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### **Paper:**

Macdonald, S. & Telford, M. (2007). The use of ASBOs against young people in England and Wales: lessons from Scotland. *Legal Studies*, 27(4), 604-629.

<http://dx.doi.org/10.1111/j.1748-121X.2007.00059.x>

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# **The Use of ASBOs against Young People in England and Wales: Lessons from Scotland**

***Stuart Macdonald and Mark Telford\****

Abstract:

*The ASBO is one of the best known measures used to tackle anti-social behaviour. In keeping with the popular conception, the order is frequently used against young people. Of all ASBOs issued in England and Wales to the end of 2005, roughly 40% were imposed on under-18s. This article begins with a brief outline of the three principles at the heart of the celebrated Scottish children's hearings system. With reference to these principles, and to the provisions which govern the use of the order against 12-15 year-olds north of the border, the article then discusses five areas of concern about the use of ASBOs against young people in England and Wales: the readiness to resort to ASBOs; the forum for ASBO applications; the terms of ASBOs; publicising the details of ASBOs; and custodial net-widening. The article ends by suggesting reforms to the ASBO regime in England and Wales insofar as it is used against young people.*

Word count (including footnotes, excluding abstract): 14,081

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# **The Use of ASBOs against Young People in England and Wales: Lessons from Scotland**

## **Introduction**

Since its introduction in April 1999, the Anti-Social Behaviour Order has become possibly the best known of the range of measures used to tackle anti-social behaviour. The general awareness of the order and its entry into popular culture have led to its acronym, ASBO, being entered in the *Oxford English Dictionary*. It is even possible nowadays to buy a range of ASBO merchandise! The popular understanding is that the order is primarily aimed at out-of-control youths, who hang around in groups intimidating and harassing local residents. This conception of the ASBO is borne out by the statistics – to the end of 2005, just over 40% of all ASBOs issued in England and Wales had been against 10-17 year-olds.<sup>1</sup> In light of the fact that the ASBO was actually designed for use solely against adults, this article outlines a number of concerns about the use of the remedy against young people in England and Wales. Through an examination of the key principles at the heart of the celebrated Scottish children's hearings system, and a comparison of the ASBO regime in England and Wales with the one in Scotland, it will suggest ways in which these concerns could usefully be addressed.

In both England and Wales and Scotland, an ASBO may be imposed on any individual who has acted in an anti-social manner, that is to say acted in a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of

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<sup>1</sup> In England and Wales, information on the age of the recipient is available for 9544 of the 9853 ASBOs issued to the end of 2005. Of these 9544, 3997 (41.88%) were imposed on 10-17 year-olds, and 5547 (58.12%) were imposed on those aged 18 and over (figures from Home Office website).

the same household as himself, provided that an order is considered necessary to protect relevant persons from further anti-social acts by him.<sup>2</sup> In Scotland, applications for an order may be made by local authorities and registered social landlords, while in England and Wales chief officers of local police, the chief constable of the British Transport Police, Housing Action Trusts and (in England) county councils may also apply.<sup>3</sup> Applications in Scotland are made to the Sheriff Court (sitting in either its civil or criminal capacity),<sup>4</sup> while in England and Wales they may be made to the magistrates' court, county court and criminal court.<sup>5</sup> In both jurisdictions, interim orders can also be made.<sup>6</sup> The prohibitions imposed by an ASBO must be necessary to protect people from further anti-social acts by the defendant,<sup>7</sup> and may cover any defined area within, or the

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<sup>2</sup> Crime and Disorder Act 1998 (hereafter 'CDA'), s 1(1); Antisocial Behaviour etc. (Scotland) Act 2004 (hereafter 'ASB (Scotland) Act'), ss 4(2), 143(1). For criticism of the definition of 'anti-social behaviour,' and suggestions for how it could usefully be reformed, see S Macdonald 'A Suicidal Woman, Roaming Pigs and a Noisy Trampolinist: Refining the ASBO's Definition of "Anti-Social Behaviour"' (2006) 69 M.L.R. 183). The term 'relevant persons' essentially means those people within the area covered by the agency applying for the ASBO (CDA, s 1(1B); ASB (Scotland) Act, s 4(13)).

<sup>3</sup> ASB (Scotland) Act, s 18; CDA, s 1(1A).

<sup>4</sup> ASB (Scotland) Act, s 4(1); Criminal Procedure (Scotland) Act, s 234AA.

<sup>5</sup> CDA ss 1(3), 1B & 1c.

<sup>6</sup> ASB (Scotland) Act, s 7; CDA, s1D.

<sup>7</sup> ASB (Scotland Act), ss 4(6), 4(7); CDA, s 1(6). In England and Wales an ASBO may only be discharged during its first two years if both the applicant for the order and the subject of it consent; thereafter either the applicant or the subject may apply for it to be varied or discharged (CDA, ss 1(8), 1(9)). In Scotland the applicant for the order and the subject of it may apply for it to be varied or revoked at any time (ASB (Scotland) Act, s 5).

whole of, England and Wales/Scotland.<sup>8</sup> Breach of an ASBO without reasonable excuse is a criminal offence.<sup>9</sup>

Although ASBOs have been available against those aged 10 and over in England and Wales since their introduction,<sup>10</sup> New Labour's original intention was that they would not be used routinely against those aged 10 to 15. During the Parliamentary debates on the Crime and Disorder Bill, Home Office spokesman Alun Michael stated that the use of ASBOs against groups of youngsters hanging around committing minor acts of criminal damage was 'unlikely' to be appropriate.<sup>11</sup> This was reflected in the draft Home Office guidance produced at the time.<sup>12</sup> However, in the months between Royal Assent and the ASBO coming into force, the Government performed a U-turn, apparently in response to strong representations made by a number of local authorities.<sup>13</sup> The draft guidance was revised, and the final version of the guidance published a few weeks before the ASBO came into force stated:

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<sup>8</sup> ASB (Scotland) Act, ss 4(6), 4(7); CDA, s 1(6).

<sup>9</sup> ASB (Scotland) Act, s 9(1); CDA, s 1(10).

<sup>10</sup> CDA, s 1(1).

<sup>11</sup> HC Deb vol 314 col 871 23 June 1998. Opposition amendments to limit the availability of ASBOs to those aged 16 and over were nonetheless rejected, on the basis that this would have created a gap in the measures available to deal with so-called families from hell. Such families – described as those in which the adult members not only commit anti-social behaviour themselves, but also use the younger members as 'deliverers' of some of this behaviour – were to be dealt with using ASBOs in the case of those aged 10 and over, and Child Safety Orders in the case of those aged under 10 (col 869).

<sup>12</sup> Home Office *Draft Guidance Document: Anti-Social Behaviour Orders* (London: Home Office, 1998), paras 3.5, 3.10.

<sup>13</sup> E Burney 'Talking Tough, Acting Coy: What Happened to the Anti-Social Behaviour Order?' (2002) 41 *Howard Journal of Criminal Justice* 469, pp 473-474.

‘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 ... [but] Applications may routinely be made for the middle and older age groups of juveniles and young people (e.g. 12-17 year-olds) as experience has shown that such individuals may commit serious acts of anti-social behaviour without adult encouragement or involvement’<sup>14</sup>

In Scotland, by contrast, the ASBO has only recently been made available against 12-15 year-olds.<sup>15</sup> At the time of its introduction, the order was only available against those aged 16 and above.<sup>16</sup> When asked to explain this apparent discrepancy between the approaches taken north and south of the border, Scottish Office Minister Henry McLeish explained, ‘[I]n Scotland, there are already measures to deal with that age group – we felt that, after 27 years of progress, it was vital to keep the children's hearings system intact.’<sup>17</sup> This provoked calls for the youth justice system in England and Wales to adopt a similar approach to the one in Scotland. Alun Michael responded:

‘I have made it clear that we believe that there are strengths in the Scottish system and weaknesses in the system in England and Wales. That is why ... we have wanted to change the system in England and Wales, not by replicating the Scottish system, but by learning from it and from what happens in other parts of the world’<sup>18</sup>

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<sup>14</sup> Home Office *Anti-Social Behaviour Orders - Guidance* (London: Home Office, 1999) para 2.1

<sup>15</sup> ASB (Scotland) Act, s 4(2)(a).

<sup>16</sup> CDA, s 19.

<sup>17</sup> HC Deb vol 314 col 878 23 June 1998.

<sup>18</sup> HC Deb vol 314 col 880 23 June 1998.

This article argues that the widespread use of the ASBO against young people in England and Wales reflects a failure to learn from, and is symptomatic of a lack of commitment to, the key values which are central to the Scottish children's hearings system. It begins with a brief description of the children's hearings system, which outlines the system's three key principles. It then discusses the use of ASBOs against young people, concentrating on five main areas of concern: the readiness to resort to ASBOs; the forum for ASBO applications; the terms of ASBOs; publicising the details of ASBOs; and custodial net-widening. It ends by outlining a suggested scheme for the reform of the ASBO regime in England and Wales insofar as it is used against young people.

### **Introduction to the Children's Hearings System**

The children's hearings system was introduced in 1971, following the blueprint set out in the report of the Kilbrandon Committee.<sup>19</sup> Its introduction flowed in part from dissatisfaction with the capacity of criminal court systems – including specially modified juvenile criminal court systems – to respond appropriately to the problematic behaviour of young people.<sup>20</sup> The Committee proposed a system in which only the gravest of crimes (such as murder, attempted murder and rape) would be prosecuted in the criminal courts, with all other crimes being dealt with by an integrated child welfare system designed to identify the child's needs and propose solutions. This system would apply to

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<sup>19</sup> Kilbrandon Committee Report on Children and Young Persons, Scotland, Cmnd 2306 (Edinburgh, H.M.S.O., 1964) .

<sup>20</sup> Ibid, para 71.

children who were referred because they had committed an offence as well as to those in need of formal care for some other reason.

