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# **‘Dispersal Powers and the Symbolic Role of Anti-Social Behaviour Legislation’**

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## **Abstract**

This article considers the development and use of dispersal powers, introduced by the Anti-Social Behaviour Act 2003, and situates these within the context of wider legislation and policy initiatives. It explores the ways in which the powers have been interpreted by the courts and implemented by police and local authorities. The article critically analyses the manner in which the powers: introduce ‘public perceptions’ as a justification for police encroachments on civil liberties; conform to a hybrid-type prohibition; constitute a form of preventive exclusion that seeks to govern future behaviour; are part of a wider trend towards discretionary and summary justice; and potentially criminalise young people on the basis of the anxieties that groups congregating in public places may generate amongst others. It is argued that the significance of dispersal orders derives as much from the symbolic messages and communicative properties they express, as from their instrumental capacity to regulate behaviour.

## **Key words**

Dispersal powers – anti-social behaviour – public perceptions - future governance - preventive exclusion – criminalisation of young people

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## Introduction

Anti-social behaviour has become a major policy preoccupation in recent years and has provided the fertile terrain out of which considerable legal and regulatory innovations have grown. Anti-social behaviour has come to comprise and delineate a distinctive, if capacious and ill-defined, field that blurs and transcends traditional differentiations between crime and disorder. In the process, it has refigured and (con)fused civil and criminal legal processes and principles, as well as muddied the relation between formal and informal regulatory responses. In practice, interventions for tackling anti-social behaviour comprise a policy domain in which diverse organisational interests, working assumptions, priorities and multi-disciplinary approaches coalesce, often in awkward combinations. Despite their apparent generic implications, the new laws, technologies and strategies brought into being by anti-social behaviour legislation, are concerned, above all else, with the question of governing 'troublesome youth'.<sup>1</sup>

The extensive array of new powers, *inter alia*, acceptable behaviour contracts (ABCs), anti-social behaviour orders (ASBOs), parenting orders, parenting contracts, tenancy demotion orders, anti-social behaviour housing injunctions (ASBIs), 'crack-house' closure orders, designated public places orders (DPPOs), dispersal orders and penalty notices for disorder (PND), as well as the latest proposals for premise closure orders and 'deferred' PNDs.<sup>2</sup> As this list testifies, the hyper-active reform agenda has seen the creation of new institutional tools and legal powers and their equally frenetic extension and replacement by alternatives and supplements. Such has been the pace of change that it has allowed little time or space for consideration of the impact of new technologies and prohibitions or for informed analysis. To date, much of the critical commentary has focused on the ASBO and has largely been 'directed at the rhetoric rather than on evidence of what the impacts of the new policies have actually been'.<sup>3</sup> This has been exacerbated by the fact that government has explicitly preferred not to fund significant or detailed evaluations, but instead has restricted oversight to the

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<sup>1</sup> See E. Burney, *Making People Behave: Anti-social behaviour, politics and policy* (Cullompton: Willan, 2005); P. Squires and D. E. Stephen, *Rougher Justice: Anti-social behaviour and young people* (Cullompton: Willan, 2005); and A. Crawford, *Governing the Future: The Contractual Governance of Anti-Social Behaviour* (Cambridge: Cambridge University Press, forthcoming).

<sup>2</sup> As outlined in the Criminal Justice and Immigration Bill 2008.

<sup>3</sup> D. Smith, 'New Labour and Youth Justice' (2003) 17 *Children & Society* 226, 233.

collection of limited data on the use of powers via annual surveys and the crude monitoring of public perceptions. This willful neglect of evaluation and close monitoring of the impact of the anti-social behaviour agenda was roundly condemned by the House of Common's Committee of Public Accounts.<sup>4</sup>

The available research has largely highlighted the significant use of ASBOs with juveniles (over 40 per cent), their high breach rate, the growing use of ASBOs attached to a criminal conviction (more than 60 per cent) and the variable use of different powers across the country, largely due to local preferences for particular approaches rather than reflecting differences in types of behaviour.<sup>5</sup> This 'justice by geography' underscores both the discretionary nature of the powers and the subjective interpretation they invest in local enforcement officers.

Both collectively and individually, many of the new modes of control represent a shifting orientation towards forms of governance and behavioural regulation that focus less on knowing and accounting for past incidences than disrupting, reordering and steering possible futures. They seek to regulate crime and disorder through their consequences for, and interconnections with, wider social problems. Simultaneously, they reflect an individualisation of control, in which responses are tailored around personal and contextual characteristics. In the process of 'rebalancing justice', as deemed necessary by the current government to 'ensure 21<sup>st</sup> century laws for 21<sup>st</sup> century crimes',<sup>6</sup> there has been a subtle shift from due process requirements as defining ideals of justice to security and public perceptions as predominant overarching narratives. In this article, it is not my intention to review the full panoply of new powers but to focus on one particularly controversial, but little discussed, legal innovation, namely dispersal powers introduced by section 30 of the Anti-Social Behaviour Act 2003. The powers are inherently contentious, given the

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<sup>4</sup> In the absence of evaluation it asserted that: 'Decisions are based on local preferences and the familiarity of those in authority with the different types of measures, rather than an objective assessment of what works with different types of perpetrators'; see House of Commons Committee of Public Accounts, *Tackling Anti-Social Behaviour, Forty-fourth report of Session 2006-7*, HC 246 (London: Stationery Office, 2007) 5.

<sup>5</sup> National Audit Office, *The Home Office: Tackling Anti-Social Behaviour*, (London: NAO, 2006); and A.-R. Solanki, T. Bateman, G. Boswell and E. Hill, *Anti-Social Behaviour Orders* (London: Youth Justice Board, 2006).

<sup>6</sup> Home Office, *Rebalancing the criminal justice system in favour of the law-abiding majority: Cutting crime, reducing reoffending and protecting the public* (London: Home Office, 2006) 11.

wide scope of discretion they accord to police and the infringements on the rights of individuals to free movement and assembly that they entail. My intention here is to use the dispersal order as a vantage point from which to assess some of the wider implications of anti-social behaviour legislation.

This article draws on the first major empirical study of the use and impact of dispersal powers.<sup>7</sup> Conducted over a 12 month period from April 2006 to March 2007, the research gathered data from three main sources. The first entailed a national overview of practice drawn from interviews conducted with practitioners from 13 police force areas across the UK, as well as national policy-makers. The second concerned two city-based studies in Sheffield and Leeds, and explored the development of strategies over time, the distribution of orders across a city and longer-term impacts. In support of this, interviews were conducted with police, local authority staff and others involved in the implementation of dispersal orders since their introduction. The third source focused on two case study sites in North Yorkshire and Outer London. In each a six-month dispersal order was investigated from instigation to completion. Surveys and focus groups were conducted with adult residents and pupils attending a local school, and interviews took place with key stakeholders and police. Police enforcement practices were observed.<sup>8</sup>

It will be argued that the significance of dispersal orders derives in large part from the symbolic messages and communicative properties they express, as much as from their instrumental capacity to regulate behaviour. This, it is suggested, is a defining attribute of much recent anti-social behaviour legislation, whereby conveying the message that certain misconduct is being taken seriously by relevant legal authorities and that something is being done in response, is more salient than the appropriateness or effectiveness of the course of action taken. It reflects a preoccupation in which the ambitions of governing and state-craft have narrowed to a focus on individual behaviour as the crucible in which the fortunes of government are forged. In the face of uncontrollable flows of capital, goods, people and risks, governments (both local and national) have re-sighted their energies on the management of public displays of behaviour. Being seen to be doing something

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<sup>7</sup> A. Crawford and S. Lister, *The Use and Impact of Dispersal Orders: Sticking Plasters and Wake-Up Calls* (Bristol: Policy Press, 2007).

<sup>8</sup> The research study was funded by the Joseph Rowntree Foundation in the absence of any Home Office sponsored evaluations. For further information on the research methods see *ibid*, 8.

tangible in response to local demands and to assuage public perceptions via the micro-management of uncivil behaviour has become an increasingly prominent governmental *raison d'être*.

The research evidence, however, suggests the messages that dispersal orders impart to different audiences are both mixed and often counterproductive, simultaneously raising expectations about policing priorities and reinforcing dominant adult assumptions about young people. The research reveals a significant disjuncture between the potential scope of the law and the more circumscribed manner in which it has generally been interpreted by the police. However, this dissonance is itself a major source of confusion. Where implemented, dispersal orders have the capacity to undermine police-community relations and leave young people feeling resentful and unfairly stigmatised. The paper concludes with some reflections on the broader trajectory of legislative developments and their implications.

### **The origins of the dispersal order**

Part 4 of the Anti-Social Behaviour Act 2003 (sections 30-36) gives the police in England and Wales new powers to disperse groups of two or more people from designated areas where there is believed to be significant and persistent anti-social behaviour and a problem with groups causing intimidation. Analogous (although slightly less extensive) powers are available in Scotland under the Anti-Social Behaviour etc. (Scotland) Act 2004. The powers are exceptional in that they are both time-limited and geographically-bounded to specific areas that have been authorised for their use. Unsurprisingly, given the restrictions on civil liberties that such powers entail, their introduction has been intensely controversial.<sup>9</sup>

The idea of dispersal orders was first articulated in the white paper *Respect and Responsibility*, which expressed ‘the need for a cultural shift from a society where too many people are living with the consequences of anti-social behaviour, to a society where we respect each other, our property and our shared public spaces’.<sup>10</sup> The genesis of dispersal orders owes much to a combination of at least five factors. First, there was a distinct frustration on the part of government ministers over the

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<sup>9</sup> C. Walsh, ‘Dispersal of Rights: A Critical Comment on Specified Provisions of the Anti-Social Behaviour Bill’ (2003) 3 *Youth Justice* 104.

<sup>10</sup> Home Office, *Respect and Responsibility – Taking a Stand Against Anti-Social Behaviour*, Cm 5778 (London: Home Office, 2003) 6.

perceived failure of local authorities and the police to use the curfew powers given to them under the Crime and Disorder Act 1998, and extended under the Criminal Justice and Police Act 2001.<sup>11</sup> The original power in the 1998 Act allowed for local authorities to apply for local curfew orders for children under 10 in specified areas (section 14). Subsequently, not one local authority across England and Wales sought to use this power. According to Jack Straw this was due to an inherent ‘conservatism’ among local authorities.<sup>12</sup> To avoid this, the Criminal Justice and Police Act 2001 extended the power to apply for a curfew order to local chief police officers (section 49) – clearly deemed to be less ‘conservative’ – and increased the age range to include under 16 year olds (section 48). Despite these extensions, the power remained (and remains) unused.

Secondly, there was a growing belief that the police were unable to respond adequately to low level but persistent group-related anti-social activity and intimidatory behaviour. Lack of witness statements was often cited as a stumbling block to prosecutions. So too, a growing culture of rights and a loss of deference to authority were perceived as undermining policing.<sup>13</sup> In England and Wales, the police themselves lobbied for new powers to redress the perceived imbalance.<sup>14</sup>

Thirdly, evidence from the British Crime Survey seemed to show an increase in public perceptions of anti-social behaviour as a problem.<sup>15</sup> Most specifically, the percentage of people who identified youths hanging about in the street in their locality

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<sup>11</sup> C. Walsh, ‘Curfews: No More Hanging Around’ (2002) 2 *Youth Justice* 70.

