

**The Use of Antisocial Behaviour Orders (ASBOs) in Britain: Unpacking
the Primacy of Legal Procedure(s) and Judicial Discretion**

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Abstract

The primary thesis that the chapters which follow are concerned to elaborate and to substantiate is to what extent legal procedure(s) and judicial discretion influence the administration, management and outcomes of Antisocial Behaviour Order (ASBO) use in Britain. A great deal of the existing academic literature on the use of ASBOs in Britain locates the strategic importance of the 'relevant authorities' (local authorities, housing associations, registered social landlords (RSLs), the police) involved in ASBO applications. While acknowledging the importance of existing scholarship which highlights the significance of the contribution of these applicant agencies in shaping ASBO outcomes, this thesis contends that the position of both legal procedure(s) and the court system in ASBO applications is also one of fundamental primacy, which necessitates further examination and analysis. Moreover, there are also no comparative studies in existence that analyse the substantive differences and/or similarities between ASBO administrative procedure(s) in Scotland, and in England and Wales. Hence this thesis will also provide a comparative account of relevant aspects of legal and administrative procedure(s) across these jurisdictions.

The data production approach applied in this thesis is both quantitative and qualitative in its composition. An online survey questionnaire was used to obtain data on solicitors' experiences of ASBO application and court procedure(s) (in Scotland, and in England and Wales), and semi-structured interviews were conducted with Sheriffs in the lower courts in Scotland in order to obtain information on judicial discretion and decision-making in ASBO cases. The study found that legal procedure(s) and judicial discretion fundamentally impacted on the operation of antisocial behaviour legislation and the use of ASBOs in both Scotland, and in England and Wales. Specifically, legal procedure(s) and judicial discretion influenced the form of ASBO prohibitions and the type of behaviour made the subject of an order; the extent of the impact of mitigating factors; the evidentiary requirements necessary for an interim/ASBO application; the sentencing tariffs for breach; the frequency with which orders on conviction are issued; the frequency with which orders are granted to children and young people; and the ability of alleged antisocial behaviour perpetrators to defend or to appeal action against them.

Building on existing theoretical frameworks on procedural justice (Galligan, 1996a; 1996b; Halliday, 1998; 2004), and, moreover, on conceptual paradigms of 'fairness' and consistency in judicial decision-making developed in other empirical

studies of procedure and judicial discretion in the lower courts (Anleu and Mack, 2005; 2007; Cowan et al., 2006 Hunter et al., 2005; Lawrence, 1995), the thesis develops an account of the network of (procedural and juridical) factors that influence the use of ASBOs in Britain. The thesis concludes that, in order to ensure greater consistency, stringency and accuracy in approach to ASBO cases – in essence, in order for there to be more ‘fairness’ in ASBO processes - there must be a greater socio-legal focus upon the influence of both *substantive* practices and *formal* procedural rules.

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Chapter One

Introduction

A great deal of the existing academic literature on the use of antisocial behaviour orders (ASBOs)¹ in Britain locates the strategic importance of the 'relevant authorities' involved in ASBO applications (local authorities, housing associations, registered social landlords (RSLs), housing action trusts (HATs), the police); and the way(s) in which the wide-ranging discretion conferred on enforcement agencies by s. 1(1)(a) of the Crime and Disorder Act 1998 has created 'a new domain of professional power and knowledge' (Brown, 2004: 203). While Burney (2002) and Cowan, Pantazis and Gilroy (2001), have observed the social housing sectors' increased use of and reliance upon procedures synonymous with crime control; Brown (2004) and Hester (2000) have suggested that the control of antisocial behaviour through the use of ASBOs has become a means for the social control of marginalised groups by local authorities.

Acknowledging the importance of existing scholarship which highlights the significance of the contribution of these applicant authorities, this thesis contends that the position of both legal procedure(s) and the court system in ASBO applications is also one of fundamental primacy, which necessitates further examination and analysis. I will argue² that the role of legal procedure(s) in ASBO applications is highly influential in deciding ASBO outcomes³; and moreover, that judicial decision-making within ASBO cases (with regard to discretionary autonomy, and pivotal jurisprudential decisions) is a component of axiological importance. While academic research and literature has been correct to identify that it is applicant agencies that are instructive in determining ASBO *applications*, this thesis proposes that it is legal and court procedure(s), coupled with the discretionary autonomy of the judiciary that primarily defines the legal legitimacy of ASBOs, their

¹ ASBOs are civil orders, designed to protect individuals from acts of antisocial behaviour 'that cause, or are likely to cause, harassment, alarm or distress' under s. 1(1)(a) of the Crime and Disorder Act 1998. ASBOs are available for persons over the age of 10 years in England and Wales and for persons over the age of 12 years in Scotland. The orders prohibit a defendant from engaging in any behaviour likely to cause harassment, alarm or distress and have a minimum duration of 2 years (although in Scotland, duration is a matter for the presiding Sheriff). Breach of an order is a criminal offence with a maximum penalty of 5 years imprisonment.

² As I have done elsewhere, see Donoghue (2007)

³ For the purposes of this study, 'outcomes' is defined as the result of an ASBO court application. That is to say, 'outcomes' spans a range of consequences: whether or not an application succeeds; to what extent an order is amended (in respect of prohibitions and duration) before being applied; and the court's approach to an application for breach proceedings. 'Outcomes' does not, however, refer to the effectiveness or otherwise of an ASBO being served – it refers only to the result of the application process.

scope, and their function in law. The purpose of this research is a socio-legal analysis of the ways in which the dimensions of due process and legal primacy; and juridical power and discretion, intersect to shape the management and outcomes of ASBO use in Britain.

Hence, the primary thesis that the chapters which follow are concerned to elaborate and to substantiate is to what extent legal procedure(s) and judicial discretion influence the administration, management and outcomes of ASBO use in Britain.

A socio-legal approach

It is the contention of this research study that 'law' (and legal procedure(s)), is an intrinsic, empirical component of the wider social structure on antisocial behaviour and the use of ASBOs in Britain. Indeed, it is the view of many socio-legal scholars that legal and court procedures 'remain unintelligible when interpreted in a non-contextual manner which excludes their social, political and policy dimension' (Charlesworth, 2007: 35). Hence, this thesis develops a critical interdisciplinary analysis of law as a 'social phenomenon' within the augmented context of a sociological analysis of the administration and management of ASBO use in Britain (see Chapter 2). That is to say, in the course of this thesis, 'law' (to include legal and court procedures; and embedded concepts of administrative and procedural 'fairness') will be considered not simply with regard to the presentation of new empirical findings borne out of my research study, but also as an instrument with which to realise ASBOs as an entity grounded in social structure(s). As Lobban succinctly concludes: 'It is only with the aid of the "external" perspective that we can make sense of the "internal" developments' (Lewis and Lobban, 2003: 26).

I will argue that existing empirical socio-legal research has made the exercise of (aspects of) law more apparent, its consequences more evident, and its operation more foreseeable, logical and progressive (Cotterrell, 2002: 643). Furthermore, socio-legal work has also been highly efficacious in 'revealing and explaining the practices and procedures of legal, regulatory, redress and dispute resolution systems and the impact of legal phenomena on a range of social institutions, on business and on citizens' (Genn et al., 2006: 1). Thus, law's role as a vital *regulatory* instrument, 'a potential source of collective as well as individual empowerment', makes it a primary vehicle of democracy (Sommerlad, 2004: 350). The benefits afforded by a socio-legal examination of ASBOs - as opposed to a

purely 'sociological' analysis – and, moreover, the importance to this study of the 'social' character of law - will be considered in detail in the next chapter.

The empirical data presented in the body of this thesis is consequently socio-legal in nature, and relates specifically to (1) *legal procedure(s) in ASBO applications* (including an examination of bureaucratic administrative and court practice(s) and an analysis of procedural justice) and, (2) *judicial discretion* (which will be considered both at a formal level of legal doctrine, but also in terms of the embedded 'procedural' discretion in ASBO cases). Let us begin by briefly considering each sub-topic in turn.

Legal procedure

Studies of the work and orientation of different branches of the professions that are involved in the legal process, or which are regulated by legislative provisions are common within socio-legal studies⁴. Halliday observes the impetus for the proliferation of such empirical research thus:

'[J]udicial mandates for bureaucratic behaviour have an authoritative and prescriptive quality which unavoidably invite social inquiry...[If the courts set out] guidance about how government should go about its business, it is difficult to resist the temptation to at least try to find out if and how the law matters – regardless of how difficult the task is, or how elusive the answers might be.' (2004: 161)

Moreover, empirical research on legal procedure(s) is - unavoidably given its legal status - highly relevant to issues of fairness and to the effective enforcement of rights. As Galligan (1996b) observes, research that demonstrates significant levels of 'error in administration, or where public bodies fail to comply with judicial requirements of fair procedure or human rights standards, provides a "moral imperative for improving procedures" not to mention actual evidence that improvements are needed and what these might consist of' (cited in Sunkin, 2006: 120). Hence the study of legal procedure in ASBO cases is important not only from the perspective of understanding derivative practice outcomes, but also with regard to the (perhaps grander) themes of access to justice and procedural fairness, within

⁴ See for example, Abel-Smith, B. and Stevens, R. (1967) *Lawyers and the Courts: A Sociological Study of the English Legal System 1750 -1965*. Heinemann.

the context of civil (and criminal⁵) court process(es) which will be discussed in detail in the course of this thesis.

Yet, it is important that the sociological foundations of the research study are not overlooked, for it is the *sociological* analysis that enables a contextual understanding of the political, social and historical conditions that have come to bear on antisocial behaviour policy, and the use of ASBOs in Britain. After all, it is not enough 'to attribute as a matter of course specific intentions to all acts or mechanisms of control without...an analysis of the complexity that causes their birth, survival and proliferation' (Lianos, 2003: 414). Hence, this research study seeks to understand 'law' (and specifically legal procedure(s)) in ASBO actions as an element within a broader sociological sphere of analysis, with deference to political, social and policy dimensions. By way of illustration, the Attorney-General, Lord Goldsmith, recently argued in support of the courts (and in particular, the judiciary) being made more aware of specific policy contexts (including social and political elements) prior to their judicial decision-making:

'[W]e [government lawyers] must think about how best to present [cases]...It is here that the question of evidence – especially of policy background and considerations – becomes absolutely crucial. That evidence is essential to bring home to the court the complexity of the policy background' (2002: 15).

Moreover, it will also be considered to what extent legal procedure(s) in ASBO actions impacts upon individual outcome(s) in ASBO cases. For example, if we follow the argument of the procedural justice theorists (see for example, Solum, 2004) that procedure(s) are just as influential as outcomes on individuals – then this provides an important grounding for analysis. Socio-legal scholars have long argued that 'procedure' strongly influences the *perceived* fairness of the substantive result of legal process(es). Indeed, Walker et al. (1979) reported seminally that legal procedure(s) can shape parties' beliefs about the distributive (and not merely procedural) fairness of the outcome of a case. Hence, the construction and application of the substantive legal procedure(s) in ASBO applications will be critically examined in order to determine the derivative influence of legal procedure(s) versus legal outcome(s) on principles of justice and 'fairness' in ASBO process(es).

⁵ In respect of ASBOs obtained on conviction in the criminal courts

Judicial Discretion

As we shall see in the review of existing literature (Chapter 3), the inherent ambiguity in the statutory definition of ‘antisocial behaviour’ has necessarily conferred a significant degree of discretionary autonomy on applicant authorities to decide the bounds of reasonable (or acceptable) behaviour within their own locales. Antisocial behaviour policy is thus fundamentally embodied within a ‘renewed “local” ideology’ (Carr and Cowan, 2006: 65) that is at once diacritic from both neo-liberalism, and also, the historical limitations (and inflexibility) of local welfare bureaucracy (ibid). However, this level of discretionary power is not unusual or unique in law. On the contrary, in his discussion of the legal definition of the term ‘antisocial’, Macdonald (2003: 194) has argued the fundamental truism that ‘no legal system can operate without significant discretionary power’, while Bradley and Ewing (2003) have observed, ‘If it is contrary to the rule of law that discretionary authority should be given to government departments or public officers, then the rule of law applies to no modern constitution’ (citing Davis, 1971: 33).

In respect of ASBO applications, discretionary autonomy naturally extends beyond the agencies involved in ASBO use to include (both the higher and lower) courts deciding on application outcomes. It is the contention of this thesis that while the higher courts have made pivotal jurisprudential decisions on the scope and legal legitimacy of ASBO actions, the lower courts decision making in ASBO cases has been ‘not...dramatic [but] local, personal, and incremental, and perhaps enduring’ (Anleu and Mack, 2007: 203). For example, taking first the higher judiciary, Lord Woolf recently discussed the importance of the European Convention on Human Rights in enabling Judges to make a ‘direct contribution’ to the international jurisprudence of human rights⁶ (2003: 19), and as we shall see in the course of this thesis, the higher courts have had to decide on human rights and civil liberties issues in the course of ASBO actions (for example, on the right to a private life in *Stanley, Marshall and Kelly v Commissioner of Police for the Metropolis and The Chief Executive of Brent Council [2004] EWHC 2229*)⁷.

However, the contribution of the lower courts must not subsequently be underestimated. Anleu and Mack (2007: 185) have argued that in the exercise of their judicial autonomy, the lower courts ‘can bring about social change on an

⁶ Previously, British judges could contribute to human rights jurisprudence in the Privy Council, but that provided only limited opportunities.

⁷ The influence of the higher judiciary in ASBO actions is discussed further in Donoghue, J., (2007) ‘The Judiciary as a Primary Definer on Antisocial Behaviour Orders’ in *The Howard Journal of Criminal Justice* 46 (4): 417-30

individual, local or micro level...Magistrates have the capacity to be agents of social change.' Indeed, as will be discussed in the forthcoming data analysis section of this thesis (Chapter 6), it became apparent in the course of interviews with the lower judiciary that many of the participants felt that their function in ASBO cases was as much about 'social work' as it was about deciding the law (Chapter 6). Moreover, Douglas and Laster (1992) have recognized the enthusiasm of magistrates for the opportunities presented by the courts to improve communities and neighbourhoods, while Marchetti and Daly (2004: 2) have discerned that 'there is a new breed of magistrates and judges...who are taking a more activist stance in criminal justice policy'. In a similar vein, Lord Woolf has argued:

'The judge's responsibility for delivering justice is no longer largely confined to presiding over a trial and acting as arbiter between the conflicting positions of the claimant and the defendant or the prosecution and the defence. The role of the judiciary is to be proactive in the delivery of justice. To take on new responsibilities, so as to contribute to the quality of justice.'
(2003: 17)

However, both jurists and academics have been highly critical of the breadth of discretion afforded to both agencies and the courts in ASBO applications. Indeed, Macdonald (2003:194) cites Davis' conceptualisation of the 'extravagant version of the rule of law' (1971) as forming the basis for such objections. That is to say, Macdonald posits that opponents of the discretion afforded in law to agencies and the courts in ASBO proceedings (proponents of what he observes as the 'extravagant version of the rule of law' theory) frequently begin from the premise that wide discretionary power should not be present in any legitimate system of law and/or government, and that it is necessary to seek to limit such discretionary decision-making as much as possible⁸.

However, the risks and difficulties inherent in discretionary decision-making (as Macdonald appreciates) evidently should not be overlooked. For example, in their research on District Judges and possession proceedings in England, Cowan et al. (2006: 552) found that 'complaints made by practitioners about the exercise of discretion have tended to coalesce around the different treatment of similar cases by different District Judges operating in the same court, as well as by the

⁸ For example, Macdonald (2003: 194) cites Baroness Helena Kennedy's opposition to the discretionary power in ASBO actions on the basis that this assumes that a governing power and/or agencies of the state are always benign - and will use such powers appropriately.

same District Judge'. Judicial discretion necessarily allows for inconsistency in decision-making - resulting in what Cowan et al. described as 'a lottery, depending on location and individual District Judge' (p. 570). Moreover, Macdonald has described the potential for poor decision-making based upon the use of 'illegitimate criteria', and 'arrogant or careless decision-making' (Macdonald, 2003: 195; see also Halliday, 2004). The potential for such difficulties similarly to arise in ASBO cases will thus be considered in the course of this thesis.

Yet, the dangers associated with judicial discretionary power need to be balanced carefully with an analysis of the potential for derivative positive outcomes. In fact, Macdonald (ibid.) argues persuasively that the 'extravagant version of the rule of law' advocated by those who seek to 'eliminate' discretionary autonomy from the rule of law, is fundamentally flawed in the respect that it assumes that there can be 'a neat dichotomy between rules and discretion. Rules are erroneously contrasted with discretion "as if each were the antithesis of the other"' (citing Galligan, 1996b:169). Within this paradigm, Macdonald argues that opponents of discretionary power necessarily ignore the opportunity for discretionary decision making to be 'beneficial', for instance with regard to efficacy in the operation of the rule of law, and in limiting the risk of erroneous deprivation of substantive rights in individual cases.

Hence, in the course of this thesis, we will examine in more detail the nature of judicial discretion, and its relevance to ASBO process(es) and outcomes. The consequences of judicial discretionary decision-making in ASBO cases will be investigated and then considered within a wider theoretical analysis of procedural justice and 'fairness' in ASBO procedures and application outcomes. The research study will also examine the social and legal complexity of judicial decision-making in ASBO cases which will form the 'social science project of a detailed examination of discretion in particular contexts, informed by an appreciation of agents' own understandings and experiences of clients and other participants' (Lacey, 1992: 372).

Conclusion

This thesis advances the argument that the study of ASBOs in Britain requires that attention be paid to the social factors underpinning their use, but equally, the legal and court process(es) that intersect to shape practices and outcomes. Hence, the primary thesis that the chapters which follow are concerned to elaborate and to substantiate is to what extent legal procedure(s) and judicial discretion influence

the administration and outcomes of ASBO use in Britain. The focus of this research study is a socio-legal analysis of the administration of ASBOs with an emphasis on due process and legal primacy; and juridical power and discretion. I am specifically interested in the ways in which these dimensions intersect to shape the management and outcomes of ASBO use in Britain.

The influence of legal procedure(s) and judicial discretion on the use of ASBOs will be explored in the following thesis, which is set out as follows: Chapter Two consists of a theoretical examination and analysis of concepts of law and sociology, and the point(s) at which the two disciplines converge for the purposes of this research study. Moreover, this chapter considers the social embeddedness of law, and provides a review of existing empirical socio-legal research on legal procedure and judicial discretion. Chapter Three reviews the relevant literature on antisocial behaviour policy and the use of ASBOs, which includes books, journal articles, case files and judgments (of both the higher and lower judiciary), and official policy documents. In Chapter Four, the research methodology will be discussed and justified. Chapter Five forms part one of the data analysis and presents findings from an online survey questionnaire with solicitors involved in ASBO applications in England and Wales, and in Scotland. Chapter Six forms part two of the data analysis and presents findings from semi-structured interviews with the lower judiciary in Scotland who have decided on ASBO applications. Chapter Seven consists of the Discussion section of thesis which draws together the empirical research findings from the qualitative and quantitative data and provides a structured, comprehensive and critical account of the research outcomes. Finally, Chapter Eight provides a conclusion on the research outcome(s) and discusses to what extent they have answered the research questions. The conclusion also suggests potential ways in which the research can be utilised and offers some suggestions for the advancement of future research in this area.

Chapter Two

Sociology and Law – A Theoretical Consideration

Introduction

In general terms, the research embodied within this thesis is concerned with due process and bureaucratic aspects of the criminal justice system (including the sentencing behaviour of the judiciary). Thus, in order to better explain the relationship that exists between *legal* regulation and *social* context, this chapter will consider both scholarship and research evidence on the inter-relationship between power and the operation of law. However, as Low (1978) rightly warned nearly three decades ago, criminal justice research must be careful to guard against the treatment of juridical aspects of the criminal justice system as autonomous and distinct entities in isolation from the wider social context in which they are situated. Hence, in the first part of this chapter, I will examine law and social science alongside notions of causality and normativity and I will consider whether the theory-based foundations and research methodologies of the two disciplines are mutually compatible and thus whether it is possible to reconcile 'sociological' and 'legal' for the purposes of constructing a theoretical context for this research study. In the next part of this chapter I will investigate law with respect to social structure and power. In particular, I will discuss law in relation to Foucault's 'analytics of power' largely embodied within 'Discipline and Punish' (1975), 'The History of Sexuality, Volume 1' (1976), 'Power/Knowledge' (1980) and 'Politics, Philosophy, Culture' (1988) and I will argue that Foucault developed ideas *about* - rather than a theory of - law. While I do not seek to develop a Foucaultian theory of law in this chapter, or indeed in this thesis, I will instead argue for the incorporation of those elements of Foucault's thesis on the 'analytics of power' that I consider to be illuminating for our understanding of 'the complex role of law in the constitution of modern society' (Baxter, 1996: 465). The third part of this chapter examines existing socio-legal studies of decision-making and procedure in the lower courts in the context of my earlier theoretical discussion of law and its relationship to power and social structure. This chapter concludes by proposing that an integrated analytical approach be used in this study of ASBOs which incorporates both the legal and sociological dimensions of the research.

Causality and normativity

The study of the administration and management of ASBOs would, I believe, be deeply impoverished by a neglect of, or a disregard for, the examination of the legal aspects of ASBO use within a socio-jurisprudential context of analysis. Indeed, it is the contention of this thesis that wider jurisprudential notions of legal procedure, and judicial discretion and decision-making, are cogent, robust normative *social* concerns (as much as they are *legal* concerns) that positively require consideration and representation in the empirical study of ASBOs as a sociological phenomenon. Yet, although most socio-legal theorists will argue – correctly - for the consideration of law as an entity embodied *within* the sphere of sociology⁹, to arrive at the conclusion that the disciplines of sociology and law are fundamentally distinct, is of course inescapable.

Consider Korn's analysis of the inherent differences between scientific knowledge(s) and law:

'Perhaps the most fundamental source of difficulty in technical fact determination is that the law and the scientific knowledge which it refers often serve different purposes. Concerned with ordering men's conduct in accordance with certain standards, values, societal goals, the legal system is a prescriptive and normative one dealing with the "ought to be." Much scientific knowledge, on the other hand, is purely descriptive; its "laws" seek not to control or judge the phenomena of the real world, but to describe or explain them in neutral terms.' (1966: 1081)

The sciences (social and natural) are thus concerned with the world as it substantively exists. Although Korn's summation of scientific knowledge(s) and research infers that much of the work of the scientific disciplines is concerned with positivism and the reporting of fact(s), clearly the fundamental axioms of qualitative and quantitative research (methodologies), coupled with the inferred, or expressly stated, 'policy relevance' of many contemporary pieces of research, means that contemporary research 'findings' and 'conclusions' may necessarily also require to have regard for the way the world *ought* to be. But this does not negate the accuracy of Korn's observation that the principle concern of scientific research is with the way the world *is*. Alternatively, law is, in some ways, an aspirational concept. For example, Kelsen described the normativity of the law thus:

⁹ The concept of law as a 'social' entity will be developed later in the course of this chapter

[A] law of nature is a statement to the effect that if there is A, there *is* B, whereas a rule of morality or a rule of law is a statement to the effect that if there is A, there *ought* to be B. It is the difference between the “is” and the “ought”, the difference between causality and normativity...’ (Kelsen, 1957: 137).

Hence, law, in contrast to the *causal* nature of social science research, is *normative*. Indeed, Walker and Monahan state succinctly, that the law ‘does not describe how people do behave, but rather prescribes how they *should* behave’ (1986: 489). In this respect, scientific research thus adduces to an empirical social reality that we ascertain from our conscious and discernable (sensory) responses, ‘rather than to the value we impute to that reality’ (ibid.). Law, on the other hand, concerns our normative (social) values about cause and effect, linked to our wider aspirational (social) objective(s).

However, social science and law also share distinct similarities. Walker and Monahan, who have written extensively on, and argued persuasively for, social science as a means for improving legal procedure(s), describe the most fundamentally analogous dimension of law and social science research thus:

‘The principle similarity between social science research and law is that both are general – both produce principles applicable beyond particular instances...Indeed, the purpose of most scientific research is to obtain knowledge that, while surely not immutable, holds true for many people over considerable time and in a variety of place.’ (1986: 490)

Law and social science thus correspond in the respect that they both typically address prospective circumstances/happenings. However, the methodology of this research study (as we shall see in Chapter 4), uses a combination of positivist *and* phenomenological research paradigms, and employs heuristic methods of analysis as well as statistical modes of analysis. Hence, it is important here to briefly distinguish the two sociological research paradigms, within this wider theoretical discussion of law and social science research methods.

While positivism assumes that the only authentic knowledge is scientific knowledge, and that such knowledge can only come from positive affirmation of theories through strict scientific method, phenomenological research paradigms have instead sought to understand (events and happenings in) the social world

through the heuristic investigation of (elements of) the social world as distinct from the natural world¹⁰. For example, values, norms, and rules are studied using qualitative and ethnographic methods which necessarily concentrate on the *social* and *cultural* nature of the phenomena being studied. A detailed explanation of and a justification for the use of a pluralist methodology, and the benefits afforded to this empirical study by the adoption of such an approach, is provided in Chapter 4.

However, in our current consideration of law and social science, the distinctive difference between the disciplines, for the purposes of this discussion, is that *phenomenological* scientific findings are evaluated in part by their heuristic value – by their ability to organise and to make intelligible new phenomena. If we briefly consider the methodology of legal scholarship, for instance, we can see this difference borne out. For example, Hillyard (2007: 275) has observed that, while legal scholarship is most often concerned with detailed textual analysis, social science research is generally concerned with deductive or inductive methods to elucidate identified social phenomena. Indeed, Hillyard posits that:

‘[T]he crucial characteristic of [social science] researchers is that they are trained to reflect on the extent to which their insider/outsider position affects their understanding of the phenomenon under study. In contrast, the aim of so much legal scholarship is to influence legal reasoning and produce clarity using a self-referential system. The aim is not to further the understanding of the phenomena of law, legal institutions or processes using a range of quantitative or qualitative research methodologies.’ (ibid)

Walker and Monahan have proposed that sociological research should thus be treated by the courts as ‘a source of authority rather than as a source of facts...we propose that courts treat social science research as they would legal precedent under the common law’ (1986: 488). As Walker and Monahan do not seek specifically to differentiate between heuristic and positivist research paradigms, the inference here must be that law, and (positivist and phenomenological paradigms of) social science – despite divergence methodologically and ontologically – can be reconciled, and are mutually compatible in terms of socio-legal analyses. Hence, in the chapters which follow, this thesis will seek to affirm of the *primacy of the social* within this socio-legal analysis of the ways in which the dimensions of due process

¹⁰ See for example, Rickert, H. [1962] *Science and history: a critique of positivist epistemology* / translated by G. Reisman; edited by A. Goddard. Princeton, N.J.: Van Nostrand.

and legal primacy; and juridical power and discretion, intersect to shape the management and outcomes of ASBO use in Britain. Let us now, then, consider the way(s) in which the *social* character of the law underpins my analysis of the research study questions.

The sociology of law

The sociologists Max Weber and Emile Durkheim are cited by many socio-legal scholars as being the most substantial and influential academic contributors to the advancement of the concept of the sociology of law. Both were fundamentally concerned to delimit the domain academic jurisdiction of sociology, and within this newly demarcated sociological territory, they sought to embody 'law' as a social phenomenon – which could then consequently be studied through sociological modes of analysis. While Weber's concept of the sociology of law was of primary significance to his *aggregate* theory of sociology, Durkheim was, historically, the first sociologist to dedicate a significantly meaningful diligence and application to the law as a social phenomenon (Hunt, 1978).

Although Durkheim made empirically unjustifiable assertions about moral cohesion in modern plural societies (Cotterrell, 2002: 640) – for example, he posited that so long as one section of society is not favoured unduly over others, (legal) standards can be accepted by all and so will contribute to the integration of that society (its 'organic solidarity') – Durkheim succeeded in making law a central concern for sociology (Hunt, 1978). Accentuating the significance of *moral* mellifluousness and euphony within law, Durkheim continually stressed law as an example of the concretisation of social norms and values in society - that is to say, law as a 'social fact'. Without an appreciation of the moral (and therefore the 'social') character of the law, any analysis would thus necessarily be hollow and, in practical terms, nonsensical (Cotterrell, 2002: 640). As Hunt succinctly concludes: 'For Durkheim, law is a visible symbol for all that is essentially social' (1978: 65).

Following on from Weber and Durkheim's proposed delimiting of sociology as a discipline, Cotterrell (2002: 633), among other contemporary socio-legal scholars, has argued that the application of sociological principles to law does *not* require a de facto devotion to sociology as a separate and distinct discipline. Alternatively, a sociological consideration of the law is about 'rejecting the boundary claims' of law and sociology, and in this respect, requires that attention be paid to the empirical, rigorous study of the field of social activities and experience. However, Cotterrell has also observed the somewhat bleak characterisation of law, reductively, as disorder control and dispute resolution.

Within this paradigm, law is servile, and subordinate to social dysfunction and breakdown (2002: 638). Thus, in defence of law as a concept that exceeds the limits of 'disorder control', Cotterrell advances the proposition that socio-legal analyses can serve to propagate an alternative perspective on law:

'Much socio-legal scholarship, operating in research settings far removed from courts...tells a different story: of law used (with varying degrees of success and failure) to guide and structure social relations, engineer deals and understandings, define lines of authority, make provision for future contingencies, facilitate projects, distribute resources, promote security, limit risks, and encourage trust...Socio-legal scholarship gives a more balanced view through studies of law's contributions to the routine structuring of social relations, as well as its responses to social breakdown.'
(p. 639)

Indeed, Cotterrell's contention that it is necessary, no less essential, that the concept of law as subservient to social pathology is rejected, forms the cornerstone of the central tenet of this thesis – that law is not 'socially marginal' (ibid.). Instead, this thesis progresses from the perspective that law is of axial importance to the study of social phenomenon. Furthermore, in general terms, and on grounds of pragmatic exigency, the requirement for the advancement of socio-legal research is compelling. Citing the exponential growth in statute law in recent years, Hillyard (2007: 274) argues that '[m]ore and more aspects of our lives are being subject to legal regulation or restraint. The need for high quality and rigorous empirical research to investigate the form, substance, and operation of the law in modern society could not be greater.'

An emphasis upon the social character of law thus requires the employment of sociological methodologies and perspectives to jurisprudential concepts and ideas that, in turn, bestow the principal utility of the social sciences in researching, and coming to understand, the operation of law as a social construct. Roscoe Pound (2002 [1931]), amongst other Realist jurists, specifically advocated harnessing sociological methods in order to study jurisprudence – in direct contrast to the historically dominant influences of philosophy and political theory (Hunt, 1978). Moreover, Pound railed against legal individualism, a concept which was in its ascendancy during the nineteenth century, and which envisaged law as the archetype of the individual as paramount. As Hunt explains: 'The dogma of the

maximisation of individual free will steeped into every facet of legal thought and activity' (Hunt, 1978: 32).

However, we must not forget that law is notably concerned to protect the individual against the excesses of *power*. An analysis of the work of the seminal sociologist Thomas Hobbes, for example, demonstrates the parallels that exist in his sociological writing, and the contemporary (legal) preoccupation with individual rights. Kriegel, by way of illustration, goes so far as to call Hobbes 'the true founder of the modern doctrine of subjective rights', whereby 'at the heart of natural security' lies the 'preservation of individual life' (Kriegel, 1995 [1979] cited in Wickham, 2006: 609). Thus, Hunt is correct when he asserts that '[q]uestions about law involve major questions that confront contemporary society. As such law presents itself as an important area of inquiry for social theory and sociology in general' (1978: 151). It is this notion of power - and its connection to law and to rights - that I now wish to consider further in the section below by reference to Foucault's seminal work on the 'analytics of power'.

Foucault's separation of sovereignty/law and discipline/norm

Law's connection to power is particularly apparent in Foucault's use of terminology to describe sovereign power as 'juridical'. Indeed, although Foucault rightly ascertains that 'law does not describe power' (1988: 110) his analysis of power is directly linked to law - although Foucault sees this form of power as essentially pejorative in its nature and 'incapable of doing anything, except to render what it dominates incapable of doing anything either' (1976: 85). Foucault identifies this type of juridical 'power to say no' (ibid.) as something of a juridical mandate for the legal regulation of citizens through and by sovereign power - that is to say 'for Foucault, "power-law" is "power-sovereignty"' (Baxter, 1996: 462). Crucially, however, this form of power is *fundamentally homogenous* and presents itself indistinguishably and analogously at all levels of the social order (Foucault, 1976: 84-85). Hence Foucault's 'analytics of power' finds that while the juridical model of power is negative in form, modern power within society is entirely pervasive and is not limited to those power relations that exist between sovereign and subject - and thus can be both potentially positive and constructive in form and outcome.

Indeed, this form of modern power – disciplinary power – is for Foucault, the 'antithesis' of power-sovereignty (1980: 104) and as such it is antithetical to power-law. As Foucault argues, the juridical model is:

‘...utterly incongruous with the new methods of power whose operation is not ensured by right but by technique, not by law but by normalization...We have been engaged for centuries in a type of society in which the juridical is increasingly incapable of coding power, of serving as its system of representation.’ (1976: 89)

Hence, Foucault contends that disciplinary power should act diametrically to juridical power and in so doing it may provide some ‘sort of counter law’ (1975: 222). Although, however, a measure of trepidation is required in attempting any *definitive* analysis of Foucault’s concept of modern law – as Hunt and Wickham (1994), Baxter (1996), and Smith (2000), amongst others, have observed, the progression of Foucault’s arguments on law are far from concise and can be ambiguous, meandering and inconclusive. Walby has suggested that although there is evidence of a shift in Foucault’s perspective on law in his writings immediately prior to his death, much of Foucault’s earlier work on the ‘analytics of power’ is characterized by a ‘knotty’ analysis of law (2007: 554). For example, in ‘Discipline and Punish’, Foucault posits that the system of rights established in the eighteenth century was:

‘...egalitarian in principle [and] was supported by these tiny, everyday physical mechanisms, by all those systems of micro-power that are essentially non-egalitarian and asymmetrical that we call the disciplines... [and it is t]he real, corporal disciplines [that] constitute the foundation of the formal, juridical liberties’ (222).

In this way, Foucault appears perhaps to offer some retraction of his view that law-power and disciplinary-power are fundamentally incompatible. However, as Hunt and Wickham (1994) warn, we should be careful not to overstate the importance of such statements (which are conclusively outweighed by the many arguments that Foucault makes determining that law-power and discipline-power are diametrically opposed) since Foucault appears to treat the principles of constitutional government as no more than an ideological form, designed as a means to conceal ‘real’ and ‘corporal’ power in the form of ‘juridical’ liberties (61-62). Moreover, Baxter (1996), in agreement with Hunt and Wickham, contends that Foucault’s analogy of disciplinary power as underlying a modern juridical framework is unsatisfactory because such a model presupposes that disciplinary power embodies ‘a whole set of legal categories and rules concerning who may exercise

such power and how they may exercise it' which is fundamentally misleading because law is not simply a component of disciplinary power but in part 'constitutes' disciplinary power (463 – original emphasis). Baxter cites an interesting example illustrated in an essay by Mark Barenberg (1994), where Barenberg directly connects law to disciplinary power in his discussion of the impact of the National Labor Relations Act on company unions. Barenberg does not see law and disciplinary power as incompatible, rather, he contends that law fundamentally impacts upon the ambit of the employer's disciplinary power - not to mention the sphere of potential 'worker resistance' (773, cited in Baxter, 1996: 473).

Following on from this argument, Baxter concludes that while Foucault is correct in distinguishing modern forms of power from sovereign command, he ties law too closely to the notion of pejorative, overbearing sovereign command. The obvious solution, Baxter proposes, is to 'weaken the link between law and sovereign command' (463). However, it is important to note that Tadros (and others – see for example, Ewald, 1991; Rose and Valverde, 1998) has argued that this type of critique is flawed in its understanding of the contradistinction Foucault makes between the term 'juridical' and the term 'law' (1998: 76). In essence, Tadros contends that it is not Foucault's intention to equate juridical power with legal power – and that such a reading of Foucault's work undermines the potential for Foucault's conceptualization of the inter-relationship(s) between law and power to inform socio/legal analyses of the position of modern law. Alternatively, Tadros posits an analysis of Foucault's work based upon an understanding of the term 'juridical' to mean 'any form of power which attempts to prevent a certain type of action through the threat of legal or social sanctions' (78). While there is merit in this approach (and in particular, in Tadros's attempts to distinguish juridical power as exercised upon acts, and his contention that the redefined aim of modern law is about intervention 'into the relationships between particular groups of people according to information carefully collected and analysed in the form of the economy' (93)), I do not consider that a failure to explicitly make clear this distinction invalidates the reasoned critiques of Foucault's conceptualization of law that Tadros takes issue with (primarily those of Hunt and Wickham (1994) and Santos (1995)). This is because, in my view, the main difficulty with Foucault's treatment of law in his 'analytics of power' (although I think that his analyses of power and social structure is extremely useful) is that it simply does 'not reflect our everyday experience of the means through which power and government are exercised'. And, moreover, as Smith persuasively argues, 'the role played by

expert knowledge and discursive power relations...does not accord with the world of mundane practice' (Smith, 2000: 291).

To begin to consider this point in more detail, let us examine several paragraphs from 'Two Lectures' (1980), where we can see further how Foucault conceptualizes the fundamental heterogeneity between legal power and disciplinary power:

'[I]n the seventeenth and eighteenth centuries, we have the production of an important phenomenon, the emergence, or rather the invention, of a new mechanism of power possessed of highly specific procedural techniques, completely novel instruments, quite different apparatuses, and which is also, I believe, absolutely incompatible with the relations of sovereignty...This type of power is in every respect the antithesis of that mechanism of [legal power] which the theory of sovereignty described or sought to transcribe...The discourse of discipline has nothing in common with that of law, rule, or sovereign will...[They are] two absolutely heterogeneous types of discourse' (106-107).

The result being that:

'[T]he theory of sovereignty, and the organisation of a legal code centred upon it, have allowed a system of law to be superimposed upon the mechanisms of discipline in such a way as to conceal its actual procedures, the element of domination inherent in its techniques, and to guarantee to everyone, by virtue of the sovereignty of the State, the exercise of his proper sovereign rights' (105).

As Baxter (1994) contends, Foucault views law very much as a 'sanction-backed command of the sovereign' (464). Yet I think it is particularly important to note that Foucault is implicit when he argues that we must not be over-preoccupied with the notion of sovereignty as the decisive element in societal ordering:

'It seems to me that power must be understood in the first instance as the multiplicity of force relations immanent in the sphere in which they operate...and lastly, as the strategies in which they take effect, whose general design or institutional crystallization is embodied in the state apparatus, in the foundation of law, in the various social hegemonies.

Power's conditions of possibility...must not be sought in a central point, in a unique source of sovereignty from which secondary and descendent forms would emanate; it is the moving substrate of force relations...It is in this sphere of force relations that we must try to analyse the mechanisms of power. In this way we will escape from the system of Law-and-Sovereign which has captivated political thought for such a long time (1978: 92-97).

According to Kennedy (1991: 358), Foucault's 'fetishizing of sovereignty' in this way, has resulted in the creation of a disjointed conceptualisation of law, which defines law reductively as the "crystallization" of processes of power' which take place *separately* from legal institutions. Drawing upon Hale (1952), Kennedy argues that Foucault's analysis also ignores a crucial element: that the interplay of factors that are 'crystallized' in lawmaking processes are themselves determined through an established legal context (Kennedy, 1991: 358). Moreover, Kennedy objects to Foucault's characterisation of legal settlements as the "crystallization" of processes of power because, he contends, it assumes that these processes are at once contrary to those other processes of power in society but also detached from them. Alternatively, drawing upon Klare (1979: 123), Kennedy posits that lawmaking should be seen as a "praxis" (or routine practice) 'in its own right' which involves the *exercise* of power (1991: 359). In order for us to better assess the merits of this notion of law as a site of power, rather than the terminus for processes of power, we must now consider the functionary processes of modern law, that is to say, we must 'bring Foucault's methodology into the courthouse' (ibid.).

Law as a site of power or an instrument of domination?

There is much that can be drawn from Foucault's work to demonstrate that his perspective on law was bound up with concepts of mastery, suppression and ultimately, domination. For example, in *Power/Knowledge* (1980), Foucault ascertains that:

'...the essential function of the discourse and techniques of law has been to efface the domination intrinsic to power...law is the instrument of domination – which scarcely needs saying' (95).

Moreover, Foucault makes clear his intention to demonstrate how the construction and components of law lend themselves to affect the domination of sovereign subjects. Subsequently, he considers the:

‘...extent to which, and the forms in which, law (not simply the rules but the whole complex of apparatuses, institutions and regulations responsible for their application) transmits and puts into motion relations that are not relations of sovereignty, but of domination’ (96).

What I intend to consider here – and what, for the purposes of this chapter, seems to be of most pertinent concern – is to what extent Foucault is correct when he identifies law as an instrument of domination rather than as a site of power. And, perhaps most crucially, if law is not simply a tool for subjugation, what aspects of Foucault’s paradigm (if any) are useful for appropriation into my explanation of the complex role of law and power in the constitution of modern society?

While Kennedy argues that Foucault’s normative ‘formulation of the role of legal rules in domination effaces legal institutions as loci of power/knowledge in their own right’ (1991: 357), Smith concludes that Foucault’s treatment of law ‘renders it vulnerable to colonisation by expert knowledge’ (2000: 284), and subsequently, she posits that ‘far from acting, as Foucault suggests, to provide a legitimating gloss on the subversive operations of power, law turns the tables *and itself operates as a form of surveillance over the norm-governed exercise of expert knowledge*’ (283, emphasis added). Foucault’s ‘analytics of power’ identifies law’s predisposition towards the regulation and legal sanctioning of an ever expanding sphere of social life – which Foucault observed as existing as a means to control expert knowledge(s) and to ‘recode them in the form of law’ (Foucault, 1978: 109). In short, Foucault identified a ‘dense web’ of social inter-relations, within which (expert) knowledge(s) impacts significantly upon the ways in which power is established, composed, transcribed and challenged (1990: 96). Drawing upon Smart (1996), Smith posits that Foucault’s notion of ‘recoding’ in fact assimilates both private and discretionary decision-making *into* law so that the way(s) in which both are governed becomes contingent upon rights, that is to say – ‘law retains its *old* power, namely the ability to extend rights’ (428, original emphasis, cited in Smith, 2000: 288). Yet, Foucault’s view of law, and his perspective on law’s ability to ‘colonise’ other disciplines in this process, continues to be one which predetermines law as subordinate within the sphere of other constitutive modes of regulation (Smith, 2000: 288). Indeed, Hunt and Wickham (1998) note that

Foucault's tendency is to treat the operation of law 'as a norm' - and the judicial institution itself as a largely regulatory body (Foucault, 1978: 144). As Smith astutely notes, within this paradigm, the law is *itself* colonised, and Foucault's 'steadfast insistence that the law must be distinguished from other forms of disciplinary power' (289) can be seen as forming the continuing basis for his argument that law power and disciplinary power are 'absolutely incompatible' (Foucault, 1980: 104).

Indeed, Foucault describes the:

'...growth of disciplinary networks, the multiplication of their exchanges with the penal apparatus, the ever more important powers that are given them, the ever more massive transference to them of judicial functions; now as medicine, psychology, education, public assurance, social work assume an ever greater share of powers of supervision and assessment, the penal apparatus will be able, in turn, to become medicalized, psychologised, educationalized...' (1991: 304)

In this way, Foucault supposes that law becomes functionally extricated from juridical power as a consequence of its over-reliance upon expert knowledge(s) – and subsequently, it transpires that the juridical domain cannot rightly be the sole province of judgement since 'the judges of normality' appear omnipresent (Foucault, 1991: 304). Thus it appears to me that Foucault advocates a consideration of law whereby law is effectively usurped as an origin of power by the disciplinary sciences, and is thereby rendered parasitic upon expert-knowledge in pursuance of its expanding normative-based functions. However, as Smith (2000: 292) proposes, an examination of the modern *operation* of the law is an effective means to challenge Foucault's paradigm. Let us now critically consider the argument that law – rather than functioning as an instrument of domination – can in fact occupy a site of 'pre-eminent' power.

Smith's exposition of law as a site of power is chiefly underpinned by four principle contentions. First, she asserts that juridical decision-making is based upon particular established 'law-made principles' which are universal in their application. These legal rules are 'functional' in their composition (as opposed to 'outcome' oriented) and so autonomy is not subverted by norm-based judgements in the way in which Foucault suggests. Second, legal rules also constrain the limits of expert knowledge(s). Citing several important legal precedents on the presumption of capacity in cases involving medical/surgical interventions, Smith argues that:

‘...any Foucauldian suggestion of expert incursion into, or colonisation of law and the juridical field, seems to have the boot on the wrong foot. Experts must subject their discretionary and norm governed judgements to juridical scrutiny and law retains its power to determine the form, content and outcome of its investigative function’ (298).

The third contention is linked to the second, and constitutes Smith’s observation that, by autonomously choosing to reject or to rely upon expert knowledge, law asserts and re-asserts its own functionary framework. Thus, judgements are made according to law and in isolation from normative discretion and moral exigencies. Finally, Smith contends that law is a powerful form of surveillance over expert knowledge(s) in that it not only provides (criminal and/or civil) redress for negligent or criminal action carried out by experts but also, said experts are unable to determine when and if they may be held to account for their actions, lending law a ‘normalizing gaze’ and a pronounced authority (299). Crucially, Smith also argues in favour of law as a ‘potentially liberating’ force of power, which I think is a highly relevant inclusion in her discussion. Drawing upon Habermas, she posits that Foucault’s construction of law as subservient to disciplinary power ignores a crucial problem inherent in institutional power – that institutional power acts as the ‘legal means for securing freedom that themselves endanger the freedom of their presumptive beneficiaries’ (1987: 291) and so she concludes that law is a means by which autonomy is protected from attempts (originating from disciplinary forces) to constrain it. (This concept of law as a potentially positive force within society *which may be used to protect and to guarantee individual and/or collective liberties* is one which I will return to later in this thesis and which I will consider critically in light of my research study findings, see Chapter 7.)

Other scholars (in particular, Smart, 1996; Tadros, 1998) have also constructed detailed and well-argued proposals for the treatment of law as more than a mechanism for express/implied domination. Smart, for example, advocates the increasing value, contribution and power of law within the framework of modern social structures:

‘...law is...well able to make the same claims to truth as the sciences and in so doing exercises a power which is not under threat. Indeed, it may be argued that law is extending its dominion in this respect as western

societies become increasingly litigious and channel more and more social and economic policy through the mechanism of legal statutes' (1996: 426).

Alternatively, Tadros proposes a perspective on law that concentrates on 'what the law is doing, as process, as verb, instead of as a fixed set of rules...[which forms] the progressive backdrop for a new paradigm of sociologically-informed thought about the carrying out of law in the everyday' (1998: 568). However, it is, I think, Smith's integration of case law into her discussion of modern law that is most effective. Although her discussion of juridical decision-making centres on judgements in medical cases involving patient autonomy, her proposition that law should be seen as a site of power - which can act to protect individuals from the coercive influence of disciplinary power - is one which I think has significant resonance as a socio-legal theory of law more generally. The evidence that she presents, in the form of case judgements and legal precedent, highlight the value of law in protecting the supremacy of the individual autonomy of the sovereign subject from challenges made to it by the state or by norm-governed disciplinary processes. As Smith notes (302), the principle of the supremacy of individual freedom is concisely illustrated by Lord Donaldson in *Re T (An Adult) (Consent to Medical Treatment)* [1992] 2 FLR 458 where he surmises the matters to be considered thus:

'This situation gives rise to a conflict between two interests, that of the [individual] and that of the society in which he lives. The [individual's] interest consists of his right to self-determination – his right to live his own life how he wishes, even if it will damage his health or lead to his premature death. Society's interest is in upholding the concept that all human life is sacred and that it should be preserved if at all possible. It is well established that in the ultimate, the right of the individual is paramount.'

Smith fundamentally rejects the Foucaultian suggestion that law is undermined by expert knowledge and instead she concludes that expert discourses are used or discarded at the discretion of a judiciary which is ultimately concerned to protect the parameters of this "social space" (285). Drawing upon Smith's conceptualisation of sovereign law and disciplinary power, and her critique of the Foucaultian view that law has essentially abdicated its power to the disciplinary sciences, it is my intention to develop an analysis of the research findings obtained in the study upon which this thesis is based, which critically considers the extent to

which law acts as a means of *curtailing* the incursion of disciplinary power into the sphere of rights-based considerations and the primacy of individual autonomy. That is to say, the potentially ‘empowering’ elements of law will be assessed alongside other relevant juridical aspects, namely, inequity in judicial decision-making and the use of discretion (discussed further below). However, although I am largely persuaded by Smith’s theory of sovereign law, her analysis does unfortunately suffer from an under-discussion of law in relation to power and social structure¹¹. Indeed, in her conclusion she accepts that ‘law constrains just as much as technologies of power constrain’ (303) but little attention is paid to assess the diffusion of power through social structures or the genealogy of power relations. Subsequently, although (in contra-distinction to Foucault) I am advocating law as a *site* of power, there are aspects of Foucault’s work on law that I think are also of value here and that I think can be imported into this current discussion of the role of modern law in society.