Referrals to the children's hearings system are first considered by an independent official known as the Reporter. The Reporter determines whether there is sufficient prima facie evidence that one of the grounds of referral is established (eg, an offence has been committed)<sup>21</sup> and, if this is the case, whether compulsory measures of supervision may be required.<sup>22</sup> If so, the Reporter will refer the case to a children's hearing. If the ground of referral is accepted by the child and their family,<sup>23</sup> the children's hearing will decide whether formal intervention – known as a supervision requirement – is required to address the child's needs.<sup>24</sup>

The system is governed by the Children (Scotland) Act 1995. Section 16 of the Act enshrines three overarching principles: participation; liberalism; and welfarism.

### *Participation*

A key feature of the children's hearings system is that decisions regarding the appropriate response to a child's offending are made in a non-court setting by non-judicial personnel, following non-judicial processes. Children's hearings are lay bodies comprising volunteers from the child's community. Since the ground of referral has already either been agreed by the child and parents or established following due process of law in the sheriff court, hearings adopt a relatively informal, roundtable (usually

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<sup>21</sup> The grounds of referral are contained in Children (Scotland) Act 1995, s 52(2).

<sup>22</sup> Children (Scotland) Act 1995, s 56(6).

<sup>23</sup> If the 'ground of referral' is not accepted, the issue will be determined in the Sheriff Court, with its panoply of due process protections (Children (Scotland) Act 1995, s 68).

<sup>24</sup> Children (Scotland) Act 1995, s 70.



literally), dialogical process involving the lay panel members, the child, their family and the local authority social worker. The hearing is required to give the child the opportunity to express their views and to 'have regard to such views' when making decisions.<sup>25</sup> Studies suggest that the hearings system is relatively successful in encouraging participation in comparison to court systems.<sup>26</sup> The importance of these participatory values of lay involvement, community representation and dialogical process is underlined by research which suggests that in criminal (and, by extension, juvenile) justice *how* and by *whom* decisions are made is as (if not even more) important to determining outcomes than *what* is actually decided.<sup>27</sup>

### *Liberalism*

The children's hearings system is a child of the 1960s, a time at which the so-called labelling school of thought was forcefully advancing the view that criminal (or juvenile) justice interventions often do not reduce offending but rather backfire and

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<sup>25</sup> Children (Scotland) Act 1995, s 16(2).

<sup>26</sup> Eg, C Hallet and C Murray *The Evaluation of Children's Hearings in Scotland Vol 1 Deciding in Children's Interests* (Edinburgh: Scottish Office Central Research Unit, 1998); L Waterhouse et al *The Evaluation of Children's Hearings in Scotland Vol 3 Children in Focus* (Edinburgh: Scottish Executive, 2000); S Asquith *Children and Justice: Decision-Making in Children's Hearings and Juvenile Courts* (Edinburgh: Edinburgh University Press, 1983).

<sup>27</sup> Eg, T Tyler *Why People Obey the Law* (New Haven: Yale University Press, 1990); R Paternoster, R Brame, R Bachman and L W Sherman 'Do Fair Procedures Matter? The effect of Procedural Justice on Spouse Assault' (1997) 31 *Law and Society Review* 163.

make matters worse,<sup>28</sup> and so measures which risked unnecessarily stigmatising young people should be avoided lest they exacerbate the behaviour they were intended to address.<sup>29</sup> Consistent with this perspective, the Scottish hearings system, almost since its inception, has been instilled with a liberal dimension which is sometimes overlooked by critics focussing on the authoritarian potential of the hearings' paternalistic welfarism.<sup>30</sup> First and foremost, the system aims to address problems (including offending) through negotiation and the seeking of consensus. This approach is enshrined in the overarching no non-beneficial order, or minimum intervention, principle, which provides that a requirement or order should only be made if 'it would be better for the child that [it] be made than that none should be made at all.'<sup>31</sup> Priority is thus given to seeking voluntary means by which troubled children (and their families) might be dealt with, though it is recognized (and power is provided) that compulsory measures may ultimately need to be imposed. Pivotal to this compulsion as a last resort mentality is the Reporter.<sup>32</sup> The Reporter has wide discretionary powers to divert cases

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<sup>28</sup> Eg, H Becker *Outsiders: Studies in the Sociology of Deviance* (London: Macmillan, 1963); E Lemert *Human Deviance, Social Problems and Social Control* (Englewood Cliffs, NJ: Prentice-Hall, 1967).

<sup>29</sup> Recent empirical evidence from the longitudinal Edinburgh Study of Youth Transitions of Crime shows that young people who were processed by the juvenile justice system were more likely to persist in their offending than those who offended at a similar level but who were not caught (D J Smith *Social Inclusion and Early Desistance from Crime* (Edinburgh, Centre for Law and Society, University of Edinburgh, 2006).

<sup>30</sup> Eg, A Morris and M McIsaac *Juvenile Justice?: The Practice of Social Welfare* (London: Heinemann Educational, 1978).

<sup>31</sup> Children (Scotland) Act 1995, s 16(3).

<sup>32</sup> The importance of the diversionary role of the Reporter is underlined by research evidence which suggests that the police tend to trigger formal intervention against young people on the

out of the system where it is determined that formal compulsory intervention is not required, and indeed does so in a substantial proportion of offence-based cases.<sup>33</sup> The minimum intervention principle is also influential in those cases which the Reporter refers to a children's hearing, as in a significant proportion the hearing will prefer voluntary measures to a supervision requirement.<sup>34</sup>

### *Welfarism*

The effect of the introduction of the children's hearings system was to more or less subsume juvenile criminal justice in Scotland within an integrated child care system. The Kilbrandon Committee were of the view that 'the legal distinction between juvenile offenders and children in need of care or protection was – looking to the underlying realities – very often of little practical significance.'<sup>35</sup> The system thus not only deals  

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basis of stereotypical class biased judgments concerning their 'respectability' as well as more objective evaluations of behaviour (L Mcara and S Mcvie 'The usual suspects? Street-life, young people and the police' (2005) 5 *Criminal Justice* 5).

<sup>33</sup> In 2005/6 a children's hearing was arranged to consider the imposition of compulsory measures of supervision in respect of only 13 percent of children referred to the Reporter on offence grounds. For 16 percent of children referred, no hearing was arranged because compulsory measures were already in place but the other children's cases were disposed of in some other, more informal, way (Scottish Children's Reporter Administration *Annual Report 2005/2006* (Edinburgh: Scottish Children's Reporter Administration, 2006), p 33).

<sup>34</sup> In 2005/6 a supervision requirement was imposed or an existing requirement reviewed in 75 percent of cases referred to a hearing on offence grounds, the other cases were discharged (ibid, p 35).

<sup>35</sup> Kilbrandon Committee, above n 19, para 13. Empirical research bares out the Committee's assumptions as it has been found that the similarities in the backgrounds and circumstances

with children who have committed a criminal offence, but also care cases, which in England and Wales would now be dealt with by the family proceedings court under the auspices of the Children Act 1989. One important consequence of this integration of the child care and juvenile justice systems is that, in theory at least, punishment is excluded from the range of powers available to children's hearings; in all cases the 'paramount consideration' is 'the welfare of the child throughout his childhood.'<sup>36</sup> The system thus adopts a forward-looking approach, focussing on what needs to be done to address the underlying causes of the offending (or whatever the ground of referral to the hearings was), rather than a backward-looking approach which focuses on punishing the individual act. This integrated, ostensibly non-punitive approach to juvenile justice, with its emphasis on the child's 'needs rather than their deeds,'<sup>37</sup> has been described as a 'paradigm example' of a welfare-based system of juvenile justice.<sup>38</sup>

### **The ASBO regime: five areas of concern**

#### *The readiness to resort to ASBOs*

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between children referred to the children's hearings system on offence grounds and those referred for other reasons offend far outweigh the differences (L Waterhouse et al, n 26 above).

<sup>36</sup> Children (Scotland) Act 1995, s 16(1). It should be noted that s 16(5) of the 1995 Act provides that a hearing may make a decision which is not consistent with the welfare of the child if it is deemed necessary to protect the public. This represents the first substantive encroachment upon what had hitherto been the undisturbed predominance of the welfare criterion.

<sup>37</sup> Lockyer and Stone *Juvenile Justice in Scotland: Twenty-Five Years of the Welfare Approach* (Edinburgh: T & T Clark, 1998), p 18.

<sup>38</sup> L McAra 'The Cultural and Institutional Dynamics of Transformation: Youth Justice in Scotland, England and Wales' (2004) 35 *Cambrian Law Review* 23.

In contrast to the minimum intervention principle which shapes the Scottish children's hearings system, it would seem that children in England and Wales frequently receive ASBOs even though other less formal, more constructive forms of intervention would have been possible. At present a two-tier system of reprimands and warnings applies where a child commits a criminal offence in England or Wales.<sup>39</sup> A child will generally receive a reprimand for a first offence, with a warning being issued if the offence is too serious for a reprimand or the child has previously received one. The warning is designed to be a once-only penalty, with prosecution normally following for a further offence and second warnings only being given in exceptional circumstances. An important feature of this framework is that the issue of a warning triggers the intervention of the local Youth Offending Team (YOT). The role of the YOT is to assess the child's needs and identify programmes which can be employed to address these needs with the intention of preventing further offending. The framework is thus designed to divert children from the criminal justice process. However, the ASBO is classified as a civil order and so falls outside the system of reprimands and warnings. Moreover, whilst there are certain statutory consultation requirements which must be satisfied before an ASBO can be applied for,<sup>40</sup> consultation with the local YOT is prescribed by Home Office guidance only.<sup>41</sup> In other words, it is possible to apply for, and obtain, an ASBO without first consulting the local YOT. In fact, the study which the

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<sup>39</sup> CDA, ss 65-66.

<sup>40</sup> CDA, s 1E.

<sup>41</sup> *A Guide to Anti-Social Behaviour Orders* (London: Home Office, 2006), p 21. See also the guidance jointly issued by the YJB, the Association of Chief Police Officers, the Home Office and the Together campaign (*Anti-social Behaviour: A Guide to the role of Youth Offending Teams in dealing with anti-social behaviour* (London: YJB, 2005) pp 23-27).