<sup>12</sup> House of Commons, *The Criminal Justice and Police Bill: Bill 31 of 2000-2001*, Research Paper (London: House of Commons, 2001) 40.

<sup>13</sup> If the problem was one of front-line police officers with insufficient power and authority, it is something of an incongruity that a new breed of police personnel with reduced powers, limited training and significantly less authority – namely the police community support officer – was introduced at the same time (via the Police Reform Act 2002) to deliver the anti-social behaviour agenda. See A. Crawford, S. Lister, S. Blackburn and J. Burnett, *Plural Policing* (Bristol: Policy Press, 2005).

<sup>14</sup> Interestingly, however, north of the border, senior and rank-and-file police organisations (the Association of Chief Police Officers in Scotland and the Scottish Police Federation) both opposed the introduction of dispersal orders: see J. Flint, R. Atkinson and S. Scott, *A Report on the Consultation Responses to Putting Our Communities First: A Strategy for Tackling Anti-social Behaviour* (Edinburgh: Scottish Executive, 2003).

<sup>15</sup> M. Wood, *Perceptions and Experiences of Anti-Social Behaviour: Findings from the British Crime Survey 2003/04* (London: Home Office, 2004).

as ‘a big problem’ was not only significant but growing. In the decade between 1992 and 2002 the figure increased by nearly two-thirds from 20 per cent to 33 per cent. This increase in public anxieties appeared to fly in the face of evidence from both police recorded statistics and the British Crime Survey that aggregate crime rates were falling after reaching a high-point in the mid-1990s. Nevertheless, public perceptions, as determined by survey findings, remained stubbornly of the view that crime and anti-social behaviour were inexorably on the rise.<sup>16</sup> This ‘reassurance paradox’ increasingly came to dominate political preoccupations and policy debate, notably with regard to policing and police reform.<sup>17</sup>

Fourthly, there was a growing acknowledgement of the particular impact on public perceptions of safety of repetitive incivilities and cumulative disorders that belie their seriousness as defined in criminal legal terms. Moreover, it was argued that doing something to combat these ‘signs of crime’ may produce real benefits for crime reduction, local community well-being and perceptions of personal safety, reflecting the growing influence of Wilson and Kelling’s ‘broken window’ thesis on public policy.<sup>18</sup> Incivilities and disorder, they argued, were precursors to, and harbingers of, crime: if left unchecked, anti-social behaviour generates, in a chain of causation, more serious crime and community breakdown. A search of official policy documents across government departments, revealed some 48 publications between 2000 and 2006 that had either an implicit or explicit reference to Wilson and Kelling’s ideas.<sup>19</sup>

Finally, this combined with a shift in government focus (especially during the second Blair administration) towards ensuring the delivery of programmes and policy initiatives, notably regarding public sector reform and the implementation of new powers. This was reflected in the establishment of the Delivery Unit at the heart of central government in 2001. A key philosophy behind the shift was that ‘numbers are

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<sup>16</sup> Regular sweeps of the British Crime Survey showed that approximately two-thirds of the population continued to believe crime to be increasing across the country in the preceding two years.

<sup>17</sup> A. Crawford, ‘Reassurance Policing: Feeling is Believing’, in A. Henry and D. J. Smith (eds), *Transformations of Policing* (Aldershot: Ashgate, 2007).

<sup>18</sup> J. Q. Wilson and G. Kelling, ‘Broken Windows: The Police and Neighbourhood Safety’ (1982) *The Atlantic Monthly*, March, 29.

<sup>19</sup> M. Innes and V. Jones, *Neighbourhood Security and Urban Change* (York: Joseph Rowntree Foundation, 2006).



important but not enough: citizens have to see and feel the difference'.<sup>20</sup> Hence delivering irreversible change that citizens might notice and appreciate became a major policy driver.<sup>21</sup> Towards the end of his period in office, Tony Blair reflected upon the importance of public perceptions:

the other thing I have learnt in over 8 years of being Prime Minister is that you can argue about statistics until the cows come home and there is usually a very great credibility gap between whatever statistics are put out and whatever people actually think is happening, but the real point is not about statistics, *it is about how people feel...* because the fear of crime is as important in some respects as crime itself.<sup>22</sup>

### **Anti-social behaviour**

The legal definition of anti-social behaviour as that which 'causes or is likely to cause harassment, alarm or distress' to others,<sup>23</sup> introduces public perceptions as central criteria. Consequently, the resultant interpretation is both subjective and context specific. As such, it has been the subject of extensive debate.<sup>24</sup> Its meaning is dependent upon local norms and values as well as individual sensibilities. It is officially recognised that people's understanding of what constitutes anti-social behaviour is 'determined by a series of factors including context, location, community tolerance and quality of life expectations... what may be considered anti-social behaviour to one person can be seen as acceptable behaviour to another'.<sup>25</sup> For this reason, the policy and legal definition has been left deliberately opaque. The Home Office has steadfastly resisted closer categorisation, arguing rather that it correctly should mean different things in different localities. This confounds difficulties of

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<sup>20</sup> M. Barber, *Instruction to Deliver* (London: Politico's, 2007) 370.

<sup>21</sup> See also D. Blunkett, *The Blunkett Tapes: My Life in the Bear Pit* (London: Bloomsbury, 2006).

<sup>22</sup> Speech to a conference by Safer Croydon partnership 10th February 2006, emphasis added; available at: <http://www.number10.gov.uk/output/Page9040.asp> (accessed 19.12.2007)

<sup>23</sup> Crime and Disorder Act 1998, s 1.

<sup>24</sup> S. Macdonald, 'A Suicidal Woman, Roaming Pigs and a Noisy Trampolinist: Refining the ASBO's Definition of Anti-Social Behaviour' (2006) 69 *Modern Law Review* 183; and A. Millie, J. Jacobson, E. McDonald and M. Hough, *Anti-Social Behaviour Strategies: Finding a Balance* (Bristol: Policy Press, 2005).

<sup>25</sup> Home Office, *Defining and Measuring Anti-Social Behaviour*, Development and Practice Report 26, (London: Home Office, 2004) 3.

measurement and meaning, especially between diverse local agencies and across different areas.

In policy discourse anti-social behaviour embodies both a common-sense understanding and appeals to popular sentiments. It operates at an affective level on the basis of feelings and emotion that provoke action. Importantly, however, this reminds us that perceptions of insecurity are influenced by both subjective and objective judgments; they are simultaneously symbolic and material. It also alludes to the communicative dimension of governmental strategies including legal powers and policing.<sup>26</sup> In interview, David Blunkett, the Home Secretary who introduced the Anti-Social Behaviour Act 2003, explained the genesis of the dispersal power as, in large part, stimulated by the desire to restore some faith in the capacity of the processes of democracy to work to deliver tangible change. For him, the power was designed to counter the perceptions that:

the local authority won't do anything, the police won't do anything, the local school won't do anything, and the housing tenancy arrangements won't work. That was the cry we were responding to, that "nobody will ever listen to us", that "they won't do anything, it doesn't matter how bad it is"... Not just in terms of [public] well-being, their health and their living conditions but also their belief that processes of democracy do work, that things can change.<sup>27</sup>

From their inception, dispersal powers were associated with the anxieties generated by young people congregating in public places. Although the legislation is not targeted specifically at young people, the genesis and use of the powers reflect this preoccupation.

### **The nature of the powers**

The exceptional nature of dispersal powers is underscored by the legislative requirement for prior authorisation. This necessitates that a senior police officer (Superintendent or above) has reasonable grounds for believing that members of the public have been intimidated, harassed, alarmed or distressed in a particular locality as a result of the presence or behaviour of groups of two or more people and that anti-

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<sup>26</sup> R. V. Ericson, K. D. Haggerty and K. D. Carriere, 'Community Policing as Communications Policing', in D. Dölling, and T. Feltes (eds), *Community Policing: Comparative Aspects of Community Oriented Police Work* (Holzkirchen, Obb.: Felix, 1993).

<sup>27</sup> Personal interview, 12 January 2007.

social behaviour is a significant and persistent problem in that area. In making the decision to authorise, evidence is to be obtained to support the application, collated from force incident logs as well as other evidential statements from local agencies (notably housing, social services or education) and complainants. The police must obtain the consent of the local authority to the authorisation as a check that the powers are appropriate and proportionate. Consequently, the process devolves key decision-making powers to senior police and local authority managers and serves as a test of the robustness of partnership relations.

The authorisation must be in writing, signed and specify the relevant locality, the grounds upon which it is given and the period during which the powers may be exercised (up to six months). The authorisation must be publicised either via a local newspaper and/or by notices in the area. At the end of the initial period, designation may be renewed. If it turns out that an order is no longer necessary or proportionate, the police can withdraw the authorisation at any stage pursuant to section 31(6) of the Act, with the agreement of the local authority.

Within a designated zone a police constable or community support officer (CSO) may disperse groups of two or more where their presence or behaviour has resulted, or is likely to result, in a member of the public being harassed, intimidated, alarmed or distressed. The officer may give one or more of the following directions:

- i. require people in the group to disperse either immediately or at a stated time and in a stated way;
- ii. require any people whose place of residence is not within the relevant locality to leave the area or any part of it either immediately or by such time and/or in such a manner as specified; and
- iii. prohibit any people who do not reside in the designated area from returning to the relevant locality for a period up to 24 hours.

A person does not commit an offence because an officer has chosen to use the power to disperse, but if individuals refuse to follow the officer's directions, they will be committing an offence, punishable by up to 3 months imprisonment and/or a fine of up to £5,000. The Act provides additional powers for dealing with those aged under 16 (section 30(6)). Where a police constable believes such a person to be in the authorised area between the hours of 9pm and 6am and without a parent or responsible adult, he or she may remove the child to their home address, unless the police officer has reasonable grounds for believing that the child, if removed to that

place, would be likely to suffer significant harm.<sup>28</sup> The local authority must be informed when this power is used.

### **The Scottish approach**

In Scotland, unlike England and Wales, there was considerable public debate around the introduction of the powers. Over 80 per cent of responses to the consultation process opposed the introduction of dispersal orders, on the grounds that the police already had sufficient powers.<sup>29</sup> The laws introduced in Scotland, some nine months after the English legislation, benefited from this time-lag and more extensive consultation process. Consequently, there are some important divergences of approach, summarised in Table 1. The most noteworthy are: the higher threshold for authorisation; the shorter duration of designation; the absence of the power to escort home young people under 16 after 9pm in a designated area; and the legal requirement to conduct a three year review of the operation of the power. These small but important dissimilarities reflect much broader cultural and legal differences of approach in Scotland, where there is greater reluctance to use criminalisation as a means of managing youth problems, as enshrined in the Kilbrandon philosophy and the Children's Hearing system.<sup>30</sup>

Largely as a result of the public debate about the appropriateness of the new orders, senior police officers in Scotland were initially reluctant to use the powers. By April 2007, some 14 dispersal zones had been designated in Scotland covering 11 locations. This compares dramatically to the much more extensive use south of the border. A total of 1,065 areas were designated in England and Wales up to April 2006 according to the most recent Home Office figures.<sup>31</sup>

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<sup>28</sup> Home Office, *Part 4 Of the Anti-Social Behaviour Act 2003*, circular 004/2004 (London: Home Office, 2004).

<sup>29</sup> Flint *et al*, n 14 above, 109.