In particular, I would contend that Foucault’s work does have consequences for the status of law especially in respect of his descriptions of modern power¹². His continual emphasis upon the productivity and ubiquity of power is a lens through which we can contextualise *and* conceptualise the creation and administration of modern phenomena – both *social* and *legal*. In this way I think that Foucault’s genealogies of power can be used within this research study to understand and to explain the use of ASBOs as embodying *elements of* choice, coercion, domination and social structure in contemporary Britain. Cotterrell (1995: 300) for example, has argued in favour of a broad theory-based approach to socio-legal research which understands the position of law as a regulator of social life – the principle function of which centres upon the regulation of specific ‘social fields’. Rejecting ‘narrow’

¹¹ Within the discipline of sociology, there is not a definitive, accepted definition of the term ‘social structure’ (Lopez and Scott, 2000). For the purposes of this discussion, ‘social structure’ is defined, as per Outhwaite (2000: 2), as embodying ‘social facts’ such as spatial distribution, classes, strata and demographic variables but also ‘social representations’ – that is, the inter-relationship(s) between what is real, and the ways in which what is real is identified, through media, popular and political discourse et cetera. By way of illustration, within this interpretation social structure underpins the social systems of law, politics, economics, culture et cetera.

¹² It is important to be aware, I think, that while the socio/legal critiques of Foucault’s understanding of law that are detailed within this chapter are, at times, relatively robust – those socio/legal scholars who have sought to identify the weaknesses in Foucault’s treatment of law within his ‘analytics of power’ are at the same time largely insistent that Foucault’s arguments also have inherent value. For example, Hunt states that, despite Foucault’s arguments about law being (in his view) deficient, this ‘does not undermine the strengths of Foucault’s contributions to our understanding of modern mechanisms of rule’ (2004: 608). Similarly, I would suggest that criminal justice research, and more widely, socio-legal research, can ultimately benefit from the strategic appropriation of Foucault’s work.

policy-based interpretations of law (and its regulatory role in social life), Cotterrell advocates a socio-legal analysis of law which characterises social structure as existing *independently* of social actors' subjective constructions and/or value-based perceptions of what that 'structure' is. Indeed as Henham - in his highly persuasive account of theorising sentencing research - summarises:

'The implication is...that phenomenology does not account for the values existing in society which have become embodied in social institutions and internalised by social actors themselves...If phenomenology cannot allow for the existence of structure except on the level of individual consciousness, it cannot logically make any progress towards delineating their relationship' (2000: 17).

Rejecting 'rights-based' approaches to sentencing theory - popularised by amongst others, Andrew Ashworth (see, for example, Ashworth, 1986; 1998; 2005) - as unable to legitimately account for the 'empirical reality' of the correlation between law, social life and social structure, Henham posits the adoption of Giddens's functional theory of structuration into socio-legal works on sentencing and, more widely, into criminal justice research (see Henham, 1998; 2000).

Giddens's theory of structuration is important because it attempts to link social structure to system and agency as follows:

'The structured properties of society, the study of which is basic to explaining the long-term development of institutions, 'exist' only in their instantiation in the structuration of social systems, and in the memory traces (reinforced or altered in the continuity of daily social life) that constitute the knowledgeability of social actors. But institutionalised practices 'happen' and are 'made to happen' through the application of resources in the continuity of daily life. Resources are structured properties of social systems that 'exists' only in the capability of actors, in their capacity to 'act otherwise'. This brings me to an essential feature of the theory of structuration, the thesis that the organisation of social practices is fundamentally *recursive*. Structure is both the medium and the outcome of the practices it recursively organises' (1982: 9-10, original emphasis).

Thus, for Giddens, all social actors have a role in developing power structures since 'neither subject (human agent) nor object ('society' or social institutions)

should be regarded as having primacy' (1982: 8). In opposition to 'time-geography' based notions of structure - which conceive of 'the individual' as located outside 'structure', Giddens theorises structuration as the simultaneous emergence of structure as human agency and agency as the constitution of structure (1984: 117). As such, Giddens's notion of the 'duality of structure' means that '[s]ocial institutions are regarded as the medium through which structural properties are applied in the continuity of daily life' (Henham, 2000: 18). Crucially, however, Giddens's concept of power also reflects Foucault's notion of power - and in particular we can see that Giddens is especially influenced by Foucault's conceptualisation of power as ubiquitous and all-pervasive (1984:145-158).

So, returning once again to Foucault, we must now ask what use is Foucault's concept of power and (to a lesser extent) Giddens's theory of structuration to our examination of law, power and social structure in the context of this research study? The answer is that the theories discussed above contribute, on a theoretical level, to our understanding of 'justice', and to how it is pursued in modern society through the operation of power and legal processes. In essence, I am arguing that the concept of law as a *social* structure (an idea which forms the basis of this chapter) intersects with socially constructed notions of justice, fairness and truth which are all underpinned by the exertion of (forms of) power in society. More specifically, for the purposes of my discussion of the study findings later in this thesis, I think that it is extremely important that substantive practices and formal legal rules are not examined *in isolation* and then related to other social variables such as power. As social actors influence the development of power structures (and thus legal processes), this thesis contends that both legal and sociological aspects of the research must be integrated into the study analysis and not separated for the purposes of evaluation. Hence, in the discussion of the research study findings (Chapter 7), I will reflect upon and consider critically the ways in which law (and its relationship to power) has veritably featured within this socio-legal study of ASBOs in Britain. In the next section of this chapter (below), existing socio-legal studies of decision-making and procedure in the lower courts are examined and some observations are made about the role of legal processes in protecting the individual from arbitrarily enacted (state or social) control.

Socio-legal studies of legal procedure and judicial discretion

Let us now turn to an examination of existing empirical socio-legal scholarship that is specifically pertinent to this research study: namely, socio-legal studies of legal

procedure, and judicial discretion and decision-making. It will now be considered to what extent existing work in this area can be of use in providing a starting point with which to explore the research aims of this thesis. However, it must first be acknowledged that while a substantial body of (largely theory-based) literature on legal procedure and judicial discretion has evolved over the years (for example, see Adler, 2003; 2006; Davis, 1971; Galligan, 1996a; Halliday, 1998; Lacey, 1992), empirical socio-legal work on legal procedure and judicial discretion in the lower courts (which is the subject of this thesis) has been somewhat limited. Indeed, Cowan et al. (2006: 548) have observed that empirical studies of lower court decision-making has, historically, been neglected by socio-legal scholarship because obtaining access to the lower judiciary can be very difficult and time-consuming, and moreover, because of general, pervasive beliefs that the work of the lower courts was, for the most part, 'commonplace' and 'dull'. Nevertheless, there do exist several older studies of the courts which are of particular significance (Hood, 1972; Lawrence, 1995; Parker et al., 1989; Runggay, 1995) not to mention that, in recent years, there have been a number of socio-legal studies that have been concerned specifically with researching procedure and decision-making in the lower courts (see, for example, Anleu and Mack, 2005; 2007; Baldwin, 1997; Cowan et al., 2006; Hunter et al., 2005; Marchetti and Daly, 2004; Millie et al., 2007; Pawson et al, 2005).

Hood's seminal work on sentencing in the Magistrates' Courts in England and Wales found substantial variation in sentencing practices (1962; 1972), while Parker et al. (1989) similarly found divergence in sentencing outcomes. Both Hood and Parker et al. identified local Magistrates' bench traditions as a possible explanation for sentencing disparity. Other studies in the higher courts (for example, Ashworth et al., 1984) found that a wide range of factors impacted upon judicial decision-making. In a similar vein, Lawrence (1995) (in her early work on sentencing process and judicial decision-making) developed a detailed methodological framework as a base line for understanding the multi-faceted, complex nature of judicial decision-making. This framework also appears to have been successfully (expressly and/or impliedly) inculcated into later socio-legal work(s) on judicial decision-making in the lower courts (compare with the studies of, for example, Hunter et al, 2005; Cowan et al., 2006). Lawrence's observation - that decision-making is influenced by the inter-play of both micro and macro factors - produced a research methodology which recognised the contribution and the influence of the individual circumstances of a case (micro factors), together with social and cultural values, and bureaucratic, administrative and legal factors (macro

factors). Indeed, *social* values are afforded as much primacy as *legal* factors in Lawrence's model of judicial decision-making. Crucially, Lawrence does not assume any rigid formula or causal link to account for, or to rationalise, decision-making outcomes. Rather, Lawrence's model for judicial decision-making allows for the discussion and analysis of a plethora of factors involved in individual decision-making by judges who:

'construct meanings for cases, apply their own objectives and beliefs, and respond to contextual factors with varying biases and varying levels of self-awareness' (Lawrence, 1995: 70, cited in Hunter et al, 2005: 104).

The recent work of Hunter et al. (2005) and Cowan et al. (2006) again demonstrate the multi-faceted nature of judicial discretion. However, both studies attempt a typology of decision-making as a way of organising data, and making findings more intelligible. Hunter et al. reported a manifold and diverse range of factors influencing judicial discretion in rent arrears cases. The variation between individual judges' decisions was analysed in respect of three specific factors (length of experience, type of legal practice before appointment¹³, and attitudes to training and updating). However, no distinct patterns of decision-making emerged, and so the construction of a clear typology was not possible. Alternatively, Cowan et al. observed a 'liberal', a 'patrician', and a 'formalist' approach to judicial decision-making in possession proceedings, although they also noted that a certain 'type' of decision-making could additionally incorporate characteristics of other type(s) of decision-making: for example, a 'liberal' style of judicial decision-making might necessarily adopt a 'formalist' position, if an individual case requires it, and in order to obtain the 'right' outcome. Cowan et al. also observe the potential for other 'types' of judicial decision-making in possession proceedings, and conclude that their typology is 'by no means complete' (2006: 549). Similarly, in Millie et al.'s research on borderline sentencing (2007), sentencers were asked to identify how they approached sentencing – as 'primarily structured, intuitive or based on experience' (248). The study considered judicial decision-making and sentencing rationale, and provided a comparison of sentencing in England and Wales, and Scotland. In the same way as both Hunter et al. and Cowan et al, it was reported that judicial decision-making was influenced by a range of factors. However, Millie et al. concluded that both the offending history of the defendant and personal

¹³ Similarly, Anleu and Mack (2007: 186) observe that the responses of the lower judiciary 'might depend on their past judicial and non-judicial work and other experiences'

mitigation were 'at least [as] influential' as the category of offence in deciding the outcome of borderline cases (260).

In respect of procedure in the lower courts more generally, the recent work of Marchetti and Daly (2004) and Anleu and Mack (2005; 2007) is of particular relevance to this study. In the same way that Cowan et al. observed something of a deficit in socio-legal work on the lower courts, Anleu and Mack (2007) recognise that much of socio-legal literature has tended to focus on the procedures and decisions of the higher courts (as an illustration of this point, at page 183, they cite the work of Anleu, 2000; Barnett, 1993; Bringham, 1996; Hamby and Goldring, 1976; Rosenberg, 1993; Solomon, 1992; and Vago, 2003). This, they argue, is unfortunate, given that:

'magistrates courts are closer to [and] are more able to recognise economic, political and social change than higher courts that do not deal with the same volume and mix of cases and participants. The higher courts are more likely to be dealing with refined legal issues and not matters where the offending behaviour, social inequalities, and human emotion are directly apparent and remain fused.' (p.196)

Moreover, Lempert (1989) has observed that wide discretionary juridical power does not necessarily mean that legal procedure is, or becomes, 'ruleless' in the lower courts. In fact, he argues that judicial discretion can precipitate the construction of informal 'rules'. Subsequently, Lempert posits that:

'practical experience may give rise to procedural routines that are honoured at least as regularly as the procedures specified in those formal rules that in theory order behaviour in ordinary courts' (1989: 348)

Indeed, of particular interest to this research study and thesis on ASBOs, is the existence of socio-legal research which has shown that formal and informal legal procedure(s) adopted by the lower courts can serve specific substantive legal (and sometimes, social) 'goals'. For example, in Lempert's study of informal procedure in eviction proceedings, he describes the historical legacy of the relaxation of (formal) procedural rules so that there would be greater access to justice for 'plain folk' who did not have the benefit of substantial knowledge of the law or its procedural workings (p. 348).

Equally, however, there is evidence that legal procedures can serve to extend existing mechanisms of (social and state) control over particular groups and/or individuals (349). As such, the impact and consequences of administrative processes and judicial decision-making on fairness in legal contexts is well established as a contemporary concern of socio-legal scholars in Britain, and is reflected in a substantial body of literature (see for example Adler, 2003; Ashworth, 1994; Galligan, 1996a; Harlow and Rawlings, 1997; Hood, 1992; McCubbins et al., 1989). If we consider, for example, racial disparity in sentencing, then this provides a good illustration of the *potential* for criminal justice process(es) to be targeted disproportionately at specific groups. A substantial body of research exists to show that in various countries across the world - including the United States, Canada, France and the United Kingdom – black and ethnic minorities are over-represented in prison populations (see for example, Hood, 1992; Tonry, 1994; Tonry and Hood, 1996; von Hirsch, 1993). In particular, existing research has been concerned to examine the sentencing process and to what extent black and ethnic minorities are afforded different treatment in criminal justice processes and outcomes (von Hirsch and Roberts, 1997).

For example, Hood's rudimentary work on racial disparity in sentencing in England (1992) found that black defendants were 5% more likely to receive a custodial sentence and there was also considerable comparative variation in the duration of sentences imposed (122). Similarly, Parenti's work on policing and incarceration in the United States found (1999) punitive and corrupt practices and the overt targeting of 'problem populations', specifically Black and Hispanic communities. Research has also found that other marginalised and/or vulnerable groups (such as – in particular - drug users, prostitutes and individuals with mental health problems) can be the subjects of inequity in the criminal justice process by virtue of 'differential policing and punishment' (Scraton and Chadwick 1987:213). Such groups have been excluded from mainstream society through de facto spatial processes of regulation or indeed through a more ideological process of exclusion and/or criminalisation which 'is influenced by contemporary politics, economic conditions and dominant ideologies' which are both emulating and responding to 'the determining contexts of social class, gender, sexuality, race and age' (Chadwick and Scraton 2001: 69).

Moreover, research has demonstrated evidence of the associations between socio-economic and environmental factors that are linked with deprivation and levels of certain types of crime. As such, Tonry (1995) has suggested that wider discretion should be available to sentencers to enable them to consider the

personal circumstances of defendants 'who have, to some degree, overcome dismal life chances' (170). In order to constitute a mitigating factor, however, defendants would need to evidence that they had enacted a positive response to their social adversity, such as, for example, gaining employment. Rejecting this model as inadequate as a framework for improving inequity in sentencing, von Hirsch and Roberts (1997) conclude that 'not many offenders are likely to benefit, so long as one clings to notions of the deserving poor' (232). Correspondingly Ashworth (1994) has observed that (within the desert model) it would be easier to reconcile 'social deprivation' - independently of positive responses - as a foundation for mitigation. As von Hirsch and Roberts notes, this is because social deprivation can, subjectively speaking, influence a defendant's culpability in the respect that:

'social deprivation...may reduce the person's options for leading a law-abiding life; and such increased difficulty of compliance, at least arguably, may make violations less blameworthy' (von Hirsch and Roberts, 1997: 235, note 14).

While I am not at all persuaded that sentencing mitigation based upon a 'criteria for social deprivation' (232) would be a positive step towards addressing disparity in sentencing (as a result not least of the fundamental subjectivity that would be required in law to determine such a criteria), the wider issue of equality before the law is central to the concerns of the research study embodied within this thesis. The evidence of the existence of disparity in sentencing (particularly in respect of evidence on marginalised groups, discussed above) is of particular interest, and links in to this chapter's previous discussion of law, and the operation of power. The rights of individuals in society to have access to a system of criminal justice that is non-discriminatory in how it applies the principles and processes of law is fundamental to our understandings and interpretation of fairness and equity before the law¹⁴. Subsequently, I would argue that questions about criminal justice processes being applied arbitrarily, or discriminatorily, necessarily intersect with wider questions about power, domination and exclusion in society. Hence, the research study findings presented in Chapters 5 and 6 of this thesis will be considered in Chapter 7 in light of existing literature on sentencing and legal procedure in order to determine how ASBO processes are being applied and how

¹⁴ What is understood by the term 'fairness' in law will be considered in detail in my discussion of the research study findings (Chapter 7)

the administration of legal procedure and judicial discretion in ASBO cases fits within the framework of our democratic justice principles and in particular, notions of 'fairness' in sentencing.

Hence, the existence of the empirical socio-legal research on legal procedure and judicial discretion highlighted above elucidates several rudimentary (but non-exhaustive) areas of interest to this research study. In particular, and of specific research interest, are the empirical studies of the uses and outcomes of lower court discretionary adjudication (Anleu and Mack, 2005; 2007; Baldwin, 1997; Cowan et al., 2006; Hood, 1962; 1972; Hunter et al., 2005; Lawrence, 1995; Marchetti and Daly, 2004; Parker et al., 1989; Pawson et al, 2005), and also the studies which have sought to understand and to evaluate the impact of procedure within the lower level courts on wider issues of fairness, justice and sentencing (Anleu and Mack, 2005; 2007; Galligan, 1996; Halliday, 1998; Hood, 1992; Lempert, 1989; Marchetti and Daly, 2004). This literature will be drawn on again later in the thesis (Chapter 7), when it will be used to inform a discussion of the research findings of this empirical study, and the significance of the research findings for existing knowledge(s) in the socio-legal discipline.

Conclusion

A recent report on the substantive capacity of empirical socio-legal research, funded by the Nuffield Foundation, found that socio-legal work had been highly efficacious in 'revealing and explaining the practices and procedures of legal, regulatory, redress and dispute resolution systems and the impact of legal phenomena on a range of social institutions, on business and on citizens' (Genn et al., 2006: 1). Crucially, however, the report acknowledged that socio-legal research has played a pivotal role in elucidating the theoretical perception of *law as a social phenomenon*. Moreover, socio-legal research is important - and influential - because it involves analyses of the power of law. Hence it is argued that law (as an internal and embedded *social* concept) can both organise and channel power - as opposed to simply controlling it (Cotterrell, 2002: 643). As a result, socio-legal research has made the exercise of law/power more apparent, its consequences more evident, and its operation more foreseeable, logical and progressive (ibid.). In a similar vein, this thesis also seeks to consider the limits of legal procedure(s) and judicial decision-making in shaping the management and outcomes of ASBO use in Britain. The potential for juridical power both to (positively) impact upon the protection of rights, as well as to (negatively) affect the risk of erroneous

deprivation of substantive rights in ASBO cases will be investigated and considered in detail. Hence, it is advocated within this thesis, that 'law' is a critical matter of *social* structure - and power - which requires to be considered as a central element in the construction of 'society'. The wider jurisprudential notions that are embodied within this research study (legal procedure and procedural justice; juridical power and discretion) are, it is argued, cogent, robust normative *social* concerns (as much as they are *legal* concerns) that positively require consideration and representation in the empirical study of antisocial behaviour orders as a sociological phenomena. Thus the primary overarching socio-legal concepts of legal procedure(s), and judicial discretion, will be considered in the course of this thesis – both with regard to the empirical research findings (Chapters 5 and 6), but also in respect of the wider discussion of salient issues arising from the socio-legal study of ASBOs in Britain (Chapter 7).

Chapter Three

Literature Review

Introduction

Although antisocial behaviour orders (ASBOs) are a relatively recent development in social policy in Britain, they have nonetheless been an extremely topical area of law for some years. Despite an enthusiastic (and annually increasing) uptake of the orders by police and local authorities, the contemporary nature of antisocial behaviour legislation has meant that there exists only a limited amount of empirical research data on the application, administration, management and 'effectiveness' of the ASBO. There are, however, a not insignificant amount of academic papers and journal articles on the subject, many of which are highly critical of antisocial behaviour policy and the use of ASBOs.

Essentially, there are three broad strands of criticism levelled at the use of antisocial behaviour orders: firstly, ASBO interventions are frequently inconsistently applied and *disproportionately* intrusive (Burney, 2002: 2005); secondly, the use of ASBOs does nothing to tackle the underlying causes of antisocial behaviour and fails to rehabilitate those who are given ASBO interventions (Scruton, 2004; Carr and Cowan, 2006); and thirdly, ASBOs do not pay enough attention to due process and are unfairly targeted (primarily) at 'marginalised groups' such as young people and social housing tenants (Hester, 2000; Brown, 2004). Hence, the aim of this chapter is to provide, through reference to the existing literature, a comprehensive but concise review of perspectives on, and current debates about, the administration of ASBOs in Britain.

However, as I have previously discussed, existing empirical research on ASBOs does not specifically examine ASBO legal and court process(es), or the ways in which these dimensions intersect to shape the management and outcomes of ASBO use in Britain. Moreover, there are also no comparative studies in existence that analyse the differences/similarities between ASBO legal and court procedure(s) in England and Wales, and North of the border. With this in mind, it is thus also the purpose of this chapter to identify the limitations of existing scholarship on ASBOs, and to clearly indicate – and provide justification for – the research aims of this thesis. The importance of the study of law (and legislative provisions) as a *sociological* phenomenon has already been argued for (Chapter 2), hence this literature review seeks, additionally, to understand the existing research evidence on ASBOs within a socio-legal sphere of analysis. It is proposed

that the literature review embodied within this chapter will provide a rigorous framework for this research investigation which, it is hoped, will in turn contribute new empirical research evidence to an under researched area within a growing body of literature in the sociological research of antisocial behaviour policy and the use of ASBOs in Britain.

This chapter is set out as follows: antisocial behaviour will first be placed in a historical context, which, it is hoped, will serve to provide a basis for current discussions and analyses of antisocial behaviour – and the use of ASBOs - in Britain. The next part of the chapter will consider contemporary experiences of antisocial behaviour (with regard to the reported incidence of antisocial behaviour in late modern society), and the legal definition of the term within the relevant legislation. The antisocial behaviour order (ASBO) will then be discussed, alongside the interim ASBO, and the antisocial behaviour order on conviction (CRASBO). Very little empirical research evidence exists on legal and court procedure(s) in ASBO cases so, for the most part, the review of the literature with regard to the relevant legal process(es) (in particular: civil procedure, evidentiary requirements and the burden of proof) will refer to statutory provisions and case law. The final section of this chapter will review the existing empirical research evidence on ASBOs in practice - specifically, the number of orders granted, the reported data on the characteristics of antisocial behaviour perpetrators, breach rate, and the numbers of orders appealed.

Antisocial behaviour in a historical context

Given the prominence of the term ‘antisocial behaviour’ in contemporary discourse(s), one could be forgiven the assumption that antisocial behaviour is solely a concern of late-modern society. Of course, ‘antisocial behaviour’ is in fact a perennial and recurring expression in social life. Academics and commentators have long identified disorder, criminal and sub-criminal behaviour (particularly relating to the young within society) as featuring as an inherent vestige of social concern for previous generations (Pearson, 1983; Shaw, 1931; Whitehead, 2004). In terms of aetiology, however, antisocial behaviour is far from perspicuous (Squires, 2006: 158) as ‘antisocial behaviour’ is a generic term, and does not necessarily relate to criminal or sub-criminal behaviour - ‘antisocial’ can of course mean one who is disinclined to mix in society and/or one who is either without, or in possession of poor, social instincts. Taking the modern, capacious interpretation of the term ‘antisocial’, and applying it to a historical analytic consideration of eighteenth and nineteenth century Britain, for example, would suggest that

'antisocial behaviour' (in all its manifold genera) was rife. Urban areas had played host to a creeping propagation of criminal gangs, on-street sex workers and pickpockets/cutpurses; and in the rural dwellings there is evidence of smugglers and rustlers, tavern brawlers, and itinerant beggars. The nineteenth century also saw the origins of new forms of 'antisocial behaviour' such as grave robbers, child pickpockets, and 'hooligans' (Pearson, 1983).

Hence, 'antisocial behaviour' is not, culturally or socially, a 'new' phenomenon. How, then, do we account for its protracted – some commentators would argue, exaggerated – political and media profile in recent years? While urban nuisance and petty incivility have veritably featured as longstanding historical social milieu, the twentieth (and early twenty-first) century appears to have accommodated a proselytism of sorts: whereby public concerns about antisocial behaviour and moral decay - for the two appear inherently bound together in media and public discourses¹⁵ - transgressed 'acts' to become about forms of culture, such as the 'sex and drugs' culture of the 1960s; football hooliganism; punk music; TV/film/video game inspired violence; and latterly; 'chav' culture¹⁶. Antisocial behaviour has become a reversed proposition; whereby individuals have instead now become concerned (at these specific generational intervals) by *cultural* threats to social stability.

Contemporary concerns about antisocial behaviour have found a commonality centred on traditional forms of antisocial acts such as drunkenness, young people 'hanging around', street assaults and binge drinking (Burney, 2005). However, these modern concerns are now paired with a more aberrant cultural anxiety, diverging on forms of *community* related troubles. Indeed, the language of both antisocial behaviour policy and government discourse focuses upon the need to protect 'communities' from antisocial behaviour. Steventon (2006), amongst other commentators, has argued that the emergence of antisocial behaviour as a central strand in political discourse has facilitated increasing political intervention in community issues. In any case, however, antisocial behaviour is not a new social phenomenon. Hence, it would be propitious for us now to briefly map the circumstances that subsequently lead to the creation and introduction of the antisocial behaviour order (ASBO). If we consider a short biography of antisocial

¹⁵ For example, Millie et al. found that neighbourhood residents frequently regarded antisocial behaviour 'as a symptom of social and moral decline' (2005: 7), while Sennett (1996) and Innes (2004), amongst others, have observed the contribution of media discourse to current perceptions about the nature and incidence of antisocial behaviour.

¹⁶ For an interesting discussion of the evolution of 'chav' culture in late-modern society, see Hayward, K. J., and Yar, M., (2006) 'The 'Chav' phenomenon: consumption, media and the construction of a new underclass', *Crime, Media, Culture*, 2 (1) 9-28

behaviour in late-modernity, for example, we can observe the factors contributing to the current construction and classification of antisocial behaviour within social policy.

From the mid-1990s, the attention of both politicians and the media had been captured by particular communities in Britain that appeared to be wrought with problems associated with urban deprivation, social exclusion (Hills, Le Grand and Piachaud, 2002) and poverty (Gordon and Pantazis, 1997). Residents and communities cited not only problems related to serious crime, but also the pernicious cumulative effects of antisocial behaviour and petty offending. However, as a result of the apparent impotence of civil law remedy in addressing neighbour(hood) nuisance, several councils became increasingly pro-active in seeking greater powers to use against perpetrators of antisocial behaviour who were 'beyond the reach of both criminal and housing sanctions' (Burney, 2005: 20). For example, nuisance law had proved to be entirely ineffectual in *Hussain v Lancaster City Council [2000] QBD 1*, whereby a family had been severely and persistently racially harassed over a protracted period of time. The victim's claim against the local authority that they had failed to take action against the (tenant) perpetrators of said antisocial behaviour was struck out as disclosing no reasonable cause of action because the alleged antisocial acts were not committed from the perpetrators' land. It was held by Hirst L.J. at paragraph 23, that:

'the acts complained of unquestionably interfered persistently and intolerably with the plaintiffs' enjoyment of the plaintiffs' land, but they did not involve the tenants' use of the tenants' land and therefore fell outside the scope of tort.'

Indeed, case law had shown there to exist intrinsic and fundamental problems for those seeking remedies as tenants. Where the antisocial act complained of was perpetrated by a fellow tenant of a common landlord, it had been established in *Hussain* that such a landlord would only be liable if he had *authorised* the acts of nuisance; this seemed to require that a let 'necessarily involved a nuisance' as per *Malzy v Eicholz [1916] 2 KB 308*. Moreover, the case of *Smith v Scott [1973] Ch. 314 321* not only indicated that this would be difficult to prove even if the landlord was aware of the troublesome nature of the tenants when housing them, but it also determined that there was no duty of care to existing tenants in the selection of new tenants.

Accordingly, Burney (2002: 469) has observed that 'local authority pressure lay behind the introduction of the ASBO'. Moreover, Brown has argued that previously, people had escaped conviction for antisocial acts 'for two reasons...witness intimidation and...the possibility that the police do not treat antisocial behaviour as 'real' crime' (2004: 208). Similarly, Hunter, Nixon and Parr (2004) have further identified the long-standing lack of support available to witnesses in civil cases. However, while the introduction of the ASBO was undoubtedly precipitated by the perceived ineffective and deficient response of local authorities and landlords to resolve neighbour complaints¹⁷ - which was coupled with the evident difficulties in obtaining civil law remedy for acts of neighbour(hood) nuisance - the precise nature of the behaviour that ASBOs were introduced to proscribe is not manifestly clear. As we shall see in the course of this thesis, whether ASBOs should be used to prohibit non-criminal, sub-criminal, and/or criminal behaviour goes to the heart of contemporary debates about the use of ASBOs - and their place within the summary justice system.

Campbell (2002a) has observed that the ASBO model was designed to address persistent yet non-criminal behaviour that was, essentially, 'trivial'. Alternatively, Brown's research on the use of ASBOs in Scotland had demonstrated that 'in at least half of all cases, there was a long history of criminal convictions' and moreover, that behaviour subject to restriction by an order was 'not a trivial or sub-criminal form of behaviour' (2004:208). Hence, in its investigation of the administration and management of ASBOs, this research study will further examine decision-making in respect of the level and type of antisocial/nuisance behaviour(s) that are made the subject of ASBO applications. The data will be obtained from solicitors involved in the ASBO application process in England and Wales, and in Scotland. Moreover, this investigation will also seek to illuminate, and to gain an insight into, judicial attitudes and decision-making on ASBO applications in respect of criminal and non-criminal behaviour(s) which are contained within ASBO prohibitions.

Incidence and nature of antisocial behaviour

It is important to acknowledge, when considering the administration and management of ASBOs that, despite a number of research projects having been

¹⁷ Which led to the formation of the Social Landlords' Crime and Nuisance Group (SLCNG) in the late 1990s - the group came into existence as an amalgamation of a local government lobby group and several large housing associations; its purpose was (and remains) to promote effective resolution of neighbour disputes through civil legal action (Burney, 2005: 21).

conducted into the incidence of antisocial behaviour, there is a lack of consensus as to the proportion, extent and situs of antisocial behaviour in Britain. Moreover, attention should also be paid to the salience of geographical, gender, age, housing tenure, and ethnic variation(s) in experience(s) of antisocial behaviour.

Scotland

Although overall crime (including serious violent crime) fell in the ten years to 2002, recorded offences of an 'antisocial' nature in Scotland increased (Scottish Executive, 2003). According to the Scottish Executive, these findings in fact understate the extent of the problem as much of antisocial behaviour is not within the criminal law, and goes unreported. Moreover, reports of vandalism in Scotland have increased by almost 50% in less than a decade: there were nearly 330 incidents a day reported on average in 2005-2006, an increase from around 220 in 1996-97 (Scottish Parliamentary Written Answer, 2 March 2007). In total, there were 120,342 cases of vandalism, reckless damage and malicious mischief recorded in 2005-2006, compared with 81,587 in 1996-1997.

However, the extent to which an increase in reported antisocial incidents is equivalent to an increase in de facto antisocial behaviour is not comprehensively evidenced. Recent research has found that individuals in Scotland are now more likely to report incidents of antisocial behaviour to the authorities (Scottish Executive, 2005b). Pawson et al. (2005) suggest that a greater willingness on the part of victims to report antisocial behaviour has come about as a direct result of increased media attention and the belief that authorities will now act positively to resolve the problem. Commentators have further observed that the increased (and increasing) attention and time devoted to reporting incidents deemed 'antisocial' within the media, has also consequently served to encourage public perception of the overall incidence of that type of behaviour in Britain¹⁸.

England and Wales

In England and Wales, despite a 39% drop in the incidence of crime since 1995, antisocial behaviour continues to remain an issue of public concern with around 66,000 reports of antisocial behaviour made to authorities each day (Home Office, 2003b). Moreover, the Home Office estimates that around 17% of the total population (approximately 7 million people) perceive there to be 'high levels' of antisocial behaviour in their area (Home Office, 2006a). However, the number of

¹⁸ An interesting comparison can be made here with Innes' influential work on 'signal crimes' (2004); see also Sennett, 1996; 2003; Pawson et al., 2005.

people who think antisocial behaviour is a 'big' or 'fairly big' problem has reduced from 20.7% in 2002/03 to 16.7% at the end of 2004 (Home Office, 2004b).

Burney (2005: 60) has argued, however, that because people living in different locales identify different types of behaviour as being more problematic than others¹⁹, that these variations in fact negate the effectiveness of having a wide definition of antisocial behaviour by virtue of its illogical categorisation of such widely varied phenomena within one annotation²⁰. Research evidence also shows that specific groups of people are more likely to be affected by antisocial behaviour than others. For example, 30% of those living in social housing and 32% of those living in 'hard pressed' areas - who are least able to move away or bear the cost of antisocial behaviour – perceived high levels of antisocial behaviour in their area. Similarly, findings show that those individuals from an ethnic minority (26%) and females aged between 16 and 24 (28%) found antisocial behaviour to be a 'big problem' for their area (NAO, 2006: 9). (In Scotland, similar findings have been reported: Scottish Executive *Guidance on Antisocial Behaviour Strategies* (2004a) notes that, in particular, vulnerable groups such as older people, women and disabled people, including children/adults with mental health or learning difficulties, are likely to be more affected by antisocial behaviour and the fear of crime.)

Housing tenure

While Hester (2000: 172) predicted that ASBOs would be used primarily in 'poor communities' and 'by definition they will thus be disproportionately deployed', Brown has also argued that 'although crime is ubiquitous, antisocial behaviour is deemed to occur principally in social housing areas...[which is] part of the broader social control of marginalised populations who can be 'managed' in social housing' (2004:204). Similarly, Scott and Parkey (1998) contend that antisocial behaviour should be seen as a problem affecting all housing tenures.

It was observed by Chadwick L.J. in *Northampton BC v Lovat* [1997] 96 LGR, 548 that:

'reasonably or unreasonably...those who live or work on a council estate and are affected by the conduct of council tenants on that estate will expect the

¹⁹ For instance, drug use/dealing is more frequently cited in social housing areas, while litter and graffiti are identified more often in affluent urban areas.

²⁰ Whether it is desirable to have more serious forms of criminal behaviour (such as drug dealing) forming the basis of ASBO prohibitions will be considered in the course of this research study. Data will be presented in respect of the opinions of both solicitors, and sentencers.

council to do something about it. The housing department will receive complaints which will have to be addressed...'

Hence, somewhat unsurprisingly, the majority of ASBO interventions continue to be issued in social housing areas (Home Office, 2006a; Scottish Executive, 2005b). While Burney (2002) and Cowan, Pantazis and Gilroy (2001) have observed the social housing sectors' increased use of and reliance upon procedures synonymous with crime control; Brown (2004) has commented that 'antisocial behaviour is found largely in social housing areas because the physical presence of "investigatory" people and technology ensure that it will be found' (2004: 210).

Yet, recent nationwide research on the incidence of antisocial behaviour has found that: 'antisocial behaviour has a significant impact on the lives of a minority of people in Britain, particularly in areas of social deprivation and inner cities. However, it has little or no effect on the lives of the majority of the population' (Millie et al., 2005: 1). Furthermore, 61% of the respondents in the British Crime Survey (BCS) 2003/04 reported no negative effects from any of 16 types of antisocial behaviour (Home Office, 2004a). Both pieces of research were conducted nationally, so in these instances, antisocial behaviour was not found primarily in deprived urban areas simply because these were the only areas being studied. Both studies found antisocial behaviour to be present in other areas, however, Millie et al. found that antisocial acts affected the quality of life of residents to a lesser degree.

Similarly, mirroring the findings of the Home Office study of *Crime in England & Wales 2005-06*, research on behalf of the National Audit Office (2006) also demonstrates that, although all research participants agreed that antisocial behaviour was a problem to some degree where they lived, participants from less affluent areas perceived antisocial behaviour to be a greater problem than those from more affluent areas (NAO, 2006: 9). Correspondingly, in Scotland, nine per cent of Scottish Household Survey 2001/02 respondents reported some experience of 'neighbour disputes', a proportion of which was fairly consistent from authority to authority (although highest in Midlothian (13% of respondents), Edinburgh (11%), Glasgow (11%) and Dundee (11%)). Nationally, the incidence of such disputes was highest in local authority housing (13%) and lowest in housing owned outright (5%). Similarly, such disputes were reported by 14% of respondents occupying flats as compared with five per cent of those living in detached houses (Scottish Executive, 2002). Hence, The Scottish Household Survey 2001/02 indicates that the incidence

of antisocial behaviour is higher in social housing than in other areas, but it also nevertheless confirms that antisocial behaviour extends out with social housing.

Young people

Another important factor in determining the incidence of antisocial behaviour is the age breakdown in relevant areas. In Scotland, the findings of the Scottish Crime Survey 2000 (Scottish Executive, 2001) and the Scottish Household Survey 2001/02 (Scottish Executive, 2002) demonstrated that the most commonly cited 'neighbourhood problem' was 'groups of young people [hanging around]'. Nearly a third of all respondents cited this as 'fairly or very common in my area'. Similarly, evidence from research in England and Wales also shows that youth disorder is a primary concern of individuals within the typology of antisocial behaviour(s) (Home Office, 2006a). Hence, if 'groups of young people [hanging around]' is the primary concern of residents then this could be a factor in determining a perceived higher incidence of antisocial behaviour, especially if an authority has in the past been guilty of re-housing 'problem families' in certain estates²¹. Evidence has shown that there can often be a larger proportion of young people living in social housing areas than in other tenures, perhaps increasing pressure on local facilities and leading to a perception by residents and agencies of increased antisocial behaviour (see, for example, SEU, 2000a).

In England and Wales, the use of ASBOs against young people is widespread. Research has shown that approximately half of all ASBOs are served on young people (Home Office, 2007), and while antisocial behaviour is perpetrated by individuals from a range of ages, recent research has demonstrated that men are much more likely to engage in antisocial behaviour than women (NAO, 2006: 10). Figure 3.1 provides a breakdown by gender and age of those who received antisocial behaviour interventions in the National Audit Office research study.

²¹ This is an issue that has generated problems between, for example, London boroughs and other authorities over accommodating tenants, (Taylor, G. [of the Local Government Association], The Guardian, 'Home and Away', 23 May 2001).

Figure 3.1 Gender and age of people who received interventions

	Female	Male	Total
18 or under	55	199	254
19-24	27	114	141
25 and over	50	125	175
Total	132	438	570

* The study sampled 893 case files of ASBOs, warning letters, and ABCs

(Source: NAO, 2006: 11)

Cost of antisocial behaviour

A variety of 'costs' have been associated with antisocial behaviour, which, it is suggested, can be condensed into a typology of three principal costs resulting from the perpetration of antisocial behaviour(s). These are financial costs; community costs; and, costs to the individual.

Financial costs

The financial costs of antisocial behaviour can be quite considerable. Based on a 'one day count'²² study of antisocial behaviour incidents in 2003, for example, the Home Office estimates that the 66,107 reports of antisocial behaviour recorded equate to £3.4 billion a year in associated financial costs (Home Office, 2006a: 28). This estimate does not, however, include the costs assumed by individuals. If costs attributed to others were included, the base line estimate for the cost of antisocial behaviour would raise substantially (NAO, 2006: 8). For example, the estimated annual cost to the victims of criminal damage is £1.2 billion (ibid.).

Moreover, the Social Exclusion Unit reported in 2000 that, the worst cases of antisocial behaviour can precipitate the demolition of recently built property and can result in the zero value of assets. It was estimated that the cost of demolition was approximately £5,000 per dwelling. However, this figure did not include the

²² It should be noted, however, that the findings of the 'one day count' study are not unanimously accepted. Burney (2005: 81), for example, has argued that because there was no recognition of the potential for 'double-counting' by different authorities, and furthermore that measurements were not incorporated into the study which could ascertain the differing degrees of upset/harm caused by the behaviours to individual complainants – particularly in view of the likelihood that some individuals are more likely to complain more frequently than others, who may do so rarely or never – that 'it cannot be held that either quantitatively or qualitatively this was a meaningful exercise.' However, in view of the substantial amount of research data on the economic cost of antisocial behaviour, one could, nonetheless, certainly arrive at the legitimate conclusion that antisocial behaviour is very costly, both in terms of costs to the community, and costs to the individual.

cost of re-landscaping the site and compensating previous tenants or owners (SEU, 2000a). Similarly, the associated cost(s) of vandalism to buildings is considerable: a study of the costs of vandalism in schools in Scotland, for example, estimated that the cost for insuring against vandalism and damage was higher than the amount spent on books each year (Accounts Commission, 1997).

In a study of social landlord's responses to antisocial behaviour, Nixon et al. (1999) reported that incidents of antisocial behaviour also have very high costs in terms of housing management time. The study estimated that 20 per cent of social landlords' housing management time was spent on dealing with complaints about neighbours' behaviour (Nixon et al., 1999). Landlords stated that tackling antisocial behaviour was a resource-intensive process which considerably impacted on housing management budgets. Research for the Scottish Office (1999) described these type of housing management costs as 'direct costs', that included the time spent dealing with neighbour complaints by housing officers, area managers, senior officers, and caretakers; the costs of implementing initiatives and associated on-going costs; legal costs for advice and court action; the associated costs of repairs for vandalism and graffiti; and the time given by homeless and allocation staff in dealing with requests for transfer (para 3.30).

A detailed breakdown of the estimated financial costs of antisocial behaviour, as categorised by the Home Office, is provided below at Figure 3.2.

Figure 3.2 Estimated costs of antisocial behaviour and disorder

Behaviour	Daily reports	Estimated cost to agencies per day (000s)	Estimated cost to agencies per year (millions)
Litter/rubbish	10,686	£1,866	£466
Criminal damage/vandalism	7,855	£2,667	£667
Vehicle-related nuisance	7,782	£1,361	£340
Nuisance behaviour	7,660	£1,420	£355
Intimidation/harassment	5,415	£1,983	£496
Noise	5,374	£994	£249
Rowdy behaviour	5,339	£995	£249
Abandoned vehicles	4,994	£360	£90
Street drinking & begging	3,239	£504	£126
Drug/substance misuse & drug dealing	2,920	£527	£132
Animal-related problems	2,546	£458	£114
Hoax calls	1,286	£198	£49
Prostitutions, kerb crawling, sexual acts	1,011	£167	£42
Total reports	66,107	£13,500	£3,375

(Source: Home Office, 2006a: 28)

Community costs

There are less likely to be amenities, services and shops in areas of high antisocial behaviour, primarily because of the associated costs of maintenance and repair (Brand and Price, 2000; Home Office, 2006a: 28). Research conducted by the Housing Corporation (1998) has also demonstrated that high levels of crime and antisocial behaviour in areas make housing difficult to let, reducing community participation, which subsequently leads to the rapid deterioration of these neighbourhoods. Communities with high levels of vandalism or graffiti can also discourage individuals from making use of community and neighbourhood areas as gathering places, which can subsequently have an affect on local business(es) as a result of reduced 'passing trade' (SEU, 2000a; Home Office, 2006a: 28). Moreover, Power and Mumford (1999) have found that low demand for housing in these communities subsequently generates falling school rolls, loss of confidence in the area, a vacuum in social control, increased antisocial behaviour and intense fear of crime.

Costs to the individual

The emotional costs to the victims of antisocial behaviour have been reported for some considerable time. In 1999, for example, the National Housing Federation (NHF) found that tenants of social housing frequently suffered from 'high levels of stress as a result of crime and antisocial behaviour in the area in which they live' (1999: 1). Moreover, Upson (2006) found that 96% of those suffering from noisy neighbours reported a resulting emotional consequence, which included annoyance, frustration, anger and worry. Of these respondents, 32% detailed more serious emotional impact and disclosed having experienced one more of the following: shock, fear, stress, depression, anxiety, panic attacks and crying. Furthermore, antisocial behaviour adversely impacts on people's quality of life (NAO, 2006: 8) and victims may also suffer continued and prospective emotional distress caused by their experiences, such as depression and anxiety (Hunter et al., 2004).

Legal definition of 'antisocial behaviour'

Thus, as we have seen from an examination of existing research, there is a lack of consensus as to the proportion, extent and situs of antisocial behaviour in Britain. Moreover, the incidence – and perception - of antisocial behaviour is subject to variation as a result of differences in geographical area and housing tenure, and by virtue of the gender, age, and ethnicity of antisocial behaviour perpetrators/victims. For the purposes of this study, we must now turn to consider in detail the legal definition of the term 'antisocial behaviour' embodied within the relevant legislation²³.

It is generally accepted by (socio-) legal scholars that the law customarily aims for an unambiguous accuracy when defining behaviour proscribed by legislation; the purpose of which is to ensure that there is little uncertainty of what the law expects of those bound by it. Although this principle is not absolute, 'generally the main function of the law is to provide an exact as well as a binding relationship' (James, 1973: 67). Yet, the legal definition of antisocial behaviour that applies in relation to ASBOs, as conduct that: 'causes or is likely to cause harassment, alarm or distress to one or more persons not of the same household'²⁴, inevitably and frequently results in a very broad range of behaviour falling within its scope. Although it is not an exhaustive list, the Home Office has, however, produced a typology of specific behaviours categorised as antisocial from a 'one day count' of antisocial behaviour carried out in 2003 (see below, Figure 3.3).

As we have observed, antisocial behaviour spans both criminal and non-criminal behaviour. Subsequently, this has meant that behaviour complained of need not necessarily be of itself unlawful. The key feature of the statutory definition of antisocial behaviour is that its primary focus is the *effect* of the behaviour complained of: it is not necessary for the applicant authority to prove intention on the part of the defendant to cause harassment, alarm or distress. While the relevant legislation defines antisocial behaviour broadly, and in terms of the affective consequences of the conduct, local authorities, Registered Social Landlords (RSLs), Crime and Disorder Reduction Partnerships (CDRPs) and police services possess their own lists of behaviours defined as antisocial for the purposes of the antisocial behaviour strategies within their locales. Relevant

²³ The Crime and Disorder Act 1998 (hereafter, 'the 1998 Act'); The Antisocial Behaviour Act 2003 (hereafter, 'the 2003 Act'); The Antisocial Behaviour Etc. (Scotland) Act 2004 (hereafter, 'the 2004 Act')

²⁴ Section 1(1)(a) of the 1998 Act. In Scotland, antisocial behaviour is defined as 'behaviour which causes or is likely to cause alarm or distress', under s.143 of the 2004 Act.

authorities have discretion over the creation of their own strategies to tackle antisocial behaviour²⁵ and these definitions display a variance in the type(s) of behaviour(s) recognised as antisocial as a result of the differing cultural compositions and social conditions of specific locales²⁶. As a result, there is disparity and variational spread in the strategies employed to address antisocial behaviour(s) across Britain: antisocial behaviour legislation is thus underpinned by an emphasis upon local level autonomy.

The consequence(s) of such a generalised and subjective description of antisocial behaviour has meant that the definition is both flexible, and capable of diverse interpretation. Certain organisations have also commented that it has made antisocial behaviour more relevant and practical at a local level: The Local Government Association has argued that the 'antisocial behaviour focus from central government has led to an increase in focus within many localities' (House of Commons, 2004a: Ev. 81). Furthermore, Sergeant Paul Dunn of the Metropolitan Police has added that: 'the legal definition helps if enforcement is necessary, and it has to be looked at from that point of view' (House of Commons, 2004b: Q.96).

The Home Affairs Committee, reporting on antisocial behaviour in April 2005, made three main points relating to its wide definition:

'first, the definitions work well from an enforcement point of view and no significant practical problems appear to have been encountered; second, exhaustive lists of behaviour considered antisocial by central government would be unworkable and anomalous; third, antisocial behaviour is inherently a local problem and falls to be defined at a local level. It is a major strength of the current statutory definitions of antisocial behaviour that they are flexible enough to accommodate this.' (House of Commons, 2005a: 21)

²⁵ Part 1, s.1 (1) of the 2004 Act, requires that 'each local authority...shall...prepare a strategy for dealing with antisocial behaviour.' Section 17 of the 1998 Act places a statutory duty on chief police officers and local authorities in England and Wales to work together to develop and implement a strategy for reducing crime and disorder.

²⁶ For example, Edinburgh city council has issued fewer ASBOs than other similar sized cities. One of the reasons for this is the success of ABCs, which include many of the same restrictions as ASBOs, such as curfews, bans from areas, etc. Although it should be noted that research has found that 'usage of ABCs is not widespread' in Scotland generally (Scottish Executive, 2005b: 2). Furthermore, while the most common basis for orders to be granted in Scotland is excessive noise, in Glasgow for example, the most common perpetrators of antisocial behaviour are males aged 30-40 years old for aggressive behaviour: so again, this will be a local variable which will be a factor in determining local authority/RSL strategy on antisocial behaviour.

