

Outlawing "annoying" conduct Anti-social Behaviour, Crime and Policing Bill Second Reading – Tuesday 29 October 2013

Less than a year after the Lords vote to protect free speech by removing the word "insulting" from Section 5 of the Public Order Act, the Government is bringing forward a bill that defines "anti-social behaviour" as "conduct capable of causing nuisance or annoyance to any person".

This extremely low threshold is borrowed from the specialist context of housing law and applied very widely - to anyone over the age of 10 in any place. The risks to free speech are obvious. The proposals have been criticised by the Home Affairs Committee, the Joint Committee on Human Rights, and civil liberties groups. Even ACPO have called for the test to be narrowed.

In addition to Clause 1 (Injunctions to Prevent Nuisance and Annoyance) civil liberty concerns have also been expressed about Clause 33 (amended dispersal powers for the police).

1) Injunctions to Prevent Nuisance and Annoyance (IPNAs)

Clause 1 replaces the ASBO regime in Section 1 of the Crime and Disorder Act 1998. Unlike ASBOs, IPNAs are civil injunctions and any breach would be dealt with through contempt of court proceedings, for which the maximum penalties are an unlimited fine or two years in prison.

"The key differences

Compared to ASBOs:

- IPNAs will have a lower threshold because they use a **wider ASBI [anti-social behaviour injunction] definition of ASB [anti-social behaviour]**. This is: conduct 'capable of causing nuisance or annoyance to any person' - rather than causing or likely to cause 'harassment, alarm or distress'.
- There is no requirement for the IPNA to be 'necessary' to protect people from ASB; the court could impose an IPNA if 'just and convenient'
- IPNAs will use the **civil standard of proof** (on the balance of probabilities) unlike the ASBO, which uses the criminal standard"

Table extracted from House of Commons Library Research Paper 13/34, 4 June 2013, p.19

a) Lower "annoyance" threshold

The Lords voted to remove "insulting" from Section 5 of the Public Order Act 1986 because it was too low a threshold for criminal sanction. "Annoyance", arguably, is even worse.

Under Clause 1 of the Bill, courts may grant an IPNA against a person if he has engaged or threatens to engage in "conduct capable of causing nuisance or annoyance to any person". Since IPNAs may apply to any person in any place, "nuisance" appears to be used in the colloquial sense rather than the limited sense used in land law. Nuisance and annoyance are simply too subjective to be used in a public order context. People become annoyed for all kinds of reasons, some rational and some irrational. Conversely, an ASBO is granted for behaviour which caused or was likely to cause harassment, alarm or distress. This is a more robust test that is tried and tested in the public order sphere.

The nuisance or annoyance test is currently used for Anti-Social Behaviour Injunctions (ASBIs), which were introduced in 2003 and apply solely in a social housing context. Since ASBIs are housing specific, their scope is automatically limited. Taking a definition that works in a housing context and applying it more generally (with a much wider range of bodies able to apply for injunctions) is a grave mistake. There is a huge difference between a housing setting and the high street. If annoyance or nuisance is being caused by a next door neighbour in social housing it is far more difficult to escape, so a lower threshold can be justified. If someone is annoyed by another person in the street - such as a street preacher or a protester - they can usually just walk away.

The crucial difference context makes is illustrated in equality law which outlaws religious "harassment" in employment but not in the provision of goods and services. An employee cannot walk away from a rude boss without risking his job. But a shopper can walk away from a rude sales assistant and buy elsewhere. The risk to free speech in the latter context outweighs the sensitivities of the shopper.

The Government's use of such a low threshold has been criticised by Liberty ("breathtakingly wide")¹, JUSTICE ("far too low")² and the Home Affairs Committee ("far too broad")³. A letter to *The Times* from a spectrum of organisations ranging from Big Brother Watch to the Prison Reform Trust argued that "the activities that could fall within this definition are limitless" and labelled the legislation "ill-thought-out".⁴ The Joint Committee on Human Rights said that the nuisance or annoyance test "is not sufficiently precise to satisfy the requirement of legal certainty required by both human rights law and the common law".⁵ The Association of Chief Police Officers has expressed its view that the "harassment, alarm and distress" test used in current ASBO law should be retained.⁶

b) No requirement to prove necessity

The Home Office highlights the fact that there is "no need to prove necessity, unlike ASBOs".⁷ Instead, the court merely needs to consider it "just and convenient to grant the injunction for the purposes of preventing the respondent from engaging in anti-social behaviour" (clause 1(3)). The JCHR doubts that this meets the requirements of human rights law.⁸ ACPO and the Commons Home Affairs Committee both advocate a return to the necessity test.⁹

c) Civil standard of proof

The standard of proof applied in ASBOs is the equivalent of the criminal standard of 'beyond reasonable doubt'. The court has to be sure that the person's conduct was such as to warrant an order. However, obtaining an IPNA would only require a court to be satisfied that it is likely the person has engaged or threatened to engage in the conduct. Civil liberty organisations including Liberty and JUSTICE have criticised the application of the lower standard of proof.¹⁰

c) No defence of reasonableness

The terms of any IPNA must "so far as practicable" avoid "any conflict with the respondent's religious beliefs" (Clause 1(5)(a)). This highly qualified obligation to respect beliefs is not a defence. The current ASBO regime includes a clear safeguard based on reasonableness: Clause 1 of the Crime and Disorder Act 1998 explicitly requires the court to "disregard any act of the defendant which he shows was reasonable in the circumstances".

d) Flawed justification

The Government justifies its new injunctions on the basis of failures in the ASBO regime. In particular, it cites the evidential difficulties and time delay involved in obtaining ASBOs. We do not doubt that anti-social behaviour is a continuing problem. However, it is profoundly wrong to try to solve the problem by removing civil liberty safeguards. The problems are caused by court delays and lack of co-operation between agencies.¹¹ This is an operational problem, not a legislative one. Ironically, adopting this low threshold for anti-social behaviour is only likely to increase the burden on the courts, as they may end up dealing with all kinds of behaviour that would not have been caught by the previous law and does not belong in the courts.

