority or each local authority whose area includes the whole or part of the relevant locality*" but publicity to be given to the authorisation notice, setting out in writing signed by the officer the relevant locality, the grounds on which the authorisation is given and the period.

52. As the Court explained in *Carter v Crown Prosecution Service* [2009] EWHC 2197 (Admin), this was no doubt because the powers are "*an interference with the liberty of the subject, and as a novel route has been taken to impose such an interference through sub-delegated powers*". The Court further considered it "*important that proper procedures should be in place to ensure that the powers that are given to the constable are properly given*" [3]. The Court thus disapproved of the notice in that case, being "*drafted in terms that are not readily understandable to those who were likely to be affected by it*" [5]

53. There are thus a number of safeguards around a present *s.30* authorisation, and a strict requirement to have reasonable grounds to believe both that more than one person in the relevant locality has perpetrated unlawful behaviour, *and* that such behaviour is a significant and persistent problem in that locality.

Directions made by the constable

54. Under the new provisions, before any directions can be given to a person under the proposed Part 3, a police officer of at least inspector rank must authorise the use of that power in the particular locality (*s.32*).

55. Such an authorisation may last up to 48 hours. The only condition that the authorising officer must consider met is that use of the powers "*may be necessary"* for the purpose of removing or reducing the likelihood of:

(1) Members of the public in the locality being harassed, alarmed or distressed, or
(2) *The occurrence in the locality of crime and disorder*.

56. Where an authorisation is in place, *s.33* of the new Bill will empower a *"constable in uniform"* (including a PCSO) to give directions to a person in a public place in the locality to do certain things:

(1) To leave the locality (or part of it); and
(2) Not to return to the locality for a specified period

57. The Officer may give directions where two conditions are satisfied. The first is that the Officer has "*reasonable grounds to suspect*" that the behaviour of the person in the locality "*has contributed to or is likely to contribute to*" either:

(1) Members of the public in the locality being harassed, alarmed or distressed; or
(2) The occurrence in the locality of crime or disorder.

58. The second is that the constable "*considers that giving a direction to the person is necessary for the purpose of removing or reducing the likelihood*" of those events. Failure to comply with directions given without reasonable excuse is a criminal offence and may lead, in the case of the dispersal direction, to imprisonment.

59. The constable may also direct the person "*to surrender to*" them temporarily "*any item in the person's possession or control that the constable reasonably believes has been used or is likely to be used in behaviour that harasses, alarms or distresses members of the public*" with safeguards as to writing, and notice that failure to comply without reasonable excuse is a criminal offence.

60. If the constable reasonably believes the person is under 16, he may remove them to a place where the person lives or "*a place of safety*".

61. Possible statutory safeguards include that the exclusion period may not exceed 48 hours, must be given in writing unless not reasonably practicable, and must

specify the area. Further, the constable must if reasonably practicable tell the person that failing to comply without reasonable excuse is an offence.

62. Further, there are some specified "*restrictions*" on the direction in *s.34:* it (1) cannot be given to someone appearing under ten; (2) must not prevent the person having access to where they live; (3) must not prevent them attending at a place where the person is (a) required to attend for employment or by a contract of services thy are party to; or (b) required to attend under an enactment or court or tribunal order; or (c) expected to attend for the purposes of education or training or receiving medical treatment, at the time they are expected or required to attend there.

63. There are further specified restrictions that prevent the giving of such a direction if the person is one of a group of people engaged in conduct lawful under *s.220* of the *Trade Union and Labour Relations (Consolidation) Act 1992* (peaceful picketing) or taking part in a *s.11(1) Public Order Act 1986* type peaceful procession where written notice has been given or is not required.

64. The explanatory notes indicate that Guidance will be issued "*to ensure that the power is used proportionately*", including a role for policing bodies or commissioners to ensure this, and publication of data as to the usage of the powers.

The risks of the wider authorising power

65. In my view, the removal of any requirement that there must be reasonable grounds to believe there has been anti-social behaviour in the locality and that this is a significant and persistent problem, coupled with the removal of the safeguard that the local authority must be consulted before an authorisation is made, has the potential to lead to very broad use indeed of the new dispersal powers.

66. The fact that an authorisation may be given merely for the purpose of reducing the likelihood of anti-social behaviour, or even the general occurrence of crime and disorder, without reasonable grounds to believe this has previously been a problem in the dispersal area, affords an extremely wide discretion to the authorising officer. This appears to amount to a broad delegation of authority to lower ranked officers (and to PCSOs) to restrict fundamental rights in the interests of general crime reduction. Of further concern is that the authorising officer no longer needs to be at or above the rank of Superintendent.

67. While the authorisation can only last for a limited time, it has almost unlimited scope. Without more strictly defined parameters, or a statutory requirement for

reasonable belief, there is a great risk of much wider usage, even a risk that authorisations might appear arbitrary. Guidance is unlikely to prove an adequate safeguard against this risk.

68. The phrasing of the necessity test compounds this concern. The authorising officer does not need to consider that use of the powers "*is necessary*", but only that they "*may be*" necessary. This appears insufficient to meet the necessary and proportionate test for authorising significant interference with core rights, particularly in the context of a hard-pressed frontline police service facing multiple challenges.

69. It is easily foreseeable that these powers may be invoked by the police in situations where their use impacts bluntly upon the exercise of rights to free expression and free assembly, as well as other core rights. In these circumstances, it is a matter of great concern that the Bill is drafted in such broad terms and includes so few safeguards to limit the potential effect of its provisions upon those rights.

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