Alternatively, however, there exists a significant degree of opposition to such a subjective definition in law. For example, Hull City Council has argued that 'a lack of clarity around the definition of antisocial behaviour does not help' in producing an effective response to it, and Salford City Council has also highlighted this area as problematic (House of Commons, 2004a: Ev. 67 and 128, respectively). Moreover, the EU Commissioner for Human Rights, having examined the use of ASBOs in Britain in 2005, commented in his report that 'the determination of what constitutes antisocial behaviour becomes conditional upon the subjective views of any given collective' (Gil-Robles, 2005: 34).

Figure 3.3 Typology of antisocial behaviours

Misuse of public space

- **Drug/substance misuse**
 - Taking drugs
 - Sniffing volatile substances
 - Discarding needles/drug paraphernalia

- **Drug dealing**
 - Crack houses
 - Presence of dealers/users

- **Street drinking**

- **Aggressive begging**

- **Prostitution**
 - Soliciting
 - Cards in phone boxes
 - Discarded condoms

- **Kerb crawling**
 - Loitering
 - Pestering residents

- **Illegal campsites**

- **Vehicle related nuisance**

- Inconvenient/illegal parking
- Car repairs on the street/in gardens
- Abandoning cars
- **Sexual acts**
 - Inappropriate sexual conduct
 - Indecent exposure

Disregard for community/personal wellbeing

- **Noise**
 - Noisy neighbours
 - Noisy cars/motorbikes
 - Loud music
 - Alarms
 - Noise from pubs/clubs
 - Noise from business/industry
- **Rowdy behaviour**
 - Shouting and swearing
 - Fighting
 - Drunken behaviour
 - Hooliganism/loutish behaviour
- **Nuisance behaviour**
 - Urinating in public
 - Setting fires
 - Inappropriate use of fireworks
 - Throwing missiles
 - Climbing on buildings
 - Impeding access to communal areas
 - Games in restricted/inappropriate areas
 - Misuse of airguns
 - Letting down tyres
- **Hoax calls**
 - False calls to emergency services
- **Inappropriate vehicle use**
 - Joyriding

- Racing cars
 - Off-road motorcycling
 - Cycling/skateboarding in pedestrian areas/footpaths
- **Animal related problems**
 - Uncontrolled animals
 - Dog fouling

Acts directed at people

- **Intimidation/harassment**
 - Groups of individuals making threats
 - Verbal abuse
 - Bullying
 - Following people
 - Pestering people
 - Voyeurism
 - Sending nasty/offensive letters
 - Obscene/nuisance phone calls
 - Menacing gestures

- **Can be on the grounds of:**
 - Race
 - Sexual orientation
 - Gender
 - Religion
 - Disability
 - Age

Environmental damage

- **Criminal damage/vandalism**
 - Graffiti
 - Damage to bus shelters
 - Damage to phone kiosks
 - Damage to street furniture
 - Damage to buildings
 - Damage to trees/plants/hedges

- **Litter/rubbish**
 - Dropping litter/chewing gum
 - Dumping rubbish (including in own garden)
 - Fly-tipping
 - Fly-posting

(Source: NAO, 2006: 39)

While Scott and Parkey (1998) have suggested a three-fold classification of antisocial behaviour to include: (a) neighbour nuisance, (b) neighbourhood nuisance and (c) crime; as ASBOs have become more widespread, it has been argued that the courts have become bolder and more inventive about how to frame such orders. One solicitor recently suggested that the definition of antisocial behaviour 'is only limited by one person's imagination' (Black, 2005). Since antisocial behaviour relates to both criminal and non-criminal behaviour, a further consequence of the generalised nature of antisocial behaviour as behaviour that 'is likely to cause harassment, alarm or distress' has been that there is a clear diversity in the types of act that ASBOs can be granted to prohibit. As the EU Commissioner for Human Rights noted; 'such orders [ASBOs] look rather like personalised penal codes, where non-criminal behaviour becomes criminal for individuals who have incurred the wrath of the community' (Gil-Robles, 2005: 34, para.110).

As such an expansive scope of behaviour is necessarily open to 'social judgement', it has been suggested that this has not only given free reign to the endorsement of prejudice and suspicions, but has also meant that 'some local authorities are using the powers to drive off the streets anybody whose behaviour is eccentric, undesirable or a nuisance'²⁷. By way of example, since their introduction in April 1999, ASBOs have been used in certain circumstances, against the mentally ill, children with learning difficulties, the homeless, peaceful protesters and prostitutes. This has met with criticism from a wide range of charitable and civil liberties organisations. For instance, The Children's Society has argued that 'many children and young people are telling us that they do not understand the term [antisocial behaviour], but they feel it is directed towards them' (House of Commons, 2004a: Ev. 25). Crisis has also objected to the equating of begging as antisocial, arguing that, 'although the act of begging may be deemed antisocial, it is a problem that is best understood and dealt with as a manifestation of social exclusion' (House of Commons, 2004a: Ev. 37).

²⁷ Harry Fletcher, General Secretary, Napo. The Guardian, 30 June 2005

Hence, it is clear that there exists a disparity among commentators, policy makers and practitioners as to the effectiveness and value of having such a flexible statutory definition of antisocial behaviour that applies in relation to ASBO cases. Macdonald (2003) has observed that criticisms relating to the broad definition of the term 'antisocial behaviour' possess a commonality centred on wider concerns about the place of discretionary autonomy within the legal system²⁸. Thus, discretionary autonomy is a particularly important aspect of the administration and management of ASBOs. As Macdonald correctly identifies, the nature of the 'umbrella' term antisocial behaviour, necessarily precludes a concise, narrow definition. Hence, local level governance/autonomy and judicial decision-making assume highly significant roles in deciding ASBO application outcomes (and the breadth and terms of ASBO prohibitions). Although studies on ASBOs to date have largely been concerned with investigating the administration and application of the orders, there have not been any studies which have sought specifically to examine judicial discretion in ASBO cases. As such, this study will provide additional insight into the decision-making of the judiciary in ASBO applications.

²⁸ Given that proposals for a clearer definition of antisocial behaviour are 'beset by the hopelessness of trying to define an umbrella term like "antisocial behaviour" precisely' (2003: 206), Macdonald has subsequently proposed two new clauses to section 1(1) of the 1998 Act with the objective, not of defining 'antisocial behaviour', but of expressly detailing the *principles* underpinning the ASBO, in order to provide clarity and consistency in application. Specifically, he suggests that section 1(1) (a) be qualified to require that the behaviour complained of was persistent, that it caused a serious level of harassment, alarm or distress, and that the perpetrator *intentionally* committed the antisocial acts.

The Antisocial Behaviour Order (ASBO)

This next section of the review will consider more fully the statutory nature of the ASBO, and, in particular, the legal and court process(es) involved in their application and administration. Specifically, I will discuss relevant legislative provisions, case law and legal precedent in the context of civil procedure, evidentiary requirements, and the burden of proof with regard to interim orders, orders on conviction and section 1 stand alone orders (full ASBOs).

'Stand alone' orders

ASBOs are civil orders, which were designed as a *preventative* – and not a criminally punitive – intervention. Introduced by the Crime and Disorder Act 1998, the orders have been available since 1 April 1999. In England and Wales, an order can be made against anyone 10 years or over, although in Scotland, ASBOs were only available for persons aged 16 or over until a subsequent amendment in the 2004 Act extended ASBOs to 12-15 year olds. An order contains conditions ('prohibitions') prohibiting the offender from specific antisocial acts or entering defined areas and is effective for a minimum of 2 years, although in Scotland, ASBO duration is a matter for the discretion and evaluation of the Sheriff. The applicant agency must show that the defendant has behaved in an antisocial manner and that the order is necessary for the protection of persons from further antisocial behaviour by the defendant - this is sometimes referred to as the 2 stage test.

The application process

The agencies that are able to apply for orders are defined as 'relevant authorities' for the purposes of the legislation. In England and Wales, these are local authorities, police forces (including the British Transport Police), Registered Social Landlords (RSLs) and Housing Action Trusts (HATs). In Scotland, a relevant authority is a local authority, RSLs and housing associations. It is important to note that the police cannot apply for orders in Scotland, which makes ASBOs appear largely as a housing issue and goes some way to explaining the lack of private sector and owner occupation ASBOs in Scotland.

As set out in the relevant legislation, applicant authorities have a duty to consult other agencies before an application for an antisocial behaviour order is made: table 3.5 (below) sets out the relevant statutory consultation requirements for applicant agencies. Additionally, in Scotland, subsection 11 of the 2004 Act

requires a relevant authority to consult, where the application relates to someone under 16, the Principal Reporter.

Table 3.5 Statutory consultation requirements

Relevant authority	Must also consult
Local Authority	Police
Police (not Scotland)	Local Authority
Registered Social Landlords (RSLs)/Housing Action Trusts (HATs)	Police & Local Authority
British Transport Police (not Scotland)	Police & Local Authority

ASBO proceedings can be conducted in the magistrates' court (a stand-alone order can be obtained from the Magistrates' Court acting in its civil capacity); the Crown, Magistrates' or Youth Court (on conviction in criminal proceedings); or in the County Courts (orders can be made by a County Court where the principal proceedings involve the antisocial behaviour of someone who is a party to those proceedings, although the court cannot make a stand-alone order as there must always be principal proceedings to which the application for an ASBO can be attached). In Scotland, application proceedings are heard in the Sheriff Court sitting in its civil capacity, or the Court of Session (appeal hearing), or the District Court or Sheriff Court on conviction in criminal proceedings.

Interim ASBOs

Interim orders are available under s.1D of the 1998 Act (as amended by s.65 of the Police Reform Act 2002) and s.7 of the 2004 Act in Scotland (as amended by s. 44 of the Criminal Justice (Scotland) Act 2003). This temporary order can impose the same prohibitions and has the *same penalties* as breach of a full ASBO²⁹. An interim order can be made at an initial court hearing held in advance of the full hearing if the court is satisfied that the specified person has engaged in antisocial behaviour and that an interim order is necessary for the purpose of protecting the

²⁹ Although, in Scotland, the granting of an interim ASBO does not allow a local authority/RSL to convert a Scottish Secure Tenancy (SST) to a Short Scottish Secure Tenancy (SSST) - such a right only exists in relation to the granting of a full ASBO.

public from further antisocial behaviour. In Scotland, if the initial writ has been served (for an interim order), the Sheriff may dispense with intimation of the motion for the interim ASBO and grant it without hearing the defender³⁰, although the Court can consider any such representations as it sees fit³¹. The Sheriff may grant an interim order provided the individual named on the application has received intimation of the initial writ and the sheriff is satisfied that the antisocial conduct complained of would be established when a full hearing takes place.

In England and Wales, however, an interim order can, with leave of the Justices' Clerk, be made *ex parte*. In *Kenny v Leeds Magistrates' Court [2004] EWCA Civ 312*, the Court of Appeal held that an interim order made without notice to the defendant did not contravene Article 6 of the European Convention on Human Rights. Statutory guidance on interim ASBOs suggests that applications will be appropriate, for example, where the applicant authority believes that persons need to be protected from the threat of further antisocial acts which might occur before the main application can be determined. In England and Wales, where an interim order is made *ex parte*, good practice guidance states that the court should arrange an early return date. An individual who is subject to an interim order then has the opportunity to respond to the case at the hearing for the full order, and may also apply to the court to have the interim order varied or discharged.

The administration of interim orders - and the statutory provisions governing their use - raises several important questions specifically in respect of procedural fairness. Firstly, because there is no legal requirement that evidence should be led at the interim stage, this necessarily means that interim orders can be issued without the lodging of any productions, or the hearing of any witness statements. As a result, interim order breaches can be prosecuted in court when the validity of the original order had never been tested by evidence at the initial hearing. As such, this research study investigates the grounds on which interim orders are obtained, and also judicial attitudes to the prosecution of interim order breaches. Moreover, the extent to which interim orders have become a means to avoid traditionally encountered difficulties - and safeguards - in the legal process is investigated and assessed through analysis of the responses of solicitors, and sentencers. Both of these research questions are necessarily embedded within the central research theme of procedural fairness in ASBO applications.

³⁰ As per s.115 of the Statutory Guidance on Antisocial Behaviour Orders (2004)

³¹ As per s.86 of the Statutory Guidance on Antisocial Behaviour Orders (2004)

Orders on conviction (CRASBOs)

Following legislative changes made in s.64 of the Police Reform Act 2002 and s.234AA of the Criminal Procedure (Scotland) Act 1995, criminal courts may now also make orders against individuals convicted of a criminal offence (sometimes referred to as a 'CRASBO'). In a similar way to ASBOs imposed in the civil courts, ASBOs on conviction are intended to prevent further antisocial behaviour, but specifically in relation to incidents that the police have reported (and where criminal proceedings have subsequently been taken). An order on conviction is granted on the basis of the evidence presented to the court during the criminal proceedings and any additional evidence provided to the court after the verdict. Contrary to reports by Madge (2004), that CRASBOs are often regarded as a component of a sentence, the order on conviction is *not* part of the sentence and can only be made in addition to a sentence or a conditional discharge.

While the ASBO on conviction was never intended as a replacement for orders on application, they *were* intended as a means of expediting a lethargic and resource-intensive court process. In England and Wales, the amount of orders now obtained on conviction has begun to exceed the volume of orders obtained by section 1 stand-alone applications. For the period between April 1999 and September 2004, of those ASBOs issued in England and Wales, 59% were on application and 41% were on conviction (House of Commons, 2005b). Yet, orders on conviction only became available to persons in England and Wales who had been convicted of a relevant offence committed *on or after* 2 December 2002, while ASBOs had been available since 1 April 1999. Statistics for England and Wales from November 2002 to September 2004, for example, show that the number of orders granted on conviction accounted for 71% of all ASBOs issued in England and Wales during this period (Burney, 2005: 94). The Court of Appeal has, however, reinforced the principle that an order should not be made simply for the purposes of extending the penalty for committing an offence³² and it was further established in *R v P [2004] EWCA Crim 287*, that orders on conviction should *not* be made where custody has been imposed if the offender is not persistent and a period on supervision will follow.

However, despite the extensive use of orders on conviction in England and Wales, only 65 ASBOs have been made on conviction in Scotland since they became available on 28 October 2004. In contrast to England and Wales, where a court can make an order on conviction on its own initiative (and an application for

³² *R v Kirby [2005] EWCA Crim 1228*, see also *R v Adam Lawson [2006] 1 Cr App. R (S) 323* and *R v Williams [2006] 1 Cr. App. R (S) 305*

an order is not required) or the order can be requested by the police or local authority (who may make representations to the court in support of the request), in Scotland ASBOs on conviction are not applied for by any authority, or the procurator fiscal. Instead, it is a matter for the court based on the evidence given at trial or the Crown narration in court.

No research evidence exists on the use of orders on conviction in Scotland. The most recent research study on ASBOs conducted by the Scottish Executive only considered the use of interim orders and full ASBOs and did not provide any data on the use of orders on conviction in Scotland. Given the enthusiastic uptake of orders on conviction in England and Wales, it would be propitious, for the purposes of extending knowledge(s) about the use of ASBOs and ASBO procedure(s), to examine the reasons behind the limited use of orders on conviction in Scotland, and moreover, the attitudes (and preferences) of solicitors in England and Wales to the use of orders on conviction, compared with the use of stand alone orders. As such, the use of orders on conviction is explored in this study with a view to providing an account of the reasons for the jurisdictional disparity in their uptake.

Civil procedure

As previously stipulated, the nature of the ASBO is such that it is designed to be a *preventative* remedy and not a punitive sanction. Thus, the civil law status of the orders has implications for the type of court proceedings at which applications are heard. In considering the classification of the orders in the landmark House of Lords case *R (McCann) v Manchester Crown Court [2003] 1 AC 787*, their lordships held that, if, for the purposes of Article 6 of the European Convention on Human Rights, or for the purposes of domestic law, ASBO proceedings were to be classified as criminal in nature, 'it would inevitably follow that the procedure for obtaining antisocial behaviour orders is completely or virtually unworkable and useless' (as per Lord Steyn at [18]). In this respect, the central argument that the (potentially) onerous conditions that could be contained within the prohibitions of an order necessitated that the proceedings be regarded as criminal were rejected. In support of this decision, Lord Steyn described the draconian nature of many civil law injunctions such as *Mareva* injunctions³³ and *Anton Piller* orders³⁴, and cited his

³³ This is a special form of injunction stopping a party from disposing of assets or removing them from the jurisdiction (out of the country).

³⁴ An Anton Pillar Order directs a defendant to disclose or to deliver up documents

'scepticism of an outcome which would deprive communities of *their* fundamental rights' (original emphasis, at [18]).

Further, in *Clingham v Kensington and Chelsea RLBC [2003] HLR 17*, whereby the imposition of an ASBO was challenged as being contrary to the Human Rights Act 1998, Lord Steyn described the balancing of rights in ASBO cases thus:

'The view was taken that the proceedings for an antisocial behaviour order would be civil and would not attract the rigour of the inflexible and sometimes absurdly technical hearsay rule which applies in criminal cases. If this supposition was wrong, in the sense that Parliament did not objectively achieve its aim, it would inevitably follow that the procedure for obtaining antisocial behaviour orders is completely unworkable and useless. If that is what the law decrees, so be it. My starting point is, however, an initial scepticism of an outcome which could deprive communities of *their* fundamental rights...' (at para 18; original emphasis)

Carr and Cowan (2006: 68), drawing upon Valverde (2003: 47), suggest that Lord Steyn is guilty of judicially 'ventriloquiz[ing] the "national" community'. Using Lord Steyn's (above) statement in *Clingham*, and his opinion in the case of *Manchester City Council v Lee [2004] HLR 11 161* - that antisocial behaviour constitutes a 'social problem' - Carr and Cowan assert that 'what Lord Steyn is doing...is quite different from the normal legislative function of judges' (p.68), and they argue that such 'discursive strategies...have a kind of negative encoding in which important elements are hidden away in what is left unsaid' (p.69).

Moreover, the civil classification of the ASBO process means that civil rules of evidence apply, including the use of hearsay and professional witness evidence. Expressing their deep concern over the use of civil rules of evidence in ASBO cases, Carr and Cowan note that:

'the dismantling of traditional restrictions on the use of anonymous evidence becomes inevitable and unchallenged. This operates to exclude the antisocial from the normal and oratorically universal protections of the law. Common sense therefore justifies the death of the social existence of the "other" because of the need to enhance protections of the "innocent" and "the law-abiding"' (p. 69).

Similarly, in his discussion of the human rights element in antisocial behaviour legislation, Andrew Ashworth (2004: 268) posits that the creation of ASBOs as a *preventative* remedy in civil law has been ‘an attempt to take maximum advantage of legal forms’, which essentially enables relatively oppressive conditions to be attached to the orders by virtue of their civil law status.

In contrast, in a consideration of the use of hearsay evidence in ASBO applications, and the need to balance the rights of the defendant and the rights of the victim, Lord Hutton argued thus:

‘I consider that the striking of a fair balance between the demands of the general interest of the community (the community in this case being represented by weak and vulnerable people who claim that they are the victims of antisocial behaviour which violates their rights) and the requirements of the protection of the defendants’ rights requires the scales to come down in favour of the protection of the community and of permitting the use of hearsay evidence in applications for antisocial behaviour orders.’
(at [113])

Additionally, it must be acknowledged that, although the application for an ASBO is a civil process, the consequences of the breach of an order are criminal. It was argued by the defendants in *McCann* that, when considering the appropriate legal status of an ASBO, the courts should have regard to the proceedings leading to the imposition of an order, *but also* that the court should acknowledge that criminal proceedings may be brought if the order is subsequently breached. Lord Steyn set aside this argument:

‘These are separate and independent procedures. The making of the order will presumably sometimes serve its purpose and there will be no proceedings for breach. It is in principle necessary to consider the two stages separately’ (at [23]).

In a consideration of the House of Lords’ decision in *McCann*, Macdonald (2003: 633) has been unable to reconcile Lord Steyn’s view that proceedings under s.1(1) of the 1998 Act should be ‘separate and independent’ from potential criminal proceedings under s.1(10). Alternatively, he contends that evidence presented at the initial proceedings for the granting of an order may then subsequently be used in criminal proceedings to form the basis of the sentence for breach. The nature of

ASBO proceedings as a hybrid of civil and criminal law has meant that 'findings of fact from the civil proceedings [are] relevant to the criminal penalty that is ultimately imposed' (ibid.). He further notes, antithetically to the view of Lord Steyn, that there is no existing legal principle that creates an obligation/duty for the two stages to be considered separately (ibid.).

In his analysis of *McCann*, Macdonald (2003: 639) has also suggested that New Labour failed to recognise, from the outset, the potential for 'a principled application of the hearsay rule' to be applied in cases involving intimidated witnesses, similar to the approach taken in the Strasbourg Court to balancing the tensions between the rights of the defendant and the rights of the victim. He argues that even if ASBO proceedings were classified as criminal, this would not consequently eliminate the ability of agencies to conduct 'an effective campaign against antisocial behaviour' (ibid.).

Hence, the discussion above (and in particular the observations of Ashworth (2004), Carr and Cowan (2006), and Macdonald (2003; 2006)), highlights the fundamental relevance of judicial decision-making in ASBO applications. Moreover, as juridical power and discretion is a central theme of this thesis, the primacy of judicial autonomy with regard to substantive decision-making will accordingly be examined in respect of the extent to which the judiciary have approved a shift from criminal law to civil remedy. Furthermore, the research study will consider to what degree the courts have, in essence, *defined* a new form of preventative order, and the civil classification of the ASBO will be examined in terms of substantive legal procedures and outcomes.

Although existing discussions on ASBOs have examined judicial decision-making (see above, Ashworth, 2004; Carr and Cowan 2006, Macdonald, 2003; 2006), there has not been a study conducted which has obtained information directly from members of the judiciary deciding on ASBO cases. As such, this study will attempt to provide additional insight into the study of ASBOs through interviews conducted with the judiciary. The interviews seek to better understand the influence of judicial decision-making in ASBO applications, and the attitudes of the judiciary towards the interpretation of the relevant legislative provisions. As I have stipulated in this Chapter and previous Chapters, judicial discretionary decision-making will, furthermore, be analysed within a wider theoretical framework which specifically analyses the place of discretion within the legal system, and the derivative effect on fairness and procedural justice outcomes.

Burden of Proof

Civil court applications

As we have already seen, in *McCann*, their lordships made ASBO applications an exception from the normal standard of proof in civil proceedings (on the balance of probabilities) and they ruled that the *heightened* civil standard, equivalent to the criminal standard, was to apply, and as such, ASBO proceedings are subsequently regarded as *quasi-criminal* in nature. The Court held that an individual must be shown to have perpetrated behaviour that is antisocial, and that such an order must be 'necessary' to protect persons from harassment, alarm or distress. The question of 'necessity' is, however, one for the exercise of the judge's individual evaluation and discretion - without a standard of proof as such. In considering the burden of proof in *interim* order applications Kennedy LJ explained in *R (Manchester City Council) v Manchester City Magistrates' Court [2005] EWHC 253 (Admin)*, that: 'The test to be adopted by a magistrates' court when deciding whether or not to make an interim order must be the statutory test: whether it is just to make the order.' Similarly, in the leading case of *R v Boness [2005] EWCA Crim 2395*, it was held that no prohibition may be imposed in the order unless it was *necessary* for the purpose of protecting persons from further acts of antisocial behaviour by the defendant.

Yet, although the House of Lords had previously set out the law on the standard or proof in respect of ASBO applications in *McCann*, the position was not binding in Scotland. Therefore, Scottish courts were not obligated to follow the House of Lords judgement. Subsequently, the standard of proof applied in Scottish cases is, in contrast to cases in England and Wales, the civil standard of proof – and not the heightened civil standard (equivalent to the criminal standard) that is applied South of the border. In effect, this appears to have created an amount of uncertainty and confusion among the legal profession (in Scotland) as to the appropriate standard of proof required in ASBO cases. Existing case law on the burden of proof in interim/ASBO cases in Scotland is limited to essentially three principal cases: *Glasgow Housing Association Ltd v O'Donnell (2004) GWD 29-604*; *Glasgow Housing Association Ltd v Sharkey (2004) HousLR 130*; and *Aberdeen City Council v Fergus (2006) GWD 36-727*.

In *O'Donnell*, Sheriff Holligan considered the criteria to be satisfied before an interim ASBO could be granted. It was held that the court had to be satisfied that the interim order was 'necessary' to protect relevant persons from further antisocial acts or conduct. However, in *Sharkey*, Sheriff Principal Bowen commented on the judgement of Sheriff Holligan in *O'Donnell*, and concluded that

Sheriff Holligan's observation that the necessity test was a 'high' one went too far. Sheriff Principal Bowen decided that 'necessity' was a matter of fact to be decided on a case by case basis, which was an exercise of judgment for the presiding Sheriff in an individual case. Sheriff Principal Bowen's judgement was confirmed in *Fergus*, whereby Sheriff Principal Young confirmed that in considering whether an interim order should be made, the court undertook a two stage test. The court requires to be satisfied, first, that the person was engaged in antisocial behaviour, and secondly, that an interim order should be made. In looking at this matter, no particular standard of proof is applicable. The second stage requires the Sheriff to consider all relevant matters, ignore irrelevant matters, correctly apply the law and come to a decision which is reasonable³⁵.

However, it is apparent that there exists inconsistency in the courts with regard to the standards that are required by Sheriffs for successful interim/ASBO applications. In Fife, for example, interim orders can be sought and are granted in Chambers without the need for a court hearing. Yet, in Glasgow, it has been reported that interim order applications have been rejected until a full proof submission is made. Moreover, in some areas, the evidential requirements laid down by Sheriffs for interim orders are 'little different from what was deemed necessary to justify applications for full ASBOs' (2005a, s.2.21). Thus, given the implications for fairness in procedural outcomes in ASBO cases, it is important that the evidentiary requirements sought by Sheriffs - and also solicitors' experiences of the burden of proof to be met – are studied in more detail. As such, I address the issue of variation in the evidentiary requirements for interim/ASBO applications through an examination of judicial decision-making, and an analysis of information from solicitors on their knowledge and experience(s) of evidentiary requirements in ASBO applications. In order to provide a comparison with evidentiary practice(s) and knowledge(s) in England and Wales, data derived from solicitors from South of the border is also included in this part of the investigation.

Criminal court applications

It is important to note that the proceedings in which an ASBO on conviction is issued are civil, even though they are conducted by a criminal court³⁶. Importantly, there are no procedural rules in existence for orders on conviction. The Court of

³⁵ It was subsequently settled in *Edinburgh City Council v Donald Gibson (2006)* that a court could make an interim antisocial behaviour order even where an interim interdict is already in place.

³⁶ As per *R (W) v Acton Youth Court [2005] EWCH 954 (Admin)*

Appeal has, however, provided some instruction in this area in the case of *R v W and F* [2006] EWCA Crim 686. Having noted the paucity of court rules setting out the procedure to be followed in such cases, the Court of Appeal gave the following general guidance:

- The prosecution should identify specific facts said to constitute antisocial behaviour;
- If the defendant accepts those facts, then they should be put in writing;
- If the defendant does not accept them, they must then be proved to the criminal standard of proof;
- The defendant should have sufficient time to consider the prosecution's evidence against him/her – particularly with regard to evidence that is beyond the scope of the offence that the defendant has been convicted of;
- Hearsay evidence is admissible;
- Procedure as per the Magistrates' Court (Hearsay Evidence in Civil Proceedings) Rules 1999 should be followed;
- Findings of the court should be recorded in writing as rule 50.4 of the Criminal Procedure Rules 2005.

In Scotland, there are certain specific differences in procedure for orders on conviction. Proceedings are criminal and subsequently, hearsay evidence cannot be considered. The court will, however, take into account previous convictions tendered by the Crown at the point of sentencing. There is also no definitive guidance on whether a civil ASBO should still be pursued if a criminal case is pending. The statutory guidance on antisocial behaviour orders (Scottish Executive, 2004a) states at paragraph 16 that:

‘An ASBO is not intended to be a substitute for criminal proceedings where these are appropriate, and is intended to be complementary to other civil procedures such as interdict (where use of these is appropriate). Joint working and effective information sharing locally is important to ensure the most appropriate action is taken in the circumstances.’

The previous section (*‘Orders on conviction’*) considers the salient questions that have been raised with regard to the use of orders on conviction and, for the purposes of this thesis, how they will be answered. This next section examines the

available evidence on the use of ASBOs with regard to data on the numbers granted, cost, breach, and appeal.

ASBOs in practice

Scotland

In Scotland, between April 1999 and March 2005, 559 ASBOs had been granted (this includes those initially granted on an interim basis) (Scottish Executive, 2005b: 1). In the most recent study year (2004/05), a total of 205 ASBOs were granted by the Scottish courts, representing a rate of 9.2 Orders per 100,000 households, and represents a decrease in the rate of growth in ASBO activity in Scotland, which had been continuously increasing since 1999/00. The rate of ASBOs in England and Wales has also been continually increasing and now stands at a rate of 12.3 Orders per 100,000 households (ibid.). Research on behalf of the Scottish Executive notes that the incidence of ASBO applications in Scotland 'is not only highly diverse, but is also quite inconsistent with what might be anticipated in terms of the expected pattern of antisocial behaviour' (2005a: s. 2.25). Moreover, ASBO activity is 'only slightly associated with survey evidence on the incidence of antisocial behaviour' in Scotland (2005b: 1). The reasons for this geographical variation in ASBO use are subsequently described as four-fold (Scottish Executive, 2005b: 2) and include the differing speeds at which local authorities/RSLs have been 'gearing up' to make full use of ASBO powers; the variation in attitudes of the legal profession/courts regarding ASBO applications; the organisational responsibility for tackling antisocial behaviour within individual local authorities; and the extent of local authority/RSL commitment to resolve antisocial behaviour through alternative means such as mediation, the use of antisocial behaviour contracts (ABCs) etc. About half of all full ASBOs granted in both 2003/04 and 2004/05 in Scotland were of indefinite duration (Scottish Executive, 2005a, s.5.5) and orders range in length from less than a year to an indefinite duration. For some landlords, placing an indefinite duration upon an ASBO is 'simply a standard approach or part of their official policy' (s.5.8).

There is also diversity in the types of act that ASBOs are being granted to prohibit, which is, in part, a consequence of the broad definition of antisocial behaviour as behaviour that causes, or is likely to cause 'alarm or distress'. Research has found that behaviour prompting an ASBO application generally falls into one of three main categories – neighbour nuisance, noise and rowdy behaviour. Of the total number of ASBOs granted in Scotland, 40% relate to noise nuisance and a further 11% of orders prohibit the perpetrator from entering a specified area. In terms of the conditions placed on ASBOs, 44% were classed as 'other' by local authority/RSL respondents, and involve the prohibition of a wide

range of behaviours, including shouting, swearing, vandalism, verbal abuse, threatening behaviour, intimidation and carrying a weapon (2005b: 3).

Originally, Home Office Guidance on the 1998 Act (although it has since been superseded by Part 2 of the 2004 Act) stated that an ASBO should be used as a 'last resort'. The 2004 Scottish Executive *Statutory Guidance on the Use of ASBOs* signals a moderate departure from this as it does not explicitly use the term 'last resort', but it does state that local 'authorities will want to consider a range of options...before deciding to pursue legal action' (Scottish Executive, 2004a: s. 11). Hence, ASBOs may now be used when other methods are deemed inappropriate or less effective than an order, or perhaps used in partnership with support mechanisms. In general, ASBOs continue to be applied mainly to social sector tenants – in 2004/05, 89% of full ASBOs were granted to local authority/RSL tenants (Scottish Executive, 2005b), and the amount of orders granted in social sector housing appears to be a reflection of the actual incidence of antisocial behaviour. It was also found that ASBO offences are more likely to be committed by individuals, rather than by groups of people. Although a significant proportion of ASBO cases involved related applications being served on individual members of the same family (24%) or to members of gangs (11%) (ibid.).

England and Wales

In England and Wales, between April 1999 and December 2005, 9,853 ASBOs were issued. The minimum duration of an ASBO in England and Wales is two years but there is no maximum period, as it is for the court to decide the duration of the order depending on the severity of the antisocial behaviour in question. The latest published figures up to September 2005 show that 62 per cent of antisocial behaviour orders issued to young people aged 10 to 17 were for a period of less than three years (House of Commons, 2006). Research also demonstrates that the same factors affecting the wide geographical variation in the use of orders in Scotland, are affecting the issuing of orders in England and Wales. Both Campbell's early work on the use of ASBOs, and the most recent study of the orders carried out by the National Audit Office, similarly highlight geographical variation, and the attitudes of practitioners to antisocial behaviour interventions (and available alternatives) within different locales, as effecting ASBO uptake (see Campbell, 2002a; NAO, 2006).

Cost

The cost of taking out an ASBO has been known to range from £2,500 to in excess of £100,000³⁷. Campbell's (2002a) early review of the financial costs associated with ASBOs concluded that the average cost to police or local authorities was £4,800, including preparation of case, attendance at problem solving meetings and dealing with breaches and appeals. In 2004, the results of the Home Office's 'Together' ASBO Cost Survey then provided an estimate of £2,500 for the average cost of obtaining an ASBO. These results suggest that the average cost of administering an ASBO has fallen since Campbell's analysis in 2002. The report notes that 'the main drivers behind this decrease in costs appear to be the use of ASBOs on conviction and possibly more efficient administrative and legal procedures, as practitioners have become increasingly familiar with using ASBOs' (2004c: 2). However, the report findings add that estimates of costs of ASBOs were wide-ranging in both the 2002 and the 2004 surveys³⁸. Alternatively, many local authority antisocial behaviour protocols state that the minimum cost of an ASBO application is likely to be £5000 and will involve several weeks/months of preparatory work. However, the nature of ASBO applications, the diverseness of those made subject of them, and the differences between the authorities applying for them, mean that no 'standard cost' of an ASBO application can be given.³⁹

Antisocial behaviour perpetrators

A substantial amount of evidence exists to show that ASBOs are being served for an increasingly broad range of behaviour. It has been suggested that the use of ASBOs across Britain to address a wider and more diverse range of behaviour, is a direct result of 'growing pressure [on relevant authorities]...from both residents and elected members – for action on antisocial behaviour...a development...resulting in part from the high profile of the issue in the media' (Scottish Executive, 2005a: 19).

³⁷ The Metropolitan Police Authority, in a 2001 report by the Commissioner, stated that a detective sergeant involved in one application had spent more time on an ASBO application than she would normally have spent on a very serious criminal investigation. Officers estimated the cost of obtaining this ASBO was in excess of £100,000.

³⁸ In 2004, the minimum estimated cost was £150 (for an ASBO on conviction). The maximum estimated cost was £10,250, which was the first ASBO issued by one CDRP. ASBOs on conviction were generally cheaper to administer than other types of ASBOs, costing on average £900 compared with over £3,000 for stand-alone orders (Home Office, 2004).

³⁹ In 2005, only 19 local authorities in Scotland were found to be collecting financial information about the cost of using ASBOs and other measures to tackle antisocial behaviour (Scottish Executive, 2005a: para. 2.4). Previously, the Convention of Scottish Local Authorities (COSLA) had emphasised the difficulties in estimating the average costs of ASBOs, but suggested that the costs were more often between £5,000 and £20,000 (Scottish Parliament, 2004).

Moreover, it has been argued that the interim ASBO has greatly widened the appeal of the device because it has demonstrated that swift action on antisocial behaviour is achievable (Pawson et al. 2005).

Inappropriate ASBOs

Statutory guidance on the use of ASBOs states that an authority does not have to prove intention on the part of the defendant to cause alarm or distress (Scottish Executive, 2004a: para.27). This effectively removes the requirement for criminal intent or *mens rea*, upon which criminal cases are dependent. Brown has argued that 'this explains why antisocial behaviour control is unconcerned about mental health problems, learning difficulties, addictions, domestic violence and other potential 'mitigating factors' that are common features of antisocial behaviour cases' (2004: 206-207). Subsequently, there has been criticism, particularly from civil liberties groups and charities (BIBIC, 2006; Liberty, 2004; Mason, 2005; Napo, 2004; SANE, 2005), of the serving of ASBOs against the mentally ill, children with learning difficulties, peaceful protesters, the homeless and prostitutes. For example, the Chief Executive of the mental health charity SANE, Marjorie Wallace, has stated that situations involving mentally ill people 'should not be allowed to degenerate to the point where the police become involved and an inappropriate course of action is taken in the form of an ASBO' (SANE, 2005). As a result, the inappropriate issuing of ASBOs has become an area of significant concern and debate. While the Home Affairs Committee has stated (House of Commons, 2005a:73) that 'we do not consider the inappropriate issuing of ASBOs...[to be] a major problem', the Committee also recommended that 'the Home Office commissions wide-ranging research in this area' (ibid).

Hence, although numerous studies have identified that ASBOs are, to an extent, being issued to individuals who are vulnerable and/or marginalised, little analytic attention has been paid to judicial decision-making processes in these circumstances, or the way(s) in which the courts involved in such applications reconcile the granting of an order with the perpetrators personal circumstances versus the need to protect the wider community. Moreover, no studies have examined the contribution and influence of judicial discretion in cases involving individuals presenting with potential 'mitigating' circumstances such as mental health or addiction problems. As such, this research study seeks to contribute to the existing work on ASBOs issued to vulnerable individuals/groups by conveying some understanding of (the complexity of) judicial decision-making in circumstances involving applications where there exist potential 'mitigating factors'.

ASBOs and Children

In Scotland, ASBOs had originally only been available for persons aged 16 or over until a subsequent amendment in Part 2 of the 2004 Act extended ASBOs to 12-15 year olds. The extension of the use of ASBOs for young people took place in October 2004, and requires local authorities/RSLs to develop specific policy and practice that directly involves social work and criminal justice practitioners, including Children's Panels and Children's Reporters. Research on behalf of the Scottish Executive (2005b.) states that it is to be anticipated that 'social work or children services departments may take the pivotal role in determining whether, and in what circumstances, ASBOs are sought' and that consequently, the use of ASBOs for adults, and for 12-15 year olds, might be significantly different within the same organisation and/or area (2005b: 44).

Subsequently, there has been criticism from particular city councils in Scotland regarding what they consider to be the overly restrictive conditions contained within statutory provisions governing the use of ASBOs for persons under the age of 16. They have argued that the legislative provisions requiring consultation with social services and other agencies is too onerous and that statutory conditions ultimately makes it very difficult for local authorities/RSLs to apply for ASBOs against young people. For example, Sheila Gilmore, an Edinburgh city councillor, has stated that:

'The way the legislation has been framed means you are required to sign up the backing of children's services, social work and the children's reporter's office to get an ASBO for an under 16. Also there are a lot of professionals who do not believe they should be used on the under-16s in the first place so are reluctant to use them.' (The Scotsman, 10 November 2006)

However, compared to the approach taken in England and Wales, the Scottish response to antisocial behaviour perpetrated by children is significantly different in certain fundamental respects. The use of ASBOs for 12-15 year olds in Scotland must complement the Children's Hearing System, which continues to be 'the primary forum' for dealing with behaviour beyond parental control or offending behaviour by under 16s (Scottish Executive, 2005a) and represents a considerably more holistic, welfare-based approach to tackling the problem of antisocial behaviour in children. For example, prior to making an application for an ASBO in respect of an under 16, applicant agencies must consult the Principal Reporter and

the presiding Sheriff must have regard to any views expressed by the Principal Reporter before determining whether to make an order or an interim order. Additionally, the Sheriff must have regard to advice provided by a children's hearing before determining an application for a full ASBO.

Moreover, children under 16 cannot be detained for breaching ASBOs in Scotland. Section 10 of the 2004 Act makes clear that breach of an ASBO by a person under 16 will not lead to detention where no other offences are involved. If criminal proceedings are taken against a child for breach of an ASBO and he/she pleads or is found guilty, the court must, if the child is subject to a supervision requirement, seek advice from the children's hearing on how the child might be treated. If the child is not subject to supervision the court may still seek the advice of a hearing, and if the case is dealt with by the Reporter, the Reporter or a hearing will take into account what more can be done to address the child's behaviour and needs, considering the range of options available to them. Data collected for research on behalf of the Scottish Executive indicates that most local authority respondents in Scotland are setting up (or have already set up) specific procedures to tackle antisocial behaviour amongst young people and are considering a range of responses including parenting orders, ABCs, referrals to other agencies, and diversionary activities (2005b: 4). Furthermore, prior to September 2005, Scotland had been markedly different from England and Wales in the respect that there had been no ASBOs served against anyone under 16 years old - although 71% of Antisocial Behaviour Contracts (ABCs) currently involve young people under 16 years of age (Scottish Executive, 2005b: 2). On 20 September 2005, Paisley Sheriff Court became the first court in Scotland to serve an ASBO on someone below the age of 16 when an ASBO was granted against a 14 year old from Renfrewshire. Edinburgh Sheriff Court followed on 17 October 2005, and awarded an ASBO against a 15 year old boy⁴⁰. Presently however, only six ASBOs have been granted against persons under 16 years old in Scotland and around a fifth of ASBOs granted in Scotland in 2004/05 related to young people aged 16-18 years old (Scottish Executive, 2005b.) - although it should be noted that this is a disproportionate number bearing in mind the overall representation of the 16-18 year old group within the Scottish population.

⁴⁰ Welcoming the outcome of the case in Edinburgh, City Councillor Donald Anderson remarked in the Edinburgh Evening News (19 October 2005) that 'an ASBO should be seen as a warning, not a last resort'. He also promised an increase in the use of ASBOs against children who believed they were 'untouchable'.

In particular, the use of publicity in ASBO cases involving children has prompted widespread debate among commentators and practitioners. While the police and local authorities in England and Wales have made wide use of the powers available to them to publicise the details of orders that have been issued to both adults and children in their locales, in Scotland, however, local authorities have been highly reluctant⁴¹ to make use of powers available to them to publicise details of those issued antisocial behaviour orders. Importantly, children in Scotland are protected from being identified by the imposition of automatic reporting restrictions⁴². However, the extensive use of publicity in England and Wales has raised civil liberties and human rights concerns, particularly with regard to the 'naming and shaming' of children. While conceding that the serving of ASBOs should be made public, and that in this respect, reporting restrictions on young people need not always be strictly adhered to, the EU Commissioner on Human Rights commented in June 2005 that:

'the aggressive publication of ASBOs through, for instance, the door step distribution of leaflets containing the names and addresses of children subject to ASBOs risks transforming the pesky into pariahs...Such indiscriminate naming and shaming would, in my view, not only be counter-productive, but also a violation of Article 8 of the ECHR.' (Gil-Robles, 2005: 37)

However, on the legal question of whether 'naming and shaming' did indeed constitute a violation of Article 8 of the European Convention on Human Rights, the High Court held, in the landmark test case of *Stanley, Marshall and Kelly v Commissioner of Police for the Metropolis and The Chief Executive of Brent Council [2004]*, that 'where publicity was intended to inform, reassure and assist in enforcing the orders and deter others, it would not be effective unless it included photographs, names and partial addresses' (Kennedy L.J.). Scraton (2004) has argued that, not only does this judgement effectively mean that 'naming and shaming' has received the endorsement of the courts, but also that ultimately, 'ASBOs [are]...a classic example of net-widening through which children and

⁴¹ For example, Edinburgh Education Chief Ewan Aitken described the use of publicity in ASBO cases as 'legalised humiliation' and likened it to bringing back the stocks. Similarly, SNP justice spokesman Kenny MacAskill said he believed that the 'naming and shaming' policy could be a 'waste of resources....We need a solution, not stigmatisation.' (Edinburgh Evening News, 30 Jan 2006)

⁴² Although the Sheriff has discretion to lift reporting restrictions if he/she considers it to be appropriate.

young people in particular...[become] elevated to the first rung of criminalisation's ladder' (p. 15). Burney (2002) has contended that the practice of 'naming and shaming' 'reinforces the image of a country at the mercy of 12 year old tearaways' (p.475), while Willow (2005) has described the increasing use of ASBOs as a 'badge of honour' for young people⁴³. In this context, it is also important to note the very limited use that has been made of Individual Support Orders (ISOs) in England and Wales.

Research has found that in England and Wales, very few ISOs have been used to support children with behavioural difficulties who have been issued with an ASBO (BIBIC, 2005). Support orders can be given to 10-17 year olds who have already been issued with an ASBO and are designed to tackle the underlying causes of the problem behaviour. However, only 7 ISOs were issued between May and December 2004; compared to over 600 ASBOs issued to young people aged 10-17. Hence, the approach adopted by both practitioners and the courts in England and Wales is considerably different to that adopted in Scotland, both in respect of the position of the child in ASBO action, and in terms of the support networks that are in place to help young people with ASBOs who also have diagnosed behavioural problems. Support agencies have proposed that what is needed is a tiered approach to antisocial behaviour interventions, with closer assessment of problematic behaviours in multi-agency discussions. In cases involving young people, it has been argued that youth offending teams (YOTs) need to be involved at the earliest stage of a young person's problematic behaviour so that learning or behavioural difficulties can be identified quickly, which would help to ensure that an inappropriate course of action is not going to be taken (YJB, 2006).

Given the different jurisdictional approaches adopted with regard to child welfare, and youth justice in general⁴⁴ - in so far as the Children's Hearing System remains the primary forum for addressing problematic behaviour (or behaviour beyond parental control) for children under the age of 16 in Scotland – it is evident from existing literature that these differences have impacted on the uptake of

⁴³ There is currently a paucity of research evidence available on the effectiveness of publicity in ASBO cases in Britain. However, in Scotland, Edinburgh city council is currently considering beginning a pilot research study to assess the effectiveness of 'naming and shaming' in ASBO cases in the South of Edinburgh.

⁴⁴ For example, Squires and Stephen (2005: 4) equate the drive to tackle youth-related antisocial behaviour in England and Wales as predicated upon the growth in public perception that young antisocial behaviour perpetrators had been able to act with 'impunity...apparently confident that neither the police nor the rest of the youth justice system could touch them'.

ASBOs for children and young people, and the circumstances in which they are deemed appropriate. No empirical studies have so far explored the discongruity between the use of ASBOs for children and young people in Scotland, and in England and Wales in respect of legal and judicial decision-making. Hence, this thesis aims to examine the diversity in jurisdictional approach(es) to the use of ASBOs for children and young people, and, moreover, the influence of solicitors and the judiciary in shaping policy and practice outcomes on the use of ASBOs for children.

ASBO breach

Scotland

Data collected on behalf of the Scottish Executive (2005a; 2005b) suggests that the term 'breach' is not consistently understood and moreover, that methods of statistical data collection within local authorities relating to types of breach are 'patchy and inconsistent'. This led to further guidance on 'monitoring, identifying and dealing with ASBO breaches' being requested by practitioners involved in their research survey group (2005a: s.5.15). Due to the lack of clarity in the monitoring of breaches, the Executive's first report of research findings was only able to analyse results from 25 of the 32 local authority areas in Scotland (2005a: s.5.11) and the data from the Scottish Executive Justice Department was also at variance with the survey returns. It was found provisionally that 67% of orders had been breached during 2003/04, although respondents emphasised that a breach did not necessarily constitute a failure (s.5.15). Of the total number of breaches identified, just under three quarters had been reported to the Procurator Fiscal (s.5.12).

The second report of their findings again identified that ASBO breaches are being interpreted differently by different local authorities and that ASBO data is being collated and recorded differently across the country. It was found that information on ASBO breach is often collected by police and/or other agencies and is not necessarily passed to local authorities. The study data collected from local authorities/RSLs for the study year 2004/05 on the numbers of ASBOs breached found that 140 of the 544 ASBOs in force (both interim and full) were allegedly breached in this period. These findings were then compared with data provided by the Scottish Court Service. According to the court data, there were a total of 303 breaches of ASBOs recorded by the courts in 2004/05. This compared to a total of 133 breaches recorded by local authorities/RSLs as being reported to the Sheriff's Court. However, it should be noted that the court data did not identify how many of the 303 recorded breaches may be accounted for by multiple breaches of the same

order. Scottish Executive survey data found that, in the survey year 2004/05, just over half of alleged breaches were reported to the Procurator Fiscal. A further 23% involved the perpetrator being detained in custody for an appearance in court. In 14% of cases no action was taken following initial police or officer visit (2005b: 40).

England and Wales

In England and Wales, for the period to December 2005, the breach rate for ASBOs was 47 per cent overall (57 per cent for juveniles and 41 per cent for adults)⁴⁵. However, the same problems apply in England and Wales in relation to the monitoring of the orders and the quantification of their efficacy if they are being breached (see also below, 'ASBO effectiveness'). Hence, it is clear that the quantification and analysis of ASBO breaches is presently an area that requires further research and study. Research evidence has also found that issues relating to the servicing and effective monitoring of ASBOs are perceived by practitioners as being of fundamental importance to the successful implementation of the orders. Without the resources to effectively and consistently monitor the provisions of serviced orders, ASBOs can become what has been described as a 'Paper Tiger', whereby the police are unable to enforce the amount of orders granted; a situation which has become more prevalent in England (for example, in the Greater Leeds and Manchester areas). If ASBOs appear unenforceable, this, of course, has public confidence implications.