"Camden Council has a long and successful history of using antisocial behaviour (ASB) legislation creatively and flexibly to address a wide range of issues that matter to our communities. There has been public concern around the proposed changes to these powers and we are not convinced that the recommendations and re-branding of powers proposed in the draft bill will provide improvements to the current position. The powers to deal with crime and disorder need to be reviewed regularly, but to abolish a successful policy rather than improve on it, is a total waste of public resources."

Home Affairs Committee, *The draft Anti-social Behaviour Bill: pre-legislative scrutiny - Additional Written Evidence*, 19 February 2013, HC 836 iii 2012-13, Ev w8

2) Police dispersal powers

Clause 33 empowers a police officer to direct a person who is in a public place to leave the locality and not to return for a period (up to 48 hours). The officer can do this provided that:

- a. He has reasonable grounds to suspect that the person's presence or behaviour in the locality has contributed or is likely to contribute to members of the public being harassed, alarmed or distressed or the occurrence in the locality of crime or disorder.
- b. It is necessary for removing or reducing the likelihood of those events.

Failure to comply with the direction without reasonable excuse is an offence, punishable by up to 3 months imprisonment or a level 4 fine (£2500) or both.

Clause 33 replaces the dispersal provisions under existing law, most notably section 30 of the Anti-Social Behaviour Act 2003. It is essential that such tools are used proportionately. The new dispersal powers differ from the 2003 powers in significant ways:

- Powers of dispersal in the 2003 Act relate to dispersal of groups, not individuals. Clause 33 can be used against individuals, making it a more potent power.
- Before a police officer can use the power it must have been pre-authorised by an officer ranked Inspector or above (Clause 32). Under the 2003 legislation the authorisation must come from a higher ranked officer (Superintendent or above).
- The focus of the 2003 powers is the harassment/alarm/distress resulting from the groups' presence or behaviour. Under clause 33 it would be sufficient that the presence or behaviour contributed to the harassment/alarm/distress. The move from being the cause to being merely a contributory factor inevitably lowers the threshold.

Examples

- A protester mounts a silent vigil once a week outside the HQ of the Scientology movement. He holds a placard describing the group as a "cult". The group complains to the police, arguing that his presence causes nuisance and annoyance to their staff. The police could seek an IPNA or a dispersal order to prevent him returning.
- A pastor preaches regularly in the high street. A shop owner complains to the local authority that "all that talk about sin" is annoying to both him and his customers. They seek an IPNA, arguing that there is no conflict with his religious beliefs since he can preach in his church.
- A gay rights campaigner pickets a weekly event organised by a radical Islamist group. He describes the group as "Nazis". The police seek an IPNA to prevent him returning on the grounds that he is causing nuisance and annoyance to participants of the event.

Conclusion

The application of the ASBI test to a non-housing context is fraught with problems and there are insufficient safeguards for freedom of expression. The expanded dispersal power could also be used to target individuals merely for exercising legitimate freedom of speech.

*The Christian Institute
23 October 2013*

¹ Liberty, *Second Reading Briefing on ASBCP Bill*, page 8

² Memorandum from JUSTICE, Anti-social Behaviour, Crime and Policing Bill Public Bill Committee (ASB 20), para. 15

³ The draft Anti-social Behaviour Bill: pre-legislative scrutiny, House of Commons Home Affairs Select Committee, Session 2012-13, 12th Report, HC 836-I, para. 28

⁴ *The Times*, 10 June 2013

⁵ Legislative Scrutiny: Anti-social Behaviour, Crime and Policing Bill, House of Lords, House of Commons Joint Committee on Human Rights, Session 2013-14, 4th Report, HL Paper 56, HC 713, page 16

⁶ Memorandum from ACPO, Anti-social Behaviour, Crime and Policing Bill Public Bill Committee (ASB 05), para. 10

⁷ *Reform of anti-social behaviour powers draft guidance for frontline professionals*, Home Office, October 2013, p 22

⁸ Legislative Scrutiny: Anti-social Behaviour, Crime and Policing Bill, House of Lords, House of Commons Joint Committee on Human Rights, Session 2013-14, 4th Report, HL Paper 56, HC 713, page 19

⁹ Home Affairs Committee, The draft Anti-social Behaviour Bill: pre-legislative scrutiny - Additional Written Evidence, 19 February 2013, HC 836 iii 2012-13, Ev w21. See also Volume 1, para. 28.

¹⁰ Liberty, *Second Reading Briefing on ASBCP Bill*, page 7; Memorandum from JUSTICE, Anti-social Behaviour, Crime and Policing Bill Public Bill Committee (ASB 20), para. 12

¹¹ The draft Anti-social Behaviour Bill: pre-legislative scrutiny, House of Commons Home Affairs Select Committee, Session 2012-13, 12th Report, HC 836-I, paras 3 and 68