<sup>30</sup> Named after the Kilbrandon Committee report published in 1964, which has informed the principal values and institutions of youth justice ever since, stressing early and minimal intervention, avoiding stigmatisation through criminalisation, with an emphasis on the needs of children rather than their (mis)deeds. The system of children's hearing panels, introduced some years after the publication of the report encapsulates this philosophy. See Kilbrandon Committee, *Report on Children and Young Persons, Scotland* (Edinburgh: HMSO, 1964).

<sup>31</sup> Home Office, *Tools and Powers to Tackle Anti-Social Behaviour* (London: Home Office, 2007) 8.

**Table 1: Scotland and England & Wales compared**

	<b>England &amp; Wales</b>	<b>Scotland</b>
<i>Legislative basis</i>	Anti-Social Behaviour Act 2003	AntiSocial Behaviour etc. (Scotland) Act 2004
<i>Commencement date</i>	20 January 2004	1 October 2004
<i>Threshold for authorisation</i>	Where anti-social behaviour is a significant and persistent problem.	Where anti-social behaviour is a significant, persistent and <i>serious</i> problem.
<i>Duration of designation</i>	Up to six months (renewable)	Up to three months (renewable)
<i>Involvement of local authority?</i>	Agreement of the local authority must be obtained.	Local authority is to be consulted and full account taken of their views, but ultimate decision lies with the senior police officer.
<i>Who can use the powers?</i>	Powers extend to police Community Support Officers	Limited to police constable. No equivalent to Community Support Officers in Scotland.
<i>Extent of powers</i>	Escort power to remove home a young person under 16 who is out on the streets between 9pm and 6am, not under adult control	No equivalent power
<i>Penalties available for breach</i>	A fine of up to £5,000 and/or imprisonment of up to three months.	A fine of up to £2,500 and/or imprisonment of up to three months.
<i>Evaluation requirement</i>	No equivalent requirement to evaluate implementation or effectiveness.	Requirement on Scottish Ministers to conduct a study into the operation of dispersal powers and lay it before Parliament within three years of the powers' commencement (Part 3, s. 24)
<i>Use</i>	By April 2006 over 1,000 areas authorised.	By April 2006 only six areas authorised (increased to 14 by April 2007)

These differences reflect wider disparities in approaches in the two jurisdictions concerning the regulation of youth and anti-social behaviour.<sup>32</sup> Despite important recent legal convergence,<sup>33</sup> Scottish practitioners have been more reluctant to enforce new anti-social behaviour powers granted to them.<sup>34</sup> The Scottish approach has also been informed more significantly by research evidence. Whereas the Home Office explicitly preferred not to evaluate the impact of dispersal orders, the Scottish legislation required that a study to review their implementation be conducted within three years and the findings be put before the Scottish Parliament.<sup>35</sup> In the light of this and other research evidence,<sup>36</sup> in October 2007, the Scottish Nationalist Party (SNP)-led government announced a formal review of Scotland's anti-social behaviour legislation.<sup>37</sup>

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<sup>32</sup> See L. McAra, 'The cultural and institutional dynamics of transformation: youth justice in Scotland, England and Wales' (2004) 35 *Cambrian Law Review* 23; A. Cleland and K. Tisdall, 'The challenge of antisocial behaviour: The new relationships between state, children and parents' (2005) 19 *International Journal of Law, Policy and the Family* 395; S. Macdonald and M. Telford, 'The use of ASBOs against young people in England and Wales: Lessons from Scotland' (2007) 27 *Legal Studies* 604.

<sup>33</sup> L. McAra, 'Modelling Penal Transformation' (2005) 7 *Punishment & Society* 277.

<sup>34</sup> For example, despite their existence on the statute book, to date, there have been no parenting orders imposed in Scotland. Furthermore, by contrast to England and Wales where some 42 per cent of ASBOs given involved young people aged 10-17, in Scotland only 13 per cent of ASBOs granted in 2005/06 were in relation to youths aged 18 or under. By 2007, whereas 96 individuals had been considered for an ASBO in Scotland, only four had been granted. For England and Wales see Home Office website <http://www.crimereduction.homeoffice.gov.uk/asbos/asbos2.htm> and for Scotland see DTZ Consulting and Heriot-Watt University, *Use of Antisocial Behaviour Orders in Scotland* (Edinburgh: Scottish Government Social Research, 2007).

<sup>35</sup> B. Cavanagh, *A Review of Dispersal Powers* (Edinburgh: Scottish Government Social Research, 2007).

<sup>36</sup> J. Flint et al., *An evaluation of the implementation and impact of local antisocial behaviour strategies at the neighbourhood level* (Edinburgh: Scottish Government Social Research, 2007).

<sup>37</sup> Scottish Government, *Tackling Anti-Social Behaviour*, Press release 25 October (Edinburgh: Scottish Government, 2007) <http://www.scotland.gov.uk/News/Releases/2007/10/25101807> (accessed 19.12.2007)

## The authorisation process

There has been considerable local variation in the take-up and use of dispersal powers.<sup>38</sup> This is not linked directly to differences in the extent or type of behaviour leading to designation, but appears more significantly to be due to local preferences for particular approaches to enforcement, the willingness of key individuals to experiment with new legal powers and the capacity of local interests to organise and champion a police-led response. The research highlights that the rigors attached to the authorisation process have been variously interpreted.<sup>39</sup> In some instances, considerable emphasis was given to the information-base upon which an application was founded. In others, however, the process was accorded less significance and on occasions was viewed less robustly, as ‘boxes to be ticked’ rather than an essential bedrock upon which the efficacy and legitimacy of designation is based. The research also uncovered examples where police data were insufficient to justify a dispersal order and alternative sources of information, sometimes reflecting subjective opinions and the views of prominent community members, were used to supplement the evidence-base.

In contrast to Scotland where the bar is set higher, in England and Wales there is no legal requirement that the history of anti-social behaviour is ‘serious’, as well as ‘significant and persistent’. The Scottish guidance defines the ‘seriousness’ test as follows:

Antisocial behaviour should be regarded as *serious* if there is a possible danger or risk to members of the public, arising from the antisocial behaviour in a relevant locality. On this basis, minor antisocial behaviour that mainly causes irritation might not be deemed to be of sufficient gravity to be considered ‘serious’.<sup>40</sup>

Such a test might go some way to ensure that dispersal order use is a genuinely proportionate response to local problems. The considerably smaller number of dispersal authorisations in Scotland might suggest that this test is a significant factor

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<sup>38</sup> Home Office, *Use of Dispersal Powers* (London: Home Office, 2005)

<http://www.together.gov.uk/article.asp?c=185&aid=3463> (accessed 19.12.2007)

<sup>39</sup> Crawford and Lister, n 7 above, 15-18.

<sup>40</sup> Scottish Executive, *Guidance on Dispersal of Groups* (Edinburgh: Scottish Executive, 2004) 4 (emphasis added).

in limiting the use of the powers. The implications for England and Wales may be that raising the evidence threshold might reduce the dangers of dispersal authorisation being exploited as a means of drawing additional police resources into areas where public perceptions and intergenerational anxieties, rather than crime and disorder *per se*, are the root of the problem.

This is particularly pertinent as research in both Scotland and England highlights that the geographic and social map of dispersal order use does not correspond straightforwardly to the distribution of risks or victimisation. Data show that across the cities of Leeds and London, for example, the areas designated for dispersal powers were not necessarily those with the highest concentration of recorded anti-social behaviour. Despite the higher threshold in Scotland, the research evidence reveals that none of the initial 14 dispersal authorisations were in areas ranked as in the most deprived 5 per cent in Scotland (according to the Scottish Indices of Multiple Deprivation, 2006).<sup>41</sup> By contrast, one authorisation (in the village of Mid-Calder) was ranked in the 10 per cent of the *least* deprived areas in Scotland. Given the correlation between deprivation and levels of crime and anti-social behaviour, this suggests an uneasy relationship between objective risks of victimisation and subjective perceptions of public anxieties. It also implies that the ‘seriousness’ test in Scotland may not be sufficiently robust in practice to avoid policing resources being skewed via dispersal authorisation into areas of high fear and perceptions of insecurity and, subsequently, away from areas of high crime need.<sup>42</sup>

#### *Interpretation by the courts*

The courts have been tentative and somewhat ambivalent in supporting the robustness of the authorisation process. Recognition of its importance in legitimising the extensive powers available to the police in a designated dispersal zone was reinforced by the court in the early case of *Sierny v DPP*.<sup>43</sup> Here it was held that failure to provide any explanation of the grounds upon which an authorisation is based would

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<sup>41</sup> Cavanagh, n 35 above, 28.

<sup>42</sup> Regarding the contemporary capture of policing as a scarce public good by private and parochial interests, see A. Crawford, ‘Policing and Security as “Club Goods”: The New Enclosures?’, in J. Wood and B. Dupont (eds), *Democracy, Society and the Governance of Security* (Cambridge: Cambridge University Press, 2006) 111-138.

<sup>43</sup> *Sierny v Director of Public Prosecutions* [2006] EWHC 716.



render the authorisation invalid and undermine the subsequent use of the powers. Nevertheless, whilst it was held that the reasons for authorisation needed to be clearly stated, the court found that there was no allied requirement to identify the evidence-base upon which authorisation is premised.

In *Sierny*, Justice Nelson appeared to go somewhat further in highlighting the pivotal role of the authorisation process as a safeguard mechanism. He suggested that the grounds specified in the authorisation would inform the police of the conditions or situations in which directions to disperse might occur:

The section is designed to ensure that there is a proper thought-out basis for making the authorisation and expressing that basis in written form, which can later be examined and challenged, and which explains to the police, who may later be required to give dispersal directions, information as to the nature of the problem which gave rise to the authorisation and hence in what circumstances the need for directions may arise.<sup>44</sup>

However, subsequently, in *R (on the application of Singh) v Chief Constable of West Midlands Police*,<sup>45</sup> the Court of Appeal held that an authorisation granted on one set of specific grounds does not restrain the subsequent use of powers in relation to other forms of anti-social behaviour. In this instance, the dispersal powers had been authorised for the stated purpose of addressing alcohol-related violent and anti-social behaviour during the pre-Christmas period in a central location in Birmingham. Nevertheless, the powers were subsequently used to disperse a group of Sikh protesters outside a theatre which was staging a play that they found offensive. The court held that so long as the use of the dispersal powers is proportionate, there does not need to be a direct relationship between the grounds for the initial authorisation and their subsequent use. The court did so largely on the justification that to constrain the use of powers to the types of behaviour for which they were authorised would be ‘unworkable’ and ‘undesirable’, and hence, contrary to the intentions of Parliament. In the words of Lord Justice Maurice (in the Divisional court) ‘it would be absurd if the police were to have to procure a separate authorisation to deal with each

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<sup>44</sup> *ibid* at [28].

<sup>45</sup> [2006] EWCA Civ 1118.

successive manifestation or source of disorder'.<sup>46</sup> This line of reasoning was reiterated in the Court of Appeal, where it was emphasised, nevertheless, that authorisation constitutes a major element in safeguarding civil liberties on the basis of the requirements for obtaining the consent of the local authority, the duty to give reasons and the duty to publicise.