Sentencing for breach

However, for the purposes of this research study, the particular area of interest with regard to ASBO breach is in respect of sentencing tariffs, and specifically, the principle of 'composite sentencing'. Macdonald (2006: 792) states that: 'One of the primary objectives of the ASBO was...to provide a mechanism for the imposition of composite sentences on perpetrators of such behaviour, i.e. sentences which reflect the aggregate impact of a course of conduct as opposed to the seriousness of a single criminal act.' However, he also observes that courts sentencing defendants for breach of an ASBO have failed to impose composite sentences, citing *McCann* as the most likely reason for this (p. 795). As has previously been discussed in this review of the literature, the court's ruling in *McCann* (that ASBO proceedings were to be classified as civil) subsequently meant that findings of fact from proceedings for the imposition of an order could not later be employed at

⁴⁵ Lords Hansard Text for 7 Dec 2006 (pt 0001)

proceedings for breach - a principle which was emphasised by Lord Steyn's statement that ASBO proceedings are 'separate and independent' from proceedings for prosecution for breach of an order⁴⁶. As a result, Macdonald argues (2006: 796) that there now exists a confusing body of case law on the sentencing tariffs available for breach.

An examination of relevant court decisions on breach proceedings in England and Wales⁴⁷ certainly demonstrates, as Macdonald posits, that confusion exists within the courts as to available tariffs, the principle of composite sentencing, and, its relevance to the ASBO model. Moreover, in Scotland, very little case law or research evidence exists on breach proceedings in ASBO cases. Hence, this study aims to build on and to contribute to existing analyses of sentencing in breach proceedings (principally, Macdonald's analysis of court decisions on breach, 2003; 2006) by providing additional insight into judicial decision-making processes in proceedings for breach. I address this issue by obtaining empirical data from members of the judiciary who have been involved in sentencing proceedings for breach. The variation in sentencing for breach, with regard to specific courts, and individual judges, will also be considered within the wider context of consistency in sentencing and procedural justice.

Appeal

The number of ASBOs granted is increasing annually – and in both England and Wales and in Scotland, the courts have refused one per cent of all ASBO applications (Home Office, 2005b: 3, Scottish Executive, 2005a: 3). In terms of cases appealed once an order has been granted, in Scotland, appeals to the Court are rare (Scottish Executive, 2005b). Of the total number of full ASBOs granted during 2005/06, only six were appealed by the defendant and in only one case was the appeal upheld in Court. In three cases, the order was varied as a result of the appeal and in two the outcome was as yet unknown. Similarly, ASBO appeals are also rare in England and Wales, although Campbell found that the exact number of appeals was unknown (2002a). While the Home Affairs Committee notes that it is 'relatively straightforward to apply to the Court...for the terms [of an order] to be varied' and that 'there is also a right of appeal' it further notes that 'cases in which these options are not being taken highlight the variable quality of legal

⁴⁶ [2002] UKHL at 23

⁴⁷ See, amongst others, *R v Boness* [2005] EWCA Crim 2395, *W v DPP* [2005] EWHC Admin 1333, and *R v Kirby* [2005] EWCA Crim 1228

representation rather than any difficulties with the current provisions for variation and appeal' (House of Commons, 2005a: 73).

Given the very high success rate of ASBO applications, and the limited number of appeals that are subsequently being made, it is evident that wider issues about legal aid, legal representation, and access to justice, are factors which require to be considered further in this context. As such, this research study provides an examination of appeal procedure(s), and the opportunities that exist for ASBO actions to be defended. The empirical data obtained from solicitors (in particular) will aid the study's analysis of one of the central themes of this thesis - procedural fairness in ASBO applications.

ASBO effectiveness

Until very recently, there has been a dominant focus upon the bureaucratic aspects of the use of ASBOs in existing empirical research, and an absence of evaluations of 'what works' in reducing antisocial behaviour. For example, the Scottish Executive's most recent research project on the use of ASBOs (2005a; 2005b) was concerned with 'monitoring' the use of the orders – it was not concerned with evaluating or analysing effectiveness, or attempting to determine quantifiable 'successes' and 'failures'. As research to date has largely been concerned with investigating the administration and application of the orders, a large proportion of the evidence on the effectiveness of ASBOs has been essentially anecdotal. Burney (2002: 481) found that there exist anecdotal examples of a reduction in antisocial behaviour as a result of certain orders being granted, and similarly, examples of the ineffectiveness of the orders, but 'no means of knowing whether they add up to a significant whole.' Moreover, the few evaluations that are in existence have been carried out locally and with very little standardisation in methodology (Armitage, 2002).

A report published on behalf of the National Audit Office in December 2006 was, however, the first national study (in England) to attempt to review the use of ASBOs with other antisocial behaviour interventions (warning letters and acceptable behaviour contracts (ABCs)), with the purpose of providing an analysis of whether interventions were successful in deterring further acts of antisocial behaviour. The study sampled 893 case files of ASBOs, warning letters, and ABCs, issued in six areas: Wear Valley, Easington, Liverpool, Manchester, Exeter and Hackney. The study found that (in the cases sampled by the Audit Office), almost two thirds (65%) of people stopped behaving antisocially after one intervention; over four out of five stopped after two interventions; and after three interventions,

antisocial behaviour had been stopped in more than nine out of ten cases. A small proportion of individuals were, however, repeatedly engaged in antisocial behaviour. The report found that approximately 20% of the sample cases received a (disproportionate) number of interventions - totalling 55% of all interventions issued in the period covered by the study (NAO, 2006: 5). This same group had a higher number of average convictions (50) than those in the total study sample who also possessed convictions (24) (ibid.). The report also suggested that about 55% of anti-social behaviour orders had been breached by offenders either committing more offences or by breaking the terms of their orders (NAO, 2006: 7). While the average number of breaches was four per person, the report found that 35% of ASBO holders breached their orders on five or more occasions (ibid.).

It is difficult to quantify from this data, the extent to which the orders have definitively been 'effective', particularly with regard to ASBO breaches. The government has argued that, where breaches are reported it means that individuals are being monitored and that communities feel confident enough to report them. Alternatively, critics contend that the orders can only be effective if they are properly enforced, and that the existence of the figures on breach demonstrates that this is not the case.

The National Audit Office report (2006: 7) made several recommendations to encourage the most effective use of antisocial behaviour interventions:

- Improved case management
- Provision of support to those administered interventions
- Training to be provided to organisations involved in administering interventions to young people/children
- Formal evaluation of cost and effectiveness of the various antisocial behaviour interventions

While it is not the purpose of this thesis to study, or to evaluate, the *effectiveness* of ASBO use in Britain in reducing or preventing antisocial behaviour, the National Audit Office's report provides relevant and useful data in respect of this study's central research questions. The report specifically highlights case management in antisocial behaviour interventions as an area which might lead to improved procedural implementation and administration of interventions (including ASBOs). As this thesis is specifically concerned to understand legal procedure(s) in ASBO applications and the way(s) in which legal and court processes intersect to shape

the administration and outcomes of ASBO use, the relevance and the potential advantages of, case management is also examined in the course of this investigation by studying data on court procedure which is derived from solicitors involved in ASBO applications across Britain.

Conclusion

This chapter has reviewed a range of literature on the bureaucratic and administrative aspects of ASBO use in Britain. As such, the above discussion has highlighted the paucity of empirical research evidence which exists on legal and court procedure(s) in ASBO applications, and the ways in which these dimensions intersect to shape the management and outcomes of ASBO use in Britain. As such, this research seeks to illuminate specific areas of ASBO procedure which are at present under-researched, and hence this study will examine a number of relevant socio-legal aspects of ASBO use. Specifically, given the flexible statutory definition of antisocial behaviour and the subsequent level of discretion inherent in legal and court processes, this research will investigate due process and bureaucratic aspects of ASBO application procedure (including the use of judicial discretion). Additionally, in view of the paucity of empirical research evidence on the use of interim orders and orders on conviction, the grounds on which these types of order are obtained and the evidentiary requirements that are required to be met by applicant agencies will be examined. Moreover, judicial attitudes towards the prosecution of interim order breaches, the impact of mitigating factors and the use of ASBOs for persons under the age of 16 years will be considered in order to illuminate the complexity of judicial decision-making. Potential variation in sentencing for breach will be studied particularly with regard to consistency in sentencing. The research will also investigate appeal procedure, together with the opportunities for ASBO action to be defended and alongside the examination of legal representation and access to legal aid. Additionally, the study will provide new data on jurisdictional variation in ASBO procedures. Hence, the objective of this socio-legal study on ASBOs is to contribute to existing knowledge(s) about the use of ASBOs, but also to *widen* the sphere of sociological analysis within a growing body of literature in the research of antisocial behaviour policy and the use of ASBOs in Britain. The study findings will then be discussed using an analytical approach which incorporates both the legal and sociological dimensions of the research, and in the wider context of socio-legal conceptions of administrative and procedural justice, and 'fairness' in criminal justice processes. Additionally, this chapter provides a basis for the next in which the methodology used to investigate

the research questions is explained, and the data analysis methodology is elaborated upon.

Chapter Four

Methodology

Introduction

From analysis of existing research (Campbell, 2002a; Burney, 2002; Scottish Executive, 2005a; 2005b; Brown, 2004; National Audit Office, 2006), specific gaps in the knowledge and understanding of ASBO use in Britain has been identified⁴⁸. What has been overlooked in empirical research on the use of ASBOs in Britain, is a deeper insight into the fundamental contribution and situs of the court system and legal process(es) in determining the administration and management of antisocial behaviour orders in both Scotland, and in England and Wales. Hence, the subject of this research study is a socio-legal analysis of the administration of antisocial behaviour orders, and the ways in which the dimensions of due process and legal primacy; and juridical power and discretion intersect to shape the management and outcomes of ASBO use in Britain.

Moreover, there are also no comparative studies in existence that analyse the substantive differences/similarities between ASBO administrative procedure(s) in Scotland, and South of the border. Hence, it is also the purpose of this research study to provide a comparative account of relevant aspects of legal and administrative procedure(s) in Scotland, and in England and Wales, in ASBO applications. It is hoped that clearly identifying the successes and encountered difficulties in the application process within the separate jurisdictions, will be a relevant, and hopefully useful, contribution to research in this area. Hence, the following chapter discusses the methodology employed in this study in order to determine to what extent legal procedure(s) and judicial discretion influence the administration, management and outcomes of ASBO use in Britain.

Data collection methodology

The data production approach(es) applied in this thesis are both quantitative (positivist) and qualitative (phenomenological) in their composition – hence, a pluralist (mixed method) research design has been used. Quantitative data was obtained through the use of an online survey questionnaire, and qualitative information was derived from both ‘unobtrusive’ (Lee, 2000) methods of data collection (document examination), and semi-structured interviews.

⁴⁸ See Chapters 1 and 3

Justification for a mixed method approach

It is essential for the production of high quality, rigorous data and research, that researchers have a coherent understanding of the most appropriate philosophical position from which to derive a suitable research method (Hines, 2000: 7). Clarity in the researcher's methodological justification(s) enables a clear study focus and consistency of research design (ibid.). According to Cohen and Manion (1980: 233), a 'mixed method' research design enables the researcher to:

'map out or explain more fully the richness and complexity of human behaviour by studying it from more than one standpoint, and, in so doing, by making more use of both qualitative and quantitative data.'

However, a mixed method approach has not been used in the course of this study with the expectation that it will provide form(s) of certainty about a specific social reality. Neither is it the purpose of the pluralist research design merely to aim to validate research findings. For the purposes of this research investigation, mixed methods are not used simply to 'deepen' understanding(s) of the ways in which the dimensions of due process and legal primacy; and juridical power and discretion intersect to shape the management and outcomes of ASBO use in Britain, but also to 'widen' them (Olsen, 2004: 1). While Weiss (1968: 349) argues that, in research processes, there is 'a capacity to organise materials within a plausible framework', the use of mixed methods within this research study is designed with the intention of providing a more holistic research methodology, which does not suffer from oversimplification. As Olsen (2004: 4) observes:

'A certain pluralism of theorising is needed to accompany pluralism of method. Therefore the methodological pluralist approach is relatively challenging and does not easily allow research topics to be simplified. Parsimonious models are unlikely to result from this approach. Since a parsimonious model would have only a few variables in it, it would be likely to be mono-causal rather than holistic. Such models might suffer from oversimplification.'

The multi-method approach of using different modes of enquiry will enable the cross-referencing of data. Importantly, it could also reduce the potential for error and researcher bias and help to ensure the validity of the aims of the research

investigation. Opposing empiricist observations that qualitative and quantitative modes of enquiry are irreconcilable (Olsen, 2004: 4), a mixed methods approach is used within this investigation to transcend the qualitative/quantitative divide, and to attempt to elucidate and to better contextualise the research aims, within a balanced framework of enquiry that is not arbitrarily conceived.

Moreover, specifically with regard to practical elements of consideration (such as time management and participant response rates), a mixed method approach was appealing. Due to the technical, sometimes complex, socio-legal nature of the study – particularly in respect of statutory provisions, court procedure(s) and legislation – it was necessary to, at the outset of the research investigation, familiarise myself with, analyse, and become extensively knowledgeable about, these aspects of the study area before designing, or proceeding to, fieldwork involving interaction with actors involved in the ASBO process. Thus, ‘unobtrusive’ data collection, in the form of document examination and analysis, underpinned the beginnings of my mixed method approach to data production.

The online survey questionnaire was then chosen as the next method of data production. As the research study is specifically interested in the ways in which the dimensions of due process and legal primacy intersect to shape the management and outcomes of ASBO use in Britain, it was important to obtain data from solicitors involved in the legal process in order to determine the way(s) in which antisocial behaviour legislation was being used in practice, in the context of legal procedure(s) and the court system. The use of the online questionnaire was particularly appropriate because it enabled the collection of large scale survey data on ASBO legal process(es), of which little salient research-based knowledge existed. Importantly, the survey also enabled a wide range of solicitor’s perspectives on the court process to be ascertained, which would not have been as likely to have been achieved with a more limited number of one to one interviews. As will be discussed in the course of this chapter, given the many derivative benefits of online surveys with regard to ease of use and data collection, the online questionnaire was evidently the most suitable method of data production for this part of the investigation. In particular, the busy working lives of solicitors necessitated an accessible, easy to use and non-time consuming mode of enquiry, which was provided by the online survey questionnaire.

The final stage of the data production was in the form of one to one semi-structured interviews with the judiciary. Juridical power and decision-making is also a central theme of this research study. Thus, in order to investigate context,

meaning and complexity in judicial decision-making, a phenomenological approach was constructed. Moreover, a qualitative data production method was chosen because qualitative enquiry as an ethnographic method would enable the delineation of particular legal examples and situations identified in both the initial document analysis, and in the survey questionnaire responses. A phenomenological approach was used in order to be able to generalise the findings to theory, rather than to populations⁴⁹. Hence, each stage of the methodological process informed the construction (and direction) of the next stage of data production. In this respect, the mixed method approach was essential in my knowledge 'layering' process, whereby each stage in the methodology was fundamental to the accruing of essential information that would develop the investigation further at the next stage of the data production process.

'Unobtrusive' data collection

I began my research investigation using what are customarily described as 'unobtrusive' methods (Lee, 2000) of data collection that do not involve the 'direct elicitation of information from research subjects' (Berg, 1995). These 'unobtrusive' methods of data collection can be collapsed into three categories: found data; captured data; and retrieved data (ibid.). As detailed within the Literature Review (Chapter 3), the existing research evidence on ASBOs was examined, alongside academic journal articles and popular written work on the subject of the investigation. Moreover, case files and legal precedent were also examined, which acted as a key source of information here. Hence, the 'unobtrusive' examination of existing data and information facilitated a reciprocal and collaborative relationship that not only helped to mould the direction of the research and to define the research questions but it also went some way to answering those questions.

Online survey questionnaire

A quantitative data production method (online survey questionnaire) was chosen for the second part of the research study. Quantitative research uses modes of enquiry imported from the physical sciences that are fundamentally positivist in

⁴⁹ The latter part of this chapter examines the role of the judiciary as 'elites', and as such it is submitted that, obtaining access to this particular group is subsequently very difficult. For this reason, a large scale quantitative study of judicial attitudes to the administration and outcomes of the ASBO process would be extremely difficult – if not impossible – to achieve. Instead, individual interviews were chosen as the best method of data production for this 'hard to reach' group. The use of one to one telephone interviews was considered as a possible alternative to interviews in person although these were not required as sufficient numbers of the judiciary agreed to be interviewed in person.

design and which are primarily concerned with implementing, administering and achieving objectivity, reliability and validity in their research findings. In particular, quantitative research studies are designed to ensure that the researcher is extraneous to the research process(es). Qualitatively-based information, particularly an individual(s) personal observations, will inherently contain a relative degree of biasing, and as such, these inconsistencies can highly bias the analysis and any subsequent recommendations of a research investigation (Potts, 1990).

Alternatively, the independence of the quantitative researcher permits research findings to be generalised and replicated because the research has (potentially) been unconstrained by researcher bias⁵⁰. Research procedures adopted to further or to promote objectivity and validity in research findings include the random selection of research participants, the standardisation of research methods and the use of statistical methods to test predetermined hypotheses regarding the relationships between specific variables. In terms of data analysis, quantitative information can also be analysed much more expeditiously than qualitative data, and is subject to a much lower degree of misinterpretation and biasing. Moreover, the use of software that is capable of generating cross-tabulations and performing other types of statistical analysis means that analysis of quantitative data can be more productive and dynamic than is possible in analyses of qualitative data. Thus, the quantitative paradigm is capable of generating objective, quantifiable, and reliable data that can be formatted into generalised categories that are applicable to a larger population.

It is important, however, to be aware of the limits of methods of quantitative data production. The quantitative mode of enquiry is ineffectual, for example, when the social reality being studied proves problematic to quantify or to measure. Moreover, the quantitative approach is insubstantial in its ability to contextualise behaviour(s) in a way that presents circumstances within the subjects studied 'lived

⁵⁰ I am not in any way arguing here that a quantitative methodology is free from researcher bias. Rather, I am suggesting that quantitative methods possess, as do qualitative methods, means through which researcher bias can be delimited. Both positivist and interpretive paradigms seek to define a 'reality' but the way in which each defines meaning and truth is at variance. As Wildemuth observes: 'it is true that the positivist approach, with its goal of discerning the statistical regularities of behaviour, is oriented toward counting the occurrences and measuring the extent of the behaviours being studied. By contrast, the interpretive approach, with its goal of understanding the social world from the viewpoint of the actors within it, is oriented toward detailed description of the actors cognitive and symbolic actions, that is, the meanings associated with observable behaviours' (1993, 451). That is to say that positivist research distinguishes a 'reality' that is not dependent on the researcher, while phenomenological research identifies 'reality' as socially constructed. Further discussion of the distinction between phenomenological and positivist traditions are included in Chapter 2.

realities', and a quantitative research design also tends to ignore the effects of variables that have not been included in the design model.

Semi-structured interviews

Semi-structured interviews are the third major area of data collection. Glazier (1992: 6-7) argues that: '[t]he strength of qualitative data is its rich description...The richness of the data is ensured by the breadth of the context captured with the data.' Hence, qualitative research seeks to represent, to understand and to delineate a situation within its 'lived' context. Thus, because people/organisation(s)/institution(s) as research study participants may be best understood within their 'lived realities' (which have not been disembedded from their true context), descriptive detail is used to contextualise participants' experience(s). Moreover, Gorman and Clayton (1997: 23) state that: '[t]he ultimate goal of qualitative research is to understand those being studied from their perspective'. This fits with Bryman's definition of qualitative research which isolates the importance of the participant's perspective(s); description and context; processes; flexibility; and concepts and theory as outcomes of the research process (2001: 264).

Qualitative methods of research enquiry are frequently occupied with examining and understanding how events or patterns unfold over a period of time, and the process(es) involved. Alternatively, quantitative modes of enquiry are often engaged with the analysis of static or constant situations/circumstances. Furthermore, a qualitative research design enables greater flexibility in terms of the defined structure(s) of the research, which subsequently permits the researcher to take advantage of new discoveries or interpretations. For example, a semi-structured interview schedule (such as the type utilised in this part of the research fieldwork), facilitates greater adaptability and permits ideas to be initiated by, and created from, the interview itself.

Questionnaire

Following on from my document analysis and examination of existing research evidence, I was able to identify specific gaps in the knowledge and understanding of ASBO use in Britain – expressly relating to the court process. I distinguished 8 specific areas of interest for further research and analysis:

1. The consultation process in ASBO applications
2. The use of evidence
3. Court procedure (to include interim order and order on conviction applications, and the right of appeal)
4. Defence counsel
5. Decision-making of judiciary
6. Antisocial behaviour legislation
7. The use of ASBOs for children and young people
8. Improvements to current system and/or court procedure(s)

Hence, the survey schema was informed by the data/document analysis (this will be discussed further in the study data analysis – Chapters 5 and 6) and the survey questions were subsequently drawn from the 8 defined areas observed as requiring further investigation.

Pilot survey

Before deciding to use a web-based format for the questionnaire, I sent out a paper-based pilot survey to 20 potential respondents in England and Wales, who had all expressed a possible interest in participating in the research. The solicitors had been contacted through the local authority antisocial behaviour co-ordinator, or community safety officer. The solicitors provided me with contact addresses and I then sent the paper-based survey to the potential respondents and included a stamped addressed envelope for ease of return. Follow up/reminder letters were sent out to the potential respondents after 3 weeks and reminder emails were sent after 5 weeks. A total period of 8 weeks was allowed for completion and return of the paper-based surveys. The purpose of the paper-based pilot survey was to enable an informed decision to be made on whether to proceed with the paper-based format after the conclusion of the pilot survey. Moreover, the pilot survey would also allow for any comments/suggestions/problems identified with the survey

questions or survey structure to be addressed, hence providing an opportunity for me to assess and refine the survey design.

Primary analysis of success of pilot survey

After a period of 8 weeks, I had received only 1 returned questionnaire. I then followed up the remaining 19 potential respondents to enquire as to whether they would still be interested in participating in the survey. The majority of the feedback that I received (12 responses in total) continued to express an interest in contributing to the research but asked to be sent an email/web-based version of the survey (11 respondents). Some respondents also stated that they had misplaced the paper-based survey (3 respondents), while others added that they felt that a web-based version would be much more straightforward and less arduous to complete (5 respondents). 1 respondent stated that they had not found any spare time to complete the survey questionnaire.

Due to the low response rate for the pilot survey, it was necessary to also pre-test the questionnaire with colleagues within my department to try to ensure (as far as possible) question relevancy and completeness, and effective survey structure. This involved two reviews of my survey by my supervisors, which enabled the survey to be further refined with regard to question wording, the elimination of questions that lacked relevancy, and also in respect of ensuring that confidentiality and anonymity concerns were explicitly addressed (c.f. Andrews et al., 2003: 26). As such, it should be noted that there was no pilot survey for the online survey questionnaire – although the final draft survey questions and schema were informed by the one returned paper-based survey questionnaire, and from my discussions with my academic colleagues.

Use of online survey software

In view of the responses gathered from the pilot study, it was decided that an online questionnaire would be the most appropriate means to survey (potential) respondents. Despite the widespread use of e-technology, the use of online questionnaire surveys in the social sciences is, surprisingly, relatively limited (Madge, 2006). In my own university department, for example, although online software had previously been used (successfully) for another research project within the department, there was no longer any software package available for

staff/research students to use in formatting web based surveys. The previous software package⁵¹ then had to be re-ordered from the service providers.

The limited use of online survey methods within my own university, and the social sciences generally, is also surprising given the numerous derivative benefits of using online software (Mueller, 1997). For example, online questionnaires enable the researcher to contact a wide geographical spread of (potential) respondents, which can accommodate both national and international research (ibid.). Moreover, online research methods can be used to approach 'hard to reach' or isolated individuals/groups including those who are disabled, incarcerated, immobile or in hospital, as well as those who are 'socially isolated' such as the terminally ill, or those with addiction problems (Madge, 2006: 5). The nature of online research is such that it can also prove to be an economically viable option for researchers and can reduce costs attributed to travel and data collection et cetera. The financial costs per response in fact reduce significantly as sample size increases (Watt, 1999). Data is supplied quickly, and in this respect, online research can provide an expeditious alternative to paper-based/postal, face to face and telephone surveys (Mueller, 1997; Madge, 2006)

It has been suggested that the limited use of online research methods is due, in part, to the perception that a degree of technical expertise is required to make use of online software (Madge, 2006: 7). However, as we shall see later in this Chapter, the specialised nature of information technology (IT), and the sometimes complex and unreliable nature of online software, means that the concerns of researchers are, to an extent, justified.

Advantages and disadvantages

Madge (2006) has developed a detailed set of preliminary guidelines that address some of the practical and ethical considerations regarding on-line research, which have also been used to frame the following discussion about the present investigation.

Response rates and data collection

As has already been noted, online questionnaires can offer an expeditious alternative to traditional survey methods and can allow for a high volume of data to be gathered at speed and with reduced expense. Although it can be labour/time intensive to format the questionnaire, response times for the return of completed

⁵¹ The software package used was 'SurveyMonkey'. The software is discussed further later in the chapter

questionnaires are usually much faster than for postal surveys. For example, Harris (1997, cited in Madge, 2006: 4) reports a return time of 48-72 hours for most completed online survey questionnaires. However, researchers must remain conscious that a large volume of responses does not necessarily equate to a large volume of high quality responses (ibid.). Research has also found that online survey participants frequently write longer and more detailed responses than they would do on traditional postal surveys (Schaefer and Dillman, 1998; Bachman and Elfrink, 1996; Kiesler and Sproull, 1986; Loke and Gilbert, 1995; cited in Andrews et al., 2003).

Online software is also a very useful tool in terms of data collection and interpretation. Researchers are able to view their survey results as they are collected in real time; amend or update specific questions as necessary; and software packages can also calculate percentage response rates for each question. It is also possible to download the raw data into Excel or SPSS. This can be particularly useful in reducing the time spent on data analysis but it is also effective in minimising researcher error in data collection, calculation, entry, collation, and coding. There are no problems associated with handwriting interpretation, and the software program can return an error message where an incorrect or invalid value is entered that requests the respondent to review and amend their entry before re-submitting the survey (Madge, 2006: 5). Hence, data entry errors are often low with online survey questionnaires.

Cost

Particularly for large scale surveys, the expense involved in the use of online questionnaires can be substantially less than the costs involved in postal surveys (Mueller, 1997). For example, expenditure relating to paperwork, telephone, postage and printing can all be minimised or perhaps even eliminated altogether. In comparison with on site survey questionnaires, no comparable expense would be incurred for travel to interview sites; or for hiring/organising an interview venue (Madge, 2006: 4). Some online survey software can be obtained for free⁵² or researchers may be able to make use of software available from their department/institution/organisation.

Madge (2006: 4) has observed that financial benefits only accrue to researchers (who are using online survey software) with institutional support in terms of computer equipment, software literacy training costs, internet connection

⁵² Although the software used for the purposes of this thesis was obtained at a cost of £300 per annum to my university department

and technical support. However, researchers are only dependent on these factors to a certain degree: in the course of my online survey fieldwork, I was reliant only upon the use of department online survey software – the other identified factors were not applicable. It should also be noted that *indirect* costs can potentially be passed on to respondents in online survey research because, for example, survey respondents usually carry the cost of internet connection time which can raise ethical issues (ibid.).

Adaptable design

Online survey questionnaires can be formatted to be as user friendly as possible in terms of their appearance, structure and clarity, which can potentially elicit higher response rates than onsite surveys (Kaye, 1999). Once respondents have access to an online survey, they are instantly able to see how (potentially) simple and quick it is to respond. Questions can be multiple choice or open-ended, and surveys can be formatted to enable respondents to have the option to add in additional information when and where they wish through the use of drop down boxes. Questionnaires can be modelled so that respondents are not required to answer every question, thus allowing for selected response and ease of survey completion (Kaye, 1999; Madge, 2006).

Online survey questionnaires can be formatted as part of a particular website (for example, the website of an organisation/university institution). This can allow for potential respondents to find out more about the research subject, the researcher(s), and the affiliated institution (Madge, 2006: 4), and it can also help to eliminate concerns that a research project may not be legitimate or worthwhile (although a lack of survey salience remains a barrier to increased response rates, (Sheenan and McMillan, 1999)). Particular software packages also allow for multi-lingual formats, audio visual stimuli and prompts for when a respondent skips a question, which may prove useful in raising a respondent's motivation to complete the questionnaire (Zhang (1999), cited in Madge, 2006: 4). However, although visual stimuli can enhance survey presentation, it is important for researchers to be mindful that the use of images and animation also increase download time therefore possibly affecting response rates (Yun and Trumbo, 2000).

Anonymity

Online surveys can be designed to be anonymous and software packages - such as the one that I used for my survey fieldwork - can ensure that the identities of the respondents are not tracked. Although, as with my survey questionnaire, an option

can be provided for respondents to leave contact details if they wish to receive details on the research findings and outcomes. However, the information provided by respondents is held anonymously and it is therefore impossible to trace respondent data back to them individually. Harris (1997, cited in Madge, 2006: 5) suggests that interviewer bias can be reduced or even removed entirely in online surveys when responses are anonymous. Moreover, because the physical presence of the researcher is removed during online survey questionnaires, Pealer et al. (2001, cited in Madge, 2006: 5) suggest that respondents are more inclined to answer socially inauspicious questions when participating in online questionnaires as opposed to onsite surveys. In this way, online research can be a 'great equaliser' (Madge, 2006: 5), whereby the involvement of the researcher is more limited, the researcher has less ability to manipulate the research process, and is thereby less likely to become a 'participant researcher' (ibid.).

Alternatively, it has been argued that, in the creation of survey questionnaires, the agenda(s), bias(es) and epistemic interests of the researcher are clearly apparent in the formation of the online questions (Sweet, 2001; cited in Madge, 2006: 5). Moreover, the importance of the ability of the researcher to set the research agenda, ask specific questions and to gain potential advantage(s) and benefit(s) from the research findings is, in effect, largely ignored by the 'equaliser argument' which does not attempt to discuss the relevance of 'structural power hierarchies' in the research process (Madge, 2006: 5). Further, McCartney, Burchinal and Bub (2006) have argued that bias can be found in many areas of quantitative study such as data management, measurement, missing data, growth modelling, mediation and moderation and in sampling bias through systematic error in measurement or sampling procedures that produces erroneous results.

Access

As previously mentioned, online survey questionnaires are a particularly useful research tool in terms of access to potential respondents who may be physically or socially isolated, and is an expedient way to obtain large scale data (Couper, 2000). Furthermore, because online questionnaires are often quick and easy to complete, they can be more favourable to potential respondents than onsite surveys which require dates/times/venues to be organised. The use of online questionnaires also allowed for a group which was both 'hard to reach' and traditionally disenfranchised from research processes by virtue of their circumstances, to be contacted (ibid.).

Sampling

Online survey questionnaires require, essentially, a pro-active approach to the recruitment of potential respondents. Once a questionnaire has been formatted, it is necessary to then actively target and approach potential respondents – it is ineffective to ‘wait’ for respondents to find a site (Coomber, 1997, cited in Madge, 2006: 17). Online surveys are increasingly being used as market research tools and online users are becoming more aware that they are in fact vicariously bearing the cost of being ‘over-surveyed’ (McDonald and Adam, 2003, cited in Madge, 2006: 17). As a result, online users now increasingly consider pop-ups and unsolicited communications to participate in online surveys to be ‘spam’ (Harris, 1997, cited in Madge, 2006: 17), therefore affecting online survey response rates which Witmer et al. (1999) report as being at approximately 10-20% or lower for online questionnaires. A variety of factors may affect responses rates, including ‘ISP access policies, email filtering software, multiple addresses for individuals and increasing volumes of email’ (Andrews et al., 2003: 11).

However, one of the most fundamental problems that has been identified with the use of online questionnaires is that there is a lack of an accurate sampling frame. For example, there is no means to verify how many users are logging on from a particular computer or how many accounts/user names an individual may have. This presents serious problems for a study based on the quantitative paradigm (Madge, 2006: 17). Moreover, random sampling or gaining a representative sample is, in effect, impossible. This is because online surveys pre-select the users to participate in the questionnaire - through either self-selection or non-probability sampling (ibid.). Yet, while self-selection is problematic, it is also vital in research studies where marginal groups are the focus of the questionnaire, or where the researcher is conducting an interpretive investigation. For example, Coomber (1997, cited in Madge, 2006: 17) posits that online self-selection is most suitable when researching a particular group of internet users, especially when a group shares a common interest but is not otherwise connected (O’Lear, 1996: 210, cited in Madge, 2006: 17).

It is not clear, however, to what extent the internet provides a fundamentally biased sample population for quantitative studies. The internet, and the use of e-technology, was at the outset dominated by users who were traditionally young white males with relatively high incomes (Sheehan and Hoy, 1999; Madge, 2006), and correspondingly, those with lower educational levels, lower incomes, living in rural areas, and Black or Hispanic people, were underrepresented (Witte et al., 2000; cited in Andrews et al., 2003; Mann and Stewart, 2000, cited in Madge,

2006). There is also research evidence to suggest that those individuals who participate in online surveys tend to be more experienced and confident in their internet use, and that they have stronger IT skills, than those who do not (Kehoe and Pitkow, 1997; cited in Andrews et al., 2003). With the passage of time, it continues to be argued that internet access is still deeply unevenly distributed as regards economics, social factors, age and ethnicity (Janelle and Hodge, 2000; Warf, 2001; cited in Madge, 2006). However, there is an increasing amount of research evidence to suggest that the internet user population is becoming wider and more diverse (Dodd, 1998: 63; Litvin and Kar, 2001; Umbach, 2004; cited in Madge, 2006: 17), and that the gap between men and women internet users has disappeared (Andrews et al., 2003)

Although it is important to note that, for the purposes of sampling procedures in online surveys, it is often not possible to confirm or verify the identity of online questionnaire respondents. This is especially relevant to my online survey questionnaire in respect of the possibility that multiple solicitors from one local authority or police area may have potentially responded to the survey (see below, '*target population*'). Moreover, Roberts and Parks (2001, cited in Madge, 2006; 18) note that some respondents adapt their online identity when answering surveys, or they may in fact be 'spoofs'.

Non response bias

Non response bias is introduced when respondents who do answer an online questionnaire have fundamentally divergent or deeply contrasting attitudes/beliefs or demographic characteristics to those who do not respond. This type of bias is of particular relevance to online survey questionnaires because the use of internet technology is lower among particular groups (for example, pensioners, members of some ethnic groups, those with limited financial resources and people with lower educational levels (Umbach, 2004)). Non response bias is increased further when respondents possess varying levels of IT ability, and this becomes more problematic if the survey sample is small. Low response rates can also be a result of concerns about internet viruses or identity theft (Madge, 2006: 18).

Survey response rates

Harris (1997, cited in Madge, 2006: 5) identifies that online survey response rates tail off after 10-15 questions, which is directly and negatively linked to questionnaire length. Hence, online survey questionnaires may require to be shorter in length than those conducted onsite. However, in a comparison of short and long survey

questionnaires, the shorter surveys did not produce significantly higher response rates than the longer surveys (Witmer, et al., 1999; cited in Andrews et al., 2003: 12). Moreover, drop out rates for online questionnaires is much more likely than for onsite questionnaires (Witmer et al., 1999). A lack of survey salience may be prohibitive or off putting to potential respondents (Sheehan and McMillan, 1999; Watt, 1999; cited in Andrews et al., 2003) and technical problems can keep responses low (Couper, 2000).

As online questionnaires (or the link to them) can be easily deleted, ignored or forgotten about, several reminders may need to be sent to potential respondents, and obtaining a reasonable response rate may prove difficult. However, Crawford et al. (2001) suggest that a single email reminder can potentially double the number of survey respondents. The optimum number of contacts described by Schaefer and Dillman (1998) was four, which yielded the greatest response rate. Bosnjak and Tuten (2001, cited in Andrews et al., 2003) have identified specific categories of survey response type(s) that include:

- Complete responders
- Unit responders (do not participate)
- Answering drop-outs
- Lurkers (view questions but do not respond to any)
- Lurking drop-outs (partially view survey)
- Item non-responders (selectively answer some questions and complete survey)
- Item non-responder drop-outs (selectively answer some questions and do not complete survey)

Technical difficulties

Due to the great variance in the technical capacities of computers, laptops, monitors, browsers and internet connections, online questionnaires that work on a high-spec system may be impossible to read on a low-spec system. If questionnaires are long, this can increase the probability of a computer crashing. As Madge (2006: 33) has observed, reducing the reliance upon complicated technical features is important and careful piloting should reduce technical difficulties. However, the use of online survey questionnaires does require a certain amount of technical knowledge by both the respondent and the researcher. Even if

this is present, it still may not be possible to eliminate errors or encountered difficulties.

Finding and engaging respondents

Target population

For the purposes of this research study survey questionnaire, the target population was identified as local authority affiliated solicitors in England and Wales, and in Scotland, who were involved in ASBO applications. As the contact details for local authority solicitors are not freely available, it was necessary to first approach individual local authority antisocial behaviour co-coordinators/community safety officers⁵³. Contact details for antisocial behaviour co-coordinators/community safety officers were available on local authority web sites and also on the Home Office's 'Together' website⁵⁴. I emailed the relevant officers of each local authority directly, giving them details about my institution and the research project that I was conducting. I then asked if they would consider forwarding an email to their solicitor(s) involved in ASBO applications, detailing the nature of the research project and providing them with the link to the online survey questionnaire (the email letter template is provided in the thesis appendices, as appendix 2).

In Scotland, there are 32 local authorities and I contacted the antisocial behaviour co-coordinator/community safety officer for each authority as detailed above. In England and Wales, there are 410 local authorities and I contacted the antisocial behaviour co-coordinator/community safety officer for each local authority. However, unlike in Scotland, where it is only the local authority or Registered Social Landlord (RSL) which acts as the relevant agency for the purposes of ASBO applications⁵⁵, in England and Wales, a relevant authority can be a local authority, registered social landlord (RSL) or the police⁵⁶.

As I discovered when contacting local authorities, many local authorities in England and Wales are not involved as the lead agency in pursuing ASBO applications for their area. Instead, ASBO applications are exclusively applied for

⁵³ Part 1 of the Antisocial Behaviour Etc. (Scotland) Act 2004 places a statutory duty on each local authority and relevant chief constable in Scotland to prepare a strategy for dealing with antisocial behaviour in the authority's area. Similarly, the Crime and Disorder Act 1998 also places a statutory duty on chief police officers and local authorities in England and Wales to work together to develop and implement a strategy for reducing crime and disorder, hence individual authorities in both Scotland, and in England and Wales, possess antisocial behaviour co-coordinators, community safety officers et cetera, for the purposes of their statutory duties in respect of reducing antisocial behaviour, crime, and disorder.

⁵⁴ <http://www.together.gov.uk>

⁵⁵ s. 2 of the Antisocial Behaviour Etc. (Scot) Act 2004

⁵⁶ s.2 of the Antisocial Behaviour Act 2003

by the local police force⁵⁷. In these instances, the local authority antisocial behaviour co-coordinators/community safety officers provided me with contact details for the relevant local police officer, who I then contacted with the same details about my research and institution as previously detailed. Again, I asked if it would be possible for details of the research project and a link to the questionnaire to be forwarded to them.

A number of the larger local authorities (for example, Manchester city council) use an external firm of solicitors for their ASBO cases, and do not have an affiliated local authority internal solicitor(s) for ASBO applications. In these instances, I also followed up contacts provided to me for external solicitors whom I approached to see if they would consider taking part in the research project. The survey responses also include those from individuals within the Crown Prosecution Service (CPS) who were involved in seeking orders on conviction, although this accounted for only a very small proportion of potential respondents (2%). In order to differentiate between the numbers of responses provided by an internal solicitor (specific to one local authority) and the number of responses provided by an external solicitor/CPS (who can represent multiple authorities), the survey questionnaire asked respondents to identify whether they act in the capacity of internal or external counsel. However, it was not possible to determine how many solicitors from each local authority had answered the survey questionnaire. It should also be acknowledged that, because local authority staff had access to the survey URL, they were also potentially able to respond to the survey themselves (although it was specifically communicated to them in the email that the survey sought responses from solicitors only).

Data limitations

As previously detailed, Registered Social Landlords (RSLs) are also empowered under the relevant legislation⁵⁸ to make ASBO applications. However, research has shown that the number of ASBOs originating directly from RSLs is small. For example, in Scotland, 13% of full ASBOs were found to originate from RSLs/housing associations/co-ops, (Scottish Executive, 2005: 4.1). Due to the high number of RSLs in existence in Scotland (296), and in England and Wales (over 1,800 in England alone), it was felt that it would not be prudent or expeditious for

⁵⁷ However, under s. 1E of the Crime and Disorder Act 1998, the police and local authorities must consult each other when applying for orders

⁵⁸ Antisocial Behaviour Act 2003; Antisocial Behaviour Etc. (Scotland) Act 2004

the purposes of this research study to contact RSLs to try to obtain contact details for solicitors involved in ASBO applications that they may be pursuing.

Moreover, no defence solicitors were approached to participate in the survey. The decision not to survey defence solicitors was made for two reasons. Firstly, in order to legitimately compare the survey responses of prosecution solicitors with defence solicitors, broadly similar sized samples would be required. It was felt that it would be difficult to obtain the contact details for many defence solicitors involved in ASBO cases as these details are not necessarily freely available and would involve a level of 'cold-calling', which may have been viewed as an invasion of privacy (see below, '*Ethics*'). Secondly, another survey would have had to have been constructed for defence solicitor participants, and a new data set(s) created. Again, it was felt that the time constraints of the study meant that this would not be prudent. The study of defence solicitors in ASBO applications would, however, be a particularly useful contribution for future research in this area.

Ethics

In conducting online survey questionnaires, it is essential that the confidentiality and privacy of the respondents is guaranteed, and that informed consent is obtained. As unsolicited emails can be considered 'spam', and because spamming can be seen as an invasion of privacy (Umbach, 2004, cited in Madge, 2006: 8), it was essential to ensure that the privacy of potential respondents was respected. Andrews et al. have observed that email pre-notification and survey follow up procedures can be found to invade the individual's privacy - unsolicited mail from researchers can be considered rude and an example of 'spamming' (Schillewaert et al., 1998; Swoboda et al., 1997; cited in Andrews et al., 2003). The survey software was also formatted to safeguard the respondent's anonymity – the identities of the respondents could not be tracked and at no time were respondents required to provide personal or identifying information.

Thus, great care was taken when initiating contacting procedures so that the individual solicitors' privacy was respected. As local authority antisocial behaviour co-coordinator/community safety officer contact details were freely available, it was, as detailed above, necessary to approach them first to ask if they would consider forwarding their internal solicitors an email regarding their possible participation in the research. Burgoon et al., (1989) have observed the ways in which the prudence of others can protect the privacy of survey respondents by allowing potential participants to make an independent evaluation of whether or not they wish to participate in the survey. In this way, antisocial behaviour co-ordinators

and community safety officers acted as gatekeepers to the solicitors, and access to the solicitors was entirely dependent upon whether or not the antisocial behaviour co-coordinator/community safety officer was willing to contact the solicitor(s) themselves to forward details of the research survey on to them.

Cho and LaRose (1999, cited in Andrews et al., 2003: 6) have suggested that the improved recognition and management of the privacy issues of potential respondents by the researcher facilitates an increased willingness in potential participants to respond and to disclose information. For the purposes of this research survey, the solicitors were not being approached directly by the researcher, and it was hoped that they would subsequently feel that their privacy was being respected and that they would be more inclined to consider participating in the survey.

All emails to the antisocial behaviour co-coordinators/community safety officers were sent directly to a single recipient and more than one address was never listed in the 'to' or 'cc' field. This ensured that the recipient's anonymity and privacy was respected. My own valid email address was listed in the 'from' field and the 'subject' field was listed as 'ASBO Research Study', so that recipients were less likely to delete the email instantly as 'spam'. The email did not possess any attachments, so recipients would hopefully be less concerned about virus threats. The email message was kept as short as possible, but still contained all the relevant information which included: the aims of the study, research procedure, researcher's details, institutional affiliation et cetera. The URL for the survey questionnaire was included in all emails to the antisocial behaviour co-coordinators/community safety officers, which would take potential respondents directly to the online survey questionnaire. By providing the URL to the antisocial behaviour co-coordinators/community safety officers, it was hoped that they could simply forward the link on to the relevant solicitor(s) if they considered it to be appropriate.

Hence, once the solicitors had received details of the survey questionnaire, they were then able to obtain any further details about the research by asking questions and/or providing comments about the research, by contacting either the researcher, or the research supervisors - or they could simply follow the URL provided that would take them directly to the online questionnaire. If they chose to follow the URL, the first page of the survey questionnaire that they were able to view gave more details about the research project, and it also ensured that informed consent was obtained before they chose to continue to the next page and begin the survey questionnaire. In both the email message, and the first page of

the survey questionnaire, the anonymity of respondents is guaranteed. The first page also explained that participation was entirely voluntary and that respondents need not answer every (or any of the) survey questions.

For the purposes of the ethical considerations emanating from this research investigation, informed consent was obtained by designing the on-line survey so that the first web page was an information and consent form rather than the first section of the survey. The nature of internet research is such that it is not currently possible to obtain a written signature on a consent form. Thus, an alternative means of obtaining the requisite consent must be sought. In this instance, the bottom of the first page of the survey required (potential) respondents to click on an on-screen button that enabled them to continue to the first page of the survey, and by clicking on this link the participant necessarily implied acceptance of the terms of the consent form and proceeded to the first section of the survey. It was also important to ensure that potential participants were made aware that their participation was entirely voluntary, and that they could choose to 'quit' the survey at any time. Hence, potential respondents had to first choose to link to the internet survey site; they then had to read the information about the research and the nature of the online survey questionnaire itself, before deciding to click on the on-screen button to continue to the survey proper.

Anonymous participation was fundamentally important and was guaranteed to study participants. Participants were not required to provide any identifying information as part of the survey proper. However, for those study participants who wanted to receive information on the results of the investigation, a separate 'Thank-you' web page was presented at the conclusion of the survey which asked participants to provide their e-mail or office address if they wished to receive feedback. Contact details for the principal researcher and the research supervisor(s) were also provided to respondents to ensure that participants had a direct means of contact with the researcher(s) post-participation, should they have any immediate concerns or questions.

Survey design

The online survey software chosen was 'SurveyMonkey', which is an American based online survey provider. The software had previously been used (successfully) for another research project within my university department and it had been reported that surveys were easy and quick to design, and the collection and analysis of responses was also very effective. Using only the web browser, it was possible to create a detailed and specific survey instrument. The software

enables the researcher to select from over a dozen types of question format (for example, single choice, multiple choice, rating scales, drop-down menus, et cetera). The software options then allow the researcher to require answers to any question, control the flow with custom skip logic, and randomise answer choices to eliminate bias. The researcher also has complete control over the colours and layout of the survey.

As Madge (2006: 34) has identified, the presence of a welcome screen for online surveys is of paramount importance, in order to make potential respondents aware that they have 'come to the right place'. The welcome screen should provide brief details about the research (aims, purpose, et cetera) and it should also articulate the importance of respondents' contributions to the research. It should further emphasise that participation is relatively simple and not time-consuming (ibid.). Hence, the welcome screen for my online survey questionnaire included a short description of the research study; contact address(es) for both myself (as the principal researcher) and my supervisor(s) (as the research project supervisor(s)); the expected time required to complete the survey questionnaire; and a guarantee of anonymity for respondents.

As we have already observed, the survey was constructed in 8 sections. Most of the question formats chosen were multiple-choice. However, respondents were provided with additional space to add in extra information where appropriate. The last section of survey questions (improvements to the system and/or court procedure(s)) was constructed using only open-ended questions. This was to enable the maximum volume and range of answers to be collected, which would then be collapsed into specific categories within the data analysis. Finally, space was available for respondents to leave their contact details should they wish to receive details of the research findings. If an email address was provided, the identity data was stripped from the main database before analysis began and was only accessible via a separate database file. A hard copy template of the full survey is provided in the appendices, as appendix 3.

I found the survey software to be particularly useful in terms of data collection and analysis. For example, the researcher can view the survey results as they are collected in real-time. It is also possible to securely share the survey results with others, while filtering allows the researcher to display only the specific responses that they are interested in. Responses can also be downloaded into Excel or SPSS. With regard to survey duration, Crawford et al. (2001, cited in Madge, 2006: 39) have recommended that online questionnaires should take respondents no more than ten minutes to complete – longer questionnaires tend to

result in lower participation rates. Madge (2006: 39) for example, has observed that respondents to an online survey at the University of Leicester typically took less than 13 minutes to answer 119 questions. There are only 75 questions within my online research questionnaire. However, it was anticipated that completion of the survey would take up to a maximum of 15-20 minutes due to the technical and/or complicated nature of some of the questions, and in particular, as a result of the open ended questions in the last section (where it was hoped that respondents would provide relatively detailed answers which would in turn be more time-consuming).