Youth Justice Board (YJB) completed for the Home Affairs committee inquiry found YOTs were not consulted in almost one-third of cases.<sup>42</sup> This led the Home Affairs Committee to state:

‘We were concerned to learn that Youth Offending Teams are not always consulted by those taking out an ASBO. We believe that they should be consulted as a matter of course before an application for an ASBO is made: not as a veto, but to ensure that sufficient thought has been given to support needs and to ensure that other measures are also taken if appropriate’<sup>43</sup>

The YJB’s more recent study nonetheless found that many YOTs – mainly those in high ASBO-use areas – remain dissatisfied at their involvement in the decision-making process. Even when they are consulted, this often comes so late in the decision-making process that it is impossible to offer diversionary alternatives and, in any event, their contributions are given little weight.<sup>44</sup> Rod Morgan, chairman of the YJB, drew two inferences from this widespread failure to adequately consult with YOTs.<sup>45</sup> First, the possibility of adducing hearsay evidence at applications for ASBOs, coupled with the extremely wide definition of ‘anti-social behaviour,’ may mean that the ASBO is seen by

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<sup>42</sup> Memorandum submitted to the Home Affairs Committee inquiry *Anti-Social Behaviour* (5<sup>th</sup> Report of 2004-05) HC80 (London: The Stationery Office, 2005), vol III, Ev 219.

<sup>43</sup> *Ibid*, vol I, para 137.

<sup>44</sup> A Solanki, T Bateman, G Boswell & E Hill *Anti-Social Behaviour Orders* (London: Youth Justice Board, 2006), pp 52-53. This study also found that YOTs are consulted even more infrequently prior to applications for post-conviction and interim ASBOs (pp 54-55).

<sup>45</sup> ‘Anti-social behaviour: getting to the root of the problem’ (2005) 23(1) *Howard League Magazine* 13.

some enforcement agencies as a way of fast-tracking problem children into custody. Second, that ASBOs, or the conditions attached to them, may be being imposed when they are not the most appropriate and constructive intervention. These inferences are supported by the YJB's recent study, which found that many YOT practitioners believe that ASBOs are used 'prematurely, and that an approach that prioritised supportive intervention over enforcement would have a greater positive impact on the behaviour of individual young people.'<sup>46</sup>

To try and combat this common failure to consider diversionary alternatives, many areas have developed a 'tiered' approach to dealing with anti-social behaviour by children, whereby a number of informal interventions must be attempted before thought is given to applying for an ASBO. In Bridgend, for example, the first tier is a warning letter (3000 sent out), the second is a visit accompanied by a letter from either the police or the YOT's ASBO support worker (400 visits made), the third is an Acceptable Behaviour Contract (30 agreed), and the final stage is to apply for an ASBO (two ASBOs imposed).<sup>47</sup> In practice, however, the YJB found that in high ASBO-use areas tiered approaches are beset by a fundamental clash of ideologies. While YOT practitioners see their role as being to assess and address a child's needs in order to prevent further offending, the main priority of enforcement agencies in such areas is to provide relief to the community quickly and decisively. For them, a tiered approach to tackling anti-social behaviour is too slow and too uncertain. It is thus unsurprising that the YJB found

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<sup>46</sup> Above n 44, p 130.

<sup>47</sup> Reg Denley, Programme Manager, Youth Works Scheme, Bridgend (oral evidence to the Home Affairs Committee inquiry, above n 42, vol III, Q 75). For further information on Acceptable Behaviour Contracts, see Home Office *A Guide to A Guide to Anti-Social Behaviour Orders and Acceptable Behaviour Contracts* (London: Home Office, 2003).

significant differences between areas in the number of pre-ASBO tiers and in whether all tiers should be used or individual tiers could be bypassed.<sup>48</sup>

There is a danger that the tendency, evident in England and Wales, to resort to ASBOs too readily could also pervade the ASBO regime in Scotland. Worryingly, the minimum intervention principle does not apply to applications for ASBOs. The role of the hearings system's diverter in chief – the Reporter – is also relatively reduced. It is the local authority or registered social landlord, not the Reporter, who determines whether to instigate the ASBO process; in stark contrast to the hearings process, there is no legal power for the Reporter to divert cases away from formal (ASBO) intervention; and it is the Sheriff Court, not the hearings system, which has been granted ultimate decision making power.<sup>49</sup> These concerns are exacerbated by the fact that there are already signs of disquiet within Scottish New Labour, at both national and local level, about the relatively liberal approach which has so far prevailed.<sup>50</sup> However, in contrast to England and Wales, where the system of reprimands and warnings is bypassed, the Scottish Parliament has made some effort to ensure that the hearings system is tapped

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<sup>48</sup> Above n 44, chs 5, 10 & 13.

<sup>49</sup> See further A Cleland and K Tisdall, 'The Challenge of Antisocial Behaviour: New Relationships Between the State, Children and Parents' (2005) 19 *International Journal of Law, Policy and the Family* 395, 405-406.

<sup>50</sup> For example, there are reports that the Scottish Executive's Justice Minister has threatened to withhold funding from councils failing to make sufficient use of enforcement powers like the ASBO ('Use ASBOs or no cash to fight crime, councils told' *The Scotsman* 10 May 2005). The influential Labour leader of Edinburgh City Council has also said that 'ASBOs are supposed to be a last resort for under-16s, but what we really want is early ASBOS because that acts as a warning' ('Move to fast-track ASBOs for teenage yobs in the Capital' *Edinburgh Evening News* 28 February 2006).



into at various junctures. Statute provides that when deciding whether to apply for an ASBO the local authority or registered social landlord must consult with the Reporter to the children's hearings system,<sup>51</sup> that when deciding whether to impose an interim ASBO the Sheriff must 'have regard' to any views expressed by the Reporter to the children's hearing,<sup>52</sup> and that, in the process for the imposition of a full ASBO, the Sheriff must instruct the Reporter to arrange a children's hearing and 'have regard' to its advice as to whether the imposition of an order is necessary.<sup>53</sup> Encouragingly, guidance produced by the Scottish Executive adds that the children's hearings system 'should continue to be the primary forum for dealing with antisocial or offending behaviour by under 16s,' and that an ASBO 'should only be pursued for a small number of persistently antisocial young people for whom alternative approaches have not been effective in protecting the community.'<sup>54</sup> This would suggest that the ASBO should generally be considered a measure of last resort. Indeed, whilst the guidance does also state that there 'must be flexibility to allow for use of an ASBO before the full range of options has been exhausted where there is a pressing need to protect the community,'<sup>55</sup> early research would suggest that in most parts of the country a last resort mentality has emerged, particularly in relation to under-16s.<sup>56</sup> So, whilst it dilutes the principle of minimum intervention which applies in children's hearings, the Scottish ASBO regime does illustrate that a

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<sup>51</sup> ASB (Scotland) Act, s4(11)(a), s 18.

<sup>52</sup> *Ibid*, s 7(3).

<sup>53</sup> *Ibid*, s 4(4).

<sup>54</sup> Scottish Executive *Antisocial Behaviour etc. (Scotland) Act 2004: Guidance on Antisocial Behaviour Orders* (Edinburgh: Scottish Executive, 2004), para 16.

<sup>55</sup> *Ibid*, para 54.

<sup>56</sup> DTZ Consulting and Heriot Watt University *Use of Antisocial Behaviour Orders in Scotland: Report of the 2005/6 Survey* (Edinburgh: Scottish Executive, 2006).

greater commitment to informal, diversionary schemes could be secured in England and Wales through integration of the ASBO with the normal youth justice process.

### *The forum for ASBO applications*

The non-court setting of children's hearings is one of the central planks of the Scottish system. This stands in stark contrast to England and Wales, where children charged with a criminal offence appear before the youth court. The youth court, a specialised branch of the magistrates' court, tries and sentences young offenders aged from 10 to 17 inclusive. A specialised system of criminal courts to deal with children was first introduced by the Children Act 1908. Then named the juvenile court, its rationale was to employ special procedures geared at meeting children's needs. Whilst the Criminal Justice Act 1991 changed the juvenile court's name to the youth court, it did not alter its underlying rationale:

'Although the powers of the youth court will in some respects be different from those of the juvenile court, the 1991 Act preserves the distinctive features of the juvenile court. This is intended to ensure that young people are dealt with in a way which has proper regard for their youthfulness'<sup>57</sup>

Proceedings in the youth court are more informal than in the adult magistrates' court. Magistrates sitting in the youth court are specially trained. Clear, accessible language should be employed, and legal terminology avoided. Rooms should be

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<sup>57</sup> Home Office 'Criminal Justice Act 1991: Young People and the Youth Court' Circular (London: Home Office, 1992). One of the differences referred to is that the Act brought 17 year-olds within the Youth Court's jurisdiction (Criminal Justice Act 1991, s 68).

appropriately furnished, without such formal and imposing features as raised benches. And sittings of the court are closed to the public.

In certain situations, the youth court has the discretion to transfer a child to the adult Crown Court for trial.<sup>58</sup> Following the European Court of Human Rights' decision that Robert Thompson and Jon Venables' trial for the murder of James Bulger had breached their right to a fair trial under Article 6 of the European Convention on Human Rights (ECHR),<sup>59</sup> Lord Bingham issued a practice direction describing how Crown Court trials involving children should be conducted. This states:

'The trial process should not itself expose the young defendant to avoidable intimidation, humiliation or distress. All possible steps should be taken to assist the young defendant to understand and participate in the proceedings. The ordinary trial process should so far as necessary be adapted to meet those ends'<sup>60</sup>

Some of the steps which might be taken to achieve this include allowing the child to visit the court pre-trial outside court hours so that he can familiarise himself with the courtroom, ensuring that all participants in the trial are on the same or almost the same level, allowing the child to sit with his family and in a place that permits easy, informal communication with his legal representatives, explaining the proceedings in language the child can understand, employing a timetable which takes account of a child's inability to concentrate for long periods, not wearing robes and wigs, and restricting public attendance at the trial. However, these steps were declared insufficient to satisfy the demands of Article 40(3) of the United Nations Convention on the Rights of the Child

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<sup>58</sup> Powers of Criminal Courts (Sentencing) Act 2000, ss 90-91.