These judgments leave considerable discretion in the hands of the police and local authorities as to the robustness of the evidence-base and threshold for authorisation, as well as the remit for the subsequent use of the powers once authorisation has been granted. They reinforce the view expressed by some practitioners in the research that authorisation is simply a hurdle to be overcome – or ‘boxes to be ticked’ – but once achieved and clearly publicised authorisation had little relationship to, or enduring influence over, subsequent implementation. This seems at odds with the approach advocated by more enlightened police and local authority practitioners who believed that the grounds for continued authorisation should be reviewed periodically (weekly or biweekly) and that the use of the powers should be restricted to the types of behaviour to which the dispersal order authorisation gave rise.<sup>47</sup>

### *Evidence from research*

The uneven distribution of dispersal zones raises concerns regarding the extent to which certain communities (or vocal segments within them) and businesses are able to use their capacity to articulate concerns about anti-social behaviour and lobby local councillors and police to influence dispersal order authorisation. As visible policing is a limited public resource subject to significant competing public demands, dispersal orders can be seen as a way of attracting or capturing, at least for a short time, an increased level of police patrols. Local residents’ groups and politicians were well aware of exploiting this opportunity. The implementation of ‘community call for action’ procedures, as required under the Police and Justice Act 2006, will institutionalise a further channel for local people to register complaints regarding

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<sup>46</sup> *R (on the application of Singh and another) v Chief Constable of West Midlands Police* [2006] WLR (D) 208, [33].

<sup>47</sup> Crawford and Lister, n 7 above, 31.

perceived council and partnership inaction over anti-social behaviour, potentially fuelling demands for dispersal authorisations.<sup>48</sup>

The existence of a dispersal order in one area often prompted calls for authorisation in neighbouring or nearby localities, provoked by concerns about displacement and/or perceptions that local policing cover was being drawn away from ‘their’ area to police the nearby dispersal zone.<sup>49</sup> Displacement was a genuine concern and to some degree a palpable product of dispersal. In many localities, dispersal orders generated short-term displacement effects, shifting problems to other places, sometimes merely for the duration of the order. An area neighbouring the North Yorkshire case study site saw crime, notably criminal damage, increase by 83 per cent during the six months of the order, as compared with the same period in the previous year. Furthermore, in the six months after the order, crime and anti-social behaviour returned to their pre-dispersal order levels, suggesting that the effect of the order did not endure beyond the authorisation period. In some instances, displacement was so localised that it was difficult to detect.

Where concerns over displacement were articulated in pre-authorisation consultations, they sometimes generated pressure to increase the area covered by a dispersal zone, so as to address the concerns of neighbouring localities by incorporating them within the area to be designated. This was evident in dispersal designations in both residential areas and city centre locations. For example, in Leeds city centre an initial application to address a problem of young people gathering around a particular shopping arcade was expanded considerably, in response to consultation, to incorporate much of the city centre.<sup>50</sup> Similarly, previous experiences of, and concerns over, displacement across force boundaries led Camden and Westminster police to authorise a ‘joint order’ in a central London location during the summer of 2006. Perversely, this expansionist logic, whilst understandable as a response to fears about displacement effects, flies in the face of developing good practice which emphasises the targeted and tailored use of dispersal orders for specific

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<sup>48</sup> A ‘community call for action’ establishes a trigger mechanism designed to give local communities a way to secure action from community safety partners if they have failed to address a particular persistent problem. Ultimately, complaints triggered may result in scrutiny action. The process is not designed to replace existing means of complaint, but to complement them.

<sup>49</sup> Crawford and Lister, n 7 above, 49.

<sup>50</sup> *ibid*, 33.

problems. In residential areas, in particular, a countervailing preoccupation that served to encourage the designation of smaller areas arose out of difficulties confronted by police in effecting directions to disperse where those concerned lived within, or were required to use, the designated zone (for example to attend school or work). As such, they could not be excluded from it.

### **The escort power**

The discretionary power to return home young people under 16 who are out on the streets in a dispersal zone and not under the control of an adult after 9 pm was one of the most controversial elements of the legislation. Various known as the ‘curfew’, ‘removal’ or ‘escort power’, it was the subject of an early legal challenge in July 2005 in the case of *R (On the Application of W) v Commissioner of Police of the Metropolis and Richmond Borough Council*.<sup>51</sup> Initially, the High Court ruled that the power to ‘remove’ did not allow for the use of reasonable force, on the basis that Parliament could not have intended the power to be coercive, but rather permissive. Whilst the ruling did not invalidate the power itself, in the light of the judgment police forces around the country immediately suspended it, pending appeal, on the assumption that without the capacity to use reasonable force the power was redundant.

However, in May 2006 the Court of Appeal over-turned this decision, holding that the word ‘remove’ in the legislation does give rise to a coercive power and allows the police to ‘take away using reasonable force if necessary’.<sup>52</sup> It was held that the discretionary power could only be used if, in the light of its purpose, it was reasonable to do so. The court held that the legislation fulfils two purposes; to prevent children from themselves participating in anti-social behaviour and to protect them from anti-social behaviour of others within a dispersal area. Hence the exercise of reasonable force in removing a young person to their home is conditional upon them either, first, being at risk of, or vulnerable to, becoming the victim of anti-social behaviour and crime or, secondly, causing (or at risk of causing) anti-social behaviour. It was affirmed that the Act did not confer an arbitrary power to remove children who were neither involved in, nor at risk of exposure to, actual or imminently anticipated anti-social behaviour. To act reasonably, according to Lord Justice May, police ‘must have

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<sup>51</sup> [2005] EWHC (Admin) 1586.

<sup>52</sup> *R (W) v Commissioner of Police of the Metropolis and others* [2006] EWCA Civ 458.

regard to circumstances such as how young the child is; how late at night it is; whether the child is vulnerable or in distress; the child's explanation for his or her conduct and presence in the area; and the nature of the actual or imminently anticipated anti-social behaviour'.<sup>53</sup> In these circumstances, according to the Court of Appeal, the relevant section did carry with it a coercive power. However, the court did not consider issues relating to infringement of young people's rights, notably under the European Convention on Human Rights, because in this particular case the young person had not actually been escorted home and therefore no rights had actually been infringed.

The judgment exposes a much wider ambiguity in the way in which children and young people are regarded in public policy. They are simultaneously constructed as *potentially at risk* and *a potential risk*. At one moment, they are in need of protection, only for the next instance to be construed as the source of social ills from which society needs protection. It is the latter construction of youth that predominates in, and informs, the implementation of dispersal orders. Whilst the Court of Appeal tried to restore some balance by conceiving of escort powers as, in large part, premised upon a discourse of child protection, this sits awkwardly with the tone and wider impact of dispersal orders which are implicitly and explicitly targeted at groups of young people as a social problem. The view that 'escort powers' were genuinely motivated by concerns over child protection is undermined further by the fact that police already had available to them more extensive powers to take young people into police protection, regardless of whether they are in a dispersal zone or not, where the police believe the young person to be likely to suffer significant harm, under the Children Act 1989 (section 46). It is noteworthy that the legislation in Scotland does not include an equivalent escort power to that under the Anti-Social Behaviour Act 2003, in large part because it was deemed to be unnecessarily coercive and in conflict with wider child-welfare policies.

In the light of the Court of Appeal ruling in *R(W)*, new guidance<sup>54</sup> was published in England and Wales. The then Home Office Minister, Tony McNulty, challenged police and practitioners 'to take a more robust and unremitting approach to tackling anti-social behaviour by making maximum use of the dispersal powers

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<sup>53</sup> [2006] 170 JP 500, 514.

<sup>54</sup> Home Office *Respect and Dispersal Powers* (London: Home Office, 2006).

available to them'.<sup>55</sup> Despite this, the power remains little used. Research shows that many police forces prefer not to use the power, either as a matter of general policy or within specific applications for dispersal orders. Data from across London for the year 2006/07 show the escort powers were recorded as having been used in just two designated areas (out of 48) and only on four occasions.<sup>56</sup> Some police officers felt that the powers were unnecessary, counterproductive or obscured the main aims of dispersal orders given their association with 'curfews'.

### **The use of powers to disperse**

Most front-line police, notably community support officers, welcomed the additional flexibility that dispersal powers conferred upon them, particularly at a time when many felt their scope for discretion was being curtailed in other areas of police-work. The powers provided them with formal authority to do what many considered to be a key aspect of traditional policing, namely engaging with groups of young people and other 'usual suspects', negotiating order and moving them on where deemed necessary for the purposes of social control.<sup>57</sup> There are clear parallels between the use of dispersal orders and other discretionary police powers, such as stop and search.<sup>58</sup> Some police managers indicated that the existence of dispersal powers actively encourages officers to engage young people in a dialogue about appropriate behaviour. Implementation strategies generally gave preference to dialogue and negotiation. In practice, recourse to formal powers was used sparingly. Police were often aware of the challenges of interpretation that the powers vest in them and subsequently preferred to err on the side of caution and not to rely on the formal authority the powers confer. Policing tended to occur in the shadow of the powers, rather than through their enforcement. Police frequently described the powers as a tool they kept in their 'back pocket'. This was reflected in the relatively low recorded use of formal powers. Across 42 dispersal zones in London that ended between 1

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<sup>55</sup> Home Office, *Disperse Anti-Social Behaviour from our Streets*, Press Release 30 June, (London: Home Office, 2006) see <http://press.homeoffice.gov.uk/press-releases/anti-social-behaviour> (accessed 19.12.2007).

<sup>56</sup> Crawford and Lister, n 7 above, 13.

<sup>57</sup> S. Choongh, *Policing as Social Discipline* (Oxford: Clarendon Press, 1997).

<sup>58</sup> B. Bowling and C. Phillips, 'Disproportionate and Discriminatory: Reviewing the Evidence on Police Stop and Search' (2007) 70 *Modern Law Review* 936.

April 2006 and 31 March 2007, some 4,888 dispersal directions were given to individuals, an average of 116 per dispersal zone.<sup>59</sup> However, only three orders accounted for more than half (54 per cent) of all people dispersed. Two of these orders were a renewal in the same residential area, which alone accounted for 1,853 dispersals (38 per cent of the total), with the other covering a large commercial area in the West End. Consequently, fewer than 10 people on average each month were formally dispersed across the remaining 39 dispersal zones. This limited recourse to the formal powers was also replicated in the case study sites. In the Outer London case study site, for example, throughout the six month designation, 105 dispersal warnings were given, only one youth was escorted home and no arrests were made for anyone breaching a direction to disperse or returning to the area during their period of exclusion.<sup>60</sup>

In practice, police have generally interpreted and implemented the legislation in a more circumscribed manner than the law might allow, often explicitly emphasising that the powers did not stop people from congregating in public places. Despite these assurances, the research highlighted that much public confusion persisted about what might trigger a direction to disperse. Interpretation of the law also presented considerable challenges to police officers asked to make on-the-spot decisions. In *Singh v DPP*, Lord Justice Hallett in the Court of Appeal gave little by way of guidance but suggested that:

Police officers must act proportionately and sensibly.... They cannot act on a whim. Both authorisations and dispersal directions must be properly justified on an objective basis.<sup>61</sup>

What this objective basis might be, given the legislation's reference to the 'likely' impact on (subjective) public perception, did not detain the court. However, it did note that the anxious perceptions of some people may be inadequate, in and of themselves, to constitute grounds for dispersal:

'alarm or distress' in some circumstances may not be sufficient to justify a dispersal direction. One or two particularly sensitive members of the public may

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<sup>59</sup> *ibid*, 12.