Response rates

The survey was completed by respondents (in all jurisdictions) between January and March 2007. In Scotland, of the 32 local authorities approached, I received 18 survey responses. Some local authorities had one designated internal solicitor dealing with ASBO applications (for example, Dundee City Council), while other local authorities had a team of solicitors for ASBO applications (for example, Edinburgh City Council). Hence, it is not possible to determine whether one response is equivalent to one local authority, or if multiple solicitors from one local authority have responded to the survey. Nor is it possible to determine which local authority solicitors participated in the survey. In England and Wales, of the 410 local authorities that I approached, I received 137 survey responses. These responses include those from police solicitor(s) involved in ASBO applications, where the local authority is not involved in ASBO applications for the area. The responses also include those from the Crown Prosecution Service (CPS) and from external solicitors, although this accounted for a very small proportion of respondents (2%). As previously detailed above, defence solicitors or solicitors attached to RSLs were not approached to participate in the survey.

Technical problems

Although the survey software had previously been used (successfully) for another research project within my department, I encountered several problems with the web-link for the questionnaire when respondents tried to access the survey. Once the survey had been uploaded to the website, the software then provided me with a link to send to all respondents. I then had to copy and paste the link from the website onto an email that I sent to individual respondents. Unfortunately, a significant proportion of respondents initially experienced difficulties when trying to access the survey via the web link.

I contacted the helpdesk for the software provider, and although they responded promptly, they could offer no appropriate advice to remedy the problems that I was experiencing. In the end, after several days of attempting to resolve the problem, I managed to format the web link in such a way that potential respondents were then able to access the survey (this involved removing the 'http://' in the web link address and beginning the web link address only with 'www'). Enabling participant access to the online questionnaire was the principal difficulty that I encountered with the survey - which was significant in the respect that, as other researchers have observed, it can be an inherently challenging process to engage potential respondents to participate in research projects such as this (see, for example, Couper, 2000; Andrews et al., 2003; Sheehan and Hoy, 1999; Sheehan and McMillan, 1999; Watt, 1999; Keyhole and Pitkow, 1996). Access to the survey proved especially problematic when I had been contacted by solicitors who had received details of the research project and who were interested in participating in the survey, but who were unable to subsequently access the questionnaire. Not only did this make the research appear potentially unprofessional but it also meant that in order to attempt to rectify the error, I was required to enter into a correspondence with the solicitors which drew out the process further, using up more of their time and making it less convenient for them as respondents.

Semi-structured interviews

The inherent value of the interview as a method of enquiry, as opposed to, for example, the questionnaire, is that interviews can provide a more contextual analysis of (a set of) circumstances. Questionnaires may only be able to provide a superficial examination of a situation, whereas, particularly semi- or unstructured interviews, can elevate the level of detail provided and enable a more descriptive account of events. Hence, semi- or unstructured interviews can be more versatile and elastic in structure, and can possess a more conversational style. As previously discussed, semi-structured interviews also facilitate an immediate response to a question, and can potentially empower both the researcher and the interviewee to explore the meaning of the questions and the answers and to resolve any ambiguities in a propitious, convenient, and even 'friendly' manner (Gorman and Clayton, 1997: 124). The use of semi-structured interviews allows the interviewee the opportunity to explain events from their own perspective, which can facilitate a greater understanding and elucidation of process(es) and organisational structures. The interview participant may also feel a greater degree of autonomy in the interview process through their opportunity to determine elements of the interview (such as content, direction et cetera).

Yet, (semi-structured) interviews are not devoid of associated difficulties. There are several fundamental problems inherent in the use of interviews as a research tool, which include the time involved in the interview process(es); the related costs(s), and; perhaps most significantly, the opportunity presented for the influence of personal bias (Gorman and Clayton, 1997: 125). Moreover, interview transcripts may not be able to represent the differences between the recorded interview dialogue and the interviewee's de facto opinion(s) on a given subject. Burke and Innes (2004: 2) warn, for example, that any published research following from an interview 'is an interpretation of a discussion, an interpretation that cannot convey the dynamic of a conversation (including tone, register, accompanying gesture and so forth).'

'Elite' interviewing

Odendahl and Shaw (2002: 229) define an 'elite' thus:

'Elites generally have more knowledge, money, status and assume a higher position than others in the population. The privileges and responsibilities of elites are often not tangible or transparent, making their world difficult to penetrate.'

Yet, although elevated economic and social status is often characteristic of an 'elite', they are by no means the exclusive standards of measurement. For example, Dexter (1970) suggests a three-fold definition of 'elite' interviewing, which is based upon the fundamental *purpose* of the interview, as opposed to the status (economic, social, or otherwise) of the interviewee. Dexter ascribes that (1) the interviewee's determination of the situation is of primary importance; (2) the way in which the interviewee constructs a narration of the situation being investigated is fundamental, and; (3) it is the interviewee, as opposed to the researcher, that determines what the issues of relevance are.

However, as Burke and Innes (2004: 9) observe, Dexter's definition of 'elite' is heavily methodologically embedded, and amalgamates a large portion of Merton's theory of the focused interview (1946). The definition of an 'elite' is not concerned simply with methodology, although it is concerned with (as Dexter observes) the intercommunication, reception and transmission of knowledge(s). An 'elite' interviewee is perhaps most easily identified by what they can bring to the interview. That is to say that, 'an elite respondent can communicate information that is not available from any other source, from the vantage of his/her personal involvement in the source material' (Burke and Innes, 2004: 9). Within this interpretation of 'elite', I think that the judiciary – who are the subjects of my semi-structured interviews - are feasibly defined.

Goldstein (2002: 669) has suggested that there are essentially three main reasons for administering elite interviews: (1) to obtain information from a sample of interviewees to facilitate the creation of theorised, general research claims; (2) to ascertain a specific piece of information, or to acquire a particular document, and; (3) to inform and to accompany research that uses other data sources. For the purposes of this investigation, elite interviews are to be placed within a wider research methodology that includes data analysis and quantitative research design, in order to inform and to elucidate my other research findings. Moreover, elite interviewing has been designed with the research purpose as its primary objective – the use of elite interviews is underpinned by one of the central aims of the research investigation (Aberbach and Rockman, 2002: 675), that is, an examination of the contribution and influence of judicial discretion and decision-making in ASBO applications in Britain.

The elite interviews were not conducted until the later stages of the research, however. The purpose of the interviews is not to override issues raised by alternative sources, but instead to provide another perspective(s). Hence, in

conducting the elite interviews once I had compiled and evaluated the data from the other sources ('unobtrusive' data collection, online survey questionnaires), it was hoped that this would allow me to develop the direction of the elite interviews in a way that would best serve the research aim(s). Furthermore, I was also able to identify specific areas which would benefit from further examination. However, it was also necessary to conduct the interviews towards the latter stages of my research investigation in order that I was thoroughly familiar with the research subject. As Leech (2002: 665) has observed, the importance of preparation for elite interviews cannot be underestimated:

'The danger here is that – especially when dealing with highly educated, highly placed respondents – they will feel that they are wasting their time with an idiot, or at least will dumb down their answers and subject the interviewer to a Politics 101 lecture.'

Yet, advance preparation is not simply a cursory requirement of manners or politeness. As Burke and Innes (2004: 10) rightly observe, preparation also informs 'interrogation'. This means that the responses given by the 'elite' can be (more) fully discussed within the course of the interview when the researcher is privy to, and better understands, the issues of salience. Of course a wider and more expansive knowledge of a range of issues – not limited to those of 'apparent' salience to the interviewer – would be better still, and could potentially facilitate the discovery of new areas of interest to the research which had previously been ignored or not recognised. As Leech argues: 'what you already know is as important as what you want to know' (2002: 665). Thus, interviews were conducted only after I had accumulated a body of detailed knowledge of the research subject, and once I had ensured that the interviews matched my research design (Rubin and Rubin, 1995: 147).

Designing the interview

Hence, it was decided that semi-structured interviews would provide a particularly useful data set through which to contextualise and to elucidate the research further – providing a more rounded and dynamic research structure. In terms of the interview schema, 'elite' interviewing duplicates the same debate as in other interviewing literature (Burke and Innes, 2004: 11) which focuses upon the ability - or power - of the interviewer to control the direction of the interview, through determining the questions or areas to be discussed, and also the extent to which

the interviewee is permitted to establish the line(s) of inquiry. In particular, arguments focus upon whether the use of semi-structured or unstructured questions is more scientifically valid (ibid.). The use of a semi-structured schema is certainly more popular within the sociological discipline nowadays, however, Dexter's original preference had been for the use of an unstructured schema, that applies unstructured questions (1970). Dexter's paradigm of unstructured interviewing, affords primacy to the interviewee and restricts the role of the interviewer, thus providing a means of enquiry that is inherently limiting in respect of researcher bias.

Yet, Dexter's paradigm, although seeking a worthy aim, is not necessarily a practical proposition. The importance of conducting interviews that are informed by the research design is essentially usurped by the importance of eliminating interviewer bias. Although Dexter observes that it is the interviewer who is seeking instruction, and who is attempting to access the interviewee's knowledge, the relevance of the research aim(s) is secondary. Alternatively, Kvale, for example, provides a moderating observation and an acceptance that the interview should be determined by the research aim(s) and the research purpose, as well as possessing a predisposition towards the primacy of the interviewee (1996: 178, cited in Burke and Innes, 2004: 33).

Hence, as previously discussed, a semi-structured interview schema was selected for use in the 'elite' interviewing process. A semi-structured interview schema allows for specific questions or areas of research interest to be addressed, but at the same time allows for a discussion of any areas that may arise which are of significance or relevance. This permits both the formal and informal aspects of the interview to be sustained, whilst at the same time, the research aim(s) are pursued and new lines of enquiry are explored. The formation of interview questions in the elite interviewing process differs markedly from the composition of questions in traditional research interviews, however. Kvale (1996: 130), for example, posits that interview questions should typically be: 'easy to understand, short, and devoid of academic language...The academic research questions need to be translated into an easy-going colloquial form to generate spontaneous and rich descriptions.' Alternatively, an elite interview requires that the phraseology incorporated into the research questions (and throughout the interview as a whole no less) is elevated to a level that will dovetail the status of the elite interviewee. As Burke and Innes (2004: 14) observe:

'In published academic interviews *both* the interviewer and the interviewee are designated as "Elite" by virtue of their knowledge, and their qualification to take part in the interview is constantly reaffirmed through their informed discourse, which is further stressed by their lexical choices. Moreover, the act of publication "legitimises" their role as informed interlocutors; thus, it is in the interests of both participants to reaffirm their unique qualification through thought and language (original emphasis).'

Hence, while the interview procedure uses a semi-structured format guided by specific questions and topics, it was also open-ended in nature to be responsive to emergent issues and themes (the interview schema is provided in the appendices, as appendix 7). It was important to design the interview schema in such a way as to enable the uninterrupted free-flow of information between the researcher and the interviewee, and although pre-formatted questions were organised as part of the interview schedule proper, they were only introduced where appropriate in order not to disrupt the 'conversational' style of the interview. Answers were recorded clearly on a digital audio recorder.

Gaining access

Goldstein (2002: 669) argues that gaining access to 'elites' is the most fundamentally important aspect of the interviewing process; because organisation and preparation is worthless if access is not obtained. His advice is specific to three categories: (1) geographical; (2) logistical, and; (3) organisational. Goldstein advocates that interviewers should be close in proximity to their (potential) 'elite' interviewees; that interviewers should be logistically prepared thus possessing, for example, email and mobile phone contact details and relevant technological support (software, interview equipment et cetera); and that researchers should try to form good impressions with 'elites' so as to establish credibility for future potential interviews.

Cowan et al. (2006: 548) have identified lower court judges as a 'hard to reach' group to research due to the existence of the different types of gatekeepers determining access arrangements⁵⁹. I found this to be true for the purposes of my research investigation also. Due to the 'elite' nature of the potential interview

⁵⁹ Cowan et al. found that, for the purposes of their research study on District Judges, both the Department for Constitutional Affairs (DCA) and the individual courts themselves acted as gatekeepers. Researchers were required to negotiate a 'Privileged Access Agreement' through the DCA with the courts they intended to research - provided that these courts agreed (Cowan et al: 548).

subjects, I was required to follow specific protocols in order to gain access to the judiciary. However, I was only partially successful in obtaining access to the lower courts.

Scotland

To obtain access to Sheriffs (residing in the Sheriffs' Court) in Scotland, it was necessary to write a formal access request letter to the Lord President, and the Sheriffs Principal of the 6 Sheriffdoms in Scotland (Grampian, Highland and Islands; Tayside, Central and Fife; Lothian and Borders; Glasgow and Strathkelvin; North Strathclyde; and South Strathclyde, Dumfries and Galloway)⁶⁰. Although I was granted permission by the Lord President to approach the 6 Sheriffs Principal, when I contacted the Sheriffs Principal, they did not all consent to me contacting individual Sheriffs to seek their participation in the study. Thus, unfortunately, I was not able to interview Sheriffs from all six jurisdictions which would have provided a more representative sample of judicial attitudes. However, I was able to obtain 11 semi-structured interviews with individual Sheriffs from 2 different Sheriffdoms, which yielded a significant - and valuable - amount of empirical study data. The interviews did not commence until the relevant access approval had been granted by both the Lord President and the Sheriffs Principal of the relevant jurisdictions, and the consent of the individual Sheriff participant had been obtained⁶¹. The template access request letter(s) to the Lord President and the Sheriffs Principal is provided in the appendices, as appendix 4 and 5 respectively. The consent form for interview participants is provided as appendix 6.

England and Wales

A similar access protocol was followed in order to obtain access to district judges and lay magistrates in the lower courts in England and Wales. An access request application was made which detailed information on:

- Which courts I planned to work in, and over what period of time;

⁶⁰ The District Court is the first level of the court hierarchy in Scotland. However district courts deal only with summary *criminal* matters and so are unable to consider ASBO applications since ASBOs are civil law remedies. Hence, I did not include the District Courts in Scotland in this study. Under s. 19 (2) of the Crime and Disorder Act 1998, relevant authorities apply to the Sheriff Court of their local authority jurisdiction for an application for an order.

⁶¹ The process of requesting, and obtaining, access to the Scottish courts was very efficient and did not take longer than 6 weeks to complete

- What interviews were planned, and what questions would be asked of whom;
- Who would be involved in the research

The application form was then sent to Her Majesty's Data Approval Panel for consideration. Unfortunately, this process was complex and time consuming. The application process took six months, after which time my access request was denied by the Senior Presiding Judge on the grounds that it would be inappropriate for interviews to be conducted with district judges and magistrates who would be asked to comment on the decisions of the higher courts.

Gummesson (1991: 21) argues that gaining access to participants is the researcher's single biggest difficulty - which proved to be true in the context of this study. Other researchers have found similar difficulties in attempting to access the courts - for example, Ashworth et al., were denied access to the judiciary for their study of sentencing in the Crown Court (1984), while Hood experienced similar difficulties in his study of racial disparity in sentencing (1992). However, it is unfortunate that access was denied to the lower courts in England and Wales, particularly because there exists so little research on judicial decision-making in ASBO applications and so the proposed interviews would have been timely, and would, moreover, have contributed significantly to knowledge in this area.

My denial of access to the courts also has significant impact upon the value of the data collected – and how it is to be interpreted and discussed. In presenting the interview data, I have used case files and records of judicial decisions to compare and contrast the outcomes of cases in England and Wales, with my interview data for judicial decision-making in Scotland. However, the data obtained from the interviews remains limited in value and is effectively only of use to inform understandings of the operation of the law on ASBOs *in Scotland*. The use of reported decisions in England and Wales can act (at best) only to inform the reader of developments in the law in other jurisdictions. As such, the interview findings for Scotland are not comparable with the other survey jurisdictions but should be read as relevant to research on the use of ASBOs *as a whole*, rather than providing parallels with other jurisdictions.

Conduct of the interviews

Kvale (1996:178) has advised that researchers should:

‘Think about how the interviews are to be analysed before they are conducted. The method of analysis decided on – or at least considered – will then direct the preparation of the interview guide, the interview process, and the transcription of the interviews. Every stage in an interview project involves decisions that offer both possibilities and constraints in later stages of the project.’

It was necessary to ensure that interviews were recorded to allow for comments to be quoted verbatim, and to act as an *aide-memoire*, enabling the interviewer to concentrate upon directing and engaging in the interview process (Gorman and Clayton, 1997: 131-5). Tizard and Hughes (1985) recommend the use of notes alongside taped interview conversations to enable faster interview analysis and dissemination. However, for the purposes of this research investigation, the use of a digital audio recorder alone in the interview process proved sufficient. Not only could the interview recordings be replayed at speed, but it was also possible to skip to relevant quotations/answers instantly. Hence the digital audio recorder was a superior and expedient alternative to the conventional tape recorder.

All interviews took place between April and June 2007, and were conducted in Sheriffs’ chambers. I had stipulated to the interview participants in advance that the length of the interview would be entirely at their discretion, although I had suggested that, if they were able to allocate half an hour of their time, then this would be ideal. All interview participants were very generous with their time, and the length of the interviews varied from half an hour, to an hour and a half in duration. Although it has been argued that the use of digital or tape recorders in the interview process can potentially act as a barrier to obtaining detailed information which limits the prospects for interviewees to impart sensitive information, and that recordings can sometimes be impaired by external noise(s) (Gorman and Clayton, 1997: 135), these difficulties were not readily apparent in this interview process. Indeed, Sheriffs spoke freely, and at length, about many sensitive issues relating to the legislation and case law, and several participants also expressed their views on policy matters⁶².

⁶² Several participants had previously been interviewed by researchers from my University for another (unrelated) study. These Sheriffs stated that they had found the previous interviews to be a positive experience, and that their anonymity had been respected in

Ethics

As with the ethical considerations of the online survey questionnaire, informed consent for the purposes of the semi-structured interviews imparted the potential interviewee with information about the research project (aims, purpose et cetera); the researcher and researcher's institution; the potential risks and benefits of participation; the voluntary nature of their participation; a guarantee of anonymity; and details about the interview procedure itself. This information was contained in all introductory letters to sheriffs, and it was again included within the consent form that was presented to the interviewees at the time of the interview. Interviewees were required to provide written consent by signing the consent form prior to the interview beginning. Participants were also given a copy of the consent form for their own reference (as stipulated above, the consent form is provided as appendix 6). The anonymity of interview participants was protected using the following methods: (a) all identifying information was removed from the interview after it had been transcribed, (b) quotations to be used for publication (in this thesis, or in any other documents) were framed in such a way that the individual's identify is hidden, and (c) coding (for example, s.1, s.2) was used where necessary.

Data limitations

Despite the interviews being recorded verbatim on the digital audio recorder, it is important to be mindful of the limitations of the resulting published interview quotes. Written transcripts of interviews provide an imperfect narrative account of how the interviews took place in reality (Burke and Innes, 2004: 15). For example, the published interview transcript of an academic interview will always be an amended or edited version of the actual interview. The published text appears verbatim, without being able to illustrate hesitation, repetition, digression et cetera, and is 'decontextualised' from the interview situation (Kvale, 1996: 165). Moreover, the physical interpretation of words; the emotion invested in words (Burke and Innes, 2004: 16) and; the relevance of the verbose in shaping meaning, is essentially cut out from the interview transcript. Hence, caution must be exercised in the interpretation of meanings derived from interview transcripts and transcript quotes.

Moreover, the limitations of the semi-structured interviews as a method of data production also include small sample size (which was limited to sentencers in

resulting research documents. Hence, it is suggested that, as a result, these participants were comfortable participating in further studies involving researchers from the same University, and thus were perhaps more willing to give full and frank answers because there was a level of trust in the research conducted on behalf of my University institution.

the Scottish courts) and possible selection bias. Selection bias may have occurred as a result of Sheriffs with negative experiences of, and attitudes towards, the use of antisocial behaviour orders being more inclined to agree to be interviewed. However, as the research findings identify⁶³, the interview participants demonstrated a range of experience(s) of, and attitudes to, the use of ASBOs in Scotland. Moreover, the primary purpose of the semi-structured interviews was not to arrive at robust findings and generalisations about judicial decision-making in ASBO cases, but to present findings of qualitative research that can be generalised to theory, rather than to populations⁶⁴. As a result, the interview findings do provide valuable information about the observations and experiences of Sheriffs involved in ASBO applications in Scotland.

Data analysis

As we have seen, the nature of this research investigation is such that it makes use of a multi-method approach to data collection. Correspondingly, more than one method of data analysis will be deployed in the study of the derivative information acquired from these processes of enquiry. Atkinson (1993: 213) observes that 'many a conventional tool of social analysis can be plundered to good effect', and thus it is prudent to appreciate that 'all technologies come burdened with their original purpose and, indeed, the ghost of the context which created them.' Hence, the data analysis methodology employed within this research study will be underpinned by a fundamental understanding of its utility within the research context, but also by an appreciation of the potential for methodologies to create 'false realities' based upon an 'interpretation' of recovered research data which has the capability to present a simplified, generalised and/or unrealistic representation of 'reality'.

Online survey questionnaire

Due to the large number of responses that were received for the online survey questionnaire, a precursor to the data analysis was that this information should be collectively coded, entered and checked. As previously discussed, one of the main benefits of the online survey software (SurveyMonkey) was that it enables the researcher to download the raw data into statistical analysis packages, allowing the coding and formatting of the retrieved information.

⁶³ See Chapter 6

⁶⁴ See Chapter 7

The questionnaire (appendix 2) was split into eight sections and the raw survey data was subsequently downloaded from the online survey website where responses had been collected, and then the software package SPSS version 14.0 was used for the survey data analysis. SPSS was chosen for the data analysis because the software was specifically designed to enable the recoding and transforming of data; data management; and large-scale data analysis. In particular, the 'data editor' tool was found to be a very useful feature of the software, which enabled data to be made immediately visible, and accessible for editing. The imported data was then held in data tables where each row represented a specific respondent and their data, and where each column represented a specific data variable. Each variable possessed a unique title and a specific level of measurement (nominal, ordinal and scale). The measurement level of each variable then determined the type of analysis that was undertaken. The next chapter (5) discusses the survey data in respect of specific data variables, and the way(s) in which the data sets obtained have been used to inform the central research study question.

Interview data

The coding of data is of fundamental importance to qualitative research primarily because coding necessarily substantively influences data interpretation and analysis. Flick (1998: 179-80) has developed a concept of 'open coding' whereby different categories are coded at varying degrees such as 'word', 'sentence', 'paragraph' et cetera. The formulation of theories is then achieved through an analysis of the inter-relationship(s) between the codes (p. 185). This method of 'open coding' was applied to the transcribed interview data. Interview transcripts were stored as a Word format and then read through to identify salient themes. The database on Word contained all the transcripts of the interview questions and answers. Each question and its transcribed answer formed one individual file⁶⁵.

After the initial reading of the transcripts, a significant number of key themes could be readily identified. The extracted themes were composed of issues arising from the interview data itself, but also from concepts and issues simultaneously arising in the survey questionnaire data. These themes were then used to form

⁶⁵ Each file also contained separate searchable fields for: a unique reference number; category of question; notes on the interview schedule; court name; and date of interview

coding trees in the qualitative software package NVivo 7 (upgraded version of NUD*IST 6). The categories generated are listed below:

- ASBO prohibitions
- Evidentiary requirements and the burden of proof
- Criminal behaviour
- Interim orders
- Orders on conviction
- Defending ASBO action
- Mitigating factors
- Breach proceedings
- ASBOs, young people and children
- The political climate

The software package NVivo 7 was selected to facilitate analysis of the data collected primarily because the software is specifically designed for use with textual documents; it facilitates the indexing of components of transcripts; and it enables data theorising, including the exploration of trends and the building and testing of theories. Moreover, NVivo 7 has a highly efficient search engine which enabled me to search for words and phrases at speed, and I was also able to insert additional key themes into the index coding as they arose. Overall, I found the software easy to obtain and to use. Once the data had been coded into specific themes, I was then able to view each specific theme and its relevant data, and in turn cross-reference the data with other data nodes. I then analysed and evaluated each theme in turn.

However, there is a substantial body of evidence to suggest that 'coding' can fracture data. For example, Catterall and Maclaran (1996) have identified that process elements in qualitative data may be removed by coding. Thus, when using computer programs for qualitative data analysis, attention must be paid to the contextual nature of the coded data, and its original place within the wider interview data structure. Hence, it was important that I carried out my data analysis whilst also working with the complete interview transcripts as off-screen documents.

Coding provided a way into, or a way of understanding, the qualitative data produced and acted as a method of simplifying complexity, organising data, and building an account of judicial decision-making in ASBO applications. Indeed, coding operated to render more visible and understandable the complex nature of

judicial decision-making, within the wider sphere of legal administrative processes, which will be discussed in the subsequent data analysis chapters (Chapters 5 and 6).

Conclusion

The mixed methodology approach of this research investigation is designed both to deepen *and* to widen understanding(s) of the ways in which the dimensions of due process and legal primacy; and juridical power and discretion intersect to shape the management and outcomes of ASBO use in Britain. One method of enquiry is not advanced as more authoritative or legitimate than the other modes of enquiry. Instead, the key purpose of this chosen methodology is to enable the comparison of data derived from different sources to be examined in the hope that it will provide a more comprehensive and detailed analysis of the administration of antisocial behaviour orders in Britain.

However, as Burke and Innes (2004: 19) have argued: individual methods of enquiry are not 'only validated when equally corroborative subjective data is forthcoming from another source'. Rather, they have merit on their own operative basis. Hence, the modes of enquiry that I have chosen in fact have value in and of themselves as data sources. Although it is propitious, for the purposes of the research investigation, to seek to compare and to contrast the information and perspectives acquired from the different modes of enquiry, the validity of the data is not conditional upon agreement of the collective sources. A dependence upon the concurrence of information could result in 'tyranny by the lowest possible denominator: that an interpretation is only reliable when it can be followed by everyone, a criterion that could lead to trivialization of the interpretations' (Kvale, 1996: 181). Alternatively, it is the purpose of the methodology in this investigation to balance the strengths of quantitative and qualitative modes of enquiry (Sudweeks and Simoff, 1999) to produce a range of comprehensive (but non-exhaustive) data sets that will inform understanding(s) of to what extent legal procedure(s) and judicial discretion influence the administration, management and outcomes of ASBO use in Britain.

Chapter Five

Solicitors' Experiences and Observations of ASBO Procedure

Introduction

As I have discussed in earlier chapters, no empirical research studies have previously sought to specifically examine or to explore current ASBO legal and court process(es). Moreover, there have also been no comparative studies in existence that have identified differences/similarities between the ASBO application procedure in England and Wales, and in Scotland. With this in mind, the online survey questionnaire sought to explore solicitors' experiences of court and legal process(es) in ASBO applications in order to better understand to what extent legal procedure(s) and judicial discretion influence the administration, management and outcomes of ASBO use in Britain. From the survey data collected, eight specific emergent themes were identified: civil procedure and the standard of proof; evidence gathering and case management; the judiciary; defence counsel; orders granted on conviction (CRASBOs); children and ASBOs; appeal; and breach proceedings. The findings are discussed in turn, below.

Data limitations and the presentation of findings

As previously discussed in the methodology chapter, the value of the research study data is constrained by both the low number of solicitors in Scotland who participated in the online survey, and by the denial of access to the courts in England and Wales. Consequently, the best evidence from England and Wales is in respect of the online survey of solicitors, and the best evidence from Scotland is in respect of the interviews with the sentencers. While I have still included (in this chapter and the next) the data obtained from solicitors in Scotland who participated in the survey and also the reported judgements of sentencers in England and Wales that were obtained from case files, it is important to underline that the value of this data is limited given the low number of participants in the online survey (Scotland) and the denial of access to the courts (England and Wales). Moreover, the findings in respect of solicitors' responses to the survey (in England and Wales, and Scotland) detailed in this chapter *are not presented as substantively comparable with the other survey jurisdictions - nor should they be interpreted as*

*providing such a comparative link*⁶⁶. Instead, it is suggested that data derived from each jurisdiction is relevant to research on the use of ASBOs as a whole, rather than providing parallels with other jurisdictions.

Civil procedure and the standard of proof

Although ASBO proceedings are civil in both Scotland, and in England and Wales, the standard of proof in ASBO applications is lower in the Scottish courts. Hence, the empirical data obtained for this section is set out in two parts. The first section will discuss findings from England and Wales, and the second part will discuss findings from Scotland.

England and Wales

The civil nature of the ASBO process means that civil rules of evidence apply, including the use of hearsay and professional witness evidence. However, although the application for an ASBO is a civil process, the consequences of the breach of an order are criminal. This, in turn, has implications for the burden of proof in ASBO cases: ASBO proceedings are subsequently regarded as quasi-criminal in nature. As discussed in Chapter 3, in the House of Lords case *R (McCann) v Manchester Crown Court [2002] All ER 593*, their lordships made ASBO applications an exception from the normal standard of proof in civil proceedings (on the balance of probabilities) and ruled that the heightened civil standard, equivalent to the criminal standard, was to apply. It was held that an individual must be shown to have perpetrated behaviour that is antisocial, and that such an order must be 'necessary' to protect persons from harassment, alarm or distress. The question of 'necessity' is, however, one for the exercise of the judge's individual evaluation and discretion - without a standard of proof as such. In considering the burden of proof in interim order applications Kennedy LJ explained in *R (Manchester City Council) v Manchester City Magistrates' Court [2005] EWHC 253 (Admin)*, that: 'The test to be adopted by a magistrates' court when deciding whether or not to make an interim order must be the statutory test: whether it is just to make the order.' Similarly, in the leading case of *R v Boness [2005] EWCA Crim 2395*, it was held that no prohibition may be imposed in the order unless it was 'necessary' for the purpose of protecting persons from further acts of antisocial behaviour by the defendant.

⁶⁶ That is to say evidence of, for example, witness intimidation in cases in England and Wales should not be interpreted as equivalent to data presented on witness intimidation in cases in Scotland.

It has been argued that the ‘amalgamation’ of elements of the civil and criminal law within the relevant antisocial behaviour legislation has effectively blurred the ‘fundamental boundary’ between the civil and criminal law (Burney, 2002: 483). However, the quasi-criminal nature of ASBO proceedings (in the respect that proceedings are civil, with civil rules of evidence, and a criminal standard of proof applies) is not necessarily problematic in and of itself⁶⁷, but it must certainly be examined in terms of the effective operation of the relevant legislation, and arguments about the civil law status of ASBO procedure(s) should, at least in part, be investigated from a functional perspective. In this respect, the ‘hybrid’ of civil and criminal procedure appears to have generated a degree of confusion⁶⁸ and practical difficulty within the court process in ASBO applications, as demonstrated by the survey responses. Figure 5.1 shows the number of respondents who found the quasi-criminal nature of ASBO proceedings, and the corresponding civil rules of evidence, to be ‘problematic’.

Figure 5.1: Civil rules of evidence (England and Wales)

Do you think that it is problematic that civil rules of evidence are used in ASBO cases when (the equivalent of) a criminal standard of proof applies?

	Response Percent	Response Total
Yes	24.6	31
No	65.0	82
Other (please specify)	10.3	13
Total Respondents		126
Skipped Question		11

Hence, nearly a quarter (24%) of solicitors in England and Wales who responded to this part of the survey questionnaire cited difficulties relating to court procedure in ASBO applications. Additionally, of the 13 who responded ‘other’, 9 stated that they

⁶⁷ This legal position is not unique to ASBOs. For example, see restraining orders (under the Protection from Harassment Act 1997, s.3) and sex offender orders (under the Sex Offenders Act 2003 and the Crime and Disorder Act 1998, s.2). The effect of the nature of the proceedings being regarded as ‘civil’ will be considered more fully in the course of this chapter

⁶⁸ Indeed, in her research on ASBOs, Campbell (2002: 49) confused the ‘civil’ nature of the orders with a ‘civil burden of proof’. She cites *McCann* as settling the issue on the burden of proof required – although she misunderstands that it is the heightened civil standard, and not the traditional civil standard (‘on the balance of probabilities’), that applies.

‘sometimes’ or ‘occasionally’ found it to be problematic. The questionnaire then asked those respondents who had experienced difficulties to explain why they had found this area to be problematic. From the responses obtained, the specific problems encountered could be collapsed into five categories, detailed in Figure 5.2.

Figure 5.2: Area(s) of difficulty (England and Wales)

Problem Identified	Response Total
Magistrates’ Court Procedure	10
Lack of guidance for interim ASBOs	2
Burden of Proof in County Courts	4
Confusion about ‘necessity test’	4
Frustration about limited use of County Court	11
Total Respondents	31
Skipped Question	0

Respondents cited magistrates’ court procedure; a lack of guidance on the level of evidence required for interim ASBOs; confusion regarding the ‘necessity test’; difficulties relating to the burden of proof in the county courts (due to the two different standards of proof that they were required to meet – the standard of proof for the ASBO and the standard of proof for the action that the order is ancillary to); and, a frustration that the majority of ASBO cases could only be heard in the magistrates’ court. When asked about possible improvements that could be made to current legal and court process(es) in ASBO cases, the majority of solicitors (62%) cited the use of the County Court for (stand alone) ASBO applications as a

major improvement that could be made to the existing court procedure for ASBOs. It was suggested that because ASBOs are akin in many ways to antisocial behaviour injunctions (ASBIs)⁶⁹, County Court District Judges and Officers would be more able to process such cases expeditiously (unless the order is made on the back of a conviction). Moreover, many respondents found the Magistrates' Court process cumbersome when compared with that of the County Court. It was suggested that the use of the County Courts would benefit Applicants and Defendants if proceedings for stand alone ASBOs were made in the County Court.

However, a large number of respondents (65%) did not find it problematic that civil rules of evidence are used in ASBO cases when (the equivalent of) a criminal standard of proof applies. The questionnaire asked those respondents who did not find civil rules of evidence problematic, to explain why. Figure 5.3 shows the responses obtained.

⁶⁹ ASBIs are also civil orders, designed to prevent and to control antisocial behaviour. Obtained in the County Court, an ASBI can compel a person over the age of 18 to do something and/or prevent a particular type of behaviour/action. Breach of an ASBI remains a civil court procedure however, and the court can impose a fine or a period of imprisonment. Using their powers under s222 of the Local Government Act 1972, local authorities can apply to the civil courts for injunctions to restrain antisocial behaviour that constitutes a public nuisance.

Figure 5.3: Why civil rules of evidence are unproblematic (England and Wales)

Reason Given	Response Percent	Response Total
Enables use of hearsay evidence	85.0	68
Civil rules of evidence are easier than criminal rules	3.7	3
Criminal rules of evidence too restrictive	8.7	7
ASBOs are civil orders so corresponding rules should apply	2.5	2
	Total Respondents	80
	Skipped Question	2

The predominant reason given by solicitors for why they found civil rules to be unproblematic (given the equivalent of a criminal standard of proof) was the importance specifically attached to the use of hearsay evidence in ASBO applications. Solicitors who supported the use of civil rules of evidence in ASBO applications, described the use of hearsay evidence as ‘vital’ and ‘crucial’ in the ASBO process, primarily with regard to protecting vulnerable witnesses who would not otherwise testify in court for fear of reprisals. For instance, 68% of respondents in England and Wales reported obtaining interim ASBOs based *only* on hearsay evidence and 22% of solicitors had also been able to obtain a full ASBO in this way (see below, Figure 5.4). It is important to note, however, that there is no statutory requirement that evidence should be led at the interim stage and there is no explicit provision for any representations to be made by or on behalf of the respondent

before an interim ASBO is granted, although the Court can consider any such representations as it sees fit⁷⁰.

In terms of the type of evidence most frequently used for interim/ASBO applications, in interim order applications in England and Wales, hearsay was used 'frequently' (46%) or 'always' (30%), video evidence was used 'rarely' (61%), photographic evidence was used 'sometimes' (46%) or 'rarely' (36%), PNC or intelligence printouts were used 'always' (51%) or 'frequently' (28%), incident diaries were used 'always' (28%) or 'frequently' (50%), non professional witness evidence was used 'frequently' (43%) or 'sometimes' (28%), and professional witness evidence was used 'always' (46%) or 'frequently' (22%). In full ASBO applications in England and Wales, hearsay was used 'frequently' (54%) or 'always' (24%), video evidence was used 'sometimes' (25%) or 'rarely' (59%), photographic evidence was used 'sometimes' (55%) or 'rarely' (21%), PNC and intelligence printouts were used 'always' (56%) or 'frequently' (24%), incident diaries were used 'always' (24%) or 'frequently' (53%), non-professional witnesses were used 'frequently' (52%) or 'sometimes' (25%), and professional witness evidence was used 'always' (51%) or 'frequently' (22%).

Figure 5.4: The use of hearsay evidence (England and Wales)

(i) How often are you successful in obtaining an interim ASBO based only on hearsay evidence?

	Response Percent	Response Total
Always	25.8	31
Frequently	31.6	38
Sometimes	8.3	10
Rarely	2.5	3
Never	12.5	15
Other (please specify)	17.5	21
Total Respondents		120
Skipped Question		17

⁷⁰ In Scotland, if the initial writ has been served (for an interim order), the Sheriff may dispense with intimation of the motion for the interim ASBO and grant it without hearing the defender. Similarly, in England and Wales, an interim order may be granted *ex parte*, without intimation to the defender, and without any defence(s) having been lodged or presented in court. The implications of *ex parte* applications will be considered more fully in the course of this thesis (see Chapter 7).

(ii) Have you ever successfully obtained a full ASBO based only on hearsay evidence?

	Response Percent	Response Total
Yes	22.5	25
No	77.4	86
Total Respondents		111
Skipped Question		26

Respondents who had been successful in obtaining a 'full' ASBO based only on hearsay evidence were then asked to identify, in an open-ended question, how many times that they had obtained an ASBO in this way. Responses from these respondents have been collapsed into 4 categories, shown in figure 5.5, below.

Figure 5.5 How often respondents have successfully obtained a full ASBO based only on hearsay evidence (England and Wales)

Reason Given	Response Total
Once	3
Twice	4
3-6 occasions	3
7-12 occasions	3
More than a dozen times	8
Total Respondents	21
Skipped Question	1

The above set(s) of findings potentially raise questions about the legitimacy of legal action following breach of an order obtained solely on the basis of hearsay evidence⁷¹. Although it was observed in the English case of *R (Keating) v Knowsley Metropolitan Borough Council* [2004] EWHC 1933 (Admin), that, where a court is concerned with interim proceedings, it must bear in mind that no findings of fact have been made, that any allegations have not been proved, and that the defendant has had no opportunity to challenge the allegations, solicitors in both Scotland, and in England and Wales, argued that, where an interim order has been granted on the basis of hearsay evidence and the defendant is subsequently arrested for breaching the order, the breach should not carry criminal sanctions. One solicitor described their opposition to criminal sanctions for interim orders thus:

I feel that it is highly unfair that an interim ASBO can be granted without the need for any evidence to be led and then that an interim ASBO can lead to a criminal conviction. The government is wanting its cake and eating it. They say the interim ASBO can be granted without the need for evidence because it is a civil order designed as a deterrent, but then people are being arrested for breaching an order, the validity of which has never been tested in court. I do not feel interim ASBOs should carry criminal sanctions, it is oppressive.

Scotland

As previously discussed in Chapter 3, although the House of Lords had previously set out the law on the standard or proof in respect of ASBO applications in *McCann*, the position was not binding in Scotland. Therefore, Scottish courts were not obliged to follow the House of Lords judgement. In effect, this appears to have created uncertainty and confusion among the legal profession as to the appropriate standard of proof required in ASBO cases. Existing case law in Scotland is limited to essentially three principal cases: *Glasgow Housing Association Ltd v O'Donnell* (2004) GWD 29-604; *Glasgow Housing Association Ltd v Sharkey* (2004) HousLR 130; and *Aberdeen City Council v Fergus* (2006) GWD 36-727 (for a discussion of these cases, see Chapter 3).

Although these cases appear to set out the law on the criteria that requires to be satisfied in interim/ASBO applications, they are not definitive on whether the

⁷¹ It was noted, however, in the course of the semi-structured interviews (see Chapter 6) that the Inner House in the Court of Session in Scotland is currently considering a case on this matter.

requisite standard of proof is necessarily a civil or criminal one. Consequently, over half (10 out of 18) of the survey respondents in Scotland stated that they were not clear on what the appropriate standard of proof was in ASBO and interim ASBO cases. Participants cited the standard of proof as being particularly problematic for them because of (1) the existence of conflicting cases suggesting different standards of proof, and (2) what they observed to be a lack of case law and definitive legal precedent in this area.

Hence, the difficulty in ascertaining the standard of proof in interim and ASBO applications (particularly with regard to Scottish cases); and the speed at which case law on evidentiary requirements, terms and breaches moves in each jurisdiction, would suggest that, to ensure - amongst other things - that consistency of approach and practice in the administration of the relevant legislation is achieved, further guidance is required. Survey respondents (in England and Wales and in Scotland) proposed that improved consistency in the ASBO process could be achieved by either the production of formal guidance reports (Practice Notes), and/or the formulation of regular information up-dates on case law et cetera for the legal profession (to include court staff and the judiciary). It was suggested by solicitors from all jurisdictions, that this would be highly advantageous and would enable good practice to be established with regard to the relevant legal and court processes in ASBO applications.

Evidence gathering and case management

As previously noted, survey respondents in all jurisdictions described the difficulties that they had experienced in the evidence gathering process, particularly with regard to obtaining testimony from witnesses vulnerable to intimidation or acts of retribution. In England and Wales, 71% of respondents had experienced problems in securing witnesses, of which 95% identified this as directly attributable to witness 'fear of reprisals' (see figure 5.6, below).

In Scotland, 15 out of 18 survey participants had difficulty in obtaining witnesses for ASBO applications, of which 13 of those respondents identified 'fear of reprisals' as effecting their ability to obtain witness testimony (see figure 5.7, below).

Figure 5.6: Difficulties securing witnesses (England and Wales)

(i) Have you ever experienced difficulties in securing witnesses for ASBO cases?

	Response Rate	Response Total
Yes	71.7	94
No	21.3	28
Other (please specify)	6.8	9
Total Respondents		131
Skipped Question		6

(ii) If you have experienced difficulties securing witnesses, with what proportion of cases?

	Response Percent	Response Total
All cases	4.3	4
The majority of cases	24.7	23
About half of all cases	22.5	21
Less than half of all cases	24.7	23
A very small proportion of cases	23.6	22
Total Respondents		93
Skipped Question		1

(iii) If you have experienced difficulties securing witnesses, was this as a result of (you may select more than one option):

	Response Percent	Response Total
Witness intimidation	53.7	50
Fear of reprisals	95.6	89
Unreliable witness(es)	27.9	26
Witness unobtainable	16.1	15
Witness memory decay	6.4	6
Other	6.4	6
Total Respondents		93
Skipped Question		1

Figure 5.7: Difficulties securing witnesses (Scotland)

(i) Have you ever experienced difficulties in securing witnesses for ASBO cases?

	Response Total
Yes	15
No	3
Other (please specify)	0
Total Respondents	18
Skipped Question	0

(ii) If you have experienced difficulties securing witnesses, with what proportion of cases?

	Response Total
All cases	2
The majority of cases	2
About half of all cases	5
Less than half of all cases	3
A very small proportion of cases	2
Total Respondents	14
Skipped Question	1

(iii) If you have experienced difficulties securing witnesses, was this as a result of (you may select more than one option):

	Response Total
Witness Intimidation	4
Fear of reprisals	13
Unreliable witness(es)	8
Witness unobtainable	2
Witness memory decay	2
Other	1
Total Respondents	14
Skipped Question	0

Although the use of civil rules of evidence was designed to enable the use of hearsay and professional witness evidence to protect vulnerable witnesses, it appears from the survey findings that the use of civil procedure has not produced the intended result and that some witnesses continue to suffer intimidation and retribution (before, during, and after) the court process. Throughout the questionnaire, it was noted that survey participants in England and Wales identified a range of problematic areas in the use of witnesses which have been condensed into 5 categories, shown in Figure 5.8, below.

Figure 5.8: Problems related to the use of witnesses (England and Wales)

Problem Identified	Number of respondents citing this problem
Lack of witness support services	42 (30.6%)
Lack of recompense for attending court	8 (5.8%)
No court transport	5 (3.6%)
Automatic right of appeal	32 (23.3%)

Respondents in England and Wales cited a paucity of witness support services; a lack of recompense for attending court; no court transport; and the existence of the automatic right of appeal⁷², which meant that witnesses may have to attend the initial application and then an appeal hearing. One respondent described their experience of resident witnesses in ASBO applications thus:

⁷² By virtue of s. 108 of the Magistrates' Courts Act 1980, appeal is by way of full rehearing as per s. 79(3) of the Supreme Court Act 1981. The relevant legislation for the purposes of appeal in Scotland is s. 5 the Antisocial Behaviour Etc. (Scot) Act 2004

It was obviously a worrying time for them. A number of them had to take unpaid leave to attend the initial application and then appeal hearings. It was impossible to explain [to the witnesses] that the defendants had an automatic right of appeal and that they would need to go through the horrendous experience again – especially when the defence barrister was overly aggressive in his cross-examination⁷³. In their position, I would not have agreed to be a witness!⁷⁴

Furthermore, fifty-nine survey respondents (43%) in England and Wales described the ‘urgent’ need for the introduction of case management powers for ASBO applications. A lack of interagency consultation and co-operation; inconsistent attitudes towards information sharing; the presence of inexperienced evidence gatherers; the defence rarely serving evidence before trial; vague hearing dates; and, a disjointed framework for the ASBO process with different procedures in different courts, were all contributing factors that respondents argued necessitated the creation of powers to enable the courts to apply rigorous case management to ASBO proceedings, see figure 5.9, below.

⁷³ Campbell (2002) had previously identified the sometimes adversarial nature of defence counsel in ASBO cases. This will be discussed further in *Defence Counsel*, see below.

⁷⁴ Quote taken from the England and Wales survey

Figure 5.9: Reasons for the introduction of case management powers (England and Wales)

Reason Given	Number of respondents citing this problem
Lack of inter-agency consultation/information sharing	25 (42.3%)
Inexperienced evidence gatherers	13 (22.0%)
Defence not serving evidence before trial	16 (27.1%)
Vague/lengthy hearing dates	22 (37.2%)
Varying court Procedures (Magistrates', County, etc.)	21 (35.5%)

Although there are currently 154 courts in England and Wales specialising in antisocial behaviour applications, a considerable number of survey respondents in England and Wales (46%) detailed the continuing difficulties that they were encountering with the speed at which the court deals with listing ASBO applications; and also with obtaining early court dates in urgent interim order cases. Figure 5.10 (below) gives details of the length of time ASBO applications take, from summons to final hearing (in England and Wales).

Figure 5.10 Length of time - summons to final hearing (England and Wales)

What is the approximate length of time an ASBO takes to come before the court, from Summons to Final Hearing?

	Response Percent	Response Total
1-6 weeks	4.9	6
7-12 weeks	44.2	54
13-18 weeks	30.3	37
19 + weeks	20.4	25
Total Respondents		122
Skipped Question		15

Although it is 'good [court] practice' to list the first hearing of an application quickly so as to ascertain whether it can be contested, and if so, to identify the issues in the case (JSB, 2007), 20% of respondents in England and Wales, stated that the approximate average length of time an ASBO case was taking to come before the court, from Summons to Final Hearing, was more than 19 weeks⁷⁵. One survey participant (England and Wales) stated that, when an application is contested, the hearing will not take place for between 6 and 9 months.

In Scotland, 6 out of 18 respondents stated that the approximate average length of time an ASBO case was taking to come before the court, from Summons to Final Hearing, was more than 19 weeks⁷⁶.

⁷⁵ Campbell (2002: 56) had found that the average length of time, from summons to final hearing, was 13 weeks, with some applicant agencies reporting up to 6 months.

⁷⁶ Fletcher (2002) found that more than half of ASBOs granted in Scotland (2001-02) took more than 16 weeks to obtain (from the date of lodging the application in court).

With regard to the role of the solicitor in the ASBO process, nearly a third (32%) of respondents in England and Wales believed that solicitors should have more control in the decision making process (at the consultation stage) on whether to proceed with an ASBO application. This is of particular relevance given that a quarter of solicitors had been involved in ASBO action which they felt was inappropriate (see figure 5.11, below). However, the majority of solicitors were involved in the decision making process at least to some extent (see again, figure 5.11). Campbell (2002: 35) had originally found that, in 71% of cases studied in England and Wales, an external solicitor presented the ASBO case in court, and only 10% of cases were presented by a force or local authority solicitor. However, survey responses from England and Wales show that 76% of cases are now being presented by internal counsel. This is most likely due to the increased level of experience and the greater confidence of internal solicitors in preparing and presenting ASBO applications in court.