<sup>59</sup> *V & T v United Kingdom* (2000) 30 EHRR 121.

<sup>60</sup> [2000] 2 All ER 285.

(UNCRC) by the United Nations Committee on the Rights of the Child.<sup>61</sup> Fionda writes, ‘these measures merely dress the window of the more significant problem ... To effectively deny the child a child’s status and then to ask the court to be wary of the child’s youthfulness makes little sense.’<sup>62</sup> Fortin points out that ‘despite the greater informality, children are still required to sit in a dock, stared at by the jury, and cross-examined by barristers.’ Highlighting the stark contrast with the civil law’s perspective on a child’s capacity to instruct a legal adviser, she notes that ‘all those tried by the Crown Courts are considered to be capable of instructing their lawyers and comprehending the proceedings.’<sup>63</sup>

The tendency to treat children accused of unlawful behaviour as being fully competent, and the concomitant failure to make adequate concessions for their youthfulness, has also pervaded the ASBO regime. Since ASBOs are civil orders, applications for standalone orders fall outside the jurisdiction of the youth court and so are heard by the adult magistrates’ court.<sup>64</sup> The Home Office guidance requires the applicant authority to ‘contact the justices’ clerk in advance of the hearing to ensure that it will be conducted in a way that is suitable for the child or young person,’ but the only modification which it stipulates in such cases is that ‘the justices constituting the court should normally be qualified to sit in the youth court unless to do so would result in a delayed hearing.’ In fact, the guidance insists that, unlike the youth court, the

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<sup>61</sup> *Concluding observations: United Kingdom of Great Britain and Northern Ireland* CRC/C/15/Add 188 (Geneva: Centre for Human Rights, 2002) paras 60-62.

<sup>62</sup> J Fionda *Devils and Angels: Youth Policy and Crime* (Oxford: Hart, 2005) p 139.

<sup>63</sup> J Fortin *Children’s Rights and the Developing Law* (London: Butterworths, 2<sup>nd</sup> edn, 2003) p 565.

<sup>64</sup> Although the youth court does hear applications for post-conviction ASBOs (as does the Crown Court).

proceedings should be open to the general public with no automatic restrictions on press access or on revealing the child's identity.<sup>65</sup>

The failure to make adequate provision for young people is even more profound in the Scottish ASBO regime. Whilst in England and Wales one court procedure has replaced another (albeit specially modified) court procedure, in Scotland the decision-making hegemony of children's hearings has been directly challenged by the Scottish Parliament's choice of the Sheriff Court, sitting in its summary, civil mode, as the forum best placed to deal with applications for ASBOs against under-16s.<sup>66</sup> This retrograde step is of great significance, for it marginalises key principles associated with the children's hearings system, principally those of participation and welfarism. Since the Sheriff Court is presided over by a single, senior, legally qualified and permanently appointed judge, selecting this institution as the forum for ASBO applications greatly diminishes lay involvement and community representation. This is a surprising development, given that in recent years a discernible policy aim of government both sides of the border has been to attempt to address the problem of anti-social behaviour through the empowerment of local people in affected communities. Anti-social behaviour policy, and the wider community safety agenda, is rooted in the intuition that attempts to govern security will be most effective when the knowledge and capacity of local people is mobilised to solve local problems.<sup>67</sup> Participation is undermined still further by the choice of an adversarial procedure. This is antithetical to the relatively informal, round table, dialogical process associated with children's hearings. The child in question may

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<sup>65</sup> Above n 41, p 16 & ch 9.

<sup>66</sup> ASB (Scotland) Act, s 4(10). The move has attracted criticism – see A Cleland & K Tisdall, above n 49.

<sup>67</sup> Les Johnston and Clifford Shearing *Governing Security: Explorations in Policing and Justice* (London: Routledge, 2003).

possibly not even be present at the hearing of the application for an interim ASBO.<sup>68</sup> Selecting the Sheriff Court as the decision-making forum for ASBOs also compromises the principle of welfarism. It represents a clear symbolic statement that a child's anti-social behaviour is not primarily a matter for an integrated child care and juvenile justice system concerned with the child's needs. Beyond the symbolic, the sole criteria for the Sheriff to impose an ASBO are that the child has acted anti-socially and that an order is necessary to protect others from further anti-social acts. Why the child's welfare should be the paramount consideration when a children's hearing determines whether to impose a potentially highly invasive supervision requirement on a child following the commission of an offence (including a breach of an ASBO), but that welfare should effectively be excluded from consideration when determining whether an ASBO should be imposed, is far from clear.

So, on both sides of the border, the choice of forum for applications for ASBOs against young people displays a failure to make adequate concessions for their youthfulness. To a limited extent, it would be straightforward to remedy this in England and Wales. The ASBO could be reclassified as criminal in nature so that applications for orders fall within the jurisdiction of the youth court. Whilst the ASBO was purposely classified as civil in nature in order to avoid the application of certain criminal law due process protections, principally the rule against hearsay evidence,<sup>69</sup> since the remedy was not intended for use against children avoiding the youth court's jurisdiction was not part of the order's design. But, while such a change would be welcome, it would only go some

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<sup>68</sup> 'There is no explicit provision for any representations made by or on behalf of the respondent before an interim ASBO is granted, although the court, using its discretion, can consider any such representations as it sees fit' (Scottish Executive, above n 54, para 86).

<sup>69</sup> A Ashworth 'Social Control and "Anti-Social Behaviour": The Subversion of Human Rights?' (2004) 120 LQR 263.

way towards meeting the needs of children accused of anti-social behaviour. The children's hearings system is an example of what a decision-making forum shaped by the values of participation and welfarism should look like. Key to it are its location outside the normal court structure and its non-judicial processes. Whilst the youth court is less formal than the adult magistrates' court, it is still far removed from children's hearings.

### *The terms of ASBOs*

Anecdotal examples of outlandish ASBOs are becoming increasingly common – the ASBO banning a woman who had attempted suicide on four occasions from jumping into rivers or canals or onto railway lines, and the ASBO banning a pensioner from feeding pigeons in his back garden being just two examples.<sup>70</sup> Equally fantastic orders have been imposed on children. A 13 year-old was banned from using the word 'grass' for six years, and a 15 year-old boyfriend and girlfriend were banned from speaking to each other for four years.<sup>71</sup> Proponents of the ASBO argue that examples like these are exceptional. This may or may not be true; the burgeoning case law on the topic certainly suggests that there is a prevalence of poorly drafted ASBOs.<sup>72</sup> But concerns about the

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<sup>70</sup> 'Woman banned from jumping in the river' *The Daily Telegraph* 26 February 2005; 'Bird lover gets Asbo for feeding pigeons' *The Times* 31 July 2006.

<sup>71</sup> 'When home's a prison' *The Guardian Weekend* 24 July 2004; 'Sweethearts banned from seeing each other' *Plymouth Evening Herald* 3 February 2005.

<sup>72</sup> Amongst the prohibitions which the appeal courts have held to be invalid are: 'In any public place, wearing, or having with you anything which covers, or could be used to cover, the face or part of the face. This will include hooded clothing, balaclavas, masks or anything else which could be used to hide identity, except that a motorcycle helmet may be worn only when lawfully riding a motorcycle' (*R v Boness* [2005] EWCA Crim 2395, [2006] 1 Cr App R (S) 120); 'Not to be a

prohibitions imposed by ASBOs extend beyond these sorts of anecdotal examples. These concerns relate, first, to so-called preventive prohibitions and, second, to the negative nature of the prohibitions which ASBOs impose.

In England and Wales, Home Office guidance insists that the formulation of prohibitions must be given careful thought.<sup>73</sup> However, the YJB's study of ASBOs imposed on children between January 2004 and January 2005 found that often the prohibitions imposed are not targeted or realistic, but formulaic.<sup>74</sup> The study expressed particular concern about ASBOs which impose geographical exclusions or prohibitions on associating with particular people. This concern was given added weight by the study's finding that each type of prohibition features in roughly half of all ASBOs.<sup>75</sup> Indeed, they are expressly encouraged by the Home Office guidance,<sup>76</sup> and have also been endorsed by the Court of Appeal. In *R v Boness* Hooper LJ explained:

'The aim of an ASBO is to prevent anti-social behaviour. To prevent it the police or other authorities need to be able to take action before the anti-social behaviour it is designed to prevent takes place'<sup>77</sup>

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passenger in or on any vehicle, whilst any other persons is [sic] committing a criminal offence in England or Wales' (*W v Acton Youth Court* [2005] EWHC 954 (Admin), (2006) 170 JP 31); and 'Not to be in possession of any bladed article' (*R v Starling* [2005] EWCA Crim 2277). Some general guidance on drafting the terms of ASBOs is set out in the judgment of Hooper LJ in *R v Boness*, and in chapter 7 of the Home Office guidance (above n 41).

<sup>73</sup> Above n 41, p 29.

<sup>74</sup> A Solanki et al, above n 44, p 141.

<sup>75</sup> Ibid, p 75.

<sup>76</sup> Above n 41, ch 7.

<sup>77</sup> Above n 72, [36].



So, if a group of young people assemble on a housing estate to race motor bikes, the ASBO should not merely prohibit them from racing motor bikes. It should also prohibit them from being in each other's company on the estate. This would allow the authorities to intervene as soon as they begin to assemble, and so not have to wait for them to begin racing.

Preventive prohibitions, which include curfews as well as geographical exclusions and bans on associating with particular people, are difficult to square with the institutional values – particularly the principle of welfarism – which are central to the children's hearings system. They may nonetheless be imposed on both sides of the border, because, just as in England and Wales, the Scottish legislation states that an ASBO is not limited to preventing repetition of the anti-social behaviour – the order may impose any prohibitions deemed necessary for the purpose of protecting others from further anti-social behaviour by the person subject to the order.<sup>78</sup> The statutory requirement to give paramount consideration to the child's welfare, which shapes decision-making in a welfarist direction in the children's hearings system, does not apply. This focus on public protection provides fertile ground for the kind of preventive prohibitions which have been actively encouraged in England and Wales.<sup>79</sup>

One consequence of this focus on public protection at the expense of the principle of welfare is that preventive prohibitions may prove counter-productive. Sometimes this counter-productivity is obvious. For example, an 18 year-old in Manchester was given

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<sup>78</sup> ASB (Scotland) Act, s 4(6); CDA, s 1(6).