<sup>60</sup> *ibid*, 45.

<sup>61</sup> [2007] 2 All ER 297 at 317.

be alarmed or distressed by conduct that would not or should not offend others.<sup>62</sup>

In the more recent case of *Marc Bucknell v DPP*<sup>63</sup> the High Court considered the vexed question of whether presence *per se* is sufficient to trigger dispersal powers. The case involved two groups of (black and Asian) young people returning home from school through a designated dispersal zone. There was no evidence that the youths were behaving in an anti-social manner nor that any member of the public was harassed, intimidated, alarmed or distressed. Nevertheless, the police officer directed the appellant to leave the area and subsequently arrested him once the appellant had refused to comply with the officer's directions. The question for the court, therefore, was whether the constable was within his powers to direct the youths to disperse out of the area on the basis that their presence was 'likely to result, in any members of the public being intimidated, harassed, alarmed or distressed'. Lord Justice May, delivering the judgment of the court, held that:

Although section 30(3) is, by its words, in some circumstances capable of operating by presence alone of two or more persons, in my judgment great care is needed if that alone is relied on... In my view, unless there are exceptional circumstances not present in this case, a reasonable belief for the purpose of section 30(3) must normally depend, in part at least, on some behaviour of the group which indicates in some way or other harassment, intimidation, the cause of alarm or the cause of distress. If this were not so, there would, in my judgment, in a case such as this be an illegitimate intrusion into the rights of people to go where they please in public. In particular, as this case illustrates, it would intrude into the legitimate activities of young people going home from school by a reasonable route, behaving properly as they do.<sup>64</sup>

In contrast to some of the earlier cases, the court began to question the conditions under which dispersal powers might constitute an 'illegitimate intrusion into the rights of people to go where they please in public'. Lord Justice May affirmed the need for 'a proportionate response within the terms of the legislation' as a pre-requisite for generating the necessary and reasonable belief of the likelihood of intimidation,

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<sup>62</sup> *ibid.*

<sup>63</sup> [2006] EWHC 1888 (Admin).

<sup>64</sup> *ibid.*, [7]-[8].



harassment, alarm or distress. However, he admitted to having ‘some sympathy with the Constable because he was put in the position of having to operate what, at the margins, is difficult legislation’.<sup>65</sup> This highlights a central problem in the law: the extensive potential application and scope of the powers demand that police officers engage in complex processes of interpretation that imply the self-limitation of discretion. It may be unreasonable to expect front-line police officers, including community support officers to whom the powers extend, to undertake such fine-grained balancing of the legitimate activities of young people and intrusions into their rights to go where they please in public. As Lord Justice May noted, this places significant pressures of professional judgment on police in situations that may precipitate rather than reduce conflict.

Furthermore, the discretionary and subjective nature of the powers leaves scope for inconsistent and differential enforcement in ways that can undermine perceptions of fairness and procedural justice. The research found that young people, in particular, were aware of different approaches to enforcement on the part of different police officers which, for them, merely served to highlight the discriminatory and inequitable implications of the powers more generally. The dangers of inconsistent implementation are most acute where police are drafted into an area to bolster visible patrols, because they may lack local knowledge. Young people often distinguished the local officers they knew from outsiders brought in to police the area during the dispersal order period. Changes of shift also had the potential to result in inconsistent application, notably where informal conditions of order had been negotiated between certain police officers and local youths only for these to be disregarded by a change in policing personnel.

Whilst the research evidence that the police generally implemented the powers in a more circumscribed way than the law might allow is a welcome finding, the consequent disjuncture between the scope of the law and police practice served to fuel rather than quell public confusion. Police in both case study sites sought to make it clear that the dispersal order did not ‘ban groups from gathering’, but nevertheless found it very difficult to answer specific questions about what behaviour or whose presence might trigger dispersal. The Home Office *Guidance* and Association of Chief Police Officers’ *Practice Advice* were similarly unhelpful, largely preferring to

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<sup>65</sup> *ibid.*

leave individual officers the responsibility to make informed decisions on the basis of the particular circumstances and prevailing conditions.<sup>66</sup> The advice from the Association of Chief Police Officers underscored the context-specific nature of decision-making, asserting that the power ‘enables police officers and PCSOs to exercise discretion in respect of any situation attended, thereby enabling the situation to be dealt with on an individual and specific basis’.<sup>67</sup> Except for the rather vague comments by Lord Justice May, discussed above, the courts have been no more forthcoming with guidance.<sup>68</sup> To some considerable degree, the nature of the powers renders guidance impractical. In keeping with other anti-social behaviour prohibitions, dispersal orders rest upon an assumption that executive officers, in this instance front-line police personnel, can be trusted to employ wide-ranging and far-reaching powers responsibly and reasonably. Yet this seems strangely at odds with the logic of the Human Rights Act 1998 which emphasises the importance of protecting individuals from the misuse of state power.<sup>69</sup>

In the research sites the ambiguity between law and practice animated concerns of young people about the uncertain and unpredictable response police officers might have to their presence in a dispersal zone. Many young people felt dispersal powers provided too much scope for the police to base their judgments on stereotypes of inappropriate visible appearance, clothing, demeanour or ethnicity. As with stop and search powers, stereotypes frequently fill the void within ‘reasonable suspicion’.<sup>70</sup> Home Office research shows that items of clothing worn by youths – such as baseball caps and hooded jackets – can render an individual suspicious in the eyes of the police.<sup>71</sup> The evidence on, and debate over, the extent to which police discretion is influenced by racial assumptions is extensive but lies beyond the scope

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<sup>66</sup> Home Office *Respect and Dispersal Powers* (London: Home Office, 2005) and Association of Chief Police Officers/Centrex *Practice Advice on Part 4 of the Anti-Social Behaviour Act 2003* (ACPO/Centrex, 2005).

<sup>67</sup> Association of Chief Police Officers/Centrex, n 66 above, 18.

<sup>68</sup> *Marc Bucknell v DPP* [2006] EWHC 1888 (Admin), [8].

<sup>69</sup> A. Ashworth ‘Social Control and Anti-Social Behaviour: the subversion of human rights’ (2004) 120 *Law Quarterly Review* 263; and S. Macdonald ‘ASBOs and Control Orders: Two Recurring Themes, Two Apparent Contradictions’ (2007) 60 *Parliamentary Affairs* 601.

<sup>70</sup> Bowling and Phillips, n 58 above, 939.

<sup>71</sup> P. Quinton, N. Bland and J. Miller, *Police Stops, Decision-Making and Practice* (London: Home Office, 2000).

of this paper.<sup>72</sup> However, what is clear is that not enough is known about the factors that influence decision-making in relation to discretionary anti-social behaviour related powers. The House of Commons Committee of Public Accounts, National Audit Office, Youth Justice Board and Runnymede Trust in separate reports have all highlighted the poor quality of data collection and monitoring of the impact of anti-social behaviour interventions on different social groups, notably in terms of ethnic origin.<sup>73</sup> This ‘knowledge gap’ is also evident with regard to dispersal powers. Given the discretionary nature of the powers and the scope for discrimination in their enforcement, this is a particularly troubling lacuna. The only data available, relate to the first year of use of dispersal powers across London where 20 per cent of those dispersed were recorded as of black ethnic origin (as compared with census data across London of 11 per cent).<sup>74</sup> However, as Bowling and Phillips’s close analysis of stop and search statistics shows, disproportionate use does not necessarily correlate unproblematically with evidence of discrimination.<sup>75</sup> It does, though, give cause for concern and demand further exploration, as well as effective monitoring to safeguard against unwarranted discrimination.<sup>76</sup>

The fact that the law allows dispersal where the *presence* of groups is deemed likely to result in a member of the public being ‘alarmed or distressed’, not only serves in practice to undermine police assurances (like those offered in the research sites) that groups could continue to congregate in dispersal zones that and only anti-social *behaviour* would be targeted, but also challenges the legal principle that the law

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<sup>72</sup> See M. Fitzgerald and R. Sibbitt, *Ethnic Monitoring in Police Forces: A Beginning*, Home Office Research Study 173 (London: Home Office, 1997); P.A.J. Waddington, K. Stenson and D. Don, ‘In Proportion: Race and Police Stop and Search’ (2004) 44(6) *British Journal of Criminology*, 889-914; and B. Bowling and C. Phillips, ‘Ethnicities, racism, crime, and criminal justice’, in M. Maguire, R. Morgan and R. Reiner (eds), *The Oxford Handbook of Criminology* (Oxford: Oxford University Press, 4<sup>th</sup> ed., 2007) 421-460.

<sup>73</sup> House of Commons Committee of Public Accounts, n 4 above; National Audit Office, n 5 above; Solanki *et al*, n 5 above; and S. Isal, *Equal Respect: ASBOs and Race Equality* (London: The Runnymede Trust, 2006).

<sup>74</sup> Crawford and Lister, n 7 above, 11.

<sup>75</sup> Bowling and Phillips, n 58 above, 959.

<sup>76</sup> The Runnymede Trust warns that local authorities and the police may be failing in their duties under the Race Relations (Amendment) Act 2000, in not adequately monitoring the impact of anti-social behaviour powers on the promotion of race equality; see Isal, n 73 above, 2.

should be known or knowable in advance of its application. The wide-ranging nature of the grounds that might trigger dispersal affronts the ‘principle of maximum certainty’ and the requirements of ‘predictability, and “fair warning”’<sup>77</sup> as it is not clear that the application of the law is knowable in advance. For people living near and using designated dispersal areas, this uncertainty constituted a particularly troubling aspect of the powers for both potential victims and offenders. Young people, in particular, were keen to know what the parameters of acceptable presence and/or behaviour might be, prompting requests for clarification from police and others. Responses to these calls to ‘know where we stand’ with regards to the law and its enforcement, however, were either not forthcoming or couched in such vague terms as to be almost meaningless. Ramsay astutely notes how the lack of ‘fair warning’ evident in much anti-social behaviour legislation may mean ‘it is ultimately impossible to be sure that you have acted cautiously enough in the face of the uncertainties involved and that the problem of insecurity is therefore created by the law rather than solved by it’.<sup>78</sup>

### **Communicative properties**

As already implied, a significant dimension of the anti-social behaviour programme (and the Respect agenda that succeeded it) has been associated with responding to the perceived deleterious cumulative impact of low-level incivilities and disorder.<sup>79</sup> As Innes and colleagues have forcefully argued, particular acts and events have a disproportionate impact on how individuals and communities experience and construct their beliefs about crime, disorder and control.<sup>80</sup> They offer ‘signal crime theory’ as an attempt to fill the lack of a ‘coherent explanation of the public understanding of crime and disorder, and how such understandings are imbricated in

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<sup>77</sup> A. Ashworth, ‘Four Threats to the Presumption of Innocence’ (2006) 123 *South African Law Journal* 62, 74.

<sup>78</sup> P. Ramsay, ‘The Theory of Vulnerable Autonomy and the Legitimacy of the Civil Preventive Order’, *LSE Law Society and Economy Working Papers*, 1/2008, 27.

<sup>79</sup> Home Office, *Together Tackling Anti-Social Behaviour: Action Plan* (London: Home Office, 2003); and Home Office, *Respect Action Plan* (London: Home Office, 2006).