Figure 5.11 Role of the solicitor in ASBO cases (England and Wales)

(i) Do you think that solicitors should have more control in the decision-making process on whether to proceed with an ASBO application?

	Response Percent	Response Total
Yes	32.0	42
No	67.9	89
Total Respondents		131
Skipped Question		6

(ii) Who makes the decision not to proceed with an ASBO application?

	Response Percent	Response Total
Internal Solicitor	29.6	40
Other professionals within applicant agency	11.1	15
Collective decision of all agencies	51.1	69
Other	8.1	11
	Total Respondents	135
	Skipped Question	2

(iii) Have you ever been involved in pursuing ASBO applications where you believed that an ASBO was an inappropriate response to the behaviour in question?

	Response Percent	Response Total
Yes	25.1	32
No	74.8	95
	Total Respondents	127
	Skipped Question	10

(iv) If you answered 'yes', approximately how often have you been involved in an ASBO application that you believed was inappropriate?

	Response Percent	Response Total
Always	6.2	2
Frequently	18.7	7
Sometimes	25.0	8
Rarely	46.8	15
	Total Respondents	32
	Skipped Question	0

The Judiciary

Campbell's early research (2002: 59) on ASBOs in England and Wales had found there to be a 'great difference between the courts in different parts of the country as to how ASBOs are being treated.' It was reported that there were frustrations in some areas about how magistrates were dealing with ASBO cases in respect of their varying attitudes as to definitions of 'antisocial behaviour' (ibid.). Although Campbell found that magistrates were generally positive about ASBOs, some magistrates were uncomfortable with certain types of behaviour being categorised as examples of antisocial behaviour (for example, prostitution) (ibid.). While some local authorities reported positively on the courts use of ASBOs, 'in other areas there is a strong sense that the partnerships and the courts are pulling in different directions' (p. 60). Similarly, 44% of online survey respondents in England and Wales reported having experienced 'difficulties' with judges and magistrates in the ASBO application process (see figure 5.12).

Figure 5.12 Difficulties encountered with the judiciary (England and Wales)

Have you ever encountered problems with Judges/Magistrates during ASBO cases?

	Response Percent	Response Total
Yes	44.4	56
No	55.5	70
Total Respondents	126	
Skipped Question	11	

Identified problems included some magistrates'/district judges' preference for the use of community orders instead of ASBOs; the inappropriate wording of prohibitions; proceedings sometimes being unfairly weighted in favour of the defendant; a misunderstanding of the legislation; ignorance of case law (in some cases, to the extent that *McCann* was unknown); confusion as to court procedure; and the failure to address the adversarial nature of defence counsel in civil proceedings (particularly with regard to witness testimony). Figure 5.13 (below) details the numbers of respondents (England and Wales) citing each type(s) of difficulty.

Figure 5.13 Type(s) of difficulties encountered (England and Wales)

Reason Given	Response Total
Preference for community orders	3
Inappropriate wording of prohibitions	1
Judicial bias towards defendant	3
Misunderstanding of legislation or ignorance of case law	18
Confusion over court procedure	21
Failure to address adversarial nature of proceedings	10
Total Respondents	56
Skipped Question	0

In Scotland, research on behalf of the Scottish Executive (2005) notes that a significant factor in ‘influencing the regional variations [in ASBO use in Scotland]...was the varying attitude of the courts’ (para.2.27) and it is apparent that as ASBOs have become more widespread, certain courts have increasingly begun to serve ASBOs for a more diverse range of behaviour(s), whilst other courts are evidently unsympathetic to the ASBO model. Of the online survey respondents in Scotland, half of the respondents (9 out of 18) reported having experienced difficulties with Sheriffs in ASBO applications, which related to the restrictiveness of prohibitions; and a lack of knowledge and understanding of the relevant legislation (see figure 5.14, below).

Figure 5.14 Type(s) of difficulties encountered (Scotland)

Reason Given	Response Total
Inappropriate wording of prohibitions	5
Misunderstanding of legislation or ignorance of case law	4
Total Respondents	9
Skipped Question	0

It appears that certain Sheriffs are unsympathetic to the ASBO model perhaps, as has been suggested because they are 'very uncomfortable with the idea of civil action with a criminal outcome'. The attitude(s) of the judiciary, and the extent and impact of judicial discretion in the granting of ASBOs, and the formation of ASBO prohibitions, will be explored in Chapter 6.

Defence counsel

Campbell (2002) found that defence solicitors were seen by certain partnerships in England and Wales as influencing or shaping the ASBO application court process. It was reported by some local authorities that they believed that, 'many of the tactics used in criminal courts [were] being brought to the civil case...making the hearing much more confrontational and adversarial than was originally envisaged' (p.52). Respondent agencies also reported that they believed that certain defence solicitors were 'trying to build their reputation by spearheading case law. Others believed that they were trying to drag the process out in order to milk as much money as possible out of the process' (p.53).

Dovetailing Campbell's early research findings, in Figure 5.15, nearly half (45%) of respondents in England and Wales in this most recent survey, also reported having encountered ASBO cases whereby they believed that the defence counsel had acted unfairly or unprofessionally in terms of how they had presented their case in court.

Figure 5.15 Difficulties encountered with defence counsel (England and Wales)

(i) Have you encountered ASBO cases whereby you believe that defence counsel has acted unfairly/unprofessionally in terms of how they have presented their case in court?

	Response Percent	Response Total
Yes	45.3	58
No	54.6	70
Total Respondents		128
Skipped Question		9

(ii) If you answered 'yes', did this relate to (you may select more than one option):

	Response Percent	Response Total
The adversarial nature of their counsel	62.0	36
The cross-examination of witnesses	27.5	16
A set period of notice being required for the use of hearsay evidence	12.0	7
Defence counsel arguing every prohibition	72.4	42
Ability of defence counsel to appeal by way of rehearing without needing to state reasons	15.5	9
Attempts to draw out the application/court process	65.5	38
Other	10.3	6
Total Respondents		58
Skipped Question		0

(iii) From your own experience, how often are problems of this nature encountered during ASBO and interim ASBO cases?

	Always Total	Frequently	Sometimes	Rarely	Respondent
Interim	3.4% (2)	25.8% (15)	36.2% (21)	34.4% (20)	58
ASBO	8.6% (5)	29.3% (17)	13.7% (8)	48.2% (28)	58
Total Respondents					58
Skipped Question					0

In Figure 5.16, the data found that participants identified three specific areas of particular concern and difficulty for them: (1) The adversarial nature of defence counsel; (2) defence counsel arguing every prohibition, and; (3) attempts made to draw out the application/court process. It should be noted, however, that such difficulties (in particular, solicitors ignoring the spirit of civil procedure rules) are not unique to ASBOs. While some participants expressly recognised this in their responses, several respondents suggested that it would be more appropriate to work towards a system whereby uniform rules of evidence apply in both civil and criminal matters.

In Scotland, 2 out of 18 participants identified difficulties with defence counsel, see below, figure 5.16.

Figure 5.16 Difficulties encountered with defence counsel (Scotland)

- (i) **Have you encountered ASBO cases whereby you believe that defence counsel has acted unfairly/unprofessionally in terms of how they have presented their case in court?**

	Response Total
Yes	2
No	16
Total Respondents	18
Skipped question	0

- (ii) **If you answered 'yes', did this relate to: (you may select more than one option)**

	Response Total
The adversarial nature of their counsel	0
The cross-examination of witnesses	0
A set period of notice being required for the use of hearsay evidence	0
Defence counsel arguing every prohibition	1
Ability of defence counsel to appeal by way of Rehearing without needing to state reasons	
Attempts to draw out the application/court process	2
Other	1
Total Respondents	2
Skipped this question	0

ASBOs on conviction (CRASBOs)

Over 55% of respondents to the online survey questionnaire in England and Wales found obtaining an order on conviction to be 'easier' or 'much easier' than obtaining a standard order on application.

Figure 5.17 Orders on conviction (England and Wales)

How easy do you find it to obtain an ASBO made on conviction?

Response	Response	
	Percent	Total
Much easier than a stand alone ASBO application	16.1	21
Easier than a stand alone ASBO application	40.0	52
About the same as a stand alone ASBO application	13.8	18
More difficult than a stand alone ASBO application	21.5	28
Much more difficult than a stand alone ASBO application	8.4	11
	Total Respondents	130
	Skipped Question	7

However, research demonstrates that the approach of the courts in imposing orders on conviction is inconsistent. Data on the use of orders on conviction in England and Wales suggests that despite the increase in the number of ASBOs granted on conviction, certain Magistrates' and Crown Courts, and the Crown Prosecution Service (CPS), are becoming progressively less tolerant of local authorities and police services attempting to obtain orders at criminal trials where the criminal offence is unrelated to the antisocial behaviour problem (Home Office, 2007). Moreover, the Court of Appeal has reinforced the principle that an order should not be made simply for the purposes of extending the penalty for committing an offence⁷⁷.

This has also been reflected in findings from the survey questionnaire with solicitors involved in ASBO cases in England and Wales; a proportion of which have stated that they find obtaining an order on conviction to be 'more difficult' (21%) or 'much more difficult' (8%) than obtaining a section 1 stand alone application. Only 19% of survey respondents had attempted to obtain an ASBO

⁷⁷ *R v Kirby* [2005] EWCA Crim 1228. See also *R v Adam Lawson* [2006] 1 Cr App. R (S) 323 and *R v Williams* [2006] 1 Cr. App. R (S) 305.

following a criminal conviction at a hearing where the criminal offence was not related to the antisocial behaviour problem, of which 69% of these respondents had been successful in obtaining an order in this way. However, 47% of survey respondents believed that it was appropriate for ASBOs to be granted at criminal trials where the criminal behaviour was unrelated to the antisocial behaviour problem.

Figure 5.18 Orders on conviction (England and Wales)

(i) Have you ever attempted to obtain an ASBO following a criminal conviction at a hearing where the criminal offence was not related to the antisocial behaviour problem?

	Response Percent	Response Total
Yes	19.2	25
No	80.7	105
	Total Respondents	130
	Skipped Question	7

(ii) If you answered 'yes', were you successful in obtaining an order?

	Response Percent	Response Total
Yes	69.5	16
No	30.4	7
	Total Respondent	23
	Skipped Question	2

- (iii) **If you have previously obtained an ASBO following a criminal conviction at a hearing where the criminal offence was NOT related to the antisocial behaviour problem, how frequently have you been successful in obtaining an ASBO in this way?**

	Response Total
Every time I have attempted to obtain an ASBO in this way	0
The majority of attempts have been successful	2
About half of attempts have been successful	2
Less than half of attempts have been successful	4
In only a very small proportion of cases	6
Total Respondents	14
Skipped Question	2

- (iv) **Do you think that it is appropriate for ASBOs to be granted at criminal trials where the criminal behaviour is unrelated to the antisocial behaviour in question?**

	Response Percent	Response Total
Yes	47.0	63
No	52.9	71
Total Respondents		134
Skipped Question		3

Yet, despite the extensive use of orders on conviction in England and Wales, only 65 ASBOs have been made on conviction in Scotland since they became available on 28 October 2004. In contrast to England and Wales, where a court can make an order on conviction on its own initiative (and an application for an order is not required) or the order can be requested by the police or local authority (who may make representations to the court in support of the request), in Scotland ASBOs on conviction are not applied for by any authority, or the procurator fiscal. Instead, it is a matter for the court based on the evidence given at trial or the Crown narration in court.

However, all of respondents who answered the survey questions relating to the use of orders on conviction in Scotland (16 out of 18 survey participants)

reported that they found obtaining an order on conviction to be either 'more difficult' (3 respondents) or 'much more difficult' (13 respondents) than obtaining an ASBO on application (see figure 5.19, below).

Figure 5.19 Orders on conviction (Scotland)

How easy do you find it to obtain an ASBO made on conviction?

	Response Total
Much easier than a stand alone application	0
Easier than a stand alone application	0
About the same as a stand alone application	0
More difficult than a stand alone application	3
Much more difficult than a stand alone application	13
Total Respondents	16
Skipped Question	2

The predominant reasons cited by respondents in Scotland for the low numbers of ASBOs on conviction was the reluctance of Sheriffs to grant an order on conviction; and, the existence of problems relating to the Procurator Fiscals' Service and role of fiscals in obtaining orders on conviction.

Figure 5.20 Reasons for difficulty in obtaining orders on conviction (Scotland)

Reason Given	Response Total
Reluctance of sheriffs	7
Fiscals unco-operative/unwilling to suggest as sentencing option	9
Skipped Question	2
Total Respondents	16

There is a long and established tradition within Scots law that fiscals, and the crown prosecution, are not involved in the sentencing process in criminal trials. In contrast to the process in England and Wales, where, pursuant to section 1C of the Crime and Disorder Act 1998, it is the prosecutor who is able to request that the court make an order on conviction, in Scotland, the role of the Procurator Fiscal in a case ends after the accused has been convicted of an offence and the court has been provided with all of the information that is admissible and relevant to the offence. Hence, it is not a matter for the fiscal to suggest an ASBO as a possible sentencing option.

Nevertheless, the statutory guidance on the use of ASBOs on conviction in Scotland (2005), under section 19, states that:

‘When the case is called for sentencing, the fiscal can suggest to the sheriff or the justice of the peace that they may wish to consider an ASBO as a possible sentencing option for the case.’

As a result, 9 survey respondents in Scotland identified that there are inherent difficulties with fiscals who are disinclined to remind sheriffs that a case may be disposed of by ASBO and are thus unwilling to suggest CRASBOs as a sentencing option to sheriffs. It was suggested that while Procurators Fiscal are ‘amenable’ to receiving information about antisocial behaviour from the local authority and the police, they do not consider it appropriate to submit the information to the court following conviction in case they are seen to be attempting to influence sentencing. Survey respondents also reported that fiscals were awaiting further guidance from the Crown Office on this issue, which had not been forthcoming - one participant stated that solicitors had been told ‘for years’ that fiscals were awaiting Crown Office guidance on this matter.

This represents a fundamental (and crucially important) anomaly in the legislation on ASBOs on conviction in Scotland. Survey respondents expressed their dissatisfaction with the composition of the legislation and guidance in this respect, which was described as ‘confusing’, ‘contradictory’ and ‘poorly constructed’. Respondents also felt that there was an overarching lack of guidance and training available for both the legal profession and antisocial behaviour practitioners in the use of CRASBOs in Scotland. Existing reports on the use of ASBOs in Scotland published by the Scottish Executive (2005a; 2005b), make no mention of ASBOs on conviction and do not contain any data on the numbers obtained, or the circumstances in which they have been granted.

Yet, it could also be argued that the problems inherent in the Scottish approach to orders on conviction are in fact partially mitigated by the potential ‘safeguards’ presented by the statutory limits placed upon the involvement of local authorities and other agencies in seeking orders on conviction. In England and Wales, there is the potential for ASBOs on conviction to be issued inappropriately in certain circumstances: not only is there no statutory requirement for proof of prior interagency consultation⁷⁸ but there is also the possibility that an order may contain inappropriate conditions. Where orders are being sought by agencies such as local authorities and the police for antisocial behaviour that has not been evidenced at the criminal trial, it follows that the conditions of that order may be less likely to be proportionate and specific to the antisocial behaviour in question (Donoghue, 2007). So, in Scotland, because the appropriation of orders on conviction is a matter for the court based on the evidence given at trial, or the Crown narration in court, it could be argued that there is greater protection in Scotland against ASBOs being granted inappropriately in these circumstances, than there is currently in England and Wales.

Children, young people and ASBOs

Another interesting comparison that exists between Scotland, and England and Wales, is the difference in the approaches to the use of ASBOs against young people and children. As already discussed in Chapter 3, in England and Wales, the practice of using ASBOs against young people is widespread with about half of all ASBOs being granted against young people (Home Office, 2006), and the use of publicity or the ‘naming and shaming’ of children with orders is commonplace in a significant number of areas. In the *English case of R (A) v Leeds’ Magistrates Court and Leeds City Council [2004] EWHC 554 (Admin)*, the court held that the interests of the child, when making an order in England and Wales, were a primary consideration – but not *the* primary consideration: the interests of the public were themselves a primary consideration. Alternatively, the use of ASBOs for 12-15 year olds in Scotland must complement the Children’s Hearing System (CHS), which continues to be ‘the primary forum’ for dealing with behaviour beyond parental control or offending behaviour by under 16s and represents a considerably more

⁷⁸ Section 1E of the Crime and Disorder Act 1998 (as amended) requires that before an application for an ASBO is made, a relevant authority is under a duty to consult: this duty does not apply to orders on conviction (although an authority pursuing an ASBO on conviction may be asked by the Crown Prosecution Service for supporting information and evidence as to how the antisocial behaviour requires an ASBO to protect the community). There are, however, no rules setting out the procedure to be followed in applying for an order on conviction.

holistic, welfare-based approach to tackling the problem of antisocial behaviour in children. Moreover, in Scotland, unlike in England and Wales, children under 16 cannot be detained for breaching orders granted against them – instead, they are referred back to the children’s hearing system. Authorities in Scotland have been highly reticent to make use of the orders against children, with only 6 ASBOs issued against children since 2004. It appears that one of the reasons for the low numbers of ASBOs granted against children in Scotland is the statutory requirement for inter-agency consultation. Home Office guidance to antisocial behaviour orders in England and Wales recommends that when a relevant authority applies for an order against a child or young person, there should also be an assessment of his/her circumstances and needs. However, no legal duty exists⁷⁹. In contrast, part 2 of the 2004 Act requires local authorities/RSLs in Scotland to develop specific policy and practice that directly involves social work and criminal justice practitioners, including Children’s Panels and Children’s Reporters.

Subsequently, there has been criticism from particular city councils in Scotland who have argued that the legislative provisions requiring consultation with social services and other agencies is too onerous and that current statutory conditions ultimately make it very difficult for local authorities/RSLs to apply for ASBOs against young people (see Chapter 3). Moreover, in view of the existence of the Scottish statutory measures which prevent children from being detained for breaching the prohibitions of their order, it has been argued that the extension of the use of ASBOs to children and young people in Scotland is only of limited value. In this respect, the role of the solicitor involved in the consultation process, prior to the making of a formal application for an order, can be considered to be somewhat superfluous by virtue of the solicitor’s lack of expertise in child welfare (ibid.). The position of the solicitor in striving to find a balance between community safety and child welfare in their assessment of the de facto requirement for an order can thus be ‘underrated and misunderstood’ (ibid: 4.). Perhaps not incongruously (as previously detailed, see above, *Evidence gathering and case management*), 39% of survey respondents in Scotland agreed that solicitors should have more control in the decision-making process on whether to proceed with an ASBO application, and several respondents stated that, in particular, solicitors should be allowed

⁷⁹ Judicial Guidance on ASBOs (England and Wales) does suggest, however, that a defendant may be able to ‘rely on the absence of such an assessment in support of an argument that an order is not yet necessary within s. 1(1)(b) of the Act’ (JCS, 2006: 46).

greater input at the evidence gathering stage which would assist in ascertaining whether or not the complaints would stand up in court as evidence.

In terms of the use of publicity to make the local community aware of children with ASBOs, and in particular, the conditions of those orders, the legal approach(es) of the jurisdictions of England and Wales, and Scotland are also at variance. No automatic reporting restrictions apply to children in England and Wales for either the granting of an order, or for the breach of an order (s. 141 of the Serious Organised Crime and Police Act (2005) removed automatic reporting restrictions for children and young people convicted of a breach of an ASBO). In Scotland, however, children are protected from being identified by the imposition of automatic reporting restrictions, although the sheriff has discretion to lift reporting restrictions if he/she considers it to be appropriate.

Results from the online survey demonstrate a fundamental difference in the approach to the use of publicity - 86% of survey respondents in England and Wales agreed with the use of publicity for children who had been granted ASBOs, although only 40% of respondents believed that the use of publicity was a deterrent to antisocial behaviour in children, see figure 5.21 (below).

Figure 5.21 The use of publicity (England and Wales)

(i) Do you agree with the use of publicity for children and young people (under 16) who have ASBOs?

	Response Percent	Response Total
Yes, Always	11.2	14
Yes, but where appropriate exceptions are made	47.5	59
Sometimes, but only when it seems essential	28.2	35
Rarely, I don't generally agree with the practice	1.6	2
Never, I disagree with the practice	5.6	7
Other	5.6	7
	Total Respondents	124
	Skipped Question	13

- (ii) In your experience, how often are children and young people (under 16) who have been granted ASBOs, also granted protection in court from being publicly identified?

	Response Percent	Response Total
Always	3.3	4
Frequently	21.4	26
Sometimes	30.5	37
Rarely	32.2	39
Never	12.3	15
Total Respondents		121
Skipped Question		16

- (iii) Do you think that there should be a presumption against publicising details of children with ASBOs unless the Judge/Magistrate specifically adjudicates that it is in the public interest to do so?

	Response Percent	Response Total
Yes	30.4	36
No	71.2	89
Total Respondents		125
Skipped Question		12

- (iv) From your own experience of ASBO cases, do you agree that the prospect of being named in court is a deterrent to antisocial behaviour in children or adults?

	Strongly Agree	Agree	Don't know	Disagree	Strongly Disagree
Children	9.1% (11)	31.6% (38)	18.3% (22)	29.1% (35)	11.6% (14)
Adults	13.3% (16)	35.8% (43)	10.8% (13)	30.8% (37)	9.1% (11)
				Total Respondents	120
				Skipped Question	17

Participants in England and Wales stated that, in their experience, children and young people (under 16) who had been granted ASBOs, were also given protection in court from being publicly identified 'always' (3%), 'frequently' (21%), 'sometimes' (30%), 'rarely' (32%) or 'never' (12%). Children and young people who had

breached their order, were granted protection in court from being publicly identified ‘always’ (9%), ‘frequently’ (15%), ‘sometimes’ (24%), ‘rarely’ (41%) or ‘never’ (12%). Moreover, 71% of respondents in England and Wales disagreed that there should be a presumption against publicising details of children with ASBOs unless the Judge/Magistrate specifically adjudicates that it is in the public interest to do so.

In Scotland, 6 out of 18 respondents agreed with the use of publicity in ASBO cases involving children ‘sometimes but only when it seems essential’; 5 respondents said that publicity should be used ‘rarely’ and that they ‘did not generally agree with the practice’; and 7 respondents believed that publicity should ‘never’ be used for children with ASBOs granted against them. No respondents agreed with the ‘yes, always’ or ‘yes, but where appropriate exceptions are made’ categories (see figure 5.22, below).

Figure 5.22 The use of publicity (Scotland)

(i) Do you agree with the use of publicity for children and young people (under 16) who have ASBOs?

	Response Total
Yes, Always	0
Yes, but where appropriate exceptions are made	0
Sometimes, but only when it seems essential	6
Rarely, I don't generally agree with the practice	5
Never, I disagree with the practice	7
Other	0
Total Respondents	18
Skipped Question	0

(ii) In your experience, how often do children and young people (under 16) who have been granted ASBOs have reporting restrictions against them lifted by a Sheriff?

	Response Total
Always	0
Frequently	0
Sometimes	0
Rarely	3
Never	14
Total Respondents	17
Skipped Question	1

(iii) From your own experience of ASBO cases, do you agree that the prospect of being named in court is a deterrent to antisocial behaviour in children or adults?

	Strongly Agree	Agree	Don't know	Disagree	Strongly Disagree
Children	1	3	1	10	3
Adults	0	5	1	8	4
Total Respondents					18
Skipped Question					0

Appeal

In both Scotland, and in England and Wales, the Courts have refused one per cent of all ASBO applications (Home Office, 2005b, Scottish Executive, 2005b). While the Home Affairs Committee has observed that it is 'relatively straightforward to apply to the Court...for the terms [of an order] to be varied' and that 'there is also a right of appeal' (2005: 73), it further notes that 'cases in which these options are not being taken highlight the variable quality of legal representation rather than any difficulties with the current provisions for variation and appeal' (ibid.). Survey respondents were asked to identify, based on their own experience, how frequently ASBO cases are appealed.

Figure 5.23 Appeal (England and Wales)

From your own experience, how frequently are cases appealed?

	Always	More than half of cases	About half of cases	Less than half of cases	Never
Interim ASBO	0% (0)	0% (0)	1.5% (2)	22.5% (30)	75.9% (101)
ASBO	1.5% (2)	1.5% (2)	1.5% (2)	34.5% (46)	60.9% (81)
Total Respondents					133
Skipped Question					4

Figure 5.24 Appeal (Scotland)

From your own experience, how frequently are cases appealed?

	Always	More than half of cases	About half of cases	Less than half of cases	Never
Interim ASBO	0	0	0	2	16
ASBO	0	0	0	2	16
				Total Respondents	18
				Skipped Question	0

Survey participants were then asked whether or not they agreed that the 'variable quality of legal representation' was the main reason why the right of appeal is not taken:

Figure 5.25 Quality of legal representation (England and Wales)

In a recent report (2005), the Home Affairs Committee stated that ASBO cases in which the right of appeal is not being taken, highlight 'the variable quality of legal representation rather than any difficulties with the current provisions for variation and appeal.' Would you agree with this statement?

	Response Percent	Response Total
Yes	53.8	70
No	31.5	41
Other (please specify)	14.2	19
	Total Respondents	130
	Skipped Question	7

Of the 14% of respondents (England and Wales) who answered 'other', 89% then cited the lack of legal aid as the primary reason why cases are not appealed. Respondents who agreed that there was a variable quality of legal representation available to defendants in ASBO cases (53%), were then asked to detail to what degree they believed that defence counsel varied in quality:

Figure 5.26 Degree of variation (England and Wales)

In your opinion, how varied is the quality of legal representation available to defendants in ASBO cases (England & Wales)?

	Response Percent	Response Total
Highly variable	25.0	17
Varied, but generally of good quality	44.1	30
Not particularly varied, of about an average standard	17.6	12
Consistent poor standard	4.4	3
Consistent good standard	2.9	2
Other (please specify)	5.8	4
Total Respondents		68
Skipped Question		2

Figure 5.27 Degree of Variation (Scotland)

In your opinion, how varied is the quality of legal representation available to defendants in ASBO cases (Scotland)?

	Response Total
Highly variable	1
Varied, but generally of good Quality	8
Not particularly varied, of about an average standard	7
Consistent poor standard	0
Consistent good standard	0
Other (please specify)	1
Total Respondents	17
Skipped Question	1

Given the existence of ‘inappropriately issued’ ASBOs (House of Commons, 2005a) and the civil rules of evidence used in court proceedings, it would appear that, in the interests of fairness, the automatic right of appeal is an important provision within the antisocial behaviour legislation – although from the data gathered from the survey responses (see above), it is evident that the automatic

right of appeal is being used infrequently⁸⁰. The reasons for the limited use of the right of appeal in circumstances where it may be appropriate, appear, in part, to be attributable to both a lack of legal aid for the defender, and (to an extent) the quality of legal representation available.

Sentencing for breach

As previously detailed within the Literature Review (Chapter 3), the area of 'breach' in ASBO cases is one which has presented problems for data collection, in part, because local authorities display a variance in their interpretation of statutory terminology and in the recording and collating of data of breaches. However, for the purposes of this research study, the area of specific interest was with regard to the corollary of breaches which have occurred as the result of criminal behaviour. Survey responses from solicitors of all jurisdictions show that a high proportion of participants thought that there were problems associated with those prohibitions relating to behaviour that was criminal and that this could then lead to a twin track approach when dealing with identical criminal acts. When participants in England and Wales were asked how often, from their own experience of ASBO cases, the antisocial behaviour referred to in applications relates in part (but not necessarily exclusively) to non-criminal behaviour, 4% stated 'always', 47% stated 'frequently', 37% stated 'sometimes', 13% stated 'rarely' and no respondents stated 'never'. Hence, it appears from this data that the prohibitions of orders often contain restrictions on behaviour that is already deemed criminal. This, of course, has implications following breach of these prohibitions.

⁸⁰ The exact numbers of ASBO appeals are currently unknown (Campbell, 2002: 55).

Figure 5.28 Sentencing approach for identical criminal acts (England and Wales)

As the antisocial behaviour definition includes behaviour that is already a criminal offence, do you think that (following breach of conditions) this can lead to a twin-track approach to identical criminal acts?

	Response Percent (Eng & Wales)
Yes	56.4% (74)
No	43.5% (57)
Total Respondents	131
Skipped Question	6

The sentencing corollary of breaches that have occurred as the result of criminal behaviour will be explored and further in Chapters 6 and 7.

Conclusion

The online survey questionnaire discussed above sought to explore solicitors' experiences and observations of court and legal process(es) in ASBO applications in order to specifically investigate to what extent legal procedure(s) influence the administration, management and outcomes of ASBO use in Britain. The empirical findings derived from the online survey questionnaire highlight specific areas of salience with regard to the legal and court process(es) in ASBO applications in Britain. In particular, the data obtained in respect of civil procedure; evidentiary requirements; interim orders; orders granted on conviction (CRASBOs); children, young people and ASBOs; appeal; and sentencing for breach, will be used to inform (a proportion of) the semi-structured interview questions (for interviews conducted with the lower judiciary) which forms the next part of the research study methodology. The following chapter will further discuss the rationale for the choice of areas which are investigated in the course of the semi-structured interviews with the judiciary, and the empirical evidence obtained from the interviews will be presented and discussed in order to determine, in this next phase of the data analysis, to what extent judicial discretion influences the administration, management and outcomes of ASBO use in Britain.

Chapter Six

Judicial Discretion and Decision-Making in ASBO Cases

Introduction

The following chapter presents research findings which were obtained from my interviews with Sheriffs in the courts in Scotland. As I was unable to obtain access to the lower courts in England and Wales, I bring attention to corresponding procedure and decision-making in ASBO cases in England and Wales, by reference to English case law, legislation, and legal precedent in ASBO applications. Differences in procedure(s) and outcomes in England and Wales, and Scotland are also highlighted⁸¹. As previously discussed in Chapter 4 (Methodology), the interview schema (appendix 7) was partially informed by the survey questionnaire responses, the data from which had highlighted specific areas of salience. The issues examined in the survey, and in the interviews, are subsequently broadly similar, although the central focus of the survey questions was in respect of *procedure(s)*, and the focus of the interview questions was with regard to *decision-making and discretion*. The findings discussed in this chapter have been condensed into nine categories: ASBO prohibitions; sentencing for breach; criminal behaviour; orders on conviction (CRASBOs); mitigating factors; interim orders; defending ASBO applications; ASBOs, young people and children; and ASBOs and the political climate⁸². Each topic is divided into two sections: first, the topic is set in its wider context, and corresponding procedure and decision-making in ASBO cases in England and Wales is briefly discussed; and then the empirical research evidence obtained from the interviews with Sheriffs in the Scottish courts, is presented. Quotes made by sentencers have been coded to protect anonymity.

ASBO prohibitions

In England and Wales, the leading case on ASBO prohibitions is *R v Boness [2005] EWCA Crim 2395*, which states that any prohibition imposed must be *necessary* for the purpose of protecting persons from further antisocial acts by the defendant, and

⁸¹ A more detailed comparative analysis of the approach of the Scottish courts, and the courts in England and Wales, will be made in the next chapter (Chapter 7), and in the context of a wider analysis of legal procedure, judicial discretion and decision-making.

⁸² The issue of the 'political' nature of ASBOs should be acknowledged as being of particular relevance to the study findings, because the interviews with the judiciary were conducted shortly before the Scottish Parliamentary election and antisocial behaviour and the use of ASBOs had featured prominently within political and media discourse(s) at this time.

proportionate to the antisocial behaviour in question. The principle that each individual prohibition must be 'necessary' was introduced by s.1(6) of the Crime and Disorder Act 1998. Similarly, in Scotland, statutory guidance on ASBOs states that:

[T]he terms must be only those necessary to protect persons in the area of the local authority from further antisocial acts or conduct. They can be prohibitory only...They should be specific, and in terms that are easily understood so that it will be readily apparent to the person and to the local community what constitutes a breach. (2004: para. 109)

Yet, one of the most fundamental criticisms of the ASBO model, has been that the prohibitions contained in the orders are often disproportionate and unduly onerous.

Research findings - prohibitions

Sheriffs' responses to questions about the nature of ASBO prohibitions generally fell in to one of two categories: (1) those Sheriffs who stated that they generally found the prohibitions drafted by applicant authorities to be 'proportionate' and 'reasonable', and (2) those Sheriffs who cited significant concerns as to the conditions that were being sought by some agencies. For example, one Sheriff described his refusal to grant badly drafted orders thus:

[T]hey are very badly drafted...which means that certainly when they come before me...they have a hard time getting them through. And sometimes they have been refused simply because they are so badly drafted and they are sent away to draft them properly. I have to say that when they come back in another form it's almost as bad as the first attempt. (S6)

In particular, those Sheriffs who stated that they often found ASBO prohibitions to be badly drafted cited broad geographical restrictions as being the most common problem encountered in this context. A Sheriff gave an example of a recent case that illustrates this problem:

[A] case brought by the council against a young lady sought six prohibitions – some were quite typical such as a prohibition against playing loud music, non-molestation of her neighbours, a prohibition on damaging property...but [the council] also wanted to ban her from entering [two entire

neighbourhoods]...from being under the influence [in the whole of X local authority area] and from possessing alcohol [in the whole of X local authority area], which I felt was excessively wide. (S3)

Similarly, a Sheriff in another jurisdiction felt very strongly that the prohibitions that were being sought by the local authority were not proportional:

[ASBO prohibitions] are not [proportional], in the respect that, if it's by a local authority, it tends to be to stop them doing certain things at a specific address where they are living – 'or any other address in [Z local authority area]'. You know, and that's a load of nonsense. I've no problem with specific addresses, but blanket prohibitions about 'any other address in Z', I think goes too far. (S1)

Interestingly, several Sheriffs who had said that they were generally satisfied with the prohibitions put before them, stated that when ASBOs had first been introduced, they had experienced some difficulties with applicant authorities seeking disproportionate prohibitions. However, these Sheriffs stated that such difficulties were simply early complications, or 'teething problems', and that the local authorities and the solicitors had since learnt from the Sheriffs refusals to grant these types of prohibitions, and were now competent in drafting orders that would meet with the standards required by the court.

Alternatively, Sheriffs who were dissatisfied with the drafting of the prohibitions of the orders felt that both applicant authorities, and solicitors, were failing to learn from past mistakes, and moreover, that they had not yet developed a rigorous and effective method of formatting ASBO prohibitions. For example, a Sheriff described the complacency of solicitors in constructing the terms of the orders thus:

What I find the council are trying to do [with ASBOs]... they are fundamentally intellectually lazy about them – that's the solicitors – they are intellectually lazy about them. They don't treat them like a conveyancing document which is what they should do. A formal contract – they don't treat it like that. And I suspect that whoever is instructing them, presumably the police, haven't really worked out themselves what they really think the danger is, to produce these blanket things for areas. I'm far from convinced they're effective. They don't allow for the obvious things that people have to

do in the course of a day – you know, banned from certain areas from 7pm til 7am – you may have no choice about being in the area. (S6)

It became apparent in the course of the interviews that those Sheriffs who found the conditions of the orders to be 'necessary' and broadly 'proportionate' were those Sheriffs who described having a good working relationship with the local council and with the solicitors involved in the ASBO process. By way of illustration, those Sheriffs repeatedly used phrases such as 'those who apply to us from our local authority are very responsible and able people', 'the local authority do good work here', and 'we have a good bar here – and we listen to them, we know that they are not going to mislead us'.

It was also evident that the quality of the relationship between the Sheriff and the local authority personnel involved in ASBO applications played a crucial role in the outcome of ASBO actions with regard to circumstances involving potential mitigating factors (such as addiction and mental health problems). This will be discussed further below, see *Mitigating factors*.

Sentencing for breach

Figures on ASBO breach rate for England and Wales to the end of 2005, show that 47% of ASBOs granted had been breached (Home Office, 2006a), while a more recent study by the National Audit Office (2006) found that, of the cases studied, 55% of those with ASBOs had breached their conditions. In Scotland, a total of 544 ASBOs (interim and full) were reportedly in force as at 31 March 2005. Of these, 140 (26%) were allegedly breached during 2004/05 (Scottish Executive, 2005b). Given the relatively high number of ASBO breaches, and the very limited amount of existing research evidence on breach, this research sought, in particular, to understand the quantification of breaches and the approach of the judiciary to the sentencing for breach.

It was held in the English case of *Parker v DPP [2005] EWHC 1485 (Admin)*, that the severity of a breach should be determined by a consideration of the individual and specific facts of a case, to include; the nature of the conduct, how soon the order was breached after it was made, and whether there was a repetition of the same breach. That is to say, each case must turn on its own facts. While the Judicial Studies Board (England and Wales) has made clear that breaches are to be treated as 'a serious matter...A court should be wary of treating the breach of an ASBO as just another minor offence...An ASBO will only be seen to be effective if breaches of it are taken seriously' (2007: 28) - it also distinguishes

breaches which do not involve harassment, alarm or distress. In such cases, it is suggested that community penalties should be considered by the court as an alternative to custody, in order to 'help the offender to live within the terms of the ASBO' (ibid.). Where a community penalty is not available, the custodial sentence should then be kept to a minimum.

Alternatively, in Scotland, very little case law or research evidence exists on breach proceedings in ASBO cases. As previously discussed in Chapter 3, data collected on behalf of the Scottish Executive (2005a; 2005b) suggests that the term 'breach' is not consistently understood by applicant authorities, and moreover, that methods of statistical data collection within local authorities relating to types of breach are patchy and inconsistent. Local authorities and RSLs display a variance in the interpretation of statutory terminology and in the recording and collating of data on breaches in ASBO cases. Nonetheless, statistics for the period 2004/05 show that the majority of alleged breaches in Scotland were reported as having resulted in further court action. Just over a half of alleged breaches were reported to the Procurator Fiscal and a further 23% involved the perpetrator being detained in custody for an appearance in court. In 14% of cases was no action taken following initial police or officer visit (Scottish Executive, 2005b).

Research findings – sentencing for breach

Given the broad nature of ASBO prohibitions and the existence of a level of dissatisfaction among some Sheriffs that orders were often poorly drafted (see above, *ASBO prohibitions*); it is perhaps not unexpected that several Sheriffs felt reluctant to take seriously 'minor' breaches of ASBO prohibitions, such as entry into an exclusion zone (with no accompanying antisocial behaviour). One Sheriff explained their view on the technical breach of conditions thus:

I'm not one who goes in for standing on the ceremony of the Court. I'm not a great one for punishing people for flouting a court order or ignoring the authority of the Court. I need to be persuaded that there is some substance to the complaint. It is sometimes a constant battle – you frequently come across it at bail application, it happens nearly every day, the Court might impose, for example, a curfew condition and you might have somebody whose committed a technical breach by being five minutes later than they should have been and he'll be arrested by the police and be charged with breach of his curfew, and because it's a breach of a court order, the Crown will take the view that this should result in the refusal of bail. They will hotly

oppose bail on the ground that the individual is demonstrating a disregard for court orders, virtually by reason of the nature of the offence, because it's a court order, they ask the Court to oppose bail. And obviously, as I say, on a daily basis I have to consider debates about that. So that's just really to illustrate the point that I don't believe in punishing people just for the technical breach of court orders – there are so many circumstances that can lead to that, and for that reason I think that it would be a mistake to adopt that sort of approach in relation to antisocial behaviour orders. (S8)

Several Sheriffs expressed the view that they supported the use of ASBOs as a means to avoid the criminal process (if appropriate), in so far as they believed that prohibitive orders could potentially act as a diversion from the criminal process and the 'filling up of jails' with individuals who had committed relatively minor acts of antisocial behaviour. However, there was also a concern that punishing minor/technical breaches of prohibitions could undermine the use of ASBOs and the potential for them to be used as an effective means for addressing problematic behaviour(s) without necessitating the criminal process. While they acknowledged that prosecution was appropriate for specific types of breach involving alarm and distress, they took the view that 'technical' breaches were often innocuous enough that they ought not to be brought before the Court.

Of particular interest to this research study is the corollary of breaches which have occurred as the result of criminal behaviour. A bifurcated relationship exists between ASBOs, and conduct that is criminally sanctioned. The two distinct contexts in which the interrelationship is evident are, firstly, with regard to ASBO prohibitions that specifically seek to prohibit conduct which has already been deemed criminal in law (see *Criminal behaviour*, below); and secondly, in respect of sentencing in breach proceedings. In particular, it is necessary to examine the extent to which the court has regard to the maximum sentence for the (criminal) offence, in the sentencing for breach of ASBO prohibitions.

The approach of the English courts on this matter has been, historically, somewhat incongruous, although a substantial body of case law now exists⁸³.

⁸³ See for example, *R v Tripp* [2005] EWCA Crim 2253 and *R v Morrison* [2006] 1 Cr. App. R (s) 488 (85) (cited in JSB, 2007: 29). However, Sir Igor Judge PQBD (at paragraphs 26 and 27) settled the issue in *R v H, Stevens and Lovegrove* [2006] EWCA Crim 255 by determining that the Court's power should *not* be limited to the statutory maximum for the criminal offence. The decision by the Court of Appeal in *R v H, Stevens and Lovegrove* set a precedent that breach of ASBO conditions should be treated as a distinct offence in its own right – undermining the outcome of the earlier case of *Morrison* [2006] 1 Cr. App. R.

However, in Scotland the law on sentencing for breach is considerably less well developed, with no definitive legal precedent on the maximum penalty available when the breach involves a criminal offence. Subsequently, I found that Sheriffs' opinions varied widely as to what extent the court has regard to the maximum sentence for the offence in the sentencing for breach, and, moreover, the role of the ASBO in providing an increment in sentencing for persistent acts of antisocial behaviour. Sheriffs' responses to questions about sentencing procedures and decision-making on breach were thus determined by whether (1) they took the view that the primary function of the ASBO was to allow increased penalties for behaviour which was a culmination of antisocial acts, or (2) they were of the opinion that in circumstances involving criminal behaviour, breach should not be afforded a different or elevated legal standing in proceedings.

Those Sheriffs who took the view that the primary function of the ASBO was to allow increased penalties for behaviour which was a culmination of antisocial acts, decided sentencing for breach accordingly:

I think the ASBO is there for a purpose - to augment the available penalty. I wouldn't feel restricted to the penalty for the offence itself. I tend to treat it in much the same way as a bail aggravation, and put on an extra month. I mean if it's a breach of two or three bail orders, as it sometimes is, I'll put on a month for each one. (S5)

In contrast, the other Sheriffs were of the opinion that in these circumstances, breach should not be afforded a different or elevated legal standing in proceedings:

I wouldn't have any regard to [the maximum sentence for the offence in sentencing for breach] to be honest, I would just consider it on its merits. But it would be bound to be coloured by my subconscious views as to what's an appropriate sentence for the crime in the end. But I wouldn't give a breach of an ASBO some special status. (S7)

Similarly, one Sheriff explained that the civil law nature of the ASBO as a *preventative* measure, as opposed to a punitive sanction, influenced their approach

(S) 488 (85) which had found that the sentence for breach should be limited to the statutory maximum for the criminal offence.

to sentencing for breach, in the respect that this particular Sheriff was of the view that criminal behaviour should necessarily be prosecuted in the criminal courts⁸⁴:

I would be unlikely to exceed the statutory maximum [for the offence], because in these circumstances I would have expected the matter to be reported to the police and then to proceed by way of prosecution as opposed to by ASBO. An ASBO is a way that I see of trying to prevent the need for people to be prosecuted and therefore liable to a criminal sanction at an earlier stage. And with a lot of people it works. (S5)

Sheriffs were also aware of the potential for a ‘twin-track approach’ to the sentencing of similar (or near identical) criminal acts in ASBO breach proceedings:

[T]he penalty for breach of an ASBO could far out strip the penalties for the original crime...and I think that there’s an example of that happening in a case in England. Because the judge took the view that ‘this is a court order now’, it’s breach of a court order – that is more serious than the original thing you were doing before the ASBO. Well, I think that there is some merit in that approach. I can see why he comes to that view but the danger is that you end up - if you had just prosecuted it properly, you would have had such and such a penalty, but because its become this sacred court order never to be breached, then you end up with far more. But that’s not my experience. (S3)

The variation in the opinions of the Sheriffs on sentencing for breach, and in particular, the views of those Sheriffs who were of the opinion that the purpose of the ASBO was to augment the available penalty for a criminal act, means that – derivatively – different penalties apply for criminal acts, dependent on whether they have status within a court order. However, as several Sheriffs observed, a court order (in the form of an ASBO) will often be the result of a culmination of persistent acts of antisocial behaviour – so in their view it was wholly legitimate that breach could be treated more seriously than an individual criminal act.

With regard to ASBOs creating a ‘twin-track approach’ to identical criminal acts, public confidence in the sentencing process was largely seen as being irrelevant by most Sheriffs. Even those Sheriffs who disagreed with a ‘twin-track

⁸⁴ This is discussed in detail in the next section - *Criminal behaviour*, below.

approach' to sentencing, did not believe that public confidence should be a factor for consideration:

I can understand that public confidence might be affected but I think that judges as a whole are not particularly willing to take into account public opinion which is frequently uninformed. (S9)

However, it is the reconciliation of criminal conduct (and in particular, violent criminal behaviour and drug dealing) within the ASBO framework, which the majority of Sheriffs felt most strongly about in this context, and which I will now consider in more detail in the subsection below.

Criminal behaviour

The Court of Appeal in England has indicated that prohibiting behaviour that already constitutes a criminal offence does not necessarily address the central purpose of the ASBO – which is to act as a *prohibitive* order⁸⁵. It was suggested in *Boness* that it is preferable for the court, in such circumstances, to make an 'anticipatory' form of order. That is, the court should seek to prohibit behaviour that may be *preparatory* to the commission of an offence. Hence, the order should prima facie attempt to prevent the commission of an offence, rather than prohibiting behaviour that is, in any event, already criminal.

An illustration of this point was given by Hooper LJ in *Boness*⁸⁶:

'If, for example, a court is faced by an offender who causes criminal damage by spraying graffiti then the order should be aimed at facilitating action to be taken to prevent graffiti spraying by him and/or his associates before it takes place. An order in clear and simple terms preventing the offender from being in possession of a can of spray paint in a public place gives the police or others responsible for protecting the property an opportunity to take action in advance of the actual spraying and makes it clear to the offender that he has lost the right to carry such a can for the duration of the order.'

⁸⁵ *Boness* at paragraph 36. See also *Hills v Chief Constable of Essex Police [2006] EWHC 2633 (Admin)* and *Gillbard v Cardon District Council [2006] EWHC 3233 (Admin)* (cited in JSB, 2007: 17).

⁸⁶ At paragraphs 36 and 37

If a court wishes to make an order prohibiting a group of youngsters from racing cars or motor bikes on an estate or driving at excessive speed (antisocial behaviour for those living on the estate), then the order should not (normally) prohibit driving whilst disqualified. It should prohibit, for example, the offender whilst on the estate from taking part in, or encouraging, racing or driving at an excessive speed. It might also prevent the group from congregating with named others in a particular area of the estate. Such an order gives those responsible for enforcing order on the estate the opportunity to take action to prevent the anti-social conduct, it is to be hoped, before it takes place.' (cited in JSB, 2007: 17)

In Scotland, statutory guidance on the use of ASBOs states that:

'ASBOs for adults are intended to tackle behaviour that is likely to escalate to the criminal level, and patterns of behaviour which cumulatively cause considerable alarm or distress to the community. An ASBO is not intended as a substitute for criminal proceedings where these are appropriate.'
(2004: para. 19)

Hence, while it is apparent that the essence of the ASBO is as a new genus of preventative order, which can be used to create, amongst other things, curfews and exclusion zones for defendants, it is evident that ASBOs are also being used to proscribe behaviour which is already criminal in nature.