<sup>79</sup> It should be noted that, since a children's hearing can make a decision which is not consistent with the welfare of the child if it is necessary to protect the public from serious harm (above, n 36), an ASBO could conceivably be imposed through an application of this exception to the general rule that the child's welfare is paramount.

an ASBO which prohibited him from congregating with three or more other youths. He was subsequently arrested when he entered a successful local youth club with a good reputation on the grounds that there were more than three youths in the premises, even though the session scheduled for that evening was how to deal with anti-social behaviour.<sup>80</sup> But they can also be counter-productive in a more general manner. Access to public space and spending time with friends is of great importance to young people.<sup>81</sup> Emphasising this, the YJB study states that preventive prohibitions reduce the likelihood of co-operation and compliance. The majority of breach cases centre on failure to comply with these types of prohibitions. A more targeted approach, with more sparing use of preventive prohibitions, would help reduce the incidence of breach of ASBOs.<sup>82</sup>

Preventive prohibitions may also breach children's rights under Articles 8, 10 and 11 of the ECHR. Whilst the infringement of these rights may have the legitimate aim(s) of preventing crime and disorder and/or protecting the rights and freedoms of others, it

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<sup>80</sup> NAPO 'Anti-Social Behaviour Orders – Analysis of the First Six Years' Memorandum submitted to the Home Affairs Committee inquiry, above n 42, vol III, Ev 185. In a similar vein, ASBOs have been imposed which included a curfew that stopped a young person from getting employment opportunities because he couldn't get to work early enough, and which prohibited a young person from entering any motor vehicle, thereby preventing him from accepting lifts from staff of the local Youth Offending Team to Positive Activities schemes and from getting on a probation minibus to take him to do his community service (Memorandum submitted by the YJB to the Home Affairs Committee inquiry, above n 42, vol II, Ev 143). Fully involving the local YOT in the process of applying for an ASBO would help prevent counter-productive prohibitions of the sort described.

<sup>81</sup> See H Matthews, M Limb & M Taylor 'The "Street as Thirdspace"' and T Skelton 'Nothing to do, Nowhere to go?' in S Holloway & G Valentine (eds) *Children's Geographies: Playing, Living, Learning* (London: Routledge, 2000).

<sup>82</sup> Above n 44, pp 142, 148.

is arguable that they are disproportionate. Although the Strasbourg Court has not explicitly recognised the ‘least restrictive means’ test as an aspect of proportionality, it ‘has often in practice decided the question of proportionality by asking whether a particular measure could be achieved by a less restrictive means.’<sup>83</sup> Yet preventive prohibitions not only ban repetition of the anti-social behaviour (the motor bike racing), they also ban conduct which is necessarily prior to it (assembling on the housing estate). To the extent that such orders extend beyond prohibiting a child’s anti-social behaviour, it is arguable that they violate the ECHR.

In England and Wales there is a further reason for believing that ASBOs which impose preventive prohibitions on children (and also ASBOs which only contain non-preventive prohibitions) may be held to be disproportionate. Unlike Scotland, where there is no statutory minimum duration for an ASBO,<sup>84</sup> in England and Wales all ASBOs must last for at least two years<sup>85</sup> – which is a long time in the life of an adolescent. The Home Affairs Committee opined that this minimum duration is ‘inappropriate’ in the case of children, and that magistrates should be given greater discretion to set the duration of an order.<sup>86</sup> Maurice Kay LJ’s acceptance that ‘Just because the ASBO must run for a minimum of two years it does not follow that each and every prohibition within a particular order must endure for the life of the order’<sup>87</sup> has mitigated the rigidity of the

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<sup>83</sup> R Clayton & H Tomlinson *The Law of Human Rights* (Oxford: OUP, 2000) para 6.47. For examples, see *Campbell v United Kingdom* (1992) 15 EHRR 137 para 48 and *Ahmed v United Kingdom* [1999] IRLR 188 para 63.

<sup>84</sup> ASB (Scotland) Act, s 4(5).

<sup>85</sup> CDA, s 1(7).

<sup>86</sup> Above n 42, vol I, para 222.

<sup>87</sup> *R (on the application of Lonergan) v Lewes Crown Court* [2005] EWHC 457 (Admin), [2005] 2 All ER 362, [13].

two year minimum duration to some extent. The Home Office guidance also states that ASBOs against children should be reviewed annually by the bodies that applied for the order in the first place. If these bodies decide that any of the prohibitions are no longer necessary, they should apply to vary or discharge the order.<sup>88</sup> However, the YJB study not only found that a significant number of children are being served with ASBOs well in excess of two years, but also that, in practice, there is no evidence that orders are proactively reassessed once they have been made.<sup>89</sup>

The second set of concerns regarding the terms of ASBOs relates to the fact that they must be negative in nature – an ASBO cannot place positive requirements on an individual. An order will thus do little to address the underlying causes of the behaviour. This is especially significant given that the Home Affairs Committee found that young perpetrators of anti-social behaviour often suffer from serious disadvantages and social exclusion and have significant support needs.<sup>90</sup> The Committee concluded that the ‘most important’ reason why almost half of all ASBOs are breached is the ‘insufficient support given to perpetrators who may have problems of addiction or of mental health or may be living in chaotic families.’<sup>91</sup>

Burney has observed that a purely negative measure like the ASBO would be ‘unthinkable’ in the welfarist Swedish system.<sup>92</sup> Seeking to adapt the order for the similarly welfarist Scottish system, the Scottish Parliament and Executive have attempted some integration with the hearings system. So, for example, the Sheriff must

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<sup>88</sup> Above n 41, p 45.

<sup>89</sup> Above n 44, pp 73, 141.

<sup>90</sup> Above n 42, vol I, para 87. The findings of the YJB were similar (above n 44, ch 4).

<sup>91</sup> *Ibid*, vol I, para 224.

<sup>92</sup> E Burney *Making People Behave: Anti-Social Behaviour, Politics and Policy* (Cullompton: Willan Publishing, 2005) p 157.

obtain the advice of the Reporter when determining whether to impose an interim ASBO, and the advice of a children’s hearing when determining whether to impose a full ASBO.<sup>93</sup> And if an ASBO or interim ASBO is imposed the Sheriff is granted the discretionary power to order that a children’s hearing be arranged to determine the nature and extent of any compulsory measures of supervision that may be necessary to run alongside the ASBO.<sup>94</sup> In a similar vein, the Criminal Justice Act 2003 introduced the Individual Support Order (ISO) in England and Wales.<sup>95</sup> An ISO – designed to ‘address the underlying causes of the behaviour that led to the ASBO being made’<sup>96</sup> – imposes positive requirements on an individual, such as meeting with a specified person or participating in specified activities (like counselling for substance misuse or an anger management programme). If the arrangements for implementing ISOs are available in the area in which the child resides, a magistrates’ court making an ASBO *must* either

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<sup>93</sup> ASB (Scotland) Act, ss 7(3) and 4(4) respectively.

<sup>94</sup> *Ibid*, s 12.

<sup>95</sup> In addition to the ISO provisions, CDA, ss 8-9, provide that any court imposing an ASBO on a child aged under 16 *must* also issue a Parenting Order or explain why a Parenting Order would not be desirable in the interests of preventing repetition of the anti-social behaviour. For 16 and 17 year-olds the court *may* make a Parenting Order if it considers that an order would help prevent repetition of the behaviour. On the subject of Parenting Orders, see L Koffman ‘The Use of Anti-Social Behaviour Orders: An Empirical Study of a New Deal for Communities Area’ [2006] Crim LR 593 and J Lyon, C Dennison & A Wilson ‘*Tell them so they Listen’: Messages from Young People in Custody* Home Office Research Study 201 (London: Home Office, 2000).

<sup>96</sup> *Anti-social Behaviour: A Guide to the role of Youth Offending Teams in dealing with anti-social behaviour*, above n 41, p 27.

issue an ISO or explain its reasons for not doing so.<sup>97</sup> An ISO can require an individual to attend sessions for up to two days per week, for a period of up to six months. Breach of an ISO without reasonable excuse is a criminal offence, punishable (in the case of those aged 14 and over) by a fine of up to £1000.<sup>98</sup>

The creation of the ISO represents a welcome concession that the imposition of negative prohibitions cannot, in itself, tackle the underlying causes of an individual's anti-social behaviour. However, while in Scotland any supervision requirement is imposed by a children's hearing shaped by the values of participation and welfarism, an ISO is imposed by a court. Moreover, for ISOs to have a chance of working effectively requires that sufficient resources are made available and that these resources are targeted properly.<sup>99</sup> The YJB found that over one-third of sentencers were unaware of the ISO or their power to impose it. Moreover, the children that ASBOs are sought against had often had previous contact with the local Youth Offending Team (YOT), which led a majority of sentencers to opine that the ISO will only prove to be a useful measure in a small proportion of cases. Some also added that ISOs are 'too little too late,' and are no substitute for a lack of earlier support to families.<sup>100</sup> And there is a further difficulty. In *R (McCann & others) v Crown Court at Manchester*<sup>101</sup> the House of Lords applied the three criteria set out by the European Court of Human Rights for

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<sup>97</sup> Note that a court making a post-conviction ASBO cannot issue an ISO, the rationale being that the sentence imposed for the criminal offence should tackle the underlying causes of the anti-social behaviour.

<sup>98</sup> The statutory framework governing ISOs is found in CDA, ss 1AA & 1AB.

<sup>99</sup> See the report of the Home Affairs Committee, above n 42.

<sup>100</sup> Above n 44, pp 70, 143.