<sup>80</sup> M. Innes and N. Fielding, ‘From Community to Communicative Policing: Signal Crimes and the Problem of Public Reassurance’ (2002) 7 *Sociological Review Online*; and M. Innes, ‘Reinventing Tradition? Reassurance, neighbourhood security and policing’ (2004) 4 *Criminal Justice* 151.

the wider symbolic construction of social space'.<sup>81</sup> What they refer to as 'signal crimes' or 'signal events' are incidents, crimes and physical or social disorders that are interpreted by individuals as warning signals. Exposure to these signals produces a reconfiguration of beliefs or actions in response to the increased risk to which people perceive themselves to be exposed. By contrast, 'control signals' refer to the ways in which the actions performed by the police and other local authorities may be interpreted by individuals or communities in ways that inform their judgments about security. These are the communicative properties of acts of social control. Importantly, not all events are assumed to have the same 'signal value'. Innes and colleagues suggest that certain local problems – such as groups of youths congregating in public spaces, graffiti and vandalism – which coalesce around the poorly defined and deeply ideological concept of 'anti-social behaviour', may produce particularly strong signals. However, they acknowledge that 'signal disorders' do not have a universal quality or fixed essence; people do not interpret warning signals in the same way. Rather, they are contextually situated and influenced by situational and cultural effects. Responding to warning signals that matter locally by influencing perceptions with suitable 'control signals', it is argued, may deliver significant public reassurance dividends. Recognition is accorded to the importance of public perceptions in shaping how neighbourhoods change. From this perspective, addressing public perceptions and the symbolic dimensions of (dis)order become pivotal in narrowing the earlier mentioned 'reassurance paradox' that has vexed politicians and police managers.

These ideas have fed into, and influenced, public policies, most notably the launch of the reassurance policing agenda in 2003 and the subsequent national roll-out of neighbourhood policing.<sup>82</sup> The most enduring insight has been that attention should be paid by the police and other legal authorities to the 'processes of symbolic

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<sup>81</sup> M. Innes, 'Signal crimes and signal disorders: notes on deviance as communicative action' (2004) 55 *British Journal of Sociology* 335, 336.

<sup>82</sup> Martin Innes was himself seconded to the National Reassurance Policing Programme as head of research from 2003 to 2005. On the link between signal crime theory and the National Reassurance Policing Programme see: R. Tuffin, J. Morris and A. Poole, *An Evaluation of the Impact of the National Reassurance Policing Programme*, Home Office Research Study 296 (London: Home Office, 2006); and P. Quinton and R. Tuffin, 'Neighbourhood Change: the Impact of the National Reassurance Policing Programme' (2007) 1 *Policing* 149.

communication, impression management, and the ways in which communities interpret crime and policing on a routine basis'.<sup>83</sup> Through the allied anti-social behaviour agenda, public perceptions have become a policy concern in their own right and 'impression management' has assumed a more central place in local strategies of control.

In this light, dispersal orders can be read as a pre-eminent form of 'control signal'. They operate as much through the symbolic messages and communicative properties they impart, as through their instrumental capacity to regulate behaviour. They express values and meaning in their designation (and the publicity associated with it), through partnership activities allied to an order and by drawing in additional visible police patrols. Importantly, the designation of exceptional powers to a specific locality emits messages about a place, its social relations, dominant values of order and general well-being. It seeks to convey signals about the types of behaviour that will and will not be tolerated, as well as appropriate responses to local complaints. The assumption is that dispersal authorisation and enforcement communicate important symbolic messages that neutralise or counteract the signal disorders by providing reassurance and security enhancement. As with ASBO enforcement, media publicity and public communication are central elements in implementing dispersal orders and enlisting community involvement.<sup>84</sup>

From the research, local councillors and some police viewed the authorisation of a dispersal order as sending a clear message to residents (and thus the local electorate) that they were 'doing something' tangible in response to concerns over safety and perceptions of insecurity.<sup>85</sup> It constituted a high profile response that was seen to speak directly to the often heard grievance that 'nobody takes our complaints seriously'. In this sense, dispersal orders can have a decidedly political appeal. Not only do they communicate a willingness of authorities to act decisively but also that problems have reached such a point as to require drastic and exceptional action. Perversely, perhaps, the very exceptional nature of the powers can prompt local agencies, residents and businesses to work collaboratively and seize the opportunity to

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<sup>83</sup> Innes and Fielding, n 80 above, para. 8.4.

<sup>84</sup> On the central, yet controversial, role of publicity in the enforcement of ASBOs see N. Cobb, 'Governance through Publicity: ASBOs, Young People, and the Problematisation of the Right to Anonymity' (2007) 34 *Journal of Law and Society* 342.

<sup>85</sup> Crawford and Lister, n 7 above, 67.

make a difference. Some residents felt that the dispersal order, by indicating that authorities were being responsive to their concerns, was able to galvanise the local community, providing it with an opportunity to demonstrate that residents too could make a difference to the quality of life in their neighbourhood. Dispersal orders could render sections of the community both more confident in local authorities (police and council) and in their own ‘collective efficacy’ and capacity to intervene in support of collective values.<sup>86</sup>

Police managers were well aware of the fact that authorising a dispersal order provided a means of countering persistent complaints by residents and businesses that the police were not visible or responsive enough in their area. Dispersal authorisation presents a very tangible, high-profile and well-publicised response to public demands for action. Moreover, the fact that authorisation is for a time-limited period means that while the resource implications for the police were substantial, they were only short-term and therefore could be more easily managed. A Superintendent interviewed in the research noted: ‘The public are demanding some sort of police action, and a dispersal order gives my officers that ability to say: “Look, we’ve done something for you.”’<sup>87</sup> However, the research evidence suggests that, rather than placating public demands, the implementation of dispersal orders can serve to raise false expectations about both short-term (during the period of dispersal authorisation) and longer-term police priorities.<sup>88</sup> In that the legislation requires local publicity to accompany the commencement of dispersal authorisation, it draws attention to the area, potentially fostering heightened sensibilities to the question of local order. This was most evidently expressed in calls for dispersal order renewal, notably as the end of the dispersal designation period drew closer. Where an intensive police presence is able to disrupt patterns of people congregating in public spaces, dispersal powers can incite genuinely held concerns about what will happen once the powers cease. That over one quarter of all authorisations are renewals – 27 per cent according to Home Office data<sup>89</sup> – testifies to the self-perpetuating nature of the orders.

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<sup>86</sup> R. J. Sampson, S. W. Raudenbush, and F. Earls ‘Neighborhoods and Violent Crime: A Multi-Level Study of Collective Efficacy’ (1997) 277 *Science* 918.

<sup>87</sup> Crawford and Lister, n 7 above, 68.

<sup>88</sup> *ibid*, 24.

<sup>89</sup> Home Office, *Use of Dispersal Powers* (London: Home Office, 2005).

Understandably, few local practitioners were keen to accord the same publicity to the termination of an order for fear of sending out an adverse message that might be interpreted as meaning a loosening of control and lessening of police concern for the area. As a consequence, many orders tended to ‘peter out’, often leaving local residents unaware of any long-term strategies that might have been implemented to address the original source of the problems and uncertain as to future police and local authority priorities in their area. Dispersal order implementation exposes the fact that public expectations about appropriate police responses to low-level incidents of disorder may be easily raised but are much more difficult to lower without engendering sentiments of dissatisfaction and disappointment.

### **Policing young people**

Where implemented, dispersal designation conveyed stark negative messages to young people about their status and how they are perceived by adults. It implies, and is interpreted as implying, that young people are problematic. In this way, the use of dispersal powers exposes a significant tension within public policy between the inclusionary commitments outlined in *Every Child Matters*,<sup>90</sup> to listen to and involve young people as active agents, on the one hand, and the punitive and exclusionary dynamics that infuse the anti-social behaviour agenda, on the other hand.

Survey and interview data from 13 to 18 year-old school pupils in the case study sites revealed that the young people living near and using dispersal areas generally understood the need for, and supported, police interventions where genuinely anti-social behaviour occurred, not least because they were most likely to be its victims.<sup>91</sup> In keeping with national survey data,<sup>92</sup> young people reported higher levels of victimisation from anti-social behaviour than did adult residents.<sup>93</sup> Young people were also acutely aware of both the risks associated with congregating in public spaces and the paradox that whilst they derived considerable feelings of safety from being in a group, they also experienced encountering large groups as potentially

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<sup>90</sup> Department for Education and Skills, *Every Child Matters*, Cm 5860 (London: The Stationery Office, 2003).

<sup>91</sup> Crawford and Lister, n 7 above, 53-58.

<sup>92</sup> D. Wilson, C. Sharp and A. Patterson, *Young People and Crime: Findings from the 2005 Offending, Crime and Justice Survey* (London: Home Office, 2006) 67.

<sup>93</sup> Crawford and Lister, n 7 above, 54.



threatening and acknowledged that in groups they might appear intimidating to others. Nevertheless, more than four-fifths said they felt safer when out at night in groups.<sup>94</sup>

The research highlights the potential for dispersal orders to antagonise and alienate young people who frequently feel targeted by the powers and unfairly stigmatised for being in public places. Some 61 per cent of young people in the Outer London case study area and 43 per cent in the North Yorkshire area said that they believed the dispersal order to have been unfairly targeted at young people.<sup>95</sup> In the North Yorkshire site, over half of all young people surveyed said that the dispersal order had had a negative impact on their feelings towards the police.<sup>96</sup> Many objected most vehemently to the apparently indiscriminate nature of the dispersal powers. On the one hand, they felt that insufficient differentiation was made between those simply hanging around in groups and those who actually engaged in anti-social behaviour. On the other hand, they felt that not enough police attention was accorded to adult forms of anti-social behaviour.

Whilst there was much uncertainty on behalf of many young people as to when they had been formally dispersed, many of those who said they had been dispersed reported feeling unfairly treated. Half disagreed that the police listened to what they had to say and two-fifths said that the experience left them less confident in the police.<sup>97</sup> Some suggested that dispersal orders introduced an element of ‘cat and mouse’ gaming, whereby flouting authority by invading and fleeing the dispersal zone without being caught became a routine pastime, provoking a more antagonistic relationship between them and the police.

Young people complained that they did not have safe and suitable alternative venues to congregate.<sup>98</sup> In the absence of such alternative meeting places, the irony for many young people was that dispersing them and making them split up was likely to render them more, rather than less, vulnerable. Girls, in particular, were concerned about being split up as a result of directions to disperse and how this might increase their vulnerability. More generally, the displacement of young people to locations

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<sup>94</sup> *ibid*, 53.

<sup>95</sup> *ibid*, 57.

<sup>96</sup> *ibid*, 58.

<sup>97</sup> Crawford and Lister, n 7 above, 58-59.

<sup>98</sup> See HM Treasury/Department for Children, Schools and Families, *Aiming High for Young People: A Ten Year Strategy for Positive Activities* (London: HM Treasury, 2007).

outside or neighbouring a dispersal zone often meant that they were forced to congregate in less safe locations. As dispersal zones tend to focus upon contested public spaces serving different constituencies – such as town centres, village greens, shopping arcades, transport hubs and public amenities – which are generally well served by pedestrian flow, natural surveillance and good quality street lighting, this often resulted in young people being pushed into poorly lit spaces beyond the peripheries of routine pedestrian movement and, hence, outside the surveillance of ‘capable guardians’. If dispersal orders are in any real sense designed with the intention of protecting vulnerable young people, then the logic of implementation would appear to fly in the face of such a contention.