Research findings – criminal behaviour

When Sheriffs were asked to determine whether the prohibitions of ASBOs that they had presided over more often related to behaviour that could be said to be preparatory to the commission of a criminal offence, or whether prohibitions more frequently related to behaviour that was already criminal, several Sheriffs stated that the prohibitions that they had had presented before them almost always related to criminal behaviour. The other Sheriffs generally responded that prohibitions contained a mixture of both types of behaviour. However, the majority of Sheriffs stated that they were very uneasy about criminal behaviour forming the basis of ASBO prohibitions. Of the Sheriffs who expressed this concern, all were of the view that inculcating prohibitions on criminal behaviour was 'inappropriate' and/or 'ill-conceived'. For example, one Sheriff described the fundamental difficulty in prohibiting criminal behaviour thus:

[E]ssentially I think that criminal conduct should be the preserve of the police and this strikes at the very heart of ASBOs - the effect of them is to render criminal, conduct which would not otherwise be criminal, and I do have slight reservations about that to be honest, and I think a lot of authorities do. (S6)

In particular, Sheriffs noted the difficulties for local authorities where an expectation existed among residents in certain locales that the council should be the 'primary agency' involved in addressing community problems such as drug dealing and aggressive behaviour. The majority of Sheriffs stated that they believed that criminal behaviour should remain a matter for the police – and not the local/housing authority:

Any criminal behaviour should be a matter for the police and the prosecuting authorities. There is, I think, a worry that where it is an escalating neighbour dispute, which is very often how these things start off, the police take the view that it's nothing to do with us, you know, 'away and see your council'. And I suppose in some cases, if it were nipped in the bud quite early, it might not escalate – but it does escalate. (S3)

Although several Sheriffs observed that prohibitions on criminal behaviour could be a useful and effective means of avoiding the criminal process for more minor infringements of the law, the majority of those Sheriffs were also of the view that any criminal behaviour that was violent in nature should not be a matter to be addressed by the council or housing authority:

I am a great supporter of efforts to avoid the criminal process if possible...and so I am in favour of all these prohibitive orders as a starting point. But I would not want them to be used in circumstances, which are difficult to define, where a relatively serious criminal offence is involved. As I say, breach of the peace generally, criminal vandalism, drunkenness, these kind of relatively minor orders - anything which involves violence, however, I would expect not to be dealt with by the local authority and it should not become a matter for housing. Obviously when people are disturbed, it is probably a more speedy and effective way of giving satisfaction to

neighbours but when it becomes a matter of violence or in any way retaliation, I would expect that to be reported to the police. (S11)

Moreover, in terms of the collection of evidence, several Sheriffs additionally stated that they did not believe that it was appropriate for council and/or housing officials to gather evidence in circumstances where there might be a risk to their personal safety – notably in those circumstances where violent/aggressive behaviour was a feature of the ASBO application:

The police should be there. I mean, how do they get the particular evidence to support their application? Are they going to send people out to observe what these lads are doing? It's a nonsense! It's a police job. (S6)

The prohibition of criminal behaviour is an aspect of ASBO use that Sheriffs felt very strongly about. It is suggested that this issue is, however, specifically pertinent to Scotland, and the Scottish Courts, because in England and Wales the police are empowered under the Antisocial Behaviour Act 2004 (as amended) to act as a 'relevant authority' for the purposes of ASBO applications⁸⁷.

Orders on conviction (CRASBOs)

As discussed in both the Literature Review (Chapter 3), and in the findings from the survey questionnaire (Chapter 4), orders on conviction are being used very infrequently in Scotland, in contrast to the position in England and Wales, where CRASBOs are now being granted more often than stand alone orders. The survey returns discussed in the previous chapter suggested that the two main reasons for the low numbers of CRASBOs in Scotland were, firstly, the reluctance of Sheriffs to grant orders on conviction, and secondly, the attitude(s) of fiscals towards 'becoming involved in the sentencing process...which [goes against] one of the fundamental principles of Scots law'⁸⁸.

⁸⁷ As has been previously noted (see Chapters 4 and 5), in England and Wales, it is often the police that are the lead agency in pursuing ASBO applications.

⁸⁸ Respondent (Scotland) answer to question (1) in section 8 of the survey (the full survey is provided as appendix 3)

Research findings - CRASBOs

In the course of the interviews with the judiciary, it became apparent that although most Sheriffs were, indeed, reluctant to grant orders on conviction, this was *not* because of their de facto opposition to CRASBOs:

I wouldn't take any exception at all if the fiscal said that your lordship might consider that this might be a case where, because this person has been up before for broadly similar things 3 times in the last three months, or something like that, this may be a case for an ASBO to exclude him from [C local authority] shopping mall, to exclude him from there. I wouldn't take exception to that. I wouldn't regard that in any way as impertinent, or going beyond the bounds of propriety. (S5)

Instead, the reluctance was in fact a result of the circumstances in which CRASBOs were being sought. The great majority of Sheriffs were of the view that they were very often unlikely to have been imparted with the appropriate and relevant knowledge/information (from the fiscals) that would enable them to legitimately grant such an order. Subsequently, at present, it is evident that many Sheriffs are very reluctant to grant/make use of orders on conviction. As one Sheriff stated:

[Orders on conviction are] just not seen by many Sheriffs as being appropriate as a suitable disposal. (S11)

The interview findings were almost unanimous in detailing the reason(s) for this, with almost all Sheriffs stating that orders on conviction will continue to be used in a limited fashion until an appropriate protocol/system is developed with regard to the necessary information being passed to the Sheriff.

[A]lthough the statutory power has existed for us to impose these orders, our immediate point was always: 'who is going to provide the detailed information which we need?' – not just to make the order in principle, but to do it on an effective basis. And we would need serious information, like the kind we get from local authorities and as far as I know, the prosecutors were not only not keen, but they were refusing to get involved. We've had detailed discussions about that over the last twelve months, and saying 'well yes, in principle, there's no reason why we wouldn't use that power in

the appropriate circumstances' but we would have to be sure that we have an agreement where the information is going to come from. Then if the fiscal – and he seems to be the appropriate person to produce it – if he was going to do that, he'd have to depend on the police, then we'd have to give the defence a chance to object to any information. To us, we seem far away from an appropriate system whereby that could properly and effectively operate. (S4)

Most Sheriffs described the benefits that would accrue from the development of a standard protocol on information sharing, and they detailed the central importance of this aspect of the legal process in obtaining orders on conviction. It was readily apparent that these Sheriffs simply were not willing to grant orders on conviction without the requisite due process and the derivative safeguards⁸⁹ of appropriate legal procedure(s). It was evident that the majority of Sheriffs interviewed were aware of this problem relating to the granting of orders on conviction without the necessary and requisite information, and many of those interviewed had discussed the matter with other members of the judiciary within their own jurisdiction, while others had discussed it with Sheriffs in other jurisdictions. While the majority of those Sheriffs interviewed were very positive about the prospect of the development of a protocol on information sharing, several Sheriffs noted that there were Sheriffs in other jurisdictions who would be very unhappy about such a development:

This is an area that is actually very live at the moment because of the new legislation on bail, for example, where the decision is going to be the Sheriffs, but the Sheriffs are taking the view that we can't make decisions without the information – and the only person that can give us the information is the fiscal. So I think it would do no harm for there to be some sort of protocol about information passing from one to the other – but I could see there being great resistance from certain Sheriffs about how this would infringe the independence of the judiciary et cetera, et cetera. But, you know, you've got to be seen to make...you've got to comply with the law

⁸⁹ Relating to the protection of the defendant's rights. It is suggested here that due process in obtaining orders on conviction is seen by Sheriffs as very important because it negates the potential for the circumvention of democratic justice principles. Without due process, correct legal procedure(s) and legal safeguards may be bypassed.

and with the contention, you've got to have appropriate information – but who's going to give you that information? It doesn't just appear! (S3)

It was also evident that some Sheriffs were of the view that, in order for the process for orders on conviction become successful and, ultimately, effective, it would be necessary for the application procedure to become longer in duration, whereby a case is continued in order for the judge to decide on matters arising from (the information contained in) the CRASBO application:

The difficulty with [the use of CRASBOs], which has been raised by the police here (and we see them fairly regularly and have conversations with them), and they've asked us what we think of CRASBOs, the problem is that you really have to spend time – as the council's solicitors have not done in my experience – to work out exactly what the order should be – in detail. And it's not something that you can just pontificate from the bench about. You have to give it consideration. You have to consider what is the problem that you're trying to solve, and how can the order be made and so forth to make sure that it is clear and certain and the offender knows exactly what he has got to do. And I regard that as something that you just can't do in the course of sentencing in the course of a busy court. So what you'd have to do would be to continue it – which is [presently] not possible – on another day and apply your mind to it. But even then, the bare facts of the case will not necessarily tell you what the real underlying problem is – you want more information than that. (S1)

However, given the already overburdened case load of the Scottish courts, it is possible that any measures introduced with the potential to bring about further delay to court proceedings, may well be unpopular. Yet, it was clear that the Sheriffs (almost unanimously) felt that the current procedure for orders on conviction was fundamentally unsatisfactory:

I don't know what the police's attitude is, I mean just giving the example of making compensation orders, we depend on the fiscals to give us details of that and they have to get that from the police and frequently, they will say 'sorry my Lord, we don't have the proper information'. So I think a great deal more work needs to be done before the proper use of that power can be taken on. (S9)

Hence, it is very interesting to note the reluctance of the Scottish judiciary towards the granting of orders on conviction as a result of their dissatisfaction with the current court procedure(s) - compared with the approach of the English courts who have granted, despite the lack of any court rules or procedure for the making of an order on conviction⁹⁰, a high number of orders on conviction since they became available in 2002. The courts in England and Wales have, however, sought to proscribe the use of orders on conviction for the purpose of extending the penalty for a criminal offence. In *R v Kirby*⁹¹, the Court of Appeal held that an order on conviction should not be made where its primary purpose was to enable the court to grant a higher sentencing tariff in the event of future offending of a similar nature (JSB, 2007: 37).⁹²

Mitigating factors

Agencies that are involved in ASBO applications are not required to demonstrate that the individual named in the application intended to cause harassment, alarm or distress – only that antisocial conduct had taken place, which has, or is likely to cause alarm or distress to others. For example, the Scottish Statutory Guidance on ASBOs states:

The authority applying for the order does not have to prove intention on the part of the defendant to cause alarm or distress. (2004: s.33)

However, the guidance goes on to note that:

While an authority does not have to prove intention, it would not be appropriate to use an ASBO where an individual cannot understand the consequences of their actions. For example, it is highly unlikely that an ASBO would be the most appropriate means to address the behaviour of an individual with autistic spectrum disorder or any disability or other

⁹⁰ Although in *R v W and F [2006] EWCA Crim 686*, the Court of Appeal set out general guidance on court procedure for orders on conviction. It is important to note also, that the granting of an order on conviction is conditional upon the prosecution being able to demonstrate antisocial behaviour by the defendant, in addition to the condition of 'necessity'. However, the impact of the sentence on the 'necessity' for an order should also be considered, since one may make the other unnecessary (JSB, 2007: 36).

⁹¹ *[2005] EWCA Crim 1228*

⁹² See also *R v Adam Lawson [2006] 1 Cr App. R. (S) 323* and *R v Williams [2006] 1 Cr. App. R. (S) 305* (cited in JSB, 2007: 37)

developmental or medical condition which is considered to cause their behaviour. Where an individual has such a condition, or it is suspected they may have such a condition, advice should be sought from medical experts or other bodies with expertise in the area on support which is available.

(ibid. s.34)

Hence, the Scottish Executive's statutory guidance on the use of ASBOs, states that it is 'highly unlikely' that an ASBO would be an appropriate measure to deal with a person whose behaviour is the result of disability. However, this phrase has no basis in law and is open to interpretation. It relies upon a common sense approach of local authorities in interpreting the legislation, which means that essentially no legislative restrictions exist to prevent the use of the orders for those with disabilities or learning difficulties. The guidance states that in cases where an individual has a condition, or is suspected of having a condition, then advice should be sought from a 'medical expert'. Disability charities have argued that this then creates an issue of workload, of GPs being approached who don't necessarily have the appropriate knowledge or information and, moreover, that this also effectively ignores the role organisations and agencies can play in providing appropriate advice and information on behaviours that are associated with diagnosed conditions.

In England and Wales, local authorities already have a duty under the NHS and Community Care Act 1990 to assess any person who may be in need of community care services, which means that if there is any evidence that the person against whom an order is being sought may be suffering from, for example, learning difficulties or an autistic spectrum disorder, then the necessary support is supposed to be provided in tandem with the evidence gathering process. However, recent research (BIBIC, 2006) has shown that relevant information regarding learning difficulties is not always made available – or is not uncovered - soon enough and potential mitigating factors are subsequently missed in court.

Research findings – mitigating factors

Several Sheriffs raised concerns about the potential for mitigating factors such as addiction and mental health problems to be missed in ASBO proceedings. One Sheriff gave an example of a recent case as an illustration:

In dealing with criminal matters, and particularly in sentencing, a Sheriff will not make any community based order, without first having obtained a social

inquiry report at the very least. Plus a psychiatric report, plus a report from a drugs and alcohol agency, in other words, any order relating to probation, a restriction of liberty order, or any conditions attached to a probation order, or psychiatric treatment or drugs treatment or anything like that would be done after a process of investigation and advice from experts. By contrast, a council can apply to the Court, even at the interim stage, for an order which might amount to the equivalent of a community based order such as a curfew. The case of [Y] illustrated that – a prohibition against entering certain areas. And what disturbed me about that case, which is a very good illustration [of the problem] was the prohibition against possessing alcohol, and the prohibition against being under the influence of alcohol. It's only because I had an insight into the case that I knew that the young lady, who had been up before me numerous times was a very vulnerably young lady. It was only because I had that insight that I knew that she had a serious drinking problem, and she's only [A or B years old], with a serious drinking problem, so I was pretty well aware that she needs to have her alcohol problem addressed but using a court order that would render it criminal for her to have a drink, to my mind, wasn't the best way of doing it. And so I do think that there is a danger that these issues will be overlooked. If I was a visiting Sheriff, and I knew nothing about that lady, and the council came in with this litany of offending, I would have just said ok, yes, on you go. And that could have been very harmful to the young lady. So, I think that there is an issue there. (S1)

However, those Sheriffs in the smaller Courts stated that it was very unlikely that such instances would arise in their Courts because the judiciary in smaller jurisdictions are highly likely to know of the circumstances of individuals who come before them from previous cases that they have presided over:

I think in a smaller jurisdiction like this, the chances [of mitigating factors being missed] are less because I don't think I've ever seen an ASBO application that wasn't in respect of somebody I didn't already know, and I already had quite a lot of information on them anyway, either through the criminal courts or the child and family side or whatever. (S3)

While several Sheriffs expressed concern at the potential for mitigating factors to be missed in court, the majority of remaining Sheriffs, while acknowledging that

addiction and mental health problems were common features of the ASBO cases that came before them, did not think that this necessarily presented a problem for ASBO applications per se – most saw addiction and mental health problems as ‘a fact of life in these type of cases’ which was to be ‘expected’. One Sheriff described the presence of addiction and mental health problems in ASBO cases thus:

Yes – drink, drugs, and, either separately, or because of drink and drugs, mental health problems – it’s a fact of life that the vast majority of those involved in the criminal court are going to have any one or more of these problems. But what can you do about it? Many of them have no desire to change, the facilities aren’t there to assist them to change, it’s a viscous circle. Until they give up the drink and drugs at the level they’re taking them, their mental health isn’t going to get any better – and most of them regard cannabis as being the cure for their mental health [problems] and not the cause of it! (S5)

Of those Sheriffs who saw addictions and mental health problems as being atypical of ASBO applications (but who did not believe that this necessarily presented a problem for ASBO procedure in itself), about half were sympathetic towards individuals in such situations:

[U]nfortunately, many of them are just hopeless cases...(s10)

The other half of respondents, although not expressly sympathetic, mostly viewed the presence of these factors within a wider sphere of criminal offending that came before the courts, in which the presence of these factors was often ‘inevitable’.

[M]yself, and all my colleagues here are very aware of...I mean it’s something like 70% of our criminal convictions here are by those who are either addicted to drugs or alcohol. (S4)

However, in the same way that it was evident that the quality of the relationship between the Sheriff and local authority personnel involved in ASBO applications played a crucial role in determining the form of ASBO prohibitions in individual applications (see above, *ASBO prohibitions*), it was also apparent that this same relationship was again highly influential with regard to mitigating factors. Sheriffs attached a high level of importance to the views of local authority practitioners,

where a good relationship existed between the local authority and the Sheriff. If the individual Sheriff was of the view that the local authority professionals were competent and trustworthy, then they were much more likely to grant applications, and less likely to be concerned that mitigating factors could be missed.

[T]hose who apply to us from our local authority are very responsible and able people - who have the ear of the court basically. We can trust them not to get an order in certain circumstances where they know that there is a problem. (S6)

This was also true of the solicitors involved in the applications. It appeared that Sheriffs were more inclined to attach weight to the arguments of the bar if they, as before, believed them to be trustworthy and competent.

We have a good bar here – and we listen to them, we know that they are not going to mislead us. (S7)

Of course, the reverse was also true, and Sheriffs who believed that solicitors were ‘incompetent’ and ‘lazy’ were unlikely to be ‘impressed’ by the ASBO applications put forward by them⁹³. It was also apparent that, given the frequent presence of the aforementioned factors in ASBO applications (addiction problems, chaotic lifestyles of defendants), several Sheriffs were of the view that their role in ASBO cases was as much about ‘social work’ as it was about deciding the law:

[T]here are times when I feel like I’m being made to be a criminal justice social worker! And I’m not! And I shouldn’t be made to be. (S3)

One Sheriff suggested that it would be useful for Sheriffs deciding on ASBO applications if a social inquiry report was provided as part of the application. Another Sheriff described the difficulty in obtaining such reports for ASBO applications thus:

In the real world, a Sheriff [in an ASBO case] would be very fortunate if he or she can get a social inquiry report just like that – I have enough trouble getting a social inquiry report just for my criminal cases!

⁹³ The role of solicitors will be discussed in more detail later in this chapter, see *Defending ASBO applications*.

Overall, however, it was felt by the majority of Sheriffs that a discretionary power to request a social inquiry report might be useful in some cases, but that the power should only ever be discretionary - and not statutory. (S9)

Interim orders

There is no explicit legal provision for any representations to be made by or on behalf of the defendant before an interim ASBO is granted. In Scotland, if the initial writ has been served (for an interim order), the Sheriff may dispense with intimation of the motion for the interim ASBO and grant it without hearing the defender⁹⁴, although the Court can consider any such representations as it sees fit⁹⁵. The Sheriff may grant an interim order provided the individual named on the application has received intimation of the initial writ and the Sheriff is satisfied that the antisocial conduct complained of would be established when a full hearing takes place.

In England and Wales, an interim order can, with leave of the Justice's Clerk, be made *ex parte* (without notice of proceedings being given to the defendant). In *R (Manchester City Council) v Manchester City Magistrates' Court*⁹⁶ it was held, by the Divisional Court, that the Justices' Clerk should have regard to a variety of factors (not limited to) the likely response of the defendant on receiving notice of the complaint; the gravity of the alleged behaviour; the nature of the prohibitions sought; and the rights of the defendant. The court has to be satisfied that an interim order is 'just'. Kennedy LJ found in *R (Manchester City Council)* that:

'The test to be adopted by a magistrates' court when deciding whether or not to make an interim order must be the statutory test: whether it is just to make the order. That involves consideration of all relevant circumstances, including...the fact that the application has been made without notice.'

The 1998 Act does not, however, give any indication as to whether or not evidence has to be heard (even in part) or whether or not the interim matter can be based on representations only. Although, it was observed in the English case of *R (Keating) v Knowsley Metropolitan Borough Council* [2004] EWHC 1933 (Admin), that, where a court is concerned with interim proceedings, it must bear in mind that no findings of

⁹⁴ As per s.115 of the Statutory Guidance on Antisocial Behaviour Orders (2004)

⁹⁵ As per s.86 of the Statutory Guidance on Antisocial Behaviour Orders (2004)

⁹⁶ [2005] EWHC 253 (Admin)

fact have been made, any allegations have not been proved, and the defendant has had no opportunity to challenge the allegations.

Research findings – interim orders

Sheriffs in Scotland observed that (although there is no explicit legal provision for any representations to be made by or on behalf of the defendant before an interim ASBO is granted) there were instances where evidence was produced at an interim stage. For example, one Sheriff described the type(s) of evidence that had come before the court for interim applications thus:

There may well be productions lodged, for example, convictions referred to. I have seen photographs lodged, I've seen plans showing the location of a property in location to neighbouring properties, and I've seen, on occasions, witness statements taken from neighbours being used in support of interim orders. (S2)

Several Sheriffs also described their views on the 'fundamental importance' of personal service in interim applications. Interim orders cannot be made *ex parte* in Scotland and the individual named on the application is required to have received intimation of the initial writ - although the defendant is not required to be present in Court for the interim application hearing. Where an individual has not been personally served with an interim order at the Court, it is good practice that the Court should be asked to arrange for personal service as soon as possible thereafter. Proof of service of an interim/ASBO is important because any criminal proceedings for breach may fail if service is challenged by the defence, and cannot be proved by the prosecution.

For example, one Sheriff noted, with regard to personal service in interim applications, that:

There would have to be, firstly, personal service before the hearing where interim orders are required. And then, when an interim order was granted, there would have to be personal service of that interim order. And provided these two things had happened, then I see no reasons why there shouldn't be sanctions for a breach. But if there hadn't been personal service of the order, then I take the view that it's inappropriate to seek a sanction for the breach. (S5)

The parallels with procedure(s) for interim/interdict were also noted, and again, the importance of intimation to the defendant was cited as being a possible determinant of whether a breach should attract criminal sanctions:

I would regard [criminal sanctions for interim antisocial behaviour orders] as a question of fairness, broadly similar to civil interdict or interim interdict. An aggrieved person can get an interim interdict simply on the basis of ex parte statements and without any notice to the other party but until interim interdict is intimated...if the opponent, the defender, in civil proceedings... until he has had intimation of it, then anything he does, which would otherwise be in breach, isn't a breach - which seems to me eminently fair. Now I would think that the same principals should surely apply in relation to an interim ASBO, that it wouldn't attract criminal sanctions until the subject has been made formally aware of it. In fact, in civil procedure, he doesn't need to be made formally aware of it, but I think in this case, because it may potentially attract criminal sanctions, it should be formally intimated, and then once it's formally intimated so he has had no opportunity to make representations if he chooses to breach it. (S11)

Sheriffs' observations on interim order proceedings generally fell into one of two different categories: (1) those Sheriffs who had found interim orders were being used effectively and appropriately, and (2) those Sheriffs who were very concerned by the prosecution of interim order breaches. Those Sheriffs who were, for the most part, positive about the use of interim orders observed that they had been effective in preventing antisocial behaviour:

My experience of them here is that one wonders why [the council] are taking so long to apply to the court! (S8)

However, the Sheriffs in the second category were deeply concerned by the prosecution of interim order breaches, the validity of which had never been tested in court by the hearing of evidence. Those Sheriffs took the view that this 'unsatisfactory' and 'ill-conceived' aspect of the legislation was open to abuse by applicant and other agencies involved in the ASBO process. For example, one Sheriff, who noted that there was a currently a case before the Inner House in the Court of Session on the issue of interim orders, stated that, although they were granting interim orders, they were uncomfortable about doing so:

I must say, I doubt the validity of antisocial behaviour orders being granted without evidence. I feel uneasy about interim orders – I grant them because the legislation says that I should if I am satisfied on the basis of information given to me – but I might one day refuse and see if the council appeal me, because I think the matter needs to be looked at. (S1)

Moreover, several Sheriffs questioned the premise upon which interim orders were based. It was suggested that interim orders were, in some cases, being used to 'get round' existing legal barriers to prosecution, and were seen by some agencies as a means to avoid traditional encountered difficulties - and safeguards - in the legal process. One Sheriff, while acknowledging that (they believed that) criminal sanctions for interim order breaches were necessary, also noted that there existed important questions surrounding the legal nature and purpose of the interim ASBO:

I think if you allow interim ASBOs to be granted at all, if you provide for them in the Act, then you're going to have to have a penalty for breach - which means a criminal penalty. The question to my mind is a more fundamental one, as to whether they are a means of getting round the difficult job of actually prosecuting somebody. But I think that if you have them, it's inevitable that you need a criminal penalty for breach. (S6)

In summary, it was evident that a significant proportion of Sheriffs interviewed felt that the prosecution of interim order breaches was a matter that 'needed to be addressed'.

Defending ASBO applications

Given the high number of successful ASBO applications (in England and Wales, and in Scotland, the Courts have refused one per cent of all ASBO applications, Home Office, 2005b, Scottish Executive, 2005b) coupled with the civil rules of evidence used in ASBO court proceedings, in the interests of fairness, the automatic right of appeal is an important provision within antisocial behaviour legislation, particularly with regard to the existence of 'inappropriately issued' ASBOs. While the Home Affairs Committee on Antisocial Behaviour has stated that 'we do not consider the inappropriate issuing of ASBOs...[to be] a major problem' (2005: 73), the Committee has also recommended that 'the Home Office

commissions wide-ranging research in this area' (ibid). Moreover, the Home Affairs Committee notes that it is 'relatively straightforward to apply to the Court...for the terms [of an order] to be varied' and that 'there is also a right of appeal' (House of Commons, 2005a: 73), it further notes that 'cases in which these options are not being taken highlight the variable quality of legal representation rather than any difficulties with the current provisions for variation and appeal' (ibid.).

Research findings – defending ASBO applications

Several Sheriffs stated that defence solicitors were often very reluctant to appeal the orders, even when it was apparent that there was evidently a justifiable reason for doing so. As one Sheriff argued:

[The ASBO applications that have come before me] are badly drafted but of course the defender's solicitor is as bad in not coming to court immediately when it's been granted, you know, get back in court and argue it - not on the merits of whether it's a good idea or not - but argue it on the basis that this appallingly drafted document should not be allowed to go any further. (S6)

Other Sheriffs observed that the majority of ASBO applications in their jurisdictions were the result of a culmination of persistent antisocial behaviour which was, in most cases, essentially indisputable. Hence, they felt that the solicitors saw 'no merit' in opposing such applications:

[M]y experience is that the solicitors take the attitude that there is so much that has happened before we get to the stage of an antisocial behaviour order that there is no point opposing the interim order. (S4)

It was also apparent that several Sheriffs were very unlikely to reject applications, even if they believed that the application was poorly constructed and/or not the most appropriate intervention, if the application was uncontested by the defence solicitor:

I've had one [application] where I thought that it was the wrong route to take, and the defender was represented - but I didn't object to it - and it was to ban her from shoplifting in any shop in [X local authority area]. You know, what's the point? But as I say, I didn't object to it. (S3)

A small number of Sheriffs felt concerned that the chaotic nature of many ASBO defendant's lifestyles (often as a result of addiction problems) might impact upon their ability to organise a defence to ASBO actions:

For the very reason that [ASBOs] can be presented by one party, the subject of the order might be so chaotically organised that they don't organise opposition, they don't defend it, and you get a very one sided view, which may not be fair. (S1)

The majority of Sheriffs, however, while acknowledging that the nature of ASBO proceedings was such that an application could succeed undefended, were for the most part, unsympathetic to the suggestion that the chaotic nature of defendants' lifestyles could mean that they were disadvantaged in court because they had not organised a defence to an application. As one Sheriff observed:

Well, there may be [problems with people subject to an application not organising opposition], but I mean, the same people, I'm quite sure, if you said 'come along here at 12 noon tomorrow, and there'll be a party with lots of booze' – they would understand that enough. (S5)

Several other Sheriffs made similar comments and stated that the chaotic nature of many ASBO defendants' lifestyles was not a factor that they were generally sympathetic towards (see also *Mitigating factors*, above).

ASBOs, young people and children

As already described in Chapters 3 and 5, the use of ASBOs for children and young people is widespread in England and Wales, with about half of all orders issued being granted against young people below the age of 18. In marked contrast, the use of ASBOs for children and young people in Scotland is limited, with only half a dozen orders having been granted to children (below the age of 16). However, although there appears to be an overarching support for the use of alternative interventions (where appropriate) for children in Scotland, there has also been somewhat of a 'backlash' in certain locales, with practitioners arguing that more use should be made of the orders for under 16s. There has been criticism from particular city councils in Scotland regarding what they consider to be the overly restrictive conditions contained within statutory provisions governing the use of ASBOs for persons under the age of 16, and moreover, the statutory

requirement for inter-agency consultation (and a 'level of agreement' among interested parties to be reached) which, it has been suggested, inhibits the use of ASBOs against children.

Research findings – young people and children

Sheriffs generally agreed that it could be a difficult process to pursue orders against children, but felt that this was an important safeguard in the system:

[The local authority] do a lot of good work to make [the use of ASBOs] unnecessary. I've met with a number of agencies which do excellent work – including with the under 16s – especially in our most troubled part of [the local authority]. Although I certainly agree that ASBOs for under 16s can be difficult to obtain. But I'm very glad that it is like that. (S8)

Several Sheriffs expressed their support for the use of ASBOs for children. However, the majority of Sheriffs were of the view that orders for children were 'ineffective' and 'irrelevant'. In particular, Sheriffs raised concerns about the possibility of young people getting drawn into the criminal justice system unnecessarily:

I think [using ASBO against under 16s] is falling into the trap of coming down hard on the people who have been spotted...I mean I'm sure there's research that shows once an individual has come to the notice of the prosecuting authorities then the likelihood of their being prosecuted is higher, and I see it all the time here. People who offend are then given bail subject to conditions and they are very, very easily re-arrested for fairly innocuous matters. You get a crowd of youths who scatter - and the one who is caught, is the one who is recognised - and I think that antisocial behaviour orders merely put greater pressure of youngsters who are already having difficulty functioning in society and I'm not sure if that's the best way to go about it. (S1)

Sheriffs that were concerned about the use of the orders for children and young people, cited the implications upon breach, which they believed would mean that children and young people would inevitably become caught up in the cycle of children's hearings or, in the case of young people, the criminal justice system:

[T]here is no point in seeking an antisocial behaviour order unless you want to follow it through with a prosecution in the event of a breach. Otherwise, the order is pointless. And so the structure of the legislation – the whole concept of antisocial behaviour orders – is to render conduct criminal that is antisocial, in effect. I would be very uneasy about using orders against children for that reason. I think it's putting pressure on them to fail and be drawn into the children's hearing system and the criminal court system sooner than they have to be. (S10)

Furthermore, some local authority practitioners in Scotland have also expressed the view that 'an ASBO should be seen as a warning [to children and young people], not a last resort'. Those Sheriffs who were generally supportive of the use of the orders for children and young people (in circumstances where such an order was genuinely deemed to be necessary) were of the view that it might, in some circumstances, be appropriate to use orders in this way:

[I]t would depend on the circumstances...but if I thought that this was a really obnoxious child – and there are really obnoxious children - then I wouldn't regard [the use of an ASBO] as merely a last resort. (S5)

However, the majority of Sheriffs (who had expressed concerns about the use of the orders for children and young people) again stated that they did not believe that it was acceptable to use ASBOs as a 'warning' to children and young people:

[ASBOs are] a criminal sanction. It's inappropriate [to use ASBOs as a warning to under 16s], it should either be granted or it should not be granted, not used as a warning. It's as if 'oh well, we'll grant the ASBO, and it's OK Sheriff because we don't intend to enforce it' – and we can't have that. [The council] either get it and they enforce it or they don't. So it's not appropriate. I mean, they've got all these contracts now [ABCs], so is that not the way around that? (S3)

Of those Sheriffs that disagreed that ASBOs should be used as a warning to children and young people, most stated that alternative interventions should be made much greater use of:

What's a parenting order for, rather than anything else, you know? If [councils] want [to use ASBOs as a warning], they should be getting parenting orders, rather than ASBOs. (S4)

Although these Sheriffs suggested that such interventions were used rarely, if at all:

I think the idea of parenting orders is a great idea – but I've never seen an application for a parenting order. (S4)

Moreover, in view of the existence of statutory measures which prevent children from being detained for breaching the prohibitions of their order, Sheriffs felt that an ASBO granted against a child or young person in Scotland would be of little consequence:

The virtual certainty is that it goes back to the Children's Hearing, they will then either admonish the individual or they'll put them on a supervision requirement. But if they need a supervision requirement then the chances are that they are already in front of the hearing through family's and children's issues in any event, so I just think that they are of little relevance. (S11)

The issue of ASBOs being used as a 'badge of honour' by virtue of the lack of sanctions available upon breach, was also raised:

[ASBOs for under 16s] would appear to be an order without sanction, which is why I suppose people are saying that some kids would regard it as a 'badge of honour', rather than as a sanction, because I mean, what can you do? (S7)

For the most part, the majority of Sheriffs did not believe that the use of ASBOs for children and young people, in their current legislative form, were a useful or well constructed part of antisocial behaviour legislation, particularly in view of the existing problems associated with offending behaviour by children and young people:

[W]e already have extreme problems about the detention of children – not anything like sufficient places, and that's only appropriate for serious

criminal offending. What else are you going to do? Impose fines? That would be an absolute waste of time. So that's another reason why I regard the use of [ASBOs against under 16s] as very restricted to serious circumstances. (S9)

Similarly, Sheriffs in Scotland were almost unanimous in agreeing that publicity should not be used for ASBO cases involving children. As one Sheriff stated:

I'm dead against it...[the use of publicity for under 16s] would be the wrong route to take entirely. (S1)

ASBOs and the political climate

As previously detailed earlier in this chapter, the interviews with the judiciary in Scotland were conducted shortly before the Scottish Parliamentary election and antisocial behaviour and the use of ASBOs had featured prominently within political and media discourse(s) at this time.

Research findings – the political climate

Despite the high level of media interest in antisocial behaviour legislation, and the increasing use of ASBOs in Scotland at the time of the interviews taking place, several Sheriffs commented that, from their experience in the Scottish courts, the range of interventions provided within antisocial behaviour legislation, including ASBOs, were being used in a very limited fashion. One Sheriff described the take up of antisocial behaviour interventions in Scotland thus:

They [ASBOs] are not used. I mean all the antisocial – 'bad behaviour', if you like – legislation that there is in place, isn't used. I don't know why it's not used, I don't know if it's not used because it's awkward, it's difficult, it's a sledgehammer approach, you know, I don't know why it's not used. I rather suspect that there's an awful lot of people that perceive themselves as being affected by antisocial behaviour that would love to see it used an awful lot more. But I think the idea of parenting orders is a great idea – but I've never seen an application for a parenting order. I've seen only (Y) applications for closure orders, amounting out of drug dealing. Great idea, as far as the local community and everything else is concerned – it

demonstrates that something is being done about something that is perceived by everybody as being an evil. (S3)

Several Sheriffs also commented on the 'political nature' of ASBOs, and the way(s) in which the attitudes of local councils affected the uptake of antisocial behaviour interventions such as ASBOs:

[I]t's all politically driven isn't it? You know, it's a great idea – tough on crime, tough on the causes of crime – we're going to sort out this antisocial behaviour, and we expect the Courts to support us!... [I]f the political masters of [W city council] suddenly decided that there should be greater use of ASBOs – then we will see greater use of ASBOs. There will be a resource found from somewhere to do it. (S9)

Moreover, as the interviews were conducted in advance of an imminent election (for the Scottish Parliament), a number of Sheriffs argued that the use of ASBOs had risen high up the political agenda, predominantly because they believed that antisocial behaviour was seen by politicians as being something of a 'vote winner':

I think to be fair to the politicians, my take on this is that, particularly at election time, they go canvassing in council estates and they arrive at some old folk's doorstep - she has traditionally cleaned her step every year, she takes down her curtains to spring clean them, her wee patch of garden is perfect et cetera et cetera, you can imagine what I'm talking about. And she says well, the kids come along, they're 9, 10, 11 and they throw stuff in her garden, they pull the flowers out, you go down the Spar shop and the kids are there, and they're intimidating, so [they ask the politicians] 'what are you going to do about it?' And, the answer is, that with our court system, it's very difficult to do anything about it. And it's all very well saying the police should be there it but the police could be there all day and all night and it still wouldn't stop. So you know, you can understand. They come up with this idea – this will stop it, this will stop the behaviour. It's real and it's quick – you don't need to wait six months for a Sheriff to decide he's guilty and then call for reports, time for deferred sentence, probation, breach of probation, all these things where it can go on for years and nothing gets any better. So superficially, it's a great idea. My difficulty with it is that you

cannot bypass justice and at the end of the day, you are actually worse off.
(S6)

However, those Sheriffs who made observations about the 'political' nature of ASBOs also suggested that, after the (Scottish) election, antisocial behaviour and the use of ASBOs would feature much less in political discourse, and the uptake of ASBOs and other antisocial behaviour interventions would again be determined by the attitude(s) of local councils, who were seen as the 'driving force' behind ASBO applications and 'instrumental' to ASBO uptake. Politicians were largely viewed by those Sheriffs as elevating the profile of ASBOs at election time, but again, they noted that local level autonomy inherent in antisocial behaviour legislation meant that politicians could influence ASBO uptake to a limited degree. It was also noted that antisocial behaviour policy became much less prominent in politicians political priorities:

[O]ne of the problems that I think we've got is that they shout from the rooftops about increased sentences for crime...be tougher on crime...the courts are not imposing tough enough sentences...there aren't enough sentences...oh the jails are too full...and there aren't enough social workers to do half the work they're supposed to do. And at the moment, in the run up to [the Scottish] election, it's a wonderfully political thing that when somebody gets elected for four years, then it'll go on the back burner again.
(S9)

Conclusion

In this chapter, the empirical data presented throughout has demonstrated the significant influence of judicial decision-making and discretion on the administration, management and outcomes of ASBO use in Britain. Indeed, judicial discretion has been shown to be specifically influential in respect of prohibitions; interim orders; orders on conviction (CRASBOs); sentencing for breach; defending ASBO applications; and the use of ASBOs for young people and children. The research evidence has also found that there are different patterns of decision-making both between courts and between individual Sheriffs. The next chapter discusses the variation between individual sentencers' decision-making on ASBO applications, and provides a variety of (possible) explanations to account for the variations between different courts. Moreover, it will be assessed whether the

empirical data obtained in the course of the research study has been successful in determining the influence of legal procedure and judicial discretion in ASBO cases.

Chapter Seven

Discussion

Introduction

Historically, the courts in Scotland, and in England and Wales, have long expounded the general principle that both legal procedures and the decision-making of officials must be fair - and that a duty exists to act fairly and to afford all participants the right to be heard. Galligan has observed that: 'Exceptions to the principle might still be made, but only where there are strong reasons for doing so; indeed the presumption is that the general duty to follow fair procedures will apply unless exceptions can be justified. The practical application of the principle can still be uneven, with various factors influencing a court's appraisal of what procedures are needed' (1996a: 329). Subsequently, this chapter examines the research study findings on legal process(es) and judicial discretion in the context of socio-legal conceptions of fairness within the criminal justice process, specifically in respect of theories of administrative and procedural justice. Additionally (and with particular reference to the use of interim orders, the impact of mitigating factors and the defence of ASBO action) the opportunity for law to act as a site of power within which individual autonomy is protected from the coercive influence of disciplinary power is discussed alongside the potential for law to act as an instrument of exclusion and/or domination. However, as I have identified already in this thesis, the research findings have specific limitations which now impact upon the discussion of the study data for the purposes of this chapter's examination of legal procedure and judicial discretion. Consequently, legal procedure is considered using data obtained from the survey responses in England and Wales, and the discussion of judicial discretion is informed by data obtained from the sentencers in the Scottish Courts. The findings from the research that are discussed here are not presented as directly or substantively comparable with its composite jurisdiction north/south of the border. Instead, it is hoped that the findings presented will further illuminate understandings of legal procedure and judicial discretion within the jurisdictional areas studied, and moreover, that given the shared policy on countering antisocial behaviour in the three jurisdictions studied, the data provided here will highlight areas that may inform or may be of interest to future research in other jurisdictions.

Socio-legal conceptions of administrative and procedural justice

Let us begin this discussion of the study findings on legal procedure and judicial discretion in ASBO cases by first considering how justice within (and equity before) the law will be defined for the purposes of my examination of fairness in ASBO legal and court process(es). Hence, it is necessary to now consider the terms 'administrative justice' and 'procedural justice', and their substantive meaning within the socio-legal field of study, in greater detail. Essentially, 'administrative justice' is an umbrella term which encompasses the principles that can be utilised in the analysis and evaluation of the level of fairness in administrative procedural decision-making. Michael Adler posits that administrative justice is composed of two distinct elements: 'procedural fairness' – that is, the particular means by which individuals are treated within a specific process with regard to professional and/or bureaucratic decision-making; and secondly, 'substantive justice', which is a term that refers to de facto outcomes of decision-making and the derivative benefits/burdens subsequently conferred on the individual participant (2003: 324). Thus, administrative justice encompasses legal agents, the courts and tribunals, but also the decision-making of a plethora of other bureaucratic and professional agencies.

So, if we accept Galligan's observation that 'justice is the first virtue of law and politics' (1996a: xvii); and we also consider procedural fairness a fundamental element in administrative justice, how do we conceive of, and conceptualise, notions of justice and fairness in administrative and procedural processes? And how does procedural fairness then ultimately contribute to the attainment of justice in the law? Hart (1961) described two basic elements fundamental in the concept of 'justice': the importance of like cases being treated alike⁹⁷, and the secondary, vacillating, element which was determined by the way in which likeness and difference was then quantified. However, Galligan (1996a: 57), in his (in my opinion) superior description of the concept of 'justice', rejects Hart's analysis of the requirement for like cases to be treated alike, on the basis that 'like treatment is not general enough in its scope'. For Galligan, what is of the most essential importance is whether an individual has been treated fairly or unfairly – comparison with the treatment of other individuals is, in this paradigm, largely irrelevant. Instead, Galligan determines four elements which make up the 'constant' part of justice. Ascribing to Finnis' (1980) analysis of justice as a bifurcated relationship - between persons, and, what is due or owed by one to another - he also attests to Finnis'

⁹⁷ The concept of 'like cases being treated alike', and consistency in decision-making, will be developed more fully later in this chapter

notion of 'balance' or 'equilibrium' between interested parties. Galligan develops this concept further by adding a fourth element: that 'any course of action must comply with certain fundamental standards of right treatment.' This is, to some extent a restatement of Galligan's view that the *context* of individual treatment and any subsequent judgement of 'fairness' can never be justified without the presence of fair treatment.

Galligan (ibid: 62) develops this line of argument further – and to great effect - when he compares the adversarial nature of proceedings at common law in England, with the more inquisitorial style of proceedings in Europe. He makes the observation that neither approach has been shown to be more effective in terms of 'fair treatment' or with regard to reaching the 'correct outcomes'. Instead, he explains that arguments about the two differing procedures are not subsequently centred on efficacy in the pursuit of truth, rather they are concerned with '*what values are relevant*' (at p.63, emphasis added).

As Galligan explains:

'[A]ny attempt to erect a strict division between outcomes and the procedures leading to those outcomes is fraught with difficulty. Clear cases can easily be found, but borderline cases are equally numerous...What is important is that the proper consideration of a person's case is a value which ought to be respected in legal processes and for which suitable mechanisms should be available. Indeed...it is better to approach procedural issues, especially issues of procedural fairness, by asking, first, *what are the values at stake and what standards do they generate in terms of fair treatment of a person, and then, secondly, what procedures are needed to ensure that the standards are upheld in practice.*' (ibid: 51, emphasis added)

Thus, it is the *process* itself, which is of principle importance in determining whether procedural fairness has been achieved – and not the individual outcome of a given procedure. Walker et al. seminally distinguished between procedural justice as 'the belief that the techniques used to resolve a dispute are fair and satisfying in themselves' and alternatively, distributive justice, which concerns 'the belief that the ultimate resolution of the dispute is fair' (1979: 1402). Further, Walker et al. observe that procedure is not simply a tool for achieving distributive justice per se, but it is in fact 'a means that profoundly affects the psychological meaning of that end' (ibid: 1403). That is to say, a participant's confidence in and perception of

whether he/she has been treated fairly (and consequently whether justice has been achieved) will be, to an extent, determined independently of the substantive outcome of a case. It will be determined in part by whether they believe that they have been treated fairly. Thus, with regard to participant's perceptions: "ends" (distributive justice) cannot justify "means" (procedural justice), but "means" can indeed justify "ends" to the extent that, for participants, the perception of procedural justice partially determines the perception of distributive justice.' (ibid. 1416) Hence, the value is not in the procedures themselves but in their contribution to the right or best outcomes' (1996a: 72). Let us now then consider procedure in ASBO applications in respect of the concept(s) of fair treatment, and procedural justice, set out above.

Fairness in ASBO Procedural Decision-Making

In previous chapters, we have observed the wide ranging discretion conferred upon enforcement agencies (local authorities, housing associations, registered social landlords, the police) by s.1(1)(a) of the Crime and Disorder Act 1998 and the renewed focus upon local level autonomy inherent in antisocial behaviour legislation, which, it has been argued, is at once diacritic from neo-liberalism, but also the historical limitations (and inflexibility) of local welfare bureaucracy. However, we must now examine this deliberate decentralisation of administrative authority and decision-making in the context of balancing 'procedural fairness', in the terms discussed above, with (achieving) policy objectives. As McCubbins et al. have argued: 'legislators see the choice of administrative structures and processes as important in assuring agencies produce policy outcomes that legislators deem satisfactory' (1989: 432). Drawing upon the empirical study findings, it will now be considered to what extent (if at all) procedural fairness in ASBO cases has featured secondary in the pursuit of policy objectives, and moreover, whether administrative and procedural decision-making in ASBO cases can, for the most part⁹⁸, be said to embody a general principle of procedural fairness.

Defending ASBO Applications

From the findings presented in Chapters 5 and 6, we are able to observe that while ASBO applications are rejected by the courts very rarely, judicial discretion can in fact play a pivotal role in determining (and, importantly, limiting) the scope of ASBO prohibitions. However, it is now argued in the context of our theoretical

⁹⁸ I would argue that it is impossible for any system to achieve perfection in its administrative and procedural outcomes

consideration of fairness in ASBO proceedings, that there are two factors which have become significant for the purposes of this theoretical analysis - and that they subsequently require to be considered here in more detail. These two elements are, firstly, the nature of the civil procedure which has been used to achieve the high success rate of ASBO applications, and secondly, the legislative provision for an automatic right of appeal in ASBO cases.

The decision of the House of Lords in *McCann*⁹⁹ - to classify ASBO proceedings as *civil* in nature - signified that the rule against using hearsay and professional witness evidence (which applies in criminal proceedings), would not apply to ASBO applications. As we have already seen, this judgement enables professional witness evidence and hearsay to be used in cases where witnesses are too intimidated or fearful of reprisals to give evidence themselves. In my view, the need to protect witnesses from retribution in ASBO cases legitimately necessitates the requirement of civil rules of evidence in such cases where reprisals and intimidation are (potential) features. Indeed, I believe that the protection of witnesses, who have suffered from persistent acts of antisocial behaviour, is one of the most vital aspects of the ASBO model. As the survey data returns demonstrated, over 90% of respondents in England and Wales had continued to experience difficulties in securing witnesses in ASBO cases as a result of 'fear of reprisals'. However, while it is fair to say that hearsay and professional witness evidence was perhaps viewed by government policy makers as, if not a panacea, then certainly an elixir, for the problems associated with obtaining evidence from fearful or intimidated witnesses, the survey returns suggest that the use of hearsay and professional witness evidence has not extinguished these difficulties and, as a number of respondents in England and Wales detailed, witnesses in ASBO cases continue to suffer intimidation and retribution (before, during and after) the court process.

Consequently, it is not surprising that the survey data shows that interim ASBOs are almost always obtained on the basis of hearsay evidence, or, as interim order rules allow, on a *prima facie* basis, without the lodging of any witness statements or productions. However, it was perhaps surprising to discover that over twenty per cent of survey respondents in England and Wales had been able to obtain a full ASBO based only on hearsay evidence. While, in my view, there are certainly legitimate grounds for the imposition of an interim ASBO based only on

⁹⁹ [2002] UKHL 39

hearsay evidence¹⁰⁰, the scope for error(s) in decision-making (bureaucratic and legal) are certainly increased when the courts are willing to endorse the use of full ASBOs – with a two year minimum duration in England in Wales – obtained only on the basis of hearsay evidence. When orders are applied for and granted in this way, the opportunity for ASBOs to be used as part of a neighbour(hood)/community vendetta is significantly increased.

Yet, in spite of this, I would not go as far as to say that full ASBOs should not be granted solely on the basis of hearsay or professional witness evidence. This would preclude the use of ASBOs, and the protection that they might provide¹⁰¹, for victims of antisocial behaviour. Rather, I would argue that, in view of the civil rules of evidence used in ASBO cases, and the high success rate of ASBO applications, in order to achieve fair treatment for defendants in ASBO applications, there must exist provisions which mitigate the conflict between the protection of individuals from antisocial behaviour, and the right of defendants to fair treatment. Within this paradigm, I would place the provision of adequate legal representation, and the right of appeal as being of fundamental importance.

While the Home Affairs Committee on Antisocial Behaviour (House of Commons, 2005a) noted the existence of the automatic right of appeal in ASBO cases, it also suggested that cases where an order had been issued ‘inappropriately’, and the option of the right of appeal was not taken, highlighted the variable quality of legal representation available to defendants, rather than any difficulties with the legislative provisions for appeal. When asked if they agreed with the opinion of the Home Affairs Committee on the variation in the quality of defence counsel, over 50% of solicitors in England and Wales stated that they did agree. Almost a quarter of solicitors believed the quality of defence counsel available to ASBO defendants to be ‘highly variable’, although the majority of respondents (over 60%) thought that, overall, the quality of defence counsel was of a good standard. However, with regard to the right of appeal specifically, respondents in all jurisdictions identified the ‘lack of legal aid’ as the primary reason for low numbers of appeal in ASBO cases. Let us now consider the quality of defence counsel available to ASBO defendants, and the current limits placed upon legal aid.