<sup>101</sup> [2002] UKHL 39, [2003] 1 AC 787.

determining whether applications for ASBOs are civil or criminal proceedings.<sup>102</sup> One of the reasons the Lords gave for their conclusion that proceedings for the imposition of an ASBO are civil in nature was that ASBOs only impose negative prohibitions, and so are intended to be preventative, not punitive. Lord Hope stated:

‘The essential characteristics of an anti-social behaviour order are that the defendant is prohibited from doing something ... An anti-social behaviour order may well restrict the freedom of the defendant to do what he wants and to go where he pleases. But these restrictions are imposed for preventive reasons, not as punishment’<sup>103</sup>

The Home Office has recognised that, since attaching an ISO to an ASBO increases the burden on the individual, it makes it more difficult to regard the combination of orders as being purely preventive.<sup>104</sup> The creation of the ISO post-

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<sup>102</sup> The three criteria are: the classification in domestic law; the nature of the offence; and the nature and degree of severity of the penalty (*Engel v The Netherlands (No 1)* (1976) 1 EHRR 647).

<sup>103</sup> At [75]-[76].

<sup>104</sup> The Home Office gave this as a reason for rejecting arguments that it should be possible to impose an ISO for a longer period than six months (Supplementary memorandum submitted by the Home Office to the Home Affairs Committee inquiry, above n 42, vol III, Ev 171).

*McCann* thus raises the question whether, in relation to children,<sup>105</sup> the civil classification of ASBOs is still appropriate.<sup>106</sup>

### *Publicising the details of ASBOs*

In criminal proceedings in the youth court in England and Wales, there is a presumption that a child's personal details should not be divulged.<sup>107</sup> This protection of a child's anonymity accords with a child's rights under the UNCRC and Beijing Rules.<sup>108</sup> But since the ASBO is classified as a civil order, the presumption in favour of anonymity is reversed, so that there is instead a presumption in favour of disclosure.<sup>109</sup> The

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<sup>105</sup> Following the creation of the Intervention Order (CDA, ss 1G-1H), similar logic could also now apply to ASBOs against adults.

<sup>106</sup> For an argument that the hybrid nature of the ASBO means that the Lords in *McCann* should have classified it as criminal in nature, see S Macdonald 'The Nature of the Anti-Social Behaviour Order – *R (McCann & others) v Crown Court at Manchester*' (2003) 66 MLR 630.

<sup>107</sup> Children and Young Persons Act 1933, s 49. This presumption is reversed where a child is tried in the Crown Court (*R v Central Criminal Court, ex p W* [2001] 1 Cr App R 2).

<sup>108</sup> UNCRC, Art 40(2)(b)(vii); United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the 'Beijing Rules'), r 8.

<sup>109</sup> Children and Young Persons Act 1933, s 39. Where a child is convicted of a criminal offence in the youth court and a post-conviction ASBO is imposed, the presumption of anonymity is reversed in those parts of the proceedings concerned with the making of the order (CDA, s 1C(9C)). The presumption in favour of anonymity is also reversed where a child is prosecuted for breach of an ASBO (CDA, s 1(10D)), the rationale being to 'allow local communities to be involved in the justice system by ensuring that breaches of antisocial behaviour orders can be publicised, so that people can see who is doing what and where it is being done' (David Blunkett HC Deb vol 428 col 1059 7 December 2004).



argument that there should be a presumption in favour of anonymity at applications for ASBOs, even though the proceedings are civil ones, was rejected by the High Court in *R (on the application of T) v St Albans Crown Court*.<sup>110</sup> Far from reinforcing the child's interest in anonymity, Elias J explained that 'where an anti-social behaviour order has been imposed, that is a factor which reinforces, and in some cases may strongly reinforce, the general public interest in the public disclosure of court proceedings.'<sup>111</sup> Home Office guidance reiterates this, stating that a court must have a 'good reason' to prevent identification of the young person and that 'Age alone is insufficient to justify reporting restrictions being imposed.'<sup>112</sup>

Whether a similar approach will prevail in Scotland is uncertain. There is a strict ban in the children's hearings system on any publicity which may identify a child subject to the hearings process.<sup>113</sup> Public identification would not only be antithetical to the system's liberal-welfare values, but would also jeopardise the perceived legitimacy of consensual decisions regarding the child's future conduct reached in accordance with participatory values. Moreover, section 44(1) of the Children (Scotland) Act 1995 –

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<sup>110</sup> [2002] EWHC 1129 (Admin). In a similar vein, the High Court in *R (on the application of K) v Knowsley Metropolitan Borough Council* [2004] EWHC 1933 (Admin), [2005] HLR 3 rejected the argument that there should be a presumption in favour of anonymity at proceedings for the imposition of an interim ASBO. Harrison J explained 'that the interim nature of the proceedings, which do not involve any findings on the allegations, is a very important consideration to put into the balance so that it can be balanced against the undoubtedly important consideration ... relating to publicity assisting in the effectiveness of enforcing the interim order' ([44]).

<sup>111</sup> *Ibid*, [22].

<sup>112</sup> *Working Together – Guidance on Publicising Anti-Social Behaviour Orders* (London: Home Office, 2005) p 4.

<sup>113</sup> Children (Scotland) Act 1995, s 44(1).

which prohibits the publication of information intended to, or likely to, identify a child or the child's school/address in any case about which the Principal Reporter has received information – will apply to all applications for ASBOs because, as noted above, the Principal Reporter will receive information about each and every ASBO case concerning a child under the age of 16 at various stages of both the interim and full ASBO process. The effect of the section, breach of which is a criminal offence, is thus to create a strong presumption against publicity. And although the Sheriff retains a power to allow publication 'in the interests of justice,'<sup>114</sup> deciding whether to exercise this discretion constitutes the determination of a matter with respect to a child, and so the Act's overarching requirement to regard the welfare of the child as paramount applies.<sup>115</sup> Since it is difficult to conceive of circumstances in which publicity could be consistent with the paramountcy principle, publicity should only be permitted in the rare situation where the Act permits the principle to be disregarded – where it is necessary to protect the public from 'serious harm.'<sup>116</sup> This is very unlikely to be the case where a child has committed minor criminal or non-criminal anti-social behaviour.

'Naming and shaming' strategies nonetheless have political appeal. The Scottish Executive's First Minister, Jack McConnell, returned from a fact-finding trip to England's 'ASBO capital', Manchester, apparently impressed by the Council's uncompromising approach, including 'name and shame' tactics. It has also been reported that a policy of 'naming and shaming' of under-16s could be included in Labour's manifesto for the forthcoming elections to the Scottish Parliament.<sup>117</sup> Plus, in spite of the provisions of the Children (Scotland) Act 1995 outlined above, guidance

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<sup>114</sup> Ibid, s 44(5).

<sup>115</sup> Ibid, s 16(1).

<sup>116</sup> Ibid, s 16(5).

<sup>117</sup> B Ferguson 'We'll shame young thugs' *Edinburgh Evening News* 17 January 2006.

published by the Scottish Executive states that since the ASBO is ‘a public court document ... the fact that it has been made and its terms and duration are in no way confidential’.<sup>118</sup> The guidance goes on to say that it is for the Sheriff imposing the order to determine whether publicity should be permitted, taking into account the need to justify the interference with the individual’s rights under Article 8(1) ECHR. The guidance describes the individual’s age as merely an ‘important factor’ to consider when balancing the rights of the individual with the public interest. So publicity campaigns similar to those in England and Wales may yet also be mounted in Scotland.

The Home Office guidance issued in England and Wales gives five reasons for its insistence that ‘publicity should be expected in most cases.’<sup>119</sup> Of these five, three – public reassurance about safety, public confidence in local services, and deterring other perpetrators – could equally be used to justify divulging the personal details of children charged with a criminal offence, yet in criminal proceedings a presumption of anonymity applies. This raises the question whether the other two reasons – enabling local people to police the order, and (therefore) deterring the child from breaching the order – are in themselves sufficient to justify reversing the presumption into one in favour of disclosure.

Whether it is necessary to disclose a child’s personal details to enable victims of the anti-social behaviour to police an ASBO is doubtful – victims will often know, or at least be able to recognise, the child in question. But it is not just victims who are expected to police the order. The whole community, victims and non-victims, are expected to play their part, a stark example of a ‘responsibilization strategy’.<sup>120</sup>

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<sup>118</sup> Above n 54, para 120.

<sup>119</sup> Above n 112, p 2.

<sup>120</sup> D Garland ‘The Limits of the Sovereign State: Strategies of Crime Control in Contemporary Society’ (1996) 36 *Brit J Criminol* 445.

Orchestrating publicity campaigns to disseminate the information non-victims need to police an ASBO risks fostering anger and resentment in the local community. Such an approach, which encourages a lynch mob mentality and exacerbates social exclusion, resonates with Rutherford's description of the 'eliminative ideal.'<sup>121</sup> The naming process does nothing constructive to aid a child's reintegration into the community. It is disintegrative.<sup>122</sup> Unsurprisingly, the YJB found widespread concern amongst professionals about publicising the details of children with ASBOs, and that, in some cases, public identification acted as a badge of honour and created a sense of satisfaction about causing trouble.<sup>123</sup> To publicly name children, who are engaged in a process of self-development and so are susceptible to stigmatization, ignores the lessons of the labelling theorists of the 1960s.

But, even if one were to accept that, notwithstanding the concerns just outlined, the benefit of enabling the local community to police ASBOs outweighs a child's interest in anonymity, a further concern remains – the nature of the rhetoric that tends to accompany such publicity. Demonising headlines like 'Ban on Devil Kid, 10,' 'The Imps of Satan,' 'Reclaim our Streets: Yob War' and 'Hellraiser cannot use front door' are all too familiar.<sup>124</sup> In *R (on the application of Stanley) v Metropolitan Police Commissioner*,<sup>125</sup> the three teenage claimants sought a declaration that material carrying their

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<sup>121</sup> A Rutherford 'Criminal Justice and the Eliminative Ideal' (1997) 31 *Social Policy and Administration* 116.

<sup>122</sup> J Braithwaite *Crime, Shame and Reintegration* (Cambridge: Cambridge University Press, 1989).

<sup>123</sup> Above n 44, ch 9.

<sup>124</sup> *The Sun* 22 April 2004, *Daily Mail* 4 May 2004, *Daily Mirror* 31 August 2004 & *Liverpool Daily Post* 20 January 2005 respectively.