For many young people, meeting peers in local public spaces constitutes a fundamental aspect of developing their own sense of identity. It provides space in which to forge an independent capacity to manage risk and danger. In the absence of suitable alternative venues, public spaces constitute key resources for young people. In the context of growing evidence to suggest that children and young people’s use of public spaces has decreased significantly since the 1970s and against the background of contemporary concerns over the dangers to young people’s health and well-being of sitting at home either in front of television sets or at internet-connected computer screens, it seems strange that when young people venture out in groups they are perceived as the source of danger to be curtailed.<sup>99</sup> It is a supreme ambiguity that through the dispersal order, sociability is itself posed as a threat on the basis of the fear of either what might occur or the anxieties in others that might be generated.

### **Preventive exclusion**

Dispersal powers have a preventive and pre-emptive logic. They are justified in terms of preventing people from feeling frightened and, hence, discouraged from using public spaces or forestalling an escalation of anti-social behaviour and crime.<sup>100</sup>

Rather than focusing on rendering individuals accountable for past actions, they seek to govern future behaviour primarily on the basis of exclusion from specific places for

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<sup>99</sup> J. Bradshaw and E. Mayhew (eds), *The well-being of children in the UK* (London: Save the Children, 2005).

<sup>100</sup> See Home Office, *Part 4 of the Anti-Social Behaviour Act 2003*, Circular 04/2004 (London: Home Office, 2004) para 3.

a certain (limited) period of time. They constitute a form of ‘preventive exclusion’<sup>101</sup> that implies a ‘precautionary principle’.<sup>102</sup> Thus, the ‘likelihood’ that future acts might cause ‘harassment, alarm or distress’ and ‘preventing’ the occurrence of certain behaviours become the touchstones for intervention. People are judged in terms of what they *might* do. Anticipating and forestalling potential harm constitute a form of temporal and conceptual ‘pre-crime’ implied in quests for security.<sup>103</sup> In governing the future, however, uncertainty prevails. Whilst the science of ‘prediction’ has begun to enter the world of governing human affairs, including crime control,<sup>104</sup> in reality the scientific knowledge-base for prevention and pre-emption remains too ambiguous to be reliable. In the face of uncertainty, decision-makers are encouraged to err on the side of precaution. In the absence of ‘rationalistic’ science to inform risk calculations, subjective public perceptions become the basis for this predictive governance. The wide ranging restrictions attached to ASBOs are a further testimony to the precautionary principle in operation. However, the dispersal order takes this logic further still by implicitly clearing the streets of young people as a precaution that they might intimidate others. Zedner notes: ‘It is now our not knowing, our inability to know, or unwillingness to prove what we think we know that provides the reason to act before that unknown threat makes itself known’.<sup>105</sup> The perceived threats to local social order posed by young people constitute powerful ‘known unknowns’ that inform contemporary adult sensibilities, precautionary thinking and pre-emptive technologies.

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<sup>101</sup> A. von Hirsch, and C. Shearing, ‘Exclusion from Public Space’, in A. Von Hirsch, D. Garland and A. Wakefield (eds), *Ethical and Social Perspectives on Situational Crime Prevention* (Oxford: Hart Publishing, 2000).

<sup>102</sup> F. Furedi, *Culture of Fear* (London: Continuum, 2002); C. Sunstein, *Laws of Fear: Beyond the Precautionary Principle* (Cambridge: Cambridge University Press, 2005); and Squires and Stephen, n 1 above, 202.

<sup>103</sup> L. Zedner, ‘Pre-Crime and Post-Criminology’ (2007) 11 *Theoretical Criminology* 261.

<sup>104</sup> See M. Feeley, and J. Simon, ‘Actuarial Justice: The Emerging New Criminal Law’ in D. Nelken (ed), *The Futures of Criminology* (London: Sage, 1994); and B. Harcourt, *Against Prediction: Profiling, Policing and Punishing in an Actuarial Age* (Chicago: University of Chicago Press, 2007).

<sup>105</sup> L. Zedner, ‘Fixing the Future? The pre-emptive turn in criminal justice’ in B. McSherry, A. Norrie and S. Bronitt (eds), *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law* (Oxford: Hart Publishing, 2008).

Spatial exclusion as a form of crime prevention seeks to forestall and foreclose anti-social behaviour by banning people from certain locations and public spaces. There is no necessary attempt to induce changes in behaviour by appeals to normative standards or inculcate moral values, merely a command to ‘keep out’. Consequently, dispersal powers by-pass the agency of the individuals concerned. The precautionary logic of public protection and reassurance takes precedence over attempting to know or understand individuals or their motivations. However, once the individuals have been given a direction to leave a dispersal zone they are treated as wilful and rational actors who either comply with or flout the conditions set down. Their agency becomes crucial to their prospects of criminalisation. A key element of the dispersal order, therefore, lies in the manner in which future conduct is regulated through the discretionary conditions attached to the direction to disperse. The resultant complex mosaic of ‘geographies of exclusion’<sup>106</sup> created by dispersal orders and other anti-social behaviour interventions may substantially restrict the ability of individuals and groups to access publicly-available resources and services, with implications for their capacity to enjoy the full trappings of citizenship and free movement.

### **Two-step prohibition**

The future orientation implicit in dispersal orders exposes the manner in which they, in common with other anti-social behaviour interventions, constitute a type of what Simester and von Hirsch have called ‘two-step prohibitions’.<sup>107</sup> Classically, as in the ASBO, two-step prohibitions comprise a civil order backed up by a criminal penalty.<sup>108</sup> The innovation lies in the fact that unlike other civil orders, such as injunctions (breach of which is a civil offence), breach of a ‘two-step’ prohibition is a criminal offence. This gives the courts the possibility for both a more severe and a broader range of punishments from which to select. The possibility of criminal sanctions arises only in respect of future conduct, not in relation to the conduct that

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<sup>106</sup> D. Sibley, *Geographies of Exclusion* (London: Routledge, 1995).

<sup>107</sup> A. P. Simester and A. von Hirsch, ‘Regulating Offensive Conduct through Two-Step Prohibitions’, in A. von Hirsch and A. P. Simester (eds), *Incivilities: Regulating Offensive Behaviour* (Oxford: Hart Publishing, 2006) 173.

<sup>108</sup> C. Bakalis ‘Asbos, “Preventative Orders” and the European Court of Human Rights’ (2007) 4 *European Human Rights Law Review* 427.

gave rise to the order in the first place.<sup>109</sup> The behaviour that breaches the conditions may under all other circumstances constitute legal behaviour. The conditions imposed at the first step create something tantamount to what the European Commissioner for Human Rights described as ‘personalised penal codes, where noncriminal behaviour becomes criminal for individuals who have incurred the wrath of the community’.<sup>110</sup> For those dispersed, their subsequent presence in the designated dispersal zone becomes an offence. As Simester and von Hirsch note, such an order criminalises future conduct: ‘it is a form of *criminalisation*: an *ex ante* criminal prohibition, not an *ex post* criminal verdict’.<sup>111</sup>

In the ‘two-step’ process, principles of proportionality are decoupled from directly structuring the relationship between past acts and future constraints. By fusing civil and criminal processes, hybrid prohibitions have fostered ‘new variations of liability’ designed specifically to evade established safeguards that themselves have been redefined as troublesome obstacles to effective regulation.<sup>112</sup> This reflects the manner in which much anti-social behaviour law conforms to what Ericson refers to as forms of ‘counter-law’ whereby: ‘New laws are enacted and new uses of existing law are invented to erode or eliminate traditional principles, standards, and procedures of criminal law that get in the way of pre-empting imagined sources of harm’.<sup>113</sup>

In many ‘two-step’ prohibitions the first step is based on a court order, with associated procedural safeguards. Dispersal orders, however, take the two-step logic further away from legal oversight by granting authority to front-line police officers, both to issue the directions and to enforce compliance. Whilst the ASBO appears to conflate the legislative, adjudicative and executive functions in the hands of

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<sup>109</sup> Other two-step prohibitions include sexual offender orders under the Crime and Disorder Act 1998, s 2; non-harassment orders under the Protection from Harassment Act 1997, s 1; non-molestation orders under the Family Law Act 1996, s 42; the police power to disperse people to avoid a risk of future drink-related disorder under the Violent Crime Reduction Act 2006, s 27; and serious crime prevention orders under the Serious Crime Act 2007, s 1.

<sup>110</sup> A. Gil-Robles, *Report by the Commissioner for Human Rights on his Visit to the United Kingdom, 4-12 November 2004* (Strasbourg: Council of Europe, 2005) 34.

<sup>111</sup> Simester and von Hirsch, n 107 above, 178.

<sup>112</sup> A. Ashworth, ‘Social Control and Anti-Social Behaviour: the subversion of human rights’ (2004) 120 *Law Quarterly Review* 263, 265.

<sup>113</sup> R. Ericson, *Crime in an Insecure World* (Cambridge: Polity, 2007) 27.

magistrates,<sup>114</sup> dispersal powers perform a similar enterprise devolving analogous functions into the hands of the constable or community support officer, in situations where oversight and review are severely limited.

As dispersal orders provide police with powers to enforce non-compliance with police directions, enforcement can easily become bound up with judgments about the manner in which (young) people respond to officers' decisions or question their authority.<sup>115</sup> In such circumstances, perceptions of those dispersed regarding the legitimate authority of the officer will be shaped by the apparent fairness of the direction, the appropriate manner in which the police exercise their powers, explain their reasoning, listen to what those subject to the direction have to say and treat them with respect. In short, compliance will be strongly influenced by perceptions of procedural fairness. There is now a substantial body of research demonstrating that experiences of procedural justice can significantly affect perceptions of legitimacy and public confidence in the police as well as legal compliance.<sup>116</sup> As this implies, perceptions of unfairness may not only have negative implications for compliance but also provoke active defiance. Given the sentiments of unfairness provoked among young people living in and using the dispersal zones, uncovered by the research, it is not hard to see how or why some young people might feel less inclined to comply. Consequently, the research concluded: 'How someone responds to authority, whether with deference or defiance, becomes a, if not *the*, salient factor in subsequent authoritative assessments and decisions, more important potentially than the initial behaviour itself.'<sup>117</sup>

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<sup>114</sup> Simester and von Hirsch, n 107 above, 180; and P. Ramsay, 'What is anti-social behaviour?' [2004] *Criminal Law Review*, 908, 920.

<sup>115</sup> Similar findings have been noted in relation to longer-standing discretionary police powers, such as s.5 of the Public Order Act 1986, see D. Brown and T. Ellis, *Policing low-level disorder* (London: Home Office, 1994).

<sup>116</sup> T. R. Tyler 'The psychology of legitimacy: A relational perspective on voluntary deference to authorities' (1997) 1 *Personality and Social Psychology Review*, 323-345; and J. Sunshine and T. R. Tyler 'The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing' (2003) 37 *Law & Society Review* 513.

<sup>117</sup> Crawford and Lister, n 7 above, 66, emphasis in original.