<sup>125</sup> [2004] EWHC 2229 (Admin), [2005] HLR 8.

photographs, names, ages and the details of the ASBOs issued against them breached their Article 8 ECHR right to respect for their private and family life. The material included statements on the Council's website describing the gang members as 'thugs' and as 'bully boys' who engaged in 'animalistic behaviour,' and a leaflet which included a statement, under the heading 'Lets Complete the Job,' that the gang members could be imprisoned if caught breaching their ASBOs. Rejecting the claimant's argument that their Article 8 rights had been violated, the High Court held that the language used in the publicity was not disproportionate. Kennedy LJ stated:

'The language used in some of the publicity was colourful, but having regard to the known facts already in the public arena it was entirely appropriate, and the colour was needed in order to attract the attention of the readership'<sup>126</sup>

Condoning the use of colourful language extends beyond permitting dissemination to the local community of the information they need to police an order. Colourful language is likely to be emotive, sensationalist and stigmatising. As argued above, it is likely to hamper a child's development, heighten social exclusion and harbour resentment in the local community. Resorting to such rhetoric in order to stir local people into policing ASBOs should not be an acceptable tactic.

### *Custodial net-widening*

In England and Wales persistent offenders aged 15-17 and persistent, dangerous offenders aged 12-14 who breach an ASBO may receive a custodial sentence – the

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<sup>126</sup> Ibid, [40].

maximum being a Detention and Training Order of up to 24 months' duration.<sup>127</sup> In Scotland, by contrast, the Scottish Parliament has expressly provided that custodial sentences cannot be imposed on under-16s who breach an ASBO.<sup>128</sup> The significance of this is more symbolic than practical; as per the vast majority of criminal cases in Scotland, breaches of ASBOs involving under-16s will almost invariably be dealt with by the children's hearings system rather than prosecuted by the Procurator Fiscal in the criminal courts.

Between 1992 and 1997 the number of 10-17 year-olds sentenced to custody in England and Wales rose by about 40%. After levelling off, the number then fell by 17% between the first quarter of 2001 and the third quarter of 2003.<sup>129</sup> This was welcomed by Rod Morgan, who stated that, whilst there is no alternative to keeping some young offenders in custody, 'the number of these young offenders is considerably smaller than the present custodial population.'<sup>130</sup> A few months later, at the start of 2005, Morgan wrote:

'In early 2004, following a 15 month trend of reducing numbers, the Youth Justice Board witnessed an alarming surge in the number of juveniles in custody: a 10% increase, compared with the usual seasonal rise of around 5%. Given the backdrop of falling crime, the question was: Why? Suspicions arose as to

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<sup>127</sup> Powers of Criminal Courts (Sentencing) Act 2000, s 100. For all other under-18s breach is punishable with a community penalty. Note also that a conditional discharge is not an available disposition for breach of an ASBO (CDA, s 1(11)).

<sup>128</sup> ASB (Scotland) Act, s 10, amending the Criminal Procedure (Scotland) Act 1995.

<sup>129</sup> Audit Commission *Youth Justice 2004: A Review of the Reformed Youth Justice System* (London: The Stationery Office, 2004) p 35.

<sup>130</sup> YJB *Annual Review 2003/04 - Building in Confidence* (London: YJB, 2004) p 4.

whether the increasing popularity of Anti-Social Behaviour Orders (ASBOs) ... might partly be responsible'<sup>131</sup>

These suspicions were understandable. The Home Office have insisted that the courts should not 'treat the breach of an order as just another minor offence.'<sup>132</sup> And the courts have held that, where an act constitutes a standalone criminal offence as well as breach of an ASBO, the sentence which may be imposed for the ASBO breach is neither calculated with reference to the sentence that would normally be imposed for the standalone offence nor limited by the standalone offence's maximum sentence.<sup>133</sup> Moreover, there was anecdotal evidence which suggested that the ASBO was causing an increase in the number of children in custody.<sup>134</sup> The YJB accordingly carried out a study to examine the profile of those children entering custody as a result of breaching an

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<sup>131</sup> Above n 45.

<sup>132</sup> Above n 41, p 48. Earlier versions of the guidance contained similar statements. Significantly, the *Youth Court Bench Book* (London: Judicial Studies Board, 2006) states that 'Breach of an order is a serious criminal offence and should be tackled quickly and effectively,' and then qualifies this: 'It is *not always necessary* to impose a custodial sentence for breach of an ASBO, especially where the original behaviour for which the ASBO may have been imposed was not sufficiently serious to carry a custodial sentence' (p 1-52, emphasis added).

<sup>133</sup> *R v H, Stevens & Lovegrove* [2006] EWCA Crim 255. For discussion of this aspect of the ASBO, see S Macdonald 'The Principle of Composite Sentencing: Its Centrality to, and Implications for, the ASBO' [2006] Crim LR 791.

<sup>134</sup> See T Donovan 'Antisocial orders come under fire' *Young People Now* 28 April 2004 and the memorandum submitted by the YJB to the Home Affairs Committee inquiry, above n 42, vol II, Ev 143.

ASBO.<sup>135</sup> It found that 95% of the children in the study were already known to the local YOT, that the average number of previous offences committed by those children for whom previous offence history was available was 42, and that the children had been subject to various interventions prior to a custodial sentence. Morgan thus concluded that the ASBO did not appear to be drawing into custody children who, prior to the introduction of the order, would not have ended up there.<sup>136</sup>

Nonetheless, given the readiness to resort to the ASBO in England and Wales, it remains possible that the ASBO could widen the custodial net for young people. The lack of integration with the normal juvenile justice process means that the ASBO regime south of border contains few safeguards against net-widening. This stands in contrast to Scotland. Whilst the children's hearings system, as an integrated child welfare system, is ostensibly non-punitive, highly interventionist measures are possible. The supervision requirements which may be imposed can include a requirement to be looked after for a time in local authority accommodation, and – in some circumstances – placing the child in secure accommodation (thus depriving them of their liberty)<sup>137</sup> or imposing a movement restriction condition involving electronic tagging.<sup>138</sup> But in Scotland there are

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<sup>135</sup> The findings are contained in the supplementary memorandum submitted to the Home Affairs Committee inquiry, above n 42, vol III, Ev 217. The YJB warned that the sample size for the study was relatively small and that the study had methodological limitations. Its more recent study stated that it was impossible to ascertain, from the available data, 'whether the ASBO, and any subsequent breaches, exacerbated the risk of custody over and above what would have been expected from further offending in any event' (above n 44, pp 113-114).

<sup>136</sup> Oral evidence to the Home Affairs Committee inquiry, above n 42, vol III, Q 450.

<sup>137</sup> Children (Scotland) Act 1995, s 70.

<sup>138</sup> ASB (Scotland) Act, s 135, amending Children (Scotland) Act 1995, s 70.



a number of ‘protective shields’<sup>139</sup> which provide a bulwark against escalatory tendencies. First and foremost, by rooting the breach process firmly in the mainstream children’s hearings system rather than the criminal justice system, the institutional values of participation, liberalism and welfarism should help prevent any significant increase in the use of secure accommodation.<sup>140</sup> The role of the overarching minimum intervention and welfare principles in section 16 of the Children (Scotland) Act 1995 and their application by Reporters and children’s hearing panellists against the background of an increasingly punitive political and media climate will be crucial in this regard. Second, there is the practical reality that the number of places in secure accommodation in Scotland is, at present, relatively small (fewer than one hundred), and although there are moves to slightly increase the capacity of this secure estate, the restricted numbers prevents the children’s hearings system and local authority social work chiefs from resorting to incapacitation as a convenient strategy for dealing with troublesome youth.

## **Conclusion**

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<sup>139</sup> A Rutherford ‘Youth Justice and Social Inclusion’ (2002) 2 *Youth Justice* 100.

<sup>140</sup> A children’s hearing can only authorise the placing of a child in secure accommodation if: either the child having previously absconded, is likely to abscond unless kept in secure accommodation and if he absconds, it is likely that his physical, mental or moral welfare will be at risk; or the child is likely to injure him or herself or some other person unless kept in such accommodation (Children (Scotland) Act 1995, s 70). Moreover, the s 16 ‘minimum intervention’ and ‘welfare’ principles are applicable to secure accommodation decisions.

Over the past century, youth justice policy in England and Wales has fluctuated between broadly punitive and welfarist approaches.<sup>141</sup> There have also often been bifurcations of policy, with a punitive approach being adopted for some, normally serious or persistent, young offenders, and a welfarist approach prevailing for others who are perceived as merely a nuisance.<sup>142</sup> Since the murder of James Bulger, political and public attitudes towards young offenders have hardened, and a punitive approach has dominated.<sup>143</sup>

At the heart of the punitive approach is a conception of young offenders as ‘devils.’ Fionda explains:

“The youth justice process increasingly denies young offenders their childhood, since as devils, they are assigned adult-like attributes of evil and the competence of free will ... If the devilish nature of offending young people can be banished – by coercion if necessary – then the assumption is that they can reclaim their “childhood” and rejoin the “angels”<sup>144</sup>

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<sup>141</sup> See, eg, A Rutherford *Growing out of Crime: The New Era* (Winchester; Waterside, 1992). Note that there are emerging signs of divergent approaches to childrens’ rights in England and Wales – see J Williams ‘Incorporating Children’s Rights: The Divergence in Law and Policy’ (2007) 27 LS (forthcoming)

<sup>142</sup> See, eg, A E Bottoms, K Haines & D O’Mahony ‘Youth Justice in England and Wales’ in J Mehlbye & L Walgrave (eds) *Confronting Youth in Europe* (Copenhagen: AKF, 1998).

<sup>143</sup> J Fionda ‘Youth and Justice’ in J Fionda (ed) *Legal Concepts of Childhood* (Oxford: Hart, 2001).

<sup>144</sup> J Fionda, above n 62, p 6.

The ASBO is a prime example of this perspective. Although it was designed solely for use against adults, the Government have encouraged its use against young people. The ASBO regime in England and Wales thus has little regard for the youthfulness of children who engage in perceivedly anti-social behaviour,<sup>145</sup> and attaches little weight to the principles of participation, liberalism and welfarism.

Empirical evidence illustrates the importance of the principle of welfarism. A simplistic ‘devils’ and ‘angels’ dichotomy is impossible to sustain. Offenders and victims are very often the same people, with offending predicting victimisation and vice versa.<sup>146</sup> Children who offend could just as easily have come to official attention as children in need of care and protection.<sup>147</sup> A non-bifurcated, welfare-based approach, which focuses in a child-centred, holistic, positive and inclusionary way on addressing the child’s various troubles, is most appropriate. In spite of this, the statutory criteria for the imposition of an ASBO on a young person do not include his/her welfare. Home Office guidance states:

‘There should be no confusion as to the purpose of the order, which is to protect the community. Where the case concerns a child, the welfare of the child is, of course, to be considered, and indeed the making of the order should contribute to this by setting standards of expected behaviour. But the welfare of the child is not the principal purpose of the order hearing’<sup>148</sup>

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<sup>145</sup> For discussion of the so-called youth problem, and the factors which have contributed to its emergence, see E Burney, above n 92, pp 64-76.

<sup>146</sup> D J Smith *The Links Between Victimization and Offending* (Edinburgh: Centre for Law and Society, University of Edinburgh, 2004).

<sup>147</sup> See, eg, L Waterhouse et al, above n 26.

<sup>148</sup> Above n 41, p 33.

This failure to recognise the importance of the principle of welfarism is further illustrated by the frequent imposition of preventive prohibitions, by the two-year minimum duration of an ASBO, and by the promotion of publicity campaigns which commonly employ ‘colourful’ language. Arguments that measures like these are needed to control crime rates are rebutted by victimisation data from Scotland, which suggests that it is possible to have less crime without a punitive juvenile justice system,<sup>149</sup> and from a comparative study of different systems in two cities (one in Germany, the other in the USA) showing that a highly punitive interventionist criminal justice system does no better at deterring juvenile crime than a relatively lenient approach.<sup>150</sup>

Empirical evidence also underlines the importance of the principle of liberalism. Self-report studies suggest that offending and anti-social behaviour is so prevalent in the teenage years that it can be viewed as a relatively normal feature of adolescence,<sup>151</sup> and that all but a small minority will be ‘adolescent limited offenders’<sup>152</sup> and will ‘grow out of crime and anti-social behaviour.’<sup>153</sup> The ASBO nonetheless sits abreast of the diversionary scheme of reprimands and warnings, allowing YOTs to be marginalised and the order to be resorted to too readily. This is especially dangerous given the potential

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<sup>149</sup> D J Smith ‘Less Crime Without More Punishment’ (1993) 3 *Edinburgh Law Review* 294.

<sup>150</sup> D Huizinga, K Schumann, B Ehret, A Elliott *The Effect of Juvenile Justice System Processing on Subsequent Delinquent and Criminal Behaviour: A Cross National Study* (Washington: National Institute of Justice, 2003).

<sup>151</sup> See, eg, D Wilson, A Sharp and D Patterson *Young People and Crime: Findings from the 2005 Offending, Crime and Justice Survey* (London: Home Office, 2006).

<sup>152</sup> T Moffitt “‘Life Course-Persistent’ and “Adolescence-Limited” Antisocial Behaviour: A Developmental Taxonomy’, (1993) 100 *Psychological Review* 674

<sup>153</sup> A Rutherford, above n 141.

for formal intervention to backfire and increase rather than reduce the risk of recidivism. The ASBO closely fits Sherman's description of the conditions which are likely to cultivate proud and shameless defiance, resulting in a net increase in the prevalence, incidence or seriousness of the behaviour a measure was intended to address.<sup>154</sup>

The disregard for participatory values is evidenced by the fact that applications for ASBOs are heard in the adult magistrates' court, with little being done to help young people understand or participate in the proceedings. This is especially unfortunate given that New Labour recognised the importance of these values by adopting the Youth Offender Panel (YOP) system for first time offenders pleading guilty in the youth court.<sup>155</sup> It could even be argued that YOPs subscribe more fully to participatory values than the

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<sup>154</sup> The four conditions identified by Sherman are: (1) the sanction is unfair. A young person subject to an ASBO may regard it as either substantively unfair (eg, the terms seem to him to be overly restrictive) or procedurally unfair (eg, not able to participate in or understand the proceedings); (2) the individual is poorly bonded to or alienated from the sanctioning agent or the community the agent represents (often the effect of an ASBO is to exacerbate social exclusion); (3) the individual defines the sanction as stigmatising and rejecting a person, not a lawbreaking act (ASBOs are often accompanied by publicity campaigns); and (4) the individual denies or refuses to acknowledge the stigmatizing shame that has been imposed (evidence that some young people regard ASBOs as a badge of honour). See further L Sherman 'Defiance, Deterrence and Irrelevance: A Theory of the Criminal Sanction' (1993) 30 *Journal of Research in Crime and Delinquency* 445.

<sup>155</sup> The Government has recently shown interest in injecting participatory values into the ASBO process in England and Wales by giving 'communities', in the form of Tennant Management Organisations, the power to apply for ASBOs (Draft SI The Local Authorities (Contracting Out of Anti-Social Behaviour Order Functions (England) Order 2007 (London: HMSO, 2007). The significance of YOPs is that they show how participation can be harnessed in a more inclusionary manner.

children's hearings system because they can include the victim(s) of the offending as well as community representatives.<sup>156</sup>

Assuming that the ASBO will continue to form part of the Government's campaign against anti-social behaviour, we believe that greater weight could be given to the principles of participation, liberalism and welfarism by making three fundamental changes to the ASBO regime in England and Wales insofar as it applies to young people. First, the order should be reclassified as criminal in nature.<sup>157</sup> Indeed, the creation of the ISO may dictate this. Second, a new independent specialised agency analogous to the Reporter should be established to oversee the prosecutorial functions in relation to youthful criminal anti-social behaviour. Third, orders should only be imposed by special 'youth panels,' the composition of which would resemble existing institutional architecture in the form of YOPs,<sup>158</sup> though our proposed panels would be primarily welfarist rather than restorative in nature.

If ASBOs were classified as criminal in nature, the scheme of reprimands and warnings would apply, and so a young person would only be eligible for an ASBO if he had previously received a warning. If a young person who has received a warning is

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<sup>156</sup> The evaluation of the YOPs found that as regards opportunities to participate, understanding of the process and perceived fairness of the proceedings, young people and their families rated the YOP process highly in comparison to their experience of the Youth Court (T Newburn, A Crawford, R Earle, S Goldie, C Hale, A Hallam, G Masters, A Netton, R Saunders, K Sharpe and S Uglow *The Introduction of Referral Orders into the Youth Justice System: Final Report* Home Office Research Study 242 (London: Home Office, 2002)).

<sup>157</sup> For the argument that ASBOs should be classified as criminal in nature regardless of whether they are imposed on adults or children, see S Macdonald, above n 106 & n 133.

<sup>158</sup> A YOP is composed of one member of the local youth offending team and two lay community representatives.

charged with committing a criminal act of anti-social behaviour, his case would be referred to the new prosecutorial official who would be granted a wide discretion to determine whether formal measures might be required. The principles of minimum intervention and welfare would apply to his decision making. If it was determined that formal measures might be necessary the child would be referred to a youth panel if he either admits guilt or (if he denies guilt) if the youth court finds liability established.<sup>159</sup> Commission of the crime would thus act as a ground of referral, as in the children's hearings system.<sup>160</sup> In accordance with participatory values, the youth panel would adopt an informal, dialogical process aiming to reach consensus. As in the existing YOP system, victims would continue to be invited to attend. A range of measures, including those which may currently be included in an ISO, would be available. The panel's paramount consideration would be the young person's welfare. Whilst imposition of an ASBO would be available, the principle of minimum intervention would apply and so an order would not normally be imposed. If an ASBO was imposed – either through mutual agreement or because the young person is deemed to pose a serious risk – the welfare principle would also apply to the terms of the order, which would militate against the use of preventive prohibitions. The ASBO's criminal classification, coupled with the

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<sup>159</sup> This would differ from the existing arrangements for YOPs, whereby a child is only referred to a YOP if he pleads guilty. It is arguable that this restriction infringes the presumption of innocence. For a critical analysis of the YOP process see C Ball 'The Youth Justice and Criminal Evidence Act 1999 Part I: A Significant Move Towards Restorative Justice, or a Recipe for Unintended Consequences' [2000] Crim LR 211.

<sup>160</sup> As Cleland and Tisdall point out, making commission of acts of anti social behaviour a new ground of referral to the children's hearings system could have avoided many of the difficulties that may now face the Scottish system following the extension of the ASBO to under-16s (above n 49).

principle of welfarism, would dictate a strong presumption in favour of anonymity. In the event that an ASBO is imposed and subsequently breached, the prosecutorial official would determine whether a custodial sanction might be necessary and if so, refer the case for prosecution in the youth court where Detention and Training Orders would remain an available sanction.<sup>161</sup> However, the principles of minimum intervention and welfarism would apply which would mean that custody should only be resorted to if truly necessary.

In spite of the introduction of the ASBO against 12-15 year-olds in Scotland, the primary forum for dealing with young offenders remains the children's hearings system. This system regards young offenders as simply one subgroup of the broader category of children in need, and so adopts an approach based on the principles of participation, liberalism and welfarism. South of the border, the ASBO has quickly become one of the most popular measures in the campaign to tackle anti-social behaviour by young people, notwithstanding the fact that the remedy was designed for use solely against adults and that a large number of the children who receive orders suffer from serious disadvantages and social exclusion and have significant support needs. This article has shown how, by reclassifying the ASBO and introducing new youth panels, greater weight could be given to the values at the heart of children's hearings. This would ensure a more effective response to the needs of young people who behave anti-socially.

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<sup>161</sup> The youth court could be granted discretionary power to revert the case to the youth panel for (non custodial) disposal in appropriate cases. The power to refer a case to a children's hearing for disposal is often used by the courts in Scotland in the small number of under-16s cases that are prosecuted rather than referred to the children's hearings.