There are dangers that directions to disperse become an ‘attitude test’ whereby individuals that fail are met with an escalation of response.<sup>118</sup> Subsequent arrests may arise as a direct result of the circumstances of the police encounter rather than any anti-social behaviour committed by groups gathering in public. Whilst the evidence to date does not show that large numbers of people are being criminalised by failure to comply with dispersal directions, the potential to do so remains. Young people who frequent public spaces and engage in ‘street-life’ constitute ‘easy pickings’ for police attention, notably under pressures of meeting targets for the number of ‘offences brought to justice’. By focusing police attention on what the former Chair of the Youth Justice Board described as ‘low hanging fruit’,<sup>119</sup> dispersal orders may not only serve to stigmatise and label whole groups of youths but also lower the threshold at which young people come to the attention of the police and subsequently other agencies.

### **Summary justice**

In keeping with other anti-social behaviour powers, dispersal orders cede considerable discretion and quasi-judicial decision-making authority to non-judicial officers, notably police and council staff, including the power to authorise an area for the purpose of the legislation. They facilitate and reflect a broader drift towards ‘summary justice’ in recent years, an element of which is a de-juridification of decision-making. Decisions that might have been taken by courts are increasingly being taken elsewhere. This has been most evident in the expansion, and expanded enforcement, of fixed penalty notices for disorder. Originally introduced by the Criminal Justice and Police Act 2001, PNDs are now available for 16 and 17 year olds.<sup>120</sup> Schemes for their use in relation to 10-16 year olds have been piloted in seven

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<sup>118</sup> Once again, there are parallels with research findings into stop and search powers, see Bowling and Phillips, n 58 above, 952. This point has also been made in relation to ASBOs, see Ramsay, n 114 above, 919.

<sup>119</sup> R. Morgan, ‘Youth Justice: A Better Way Forward?’ (2007) *RSA eJournal*, June, available at: <http://www.rsa.org.uk/journal/article.asp?articleID=1059> (accessed 19.12.2007).

<sup>120</sup> Currently, PNDs are available for 25 different offences which are organised into two bands for which the fine is either £50 or £80. The Anti-Social Behaviour Act 2003 enlarged the scheme to include 16 and 17 year-olds and provided a power for the Secretary of State to extend the initiative to 10 to 15 year-olds, subject to the approval of both Houses of Parliament.

police force areas, with a view to extension across the country. The fact that police community support officers, as well as local authority officers and ‘accredited persons’, can enforce PNDs has served to increase their use. In 2006/07, the number of PNDs issued across England and Wales rose to approximately 125,000, constituting some 9 per cent of all detections.<sup>121</sup> Allied to this has been an increase in the powers of police officers to impose on-the-spot quasi-judicial decisions and directions with breach being a criminal offence, of which dispersal orders are a notable example. Current proposals to introduce ‘deferred PNDs’, whereby payment of the financial penalty is suspended for up to six months on condition that the individual signs an ‘acceptable behaviour contract’ setting out terms designed to regulate their behaviour in both a preventive and precautionary manner, appear set to extend this trend.<sup>122</sup> The intention is that if the agreement is not fulfilled, the PND would then be ‘reactivated’ for the original offence. As a ‘voluntary agreement’, conditions attached to acceptable behaviour contracts can be both extensive and highly intrusive, including exclusions from visiting specified places and/or meeting certain people.<sup>123</sup> Accordingly, they reflect the broader micro-management of individual behaviour heralded by diverse new forms of ‘contractual governance’.<sup>124</sup>

Dispersal orders also expose the way in which new powers have been introduced initially as exceptional, by way of being time-limited or area-based, only for them later to become routine aspects of policing. This normalisation of exceptional powers is evidenced in the manner in which designated public places orders,<sup>125</sup> which provide police with powers within controlled drinking zones, have been supplemented and extended by new police powers under section 27 of the Violent Crime Reduction Act 2006. These allow police officers to give directions to leave a locality for up to 48 hours to someone aged 16 or over who is believed to be likely to cause or to contribute to the occurrence of alcohol-related crime or disorder

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<sup>121</sup> S. Nicholas, C. Kershaw and A. Walker, *Crime in England and Wales 2006/7* (London: Home Office, 2007).

<sup>122</sup> Home Office, *Strengthening Powers to Tackle Anti-social Behaviour, Consultation Paper* (London: Home Office, 2006) 11-13.

<sup>123</sup> Home Office, *Acceptable Behaviour Contracts and Agreements* (London: Home Office, 2007).

<sup>124</sup> A. Crawford, ‘Contractual Governance of Deviant Behaviour’ (2003) 30 *Journal of Law and Society* 479.

<sup>125</sup> Criminal Justice and Police Act 2001, s 13.



in that locality, without the need for prior designation. These powers dramatically extend the logic of dispersal orders by normalising their use. Not only is there no requirement for prior authorisation in relation to an identified area where there has been a history of such behaviour, and hence no consultation or agreement on the part of the local authority, but the powers also extend to individuals and the exclusion period is twice as long as that available in relation to dispersal orders. In addition, the new powers give police constables the discretion to determine the location and scope of the area from which an individual or group is to be excluded.<sup>126</sup> Hence, most of the safeguards apparent in the dispersal order and designated public places order are swept aside. As well as creating extensive challenges for the police to enforce such directions, the new powers dramatically extend the reach of two-step prohibitions and the logic of preventive exclusions, whilst handing police officers far-reaching discretion, in situations where it is not necessary for a crime to have been committed.

There are direct analogies here with the proposals in the government's consultation paper *Strengthening Powers to Tackle Anti-Social Behaviour*, published in late 2006, to introduce new front-line powers to prevent and deter anti-social behaviour. If introduced, these would normalise dispersal powers with regard to general anti-social behaviour by allowing police to disperse individuals without the need for any prior designation of a given area.<sup>127</sup> The consultation also mooted extending the period of exclusion beyond the current 24 hours.<sup>128</sup>

This developmental trend in the use of anti-social behaviour powers is further evidence of 'counter-law' in which exceptional powers have been introduced as the thin end of a subsequently broader wedge, in part to disarm opposition. Not only does

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<sup>126</sup> Section 27(7) of the 2006 Act amends the Police and Criminal Evidence Act 1984 to enable photographs to be taken by the police without the consent of the individual who will be subject to the direction. Photographs may also be used as evidence that a direction was given in any subsequent court action. According to official advice, taking photographs is 'strongly recommended as good practice in all cases where it is practically possible to do so as it may help in enforcing the direction'; see Home Office, *Giving Directions to Individuals to Leave a Locality (Section 27 of the Violent Crime Reduction Act 2006) Practical Advice* (London: Home Office, 2007) 11.

<sup>127</sup> Home Office, n 122 above.

<sup>128</sup> These proposals were not included in the current Criminal Justice and Immigration Bill, but remain under consideration by the government, see Home Office, *Strengthening Powers to Tackle Anti-social Behaviour, Summary of Responses to a Home Office Consultation Paper* (London: Home Office, 2007) 7.

this incremental process potentially evade strong objections by introducing change through a gradual and incremental process, but it also means that initial safeguards, protections and due process considerations are gradually watered down. Thus, the authorisation process required for dispersal order designation, initially seen as providing crucial procedural legitimacy and an evidence-base for the powers, in a short space of time has come to be seen (by the same government that introduced them), as a restriction that unduly hampers front-line police officers.<sup>129</sup> Yet the research evidence suggests that the benefits that may accrue to dispersal orders derive more explicitly from the partnership, problem-solving and diversionary activities initiated through the pre-authorisation consultation process than from the use of the powers *per se*.<sup>130</sup> If anything, the research evidence points to the need to strengthen the authorisation process by justifying the evidence-base and the proportionality of the exceptional response, raising the threshold to where there is a history of ‘serious’, as well as ‘persistent and significant’, anti-social behaviour (in line with the Scottish legislation) and requiring extensive consultation and diversionary activities to accompany authorisation.<sup>131</sup> Ultimately, a rigorous process of authorisation provides the subsequent designation, powers and associated initiatives with crucial procedural legitimacy and public accountability, and constitutes the reasoned basis upon which local deliberations about long-term strategies can be founded. However, according to the government consultation paper, this key procedural bulwark is now seemingly perceived as a hindrance.

## **Conclusion**

Government hyper-activity in creating new regulatory technologies and legal prohibitions to tackle anti-social behaviour – as well as, subsequently, extending and supplementing these – has advanced at such a frenetic pace as to leave little space for considered reflection on the normative and social implications of legal reforms or their effectiveness in regulating behaviour.<sup>132</sup> This article has gone some way to drawing together an assessment of both legal developments and empirical research

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<sup>129</sup> *ibid*, 11.

<sup>130</sup> Crawford and Lister, n 7 above, 74.

<sup>131</sup> Cavanagh, n 35 above.

<sup>132</sup> A. Crawford, ‘Networked Governance and the Post-Regulatory State?: Steering, Rowing and Anchoring the Provision of Policing and Security’ (2006) 10 *Theoretical Criminology* 449.

findings in relation to one particularly controversial, but little discussed, instrument in the new regulatory tool-kit: the dispersal order. Dispersal powers are important not only for the considerable infringements on the rights of individuals to free movement and assembly that they entail, but also because their genesis and development reflects broader and more fundamental shifts in regulating troublesome behaviour and incivilities. In the preceding discussion, I have sought to show how much of the appeal of dispersal orders derives from their communicative properties and symbolic representations as signifiers of local state action, rather than from their instrumental capacity to regulate behaviour. However, as the research highlights, in reality these messages are often mixed and contradictory. Frequently, the meanings invested in dispersal order designation are both confused and subject to misinterpretation. As such, dispersal orders often provoked a ‘communication battle’ in which the manipulation of appearances becomes almost more important than the impact of policing and allied activities on the ground. Moreover, the messages implied are differently interpreted by diverse interests within localities in ways that can increase inter-group and inter-generational misunderstandings and tensions. In this vein, policing and enforcement-led solutions to problems of order can serve to heighten levels of anxiety and solidify lines of difference between groups within given localities. Dispersal powers, of themselves, invariably fail to address the wider causes of perceived anti-social behaviour or address long-term issues of disorder, providing little more than a degree of localised respite through intensive policing.

The evidence suggests that dispersal powers may end up being counter-productive by: falsely raising local expectations over policing priorities; alienating young people who feel unfairly discriminated against and stigmatised by such powers; and drawing some young people (at an earlier stage) into adversarial relations with local police. It is reassuring, therefore, that the research reveals that police officers and local authority staff offered some of the most critical and reflective insights into the shortcomings of the powers and the challenges they entail. Through practice, many have come to appreciate both the limitations and the unintended consequences of such sweeping and highly discretionary prohibitions. As a consequence, there is a growing realisation of the need to retain such exceptional powers for focused, short-term and well-evidenced use. It may be that this growing awareness is reflected in the reduced use of the powers in England and Wales in 2005/06 as compared to the

previous year.<sup>133</sup> However, the ambiguities apparent in the implementation of dispersal orders are a product of ill-considered and ‘difficult’ law, the impact of which the government in England and Wales has preferred not to evaluate in any rigorous manner. Following the lead of the Scottish Government,<sup>134</sup> the time has come to conduct a major review of the direction, impact and social implications of the anti-social behaviour agenda and the swathe of allied powers that it has generated, before too much damage is inflicted upon local social relations, a generation of young people and cherished principles of civil liberties.

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<sup>133</sup> The use of dispersal orders decreased by 42 per cent, the only major anti-social behaviour-related power to have declined in use during the period; see Home Office, *Tools and Powers to Tackle Anti-Social Behaviour* (London: Home Office, 2007) 8.

<sup>134</sup> See n 37 above.