¹⁰⁰ Although not ideal, the opportunity for poor decision-making is somewhat mitigated by an opportunity for swift redress in a full hearing

¹⁰¹ I have already discussed the lack of conclusive evidence of the ‘effectiveness’ of ASBOs (see Chapter 3). However, I acknowledge the findings of the National Audit Office’s study (2006) which suggests that ASBO interventions can be effective in reducing antisocial behaviour; I also acknowledge that there are anecdotal accounts of the effectiveness of the orders; and I further acknowledge that, in the course of my interviews with the judiciary in Scotland, several Sheriffs argued that ASBOs were ‘working’.

In an adversary system, the quality of legal representation available to defendants, may, it is fair to speculate, affect the risk of erroneous deprivation of substantive rights. Given that the quality of representation depends on the ability to pay, current civil procedure doctrine would seem to provide a systematic distribution of the risk of error in favour of those who have the greatest share of social resources. In a recent speech¹⁰² on barriers to access to justice, Mr Justice Lightman described the erosion of the protection of rights ('human and otherwise') by the 'emasculat[i]on' of civil legal aid, which has meant that 'the cost of enforcing or defending such rights were beyond all but the very rich and the legally aided'. Justice Lightman argued that, in view of the Government's unwillingness to fund 'access to justice', '[t]he dilemma, then, is how to provide the protection of the law to citizens who cannot pay', concluding that, 'No thinking person can be but embarrassed by the lack of provision by the State of the means for access to the courts.'

Moreover, the importance of the standard of legal representation provided to a defendant should not be understated, given the range of functions that solicitors potentially can undertake. As Galligan observes: 'Lawyers can provide advice on what must be done to gain benefits or to avoid burdens; they can help in collecting evidence and presenting the facts; they can advise on the law; and they can be especially effective in examining the facts and material upon which the deciding authority proposes to act. If the matter goes to appeal, then lawyers can provide invaluable help in assembling and presenting the case' (1996a: 363). Indeed, the skills involved in legal representation should not be underestimated, since it is unlikely that defendants will be able to successfully represent themselves. Lightman, J. has warned: 'Do not believe that justice can be readily achieved by litigants acting in person. Quite the reverse. They cannot generally distinguish what is and what is not arguable, what course serves their interest and what risks they run over costs'¹⁰³.

Walker et al.'s (1979) rudimentary work on procedural fairness in legal contexts found, contrary to the situation which presently predominates (where, the client, by virtue of their lesser position, both in terms of knowledge and in terms of their limited options, is *lead* by their solicitor) that, in fact:

¹⁰² The edited version of this speech, *Breaking Down the Barriers*, which was delivered at the law firm SJ Berwin, appeared in *The Times* newspaper on 31 July 2007.

¹⁰³ Op. citation, note 102

‘[T]he attorney should facilitate participation by the client in the decision making process. The case ought to be regarded as belonging to the client, not to the lawyer, and the attorney should see himself as the agency through which the client exercises salutary control over the process. In this client-centred role, the attorney best functions as an officer of the court in the sense of serving the wider public interest’ (1979: 1417).

However, it appears that, in the (minority of) cases where legal representation is of a poor standard (for example, where the solicitor is uninformed about legislative provisions or is disinterested in representing the client’s best interests), the defendant will have few alternative options.

So, in the context that we have been discussing, there is certainly the scope for ASBOs to be issued inappropriately. In these instances, it appears that the standard of defence counsel constitutes one factor in this outcome. It has been suggested that the high success rates for ASBO applications means that applicant agencies are applying for the orders in the correct circumstances, and are providing the requisite evidence in support of their applications. However, interview data from the judiciary in Scotland, for example, demonstrates that ASBO applications are infrequently contested, even in circumstances where there may be legitimate reasons for doing so. The potential for ASBO applications to be issued inappropriately in these circumstances would therefore appear to make the legislative provision for the automatic right of appeal all the more necessary. Yet, as the survey data for England and Wales also demonstrates, the right of appeal is being taken in only a very small number of cases. Solicitor respondents to the survey questionnaire suggested that this was primarily a result of a ‘lack of Legal Aid’.

The current restrictions on legal aid, it has been argued, are particularly stringent. For example, in Scotland in 2005/06, an application for legal aid was made in 81 out of 344 ASBO application cases. In 43 of these cases, the pursuer (applicant authority) objected to the application. The two main reasons cited for objection were where an application was deemed ‘not in the public interest’ and therefore ‘a waste of money’ and secondly, where there was ‘no defence to the action’. As a result, legal aid was granted in only a tenth of ASBO cases in 2005/06¹⁰⁴ (Scottish Executive, 2005b: s.4.4). Similarly, in England and Wales, the reforms to Legal Aid resulting from Lord Carter’s *Review of Legal Aid Procurement*

¹⁰⁴ This figure is the same as the previous year.

(House of Lords, 2006) have been unpopular with the legal profession, having been described as 'rigid' and 'complex'. It has also been argued that the reforms have alienated some sections of society most in need of legal services. For example, a single parent working full-time on the minimum wage, and supporting a child, is not eligible for legal aid in criminal proceedings at the magistrates' court.

But where do these wider issues about legal aid, legal representation, and access to justice, sit within our examination of procedural fairness in ASBO applications? Firstly, let us consider the way in which Galligan reconciles legal representation and fair treatment:

'In determining when legal representation is needed for fair treatment, the principal guideline should be that legal advice and representation are needed when, without them, the person affected would not be able properly to prepare and present his case... *The principle of English law is that legal or other representation of a party in an administrative process is not a necessary requirement of procedural fairness. An authority must follow fair procedures, and whether representation is required as a fair procedure depends on the context*' (1996a: 365, emphasis added)

Indeed, Adler (2003: 331) talks of 'trade offs' that are made between institutional actors in administrative processes, and, moreover, he recognises a plurality of competing normative positions on what it means to treat people fairly (Adler, 2006: 637). While greater access to the courts in the form of legal aid would, in my view, be a step towards increased access to justice, it is also essential that the system aims at a balance between accuracy and its cost. Consider, for example, Richard Posner's economic analysis of procedure (1992). He writes:

'The objective of a procedural system, viewed economically, is to minimize the sum of two types of cost. The first is the cost of erroneous judicial decisions. The second type of cost is the cost of operating the procedural system' (p.312).

Operating costs are borne by the public in the form of subsidies to the judicial system and by the parties in the form of court fees, solicitor's fees, and litigation costs. However, cost is not the most relevant factor when considering the value of legal representation within the administrative process. Instead, the effects of increased legal provision, particularly with regard to appeal cases, on an over-

burdened and lethargic summary justice system should be considered. Hence, the effect of increased legal provision on the summary justice system is certainly an important consideration in this context. While there is evidence to show a correlation between legal representation and delay, this is of course no reason to bypass procedural fairness for administrative expediency - indeed, delay may be a necessary factor for good decision-making (Genn and Genn, 1990). However, de facto practical considerations mean that procedural justice is only achieved through an exercise in counterbalance and proportionality. While the enfranchisement of all participants in court processes via, amongst other elements, access to legal representation of a certain standard, should be an aspirational ideal, current circumstances necessitate that such objectives are viewed within the wider sphere of an overburdened and lethargic summary justice system.

Taking Scotland as an example, the current level of criminal prosecution is 130,000 cases per year, of which 90,000 cases are heard in the Sheriff Court (Scottish Parliament, 2007). The increasing number of cases has resulted in undue delay and the summary justice system has become slow and progressively less efficient. Moreover, the costs related to bringing a case to court mean that prosecution is an extremely expensive option and hugely above the average fine¹⁰⁵. As a result, jurists and legal professionals/practitioners have argued that fewer cases (relating to lower level criminality such as littering and nuisance behaviour) should be addressed by the courts (McInnes, 2005). It is thus highly unlikely that the summary justice system, in its current form, would be able to cope with a significant increase in its case load and it should also be remembered that wide and unfettered access to legal representation would likely give rise to an increase in the number of spurious and/or illegitimate cases.

Nonetheless, I would certainly argue that current provisions for legal aid are unduly prescriptive, and without doubt, mean that access to the courts, and consequently to fair treatment, is fundamentally circumscribed for participants in ASBO cases, and civil trials more generally. However, one way of approaching this difficulty without 'opening the floodgates' to unrestricted legal representation is to attempt to ensure fairness from *within* the court process itself. Certainly, given the autonomy entrusted to local enforcement agencies, a rigorous approach to evidence gathering and case management should be ascribed the highest priority.

¹⁰⁵ The average fine in the sheriff court is £281 (for the period 2002/03), where the average cost of legal aid is £695 (for the period 2003/04). And in the district court, the average fine is £113, where the average legal aid bill is £399. In addition, there is the cost of the police processing the case, reporting to the procurator fiscal, the fiscal then processing the case and the subsequent cost of the case at trial (McInnes, 2005).

Yet, as we have seen, nearly half of solicitors surveyed in England and Wales cited the 'urgent' need for the introduction of case management powers for ASBO applications. A lack of interagency consultation and co-operation; inconsistent attitudes towards information sharing; the presence of inexperienced evidence gatherers; the defence rarely serving evidence before trial; vague hearing dates; and, a disjointed framework for the ASBO process with different procedures in different courts, were all contributing factors that respondents argued necessitated the creation of powers to enable the courts to apply rigorous case management to ASBO proceedings. An illustration of the importance of the requirement for rigorous case management is made by a recent ASBO case in Manchester. In July 2007, a lady in Manchester was awarded £2000 in compensation by her local authority after The Local Government Ombudsman said that Manchester City Council was guilty of an 'abuse of power of nightmarish proportions' in obtaining an ASBO against her based upon false and uncorroborated allegations from a neighbour. In this instance, the court granted an interim order against the lady a week after ASBO papers were served against her.

This case appears similar in kind to examples cited by Halliday (2004) in his study of homelessness decision-making - where legal values were sometimes regarded as 'unwelcome intruders' by authority staff. He illustrates this with reference to the importance of 'professional intuition'. In homelessness decision-making, for example, experienced decision makers develop 'confidence in their ability to gain an almost immediate sense of the truth underlying an applicant's claim for housing so that they are able to "just know" what a case was about'. (p.54). Halliday identified a 'strong internal culture which resists interference from legal values' (p.59) so that, in trusting their intuition, decision makers react out of a siege mentality to reject the normative authority of the law (p.60). Given that Manchester city council has obtained the highest number of ASBOs in Britain, parallels could perhaps be drawn between these types of example, whereby because of the volume of decisions being made by local authority staff (and the autonomy conferred upon them) elements of the law are not necessarily paid the requisite attention. Subsequently, the potential benefits of statutory case management rules for ASBO proceedings will be considered more fully in the next chapter.

Interim orders granted ex parte

As previously discussed, the vast majority of interim orders in Britain are granted on the basis of hearsay evidence or, as the legislation permits, on a *prima facie*

basis without the hearing of any evidence or the lodging of any witness statements or productions. Moreover, in England and Wales, interim orders can be granted *ex parte* (without notice to the defendant). It follows, of course, that if an application is made on notice, then the defendant may choose to give evidence at the hearing. However, the study findings showed that evidence is rarely served at the interim application stage (in either Scotland, or in England and Wales), and as one Sheriff concluded: defence 'solicitors take the attitude that there is so much that has happened before we get to the stage of an antisocial behaviour order that there is no point opposing the interim order'. Consequently, orders that are made *ex parte* necessarily mean that the defendant will have no opportunity to give evidence at this stage of the application process. In terms of the wider implications for procedural justice, we must now consider *ex parte* applications, and applications made on a *prima facie* basis in the context of the right to be heard – and whether such a right does or should exist in relation to ASBO action.

A hearing, in its simplest legal context, is a procedure through which evidence is imparted from both parties, and the process provides an opportunity for argument to be presented from more than one source. In this way, a hearing is important in providing fairness in procedure, and in achieving a balance between the competing interests of the parties. Moreover, good decision-making will most often necessarily require an investigation of an individual's circumstances and a hearing will be an effective means of achieving this. Thus, the opportunity for an individual to be heard within a given legal process is fundamentally bound up with conceptions of fair treatment, impartiality and equity. However, while the principle of a hearing is certainly intrinsic to discussions about fairness and procedure – it is important to consider the boundaries and limits of such a principle, and how it is variously construed. So if we consider the hearing principle in ASBO applications within the wider context of procedural justice, we must first necessarily examine what values are at stake, and what standards they generate in terms of fair treatment of person(s) involved in the legal process.

The hearing process is fundamental to good decision-making and good outcomes, primarily because a hearing embodies the *telos* of the civil procedural system as a 'search for truth'. A hearing also allows the opportunity for an individual to actively advance or to defend their interests, which is a relationship that 'draws on the value of each person being actively engaged in his relationship with the state, rather than being the passive recipient of benefits or the victim of burdens' and consequently, the hearing is 'directly linked to fair treatment' (Galligan, 1996a: 349). While the notion of an individual's right to autonomy, self-

determination and the preservation of rights in the context of legal process(es) is embodied within the hearing principle, Galligan simultaneously advances another, far less individualised explanation for the right to be heard. Acknowledging that, although one could argue in favour of the hearing principle on the basis of respect – after all, ‘respect for a person requires that he be heard’ (ibid.) – he is mindful of the fact that ‘there is, however, scarce support for this approach in judicial statements of principle’ (ibid.). Instead, he posits that:

‘The hearing principle might be approached in another way, not in order to establish rights, but to show its value to society as a whole...There may also be social gains, perhaps less tangible, in having a citizenry which is active in protecting its own interests and in each being treated with respect by the whole.’ (p. 352)

Indeed, a consideration of English case law on the hearing principle suggests that the right to be heard is a fundamental tenet of English law. For example, Lord Diplock considered the right to be heard one of the fundamental rights generated by the general duty on administrative officials to act fairly towards those affected by its decisions (*O’Reilly v Mackman* [1983] 1 AC 237 at 279). The right to be heard meant in that case learning what is alleged against the person, and then having the chance to put forward an answer to it. Similarly, in Scots law, the Scotland Act 1998, and Article 6 of the Human Rights Act 1998 safeguards the right to ‘a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law’. Implicit in the requirement for a ‘fair hearing’ is the principle of equality of arms between litigants, and the opportunity to present a case. However, while Galligan observes the hearing principle as linked to societal good, and citizen participation, he also recognises that ‘the supposed principle that a person should be heard is much less secure as a general legal practice than judicial statements suggest’ (p.355).

In the context of the discussion of procedural fairness embodied within this Chapter, specifically in respect of antisocial behaviour orders granted *ex parte* in England and Wales, it is thus important to note the provision for defendants to make an early challenge to a decision to grant an application made in their absence is included within the relevant statutory provisions. The Justices’ Clerks’ Society *Good Practice Guide to Antisocial Behaviour Orders* states that: ‘*ex-parte* interim orders should be given as early a return date as practicable to allow the defendant an opportunity to be heard’ (2006: 6). Galligan goes as far as to say that,

although ‘*ex parte* applications by one party in the absence of the other are presumptively unfair...the unfairness can be *removed* by effective procedures for early challenge by the absent party’ (1996a: 391, emphasis added). While I would not go as far as Galligan in stating that an early return date necessarily *removes* inequity in procedure, the opportunity for a speedy challenge to an incorrect decision certainly provides redress for affected parties. Whether an individual who has had an *ex parte* order issued to them in error¹⁰⁶ would necessarily view an early return date as negating any injustice in the original procedure remains to be seen.

The principle of a hearing - the right to be heard – is thus not by any means absolute in law, and defendants should not necessarily expect to be afforded a hearing. Indeed, the discretionary power of the courts means that they will seek to establish if, given the type of case before them, fair procedure could only be achieved were the defendant given the opportunity to be heard. Galligan states that ‘the courts often ask whether a hearing is necessary in the circumstances of the case to ensure fair treatment’ (1996a: 353). Thus, it is argued that interim orders granted *ex parte* do not presumptively infer unfair treatment, rather, the issuing of *ex parte* orders should be considered within the context of the balancing of parties’ competing interests. While I certainly agree with Galligan’s statement that ‘there is still a strong case for a presumption in administrative processes generally in favour of a hearing, not as a fundamental principle, but for a mixture of practical and value-based reasons’ (ibid: 355), it is also apparent that the principle of a hearing falls within the scope of the discretionary autonomy of the judiciary to decide the bounds of fair treatment through their interpretation of symmetry, proportionality and individual rights-based considerations in ASBO applications. Thus, let us now turn to an analysis of judicial discretion within the context of administrative and procedural justice in ASBO cases.

Discretion and procedural justice

Harlow and Rawlings claim (1997: 516) that, in recent years, there has been a measure of increased judicial activism and of greater flexibility of response in judicial decision-making. Indeed, Marchetti and Daly have observed that ‘there is a new breed of magistrates and judges in the criminal courts who are taking a more activist stance in criminal justice policy’ (2004: 2), while Douglas and Laster (1992) have discerned the considerable optimism among magistrates regarding the

¹⁰⁶ Perhaps, as suggested by the European Commissioner on Human Rights, as a result of a spiteful neighbour(hood)/community vendetta against them (Giles-Robles, 2005)

potential of the courts to assist the community. Moreover, my earlier discussion (Chapter 2) of existing empirical research evidence on judicial discretion (see, for example, Anleu and Mack, 2005; 2007; Baldwin, 1997; Cowan et al., 2006; Hood, 1962; 1972; 1992; Hunter et al., Lawrence, 1995; Marchetti and Daly, 2004; 2005; Millie et al., 2007; Pawson et al, 2005) demonstrated the 'multifaceted' nature of judicial decision-making and the wide and diverse range of factors reported as being influential in how discretion is exercised. In this context, it is important to consider the implications of judicial discretion on administrative and procedural fairness in ASBO cases.

Decision-making and the 'public interest'

Socio-legal scholars have often noted the dangers inherent in discretionary decision-making (for example, Cowan et al., 2003; Hood, 1962; 1972; 1992; Lacey, 1992; Macdonald, 2003). For instance, Macdonald cites 'the possible use of illegitimate criteria, the risk of inconsistencies of outcome, and the potential for arrogant or careless decision-making' (2003: 195). Yet, it is important to remind ourselves also that while the principle function of the judiciary is to support the pillars of government established under the law, to maintain law and order, and to protect the public interest, traditionally it is not their role to promote or to advocate change, nor is it primarily to protect individual freedoms. However, instances when the courts will move to defend and to protect individual rights are notably, when this is deemed to be in the 'public interest'.

Yet, the court's validation (and potential endorsement) of the use of ASBOs against disadvantaged and/or marginalised groups (such as the mentally ill, homeless people and on-street sex workers), would seem to suggest a particularly narrow interpretation of this term ('public interest') by certain judges - and it is unconditionally the judges of both the higher and lower courts who decide the bounds of the public interest in ASBO applications. Hence, the inappropriate issuing of ASBOs is an area of concern, which raises questions about the value and status of civil liberties and human rights within antisocial behaviour legislation. While the Home Affairs Committee stated that 'we do not consider the inappropriate issuing of ASBOs...[to be] a major problem' (House of Commons, 2005a: 73), the Committee also recommended that 'the Home Office commissions wide-ranging research in this area' (ibid).

The interview study data demonstrated that, in many of the ASBO applications that came before the Sheriffs in Scotland, the defendants were likely to be affected by problems such as addiction, mental health problems, unemployment

and economic marginalization. Indeed, one Sheriff stated that 'something like 70% of the [total court] cases that come before us involve drug or alcohol dependency'. Similarly, critics of the ASBO have frequently identified that those who are made subject to the terms of the orders, are often those who have 'extreme vulnerability' as a result of their marginalized circumstances (for example, see Carr and Cowan (2006), Hunter et al. (2000)). As the interview data showed, the majority of Sheriffs interviewed, while acknowledging that addiction and mental health problems were common features of the ASBO cases that came before them, did not think that this necessarily presented a problem for ASBO applications per se – most saw addiction and mental health problems as 'a fact of life in these type of cases' which was to be 'expected'. Alternatively, (a minority) of Sheriffs were very concerned about the use of the orders for people with (in particular) addiction problems. Their concern about this aspect of ASBO use appeared to have an impact on the outcome of such applications. However, it was evident that these factors would only have an impact on sentencers' decision-making if the sentencers were (made) aware of the defendant's circumstances, or if they had previous knowledge of the defendant. In light of the interview findings, we will now consider more fully what forms discretion might take in ASBO cases, and how the effects of those forms affect judgements about administrative justice and fair procedure.

Consistency in decision-making

A particularly important empirical finding from the research study concerns the consistency in judicial decision-making in ASBO cases. This research showed that there were different patterns of decisions both between courts and between individual Sheriffs in courts. A variety of (possible) explanations to account for the variations between the courts became apparent. These factors include (but are not necessarily limited to): the prevalence and type of antisocial behaviour in the local authority area; the quality of relationship between the sentencer and the applicant authority; the local authority's willingness to use alternative interventions (ABCs, mediation et cetera); evidentiary requirements deemed necessary to obtain an interim/ASBO; and the attitudes of the solicitors/sentencers regarding interim/ASBO applications.

Moreover, there was also considerable variation between individual sentencers' decision-making on ASBO applications. The qualitative data obtained from the interviews with Sheriffs highlighted the contribution of the following key factors: whether the alleged antisocial behaviour perpetrator is already known to the sentencer; the presence of mitigating factors (for example, drug/alcohol

dependency and/or mental health problems); the sentencer's understanding of the status of breach proceedings; the sentencer's willingness to grant orders on conviction; the sentencer's understanding and/or awareness of ASBO legislation and case law. So far as sentencing for breach was concerned, decision-making was primarily influenced by the sentencer's understanding of the *status* of breach proceedings – that is to say, whether sentencers viewed breach proceedings (for criminal acts) as possessing an identical, or an elevated, legal standing in proceedings. A sentencer's view of the status of breach proceedings was underpinned by their belief about whether the purpose of the ASBO was to augment the available penalty for a criminal act. In this respect, there was considerable variation among sentencers' decision-making in breach proceedings. As a result, different penalties applied in relation to breach proceedings for similar criminal acts - depending on the decision-making of the individual sentencer, and whether they viewed the role of the ASBO as providing an *increment* in sentencing. However, much greater consistency in approach and outcomes was observed in relation to decision-making for orders on conviction (CRASBOs). The majority of sentencers were very reluctant to grant this type of order because they were dissatisfied with court procedure for the issuing of orders on conviction (in respect of information being passed to the Sheriff). However, it should be noted that there are other court jurisdictions in Scotland (which were not studied in the course of this research investigation) where sentencers have made greater (although still limited) use of orders on conviction. A larger scale study of sentencers' use of orders on conviction in Scotland would, it is suggested, be useful in further accounting for the differences in the approach of sentencers to the use of orders on conviction in other court jurisdictions.

In the course of the interviews, sentencers often commented on the 'political' nature of antisocial behaviour and the use of ASBOs. Some Sheriffs believed ASBOs were a 'bad idea' and a 'means to bypass justice', and that the recent focus upon the use of ASBOs was 'politically driven'. Other Sheriffs commented that antisocial behaviour legislation (including other antisocial behaviour interventions such as Parenting Orders) is rarely used. While the number of sentencers in favour of the use of ASBOs and those against appeared to be fairly well balanced, those sentencers who were opposed to the use of the orders, or who felt that the legislation was 'poorly constructed', explicitly stated that this did not mean that they were not granting the orders. Nevertheless, from interviews conducted with the sentencers, and from observation of relevant case files, it was clear that a broad range of factors impacts on judicial discretion in ASBO

applications - which may or may not be influenced by whether or not the sentencer supports, or is opposed to, the use of the orders. For example, one Sheriff stated that the orders must be well drafted in order for an application to succeed. Of course 'well drafted' is a subjective term, which, from the interview data, evidently varies in its interpretation. Moreover, the sentencers' attitudes as to what constitutes 'antisocial behaviour' are not uniform - but it is evident from the interviews that the local context, and the type and prevalence of antisocial behaviour in the local authority area, exerts some influence on the use of discretion in granting orders. Hence, a wide range of factors can be seen as being influential in how Sheriffs exercised their discretion in individual cases¹⁰⁷. In this respect, ASBO proceedings¹⁰⁸ are a lottery, depending both on court location and the individual sentencer.

Although it was concluded earlier in this chapter that the requirement for like cases to be treated alike, and different cases to be treated differently, was not absolute in terms of achieving fairness in legal administrative procedure(s) - as it is for the courts to decide best what procedures are necessary for fair treatment - one cannot avoid the inescapable, but wholly unsurprising, conclusion that judicial discretion has resulted in wide inconsistency in the administration of ASBOs. To what extent that inconsistency necessarily negates fairness in procedure is, at the very least, contentious.

Consider Pepinsky on discretion as a product of the law:

'There is no basis in our experience of the social world for believing that the meaning of written rules of conduct can be determined independently of the ambiguities of human interpretation....If sociologists are to be true to their disciplinary faith, they must reject pursuit of the issues of whether or not discretion under law exists in this or that setting, in favour of asking what forms discretion might take and how the effects of those forms might vary as changes are made in positive law.' (1978: 53, emphasis added)

Pepinsky's socio-legal analysis of judicial discretion demonstrates that discretion is not only something which operates at a formal level of legal doctrine, but is also an element that percolates through the entirety of legal administrative proceedings. He posits, correctly in my view, that we should not centre socio-legal debates on

¹⁰⁷ There was no evidence of judges having regard to inappropriate factors, simply that they approached decision-making in the different ways set out above.

¹⁰⁸ With regard to the formation of prohibitions, and sentencing for breach in particular

judicial discretion around whether discretion does or does not exist, or should or should not exist, in any given legal context – rather, we should consider the affective dimensions of discretionary decision-making. That is to say that, in this context, we must consider inconsistency in outcomes within the wider context of fairness and justice. In a similar vein, Millie et al.'s (2007: 261) recent study of borderline sentencing – while recognising the potential for judicial discretion to result in wide variation 'between sentencers, between courts [and] between social groups' - is sympathetic towards the use of discretion in the sentencing process. They contend that the need for judicial discretion in the sentencing process should be considered alongside arguments that discretion furthers, rather than 'erodes' justice¹⁰⁹.

However, critics of the use of ASBOs – and the 'postcode lottery' that exists in their application – often cite the indeterminateness of the legal definition of antisocial behaviour as being responsible for the inconsistency in their use. Although Macdonald has noted in his account of judicial discretion in the ASBO process, that '[s]ome degree of vagueness is unavoidable when seeking to define an umbrella term like antisocial behaviour' (2006: 206), Ashworth and Zedner (2008: 31) have argued that the flexible nature of the legal definition of antisocial behaviour – and the degree of discretion that it confers upon the courts - 'contravenes the rule-of-law principles of certainty and fair-warning'. In a related argument, proponents of the 'extravagant version of the rule of law theory'¹¹⁰ (that is to say, those who seek to limit the use of discretion within the law) contend that, in order to ensure that like cases are treated alike, and different cases are treated differently, the law must be specific in what it expects of those bound by it, and legislation must be clear and unambiguous when it seeks to curtail specific behaviour(s)¹¹¹. However, according to Pepinsky, such an assumption 'overlooks the fact, well known to semantics, that language does not determine its own meaning. As the language of the law grows more detailed, the number of pretexts grows geometrically for honest differences in interpreting how the law should be applied to cases' (Pepinsky, 1978: 30). Indeed, Pepinsky concludes that: 'The assumption that spelling out terms of the law reduces discretion is too glib to accept on its face' (ibid: 31).

¹⁰⁹ Although they do not go into detail, Millie et al. posit that a reduction in the weight attached to the offender's characteristics, and then subsequently, corresponding weight attached to the offence – might offer some form of response to debates about the operation of discretion in current sentencing practices (2007: 261)

¹¹⁰ See also Chapter 1

¹¹¹ See also Hart (1961: 155)

Similarly, my argument here, in considering these principles, is that de facto judicial discretion is not at fault. While I accept that there are legitimate discussions to be had concerning the legal definition of antisocial behaviour and its scope, inconsistency in decision-making remains inevitable for the reasons that I have stated above. However, I would argue that discretion can appear increasingly wide and unfettered, leading to public dissatisfaction with outcomes, when court procedures are themselves inept or lacking in some respect. As Pound¹¹² has articulated, public dissatisfaction with the courts can indeed be reduced, by alterations in court procedures. Earlier in this chapter, it was observed that nearly half of solicitors surveyed in England and Wales cited the 'urgent' need for the introduction of case management powers for ASBO applications. In this respect, it is suggested that improved case management and/or the creation of statutory case management powers is a possible means to improve fairness in ASBO procedure(s) and outcome(s).

Indeed, the benefits of case management for civil cases generally, have now been advocated for some considerable time. For example, in a 1995 *Review of the Business of the Outer House of the Court of Session* in Scotland, Lord Cullen clearly saw case management as potentially a very important provision which could be of benefit to all civil cases, but which could be targeted to particular areas or cases if necessary. In his recommendations, he suggested that a case management hearing should be fixed in every civil case, 'for the purpose of seeking, consistently with doing justice between the parties, the expeditious progress of the action and the avoidance of unnecessary expense' (Stoddart, 1997: 60). Moreover, Lord Woolf's report on *Access to Justice* (1996), adopts as its starting point the premise that unacceptable delays in civil cases will not be eliminated unless a system of case management is adopted by the judiciary. Such a system enables the court to allocate a case to a different 'track', if is practicable and desirable to do so. Furthermore, the most recent research on ASBOs conducted by the National Audit Office (2006: 7) also suggested that 'improved case management' would encourage the most effective use of the orders.

The main difficulty with the statutory implementation of case management in ASBO cases would appear, however, to be the allocation of judicial time for such a task. For example, although there are currently 154 courts in England and Wales specialising in antisocial behaviour applications, 46% of survey respondents in England and Wales detailed the continuing difficulties that they were encountering

¹¹² 9 A.B.A. Rep. 395 (1906)

with the speed at which the court deals with listing ASBO applications; and also with obtaining early court dates in urgent interim order cases. While it is 'good [court] practice' to list the first hearing of an application quickly so as to ascertain whether it can be contested, and if so, to identify the issues in the case (JSB, 2007), 20% of respondents in England and Wales, and 33% of respondents in Scotland, stated that the approximate average length of time an ASBO case was taking to come before the court, from Summons to Final Hearing, was more than 19 weeks¹¹³. Thus, it is suggested that a rigorous re-appraisal of court time-tabling is required in order that case management powers can be enacted for ASBO applications. Further, it is argued that statutory case management powers would help to ensure greater consistency, stringency and accuracy in approach to ASBO cases, and would also go some way to limiting unnecessary complexity. Hence, it is submitted that it that court procedures should be constructed rigorously to ensure that ASBOs are used proportionately, and with due consideration. It is my belief that removing discretion from the formal law is unlikely to alter the ways in which different courts, and different judges, operate court procedures. However, given the autonomy entrusted to local enforcement agencies, a rigorous approach to evidence gathering and case management should be ascribed the highest priority. In this context, the creation of case management powers in respect of all ASBO applications is recommended.

ASBOs, law, and power

In the final section of this chapter, let us now consider where the above discussion of the substantive research findings sits within the wider context of law as a site of power, and its potential to act as an instrument of domination. First, however, we must begin by briefly revisiting those areas which appear problematic for achieving 'fairness' and equity before the law in ASBO action. As Ashworth and Zedner have observed, recent changes to the treatment of defendants under the law in Britain, in respect of new legal definitions of crime, and the modification and revision of procedure(s) and sanctions, has 'profound normative implications for a liberal theory of...law' which necessitates 'its re-articulation and defence' (2008: 21). Through, in particular, the increased use of hybrid civil/criminal remedies and an escalation in the use of summary trials, Ashworth and Zedner contend that the

¹¹³ Campbell (2002: 56) had found that the average length of time, from summons to final hearing, was 13 weeks, with some applicant agencies reporting up to 6 months. Fletcher (2002) found that more than half of ASBOs granted in Scotland (2001-02) took more than 16 weeks to obtain (from the date of lodging the application in court).

traditional safeguards of due process are being eroded, resulting in the disintegration of our established concepts of procedural justice (see also Ashworth et al., 1998; Ashworth, 2006).

As we have seen from the discussion above, there are significant grounds for such a critique of the ASBO process. Indeed, basic procedural rights such as the need for proper notice of charge, adequate time for preparing a defence, state-funded legal assistance, the right to confront witnesses et cetera have all been considered critically in the context of ASBO legal and court processes. Moreover, attention has been paid to the use of evidence in ASBO applications, where it has been observed that the primary source of evidence in interim cases is untested hearsay – which, it was found, has been used in some circumstances to form the sole basis to full ASBO applications. The wide discretion available to both applicant authorities and to judges also means that orders are used to proscribe forms of low level nuisance behaviour as well as more serious forms of criminal behaviour which, some sentencers argued, may be better dealt with under the general criminal law.

However, I am arguing that, within the ASBO process, law retains its status as a site of power – which is used not simply as a mechanism to circumvent the safeguards of due process, but *which is being used* as a means to protect and to guarantee liberties. It is certainly the case that the evidence presented within this thesis (specifically in the form of the survey data from England and Wales) illustrates the requirement for improved administrative courts procedures which, notably, I have suggested could be addressed through improved case management. However, I think that the evidence (specifically in the form of the interview data from the Scottish sentencers) also shows that the law – *in its current form* – is being used as a means to safeguard the interests of ASBO defendants. As one sentencer noted:

‘...the law [on ASBOs] as it currently stands means, I think, that [sentencers] ought to think very carefully about...due process and should give proper regard to that...it’s important that justice is not bypassed’ [S3]

The central question should be therefore – is the balance of interests between public protection and the procedural rights of the defendant correctly struck? We must, however, be careful here in distinguishing what is meant by the ‘balancing’ of rights in ASBO cases since the notion of ‘rebalancing’ could be interpreted as an explicit reflection of sectional interests. As Zedner (2005), amongst other

criminologists has argued, the experience of criminal justice is that 'balancing' is a politically dangerous metaphor - unless careful regard is given to what values are at stake.

In this context, it is important to be mindful that it is not necessarily the circumvention of the safeguards of due process *per se* that are given primary consideration in many of the existing critiques of ASBOs (see, for example, Brown, 2004; Scraton, 2004) – rather, it is the evidence that some social groups appear to be targeted disproportionately by the ASBO model. Notably, no statistical data is collected by the Home Office or the Scottish Executive on the numbers of ASBOs issued to people with disabilities (such as Tourettes Syndrome, Asperger Syndrome, Attention Deficit Disorder, Autism and other autistic spectrum disorders and mental health problems). Moreover, a recent report found that data on the ethnicity of ASBO recipients is not collected at central government level, is not adequately monitored at local level, and as a consequence, there is currently no way to investigate whether black and minority ethnic communities are disproportionately represented in the numbers served with an ASBO (Isal, 2006). However, as discussed earlier in this thesis, it is known that ASBOs *are* served disproportionately on social housing residents and that nearly half of all ASBOs are served on children and young people. While social control theory, and more explicitly, its links to social stratification and crime control, does not form the basis of this research investigation - since this study is concerned primarily with understanding and explaining procedural and administrative fairness in the ASBO process – the social-demographic characteristics of ASBO recipients is an area that evidently requires further empirical study, particularly in the context of (antisocial behaviour) policy and social structure. For example, Western (2004: 38) has argued that 'crime control efforts have become so pervasive in poor urban communities that they have distinct effects on the social structure. Indeed, crime control...is constitutive of the social structure'.

However, where do we place Foucault's notion of the ubiquity of power, and the relevance of expert knowledge that we considered in Chapter 2, within the context of this discussion of law as a site of power? In my view, the evidence presented within this thesis demonstrates both the power and the autonomy of law which is, as Smith rightly identifies: 'impenetrable to the incursions of all those judges of normality to whom Foucault refers' (2000: 295). However, Smith is, I think, only half correct when she advocates the primacy of law as a site of autonomous power. While I entirely agree that law establishes and protects its own rational, principled rules within the juridical field – and can choose to reject or to

appropriate the discretionary/normative assessments of expert knowledge as it sees fit - law is not its own legislator. Hence the creation of new legal provisions, or 'new law', is of course contingent upon statute (or common law). In this respect, Ashworth and Zedner (2008) are correct to warn us about the 'decline of the criminal law' through the introduction of 'hybrid' orders like the ASBO. Sentencers, despite the existence of a significant degree of discretion, are constrained by the existing statutory provisions on ASBOs. So, returning to the question of 'balance', I would argue that despite the level of 'protection' offered by the judicial application of the law, there still remains a substantive requirement for improved administrative courts procedures.

It is important to note, however, that in opposition to Ashworth and Zedner's contention that procedural justice is becoming progressively undermined, other criminologists have argued for a cost-based analysis of procedural rights. For example, Green posits that:

'[g]iven the high costs of ensuring that defendant's rights are protected, and the limited resources available to cover such costs, it seems surprising that procedural protections are not allocated proportionally, so that, the more serious the offence charged, the more extensive the process due; the less serious the charge, the less due... In a world of limited resources and a diminished willingness to expend those resources on the rights of criminal defendants, the only practical alternative might be to engage in some form of rationing' (2008: 53-57).

In my view, the procedural protections that are afforded to defendants under the law goes to the heart of how we conceptualise the role of law in the constitution of modern society, and within this paradigm, law's relationship to power and social structure. The concept of cost conservation as a basis for delimited procedural rights is not one that sits well with any advocate of procedural justice rights (see, for example Ashworth, 2006; von Hirsch, 1993). Such an approach to criminal procedure would undermine our model of law, and the basic principles which underpin it and would, moreover, potentially risk unreliable outcomes. Defence of the liberal model of law and trial posits that there must be a justifiable link between censure through conviction, accountability through punishment, *and the requirement to uphold the rights of the defendant through procedural fairness* (Ashworth and Zedner, 2008: 49). It is this last link which I have sought to examine

within the context of this discussion in order to provide knowledge upon which to further understandings about ASBO legal and administrative procedures.

Conclusion

Throughout the body of this thesis, I have argued that established literature has, to an extent, been neglectful in its analyses of the socio-legal dimension(s) of ASBO use. Indeed, it is the central contention of this research study that 'law' (and legal procedure(s)), is an intrinsic, empirical component of the wider social structure on antisocial behaviour and the use of ASBOs in Britain. Moreover, it has been observed that much of the empirical research on ASBOs does not provide any account of the use of interim orders, or orders on conviction, nor does established literature adequately consider the role of administrative and legal procedure(s) in ASBO applications in deciding ASBO outcomes; or the position of the judiciary within ASBO cases (with regard to discretionary autonomy, and pivotal jurisprudential decisions). Subsequently, this research study has sought to investigate the extent to which legal procedure(s) and judicial discretion influence the management and outcomes of ASBO use in Britain.

Hence, the research evidence discussed in this chapter has demonstrated that legal procedure(s) and judicial discretion and decision-making significantly influence the form of ASBO prohibitions and the type of behaviour made the subject of an order; the extent of the impact of mitigating factors; the evidentiary requirements necessary for an interim/ASBO application; the sentencing tariffs for breach; the frequency with which orders on conviction are issued; the frequency with which orders are granted to children and young people; and, the ability of alleged antisocial behaviour perpetrators to defend or to appeal action against them. Furthermore, the detailed exploration of ASBO application processes and decision-making found variation in the standard of evidence required to obtain an interim/ASBO, and differences in the quality of legal representation available to defendants in ASBO applications which can, it is fair to state, affect the risk of erroneous deprivation of substantive rights in ASBO cases, in respect of defence and appeal procedures.

Building on existing theoretical frameworks on procedural justice, and moreover, on conceptual paradigms of 'fairness' and consistency in judicial decision-making developed in other empirical studies of procedure and judicial discretion in the lower courts (Anleu and Mack, 2007; Cowan et al., 2006; Hunter et al., 2005; Lawrence, 1995), this chapter has sought to understand the network of

(procedural and juridical) factors that influence the use of ASBOs in Britain. Moreover, the discussion embodied within this chapter has also attempted to reconcile identified procedural factors with substantive outcomes in the context of procedural justice in ASBO applications/cases. Subsequently, it has been argued that 'fairness' in ASBO proceedings should not be conceptualised simply in terms of their inconsistency in application; the disproportionate nature of their prohibitions; or their use against 'marginalised groups' such as young people and social housing tenants, but fairness must also be considered in terms of the design and implementation of legal rules, both substantive and procedural. In contrast to much of the existing literature on ASBOs, this research study has identified the primary influence of legal procedure(s) and judicial discretion on how, and against whom, ASBOs are presently being used. It is argued that in order to ensure greater consistency, stringency and accuracy in approach to ASBO cases – in essence, in order for there to be more 'fairness' in ASBO processes - there must be a greater socio-legal focus upon the influence of *substantive* practices and *formal* procedural rules. In the following final chapter, how far the empirical research conclusions contribute to, and build upon, existing socio-legal theoretical frameworks will be considered, and the study data's overall contribution to the knowledge of the subject will be assessed.

Chapter Eight

Conclusion

Introduction

This last chapter consolidates the constituent elements from previous chapters, and in so doing, connects the evidence emerging from the thesis, to the original purpose of the research study in seeking to determine the influence of legal procedure(s) and judicial discretion on the use of ASBOs in Britain. Hence, the research findings are discussed in terms of a socio-legal analysis of the ways in which the dimensions of due process and legal primacy; and juridical power and discretion, intersect to shape the administration, management and outcomes of ASBO use in Britain. The chapter also considers the wider significance of the research findings for the empirical study of antisocial behaviour orders as a sociological phenomenon, and the specific contribution that the evidence embodied within this thesis makes to knowledge(s) of the administration, management and outcomes of ASBO use in Britain. The first section of the chapter begins with a short discussion of the established literature on ASBOs; and the specific aperture in knowledge(s) and understanding(s) that this study sought to address. The next sections summarise the research evidence emerging from the investigation; the implications of the data to the sociological study of ASBOs and the limitations of the findings; and the study data's contribution to the knowledge of the subject. The final section provides some brief suggestions for further research and future work that is indicated by the thesis findings.

Established literature

Since antisocial behaviour orders came into force on the 1 April 1999, there has been a limited amount of scholarly research conducted into their administration, management and effectiveness. However, the laconic nature of the established literature on ASBOs is, of course, to be expected given that ASBOs (and, more widely, antisocial behaviour policy) are relatively recent additions to the sociological field of study. Indeed, given the slow initial uptake of the orders by applicant agencies (Burney, 2002; Campbell, 2002a), the value in conducting earlier studies on ASBO use would have been negligible, given the limited amount of empirical data that could have been obtained. By way of illustration, although Campbell's work on ASBOs in England and Wales (2002) provided a range of very useful data on the administration and management of the orders, she was unable (because the

relevant legislation had not yet been enacted) to provide any evidence on the use of interim orders, or of orders on conviction. Similarly, in Scotland, the first study on the use of ASBOs, conducted by the Chartered Institute of Housing (CIHS, 2003), established that there were large variations in the incidence of ASBO usage between local authorities. However, the study was narrow in scope, exploring only the administration of ASBOs without an examination of the reasons for the geographical variations. Furthermore, the research did not provide an account of the use of interim orders, or the use of orders on conviction, nor any detailed exploration of ASBO application processes or outcomes.

More recent sociological literature on ASBOs (for example, Burney, 2005) makes only fleeting reference to the use of orders on conviction and the recent difficulties associated with interim orders¹¹⁴, I would suggest, primarily because there exists very little empirical research evidence to draw upon. Current socio-legal scholarship on ASBOs has used a discussion of case law and legal precedent to inform their analyses of the use of the orders (for example, see Macdonald, 2003; 2006). While it is acknowledged that court decisions and court records on the use of ASBOs are very useful as a method of data production (indeed, I too examine court decisions and selected cases within the body of this thesis), it is also apparent that there is evidently a need for further empirical research in this area which focuses on, but is not limited to, administrative and legal process(es) in ASBO, interim order, and order on conviction applications, and the substantive outcomes of these processes.

Moreover, existing sociological research and scholarship on ASBOs has, as we have seen, been very much concerned with conceptualising antisocial behaviour orders, and antisocial behaviour policy more generally, as a 'regime of signification' (Lash 1988). For example, while Burney (2002) and Cowan, Pantazis and Gilroy (2001) have observed the social housing sectors' increased use of and reliance upon procedures synonymous with crime control; Brown (2004) and Hester (2000) have suggested that the control of antisocial behaviour through the use of ASBOs has become a means for the social control of marginalised groups by local authorities. Indeed, Ravetz (2001; cited in Flint (2006: 21)), goes further in his analysis of control in social housing, and posits the existence of a (historically) bifurcated relationship - that has been fundamentally inherent in social housing - whereby the objective of council housing was, and remains, *equally* as much about

¹¹⁴ For example, there is currently a case before the Inner House in Court of Session in Scotland on the issue of the legitimacy of breach proceedings for interim orders (which have been obtained on a prima facie basis and without the hearing of evidence)

altering and moulding the behaviour(s) of the poor towards normalised – and orthodox middle class - standards of behaviour, as it has been about the provision of affordable housing. As Flint observes (2006: 24), housing governance as a form of policing has ‘many historical precedents’, but the difference now is manifested only in name, through the use of ‘antisocial behaviour’ as a ‘reconfiguration’ of old technique(s) of control. Policing has taken on the guise of housing management; however, the categories of people who are identified as ‘risk’ groups remain unchanged.

Consequently, the use of ASBOs is now widely considered within sociological scholarship to be a restrictive and fundamentally reactionary process whereby professionals and practitioners attempt to sequester the behaviour(s) of historically ‘targeted populations’: lone parent mothers, those with addictions, mental health problems and learning difficulties, social housing tenants, prostitutes, and young people (Brown, 2004; Burney, 2002; 2005; Hester, 2000; Sagar, 2007; Scraton; 2004; Squires, 1990; 2006;). For example, in her incisive study of the use of ASBOs against sex workers, Tracey Sagar (2007: 156, 164) has identified both the ‘historic popularity’ of punitive and exclusionary measures to target on-street sex work, coupled with the reluctance of the police and other agencies to locate the social/welfare issue(s) of sex work above the traditional police ideology of sex work as, fundamentally, a ‘policing problem’. Moreover, it has been argued that the use of ASBOs against sex workers to exclude them from residential areas has been as much about the sanitising of public space for the ‘respectable’ (middle class), as it has been about tackling the derivative nuisance associated with on-street sex work (Hubbard, 2004, cited in Sagar, 2007: 156).

Thus, dominant academic perspectives on antisocial behaviour policy and the use of ASBOs are largely concerned with locating the significance of the contribution of applicant authorities (and in particular, social housing agencies) on the administration and uptake of the orders. Acknowledging the importance of this existing scholarship, this thesis contends that the position of both legal procedure(s) and the court system in ASBO applications is also one of fundamental primacy, which has necessitated the further research and analysis embodied within this thesis. Specifically, this study has sought to investigate the primacy of legal procedure(s) and judicial discretion within ASBO cases in Britain. Established literature has, to an extent, been neglectful in its analyses of the socio-legal dimension(s) of ASBO use. Indeed, it is the central contention of this research study that ‘law’ (and legal procedure(s)), is an intrinsic, empirical component of the wider social structure on antisocial behaviour and the use of ASBOs in Britain. It

has been argued that existing research does not adequately consider the role of administrative and legal procedure(s) in ASBO applications in deciding ASBO outcomes; or moreover, the position of the judiciary within ASBO cases (with regard to discretionary autonomy, and pivotal jurisprudential decisions). Hence, the primary thesis that the preceding chapters were concerned to elaborate and to substantiate was that the study of the administration of antisocial behaviour orders in Britain requires that attention be paid to the social factors underpinning their use (as existing literature has done), but equally, the legal and court process(es) that intersect to shape practices and outcomes.

Research findings and implications

The research study sought to investigate, specifically, the influence of legal procedure(s) and judicial discretion within ASBO cases in Britain. The empirical research evidence found that legal procedure and judicial discretion fundamentally impact upon the administration of ASBOs, specifically in respect of prohibitions; interim orders; orders on conviction (CRASBOs); sentencing for breach; defending ASBO applications; and the use of ASBOs for young people and children. Moreover, the research findings have distinct implications in terms of practice, understanding, and theory, with regard to the use of ASBOs in Britain. Although it was clear that judicial discretion at times facilitated greater efficacy in the operation of the relevant legislation, in respect of complex decisions which could be made on a case-by case basis; the protection of rights; and the avoidance of undue rigidity in the operation of the rule of law; it was also evident that the treatment of ASBO defendants - particularly with regard to ASBO prohibitions and sentencing for breach – is a lottery, depending on court location and the individual sentencer presiding over the application¹¹⁵.

The reasons for the differences in approach between sentencers in ASBO cases (as discussed in Chapter 7) were composite and complex. Indeed, explanations for the use of judicial discretion - in general - are themselves, composite and complex (see, for example, Hawkins, 1992; Baldwin, 1997; Davis et al., 1998). Cowan et al. correctly describe judicial discretion as ‘multi-faceted’ (2006: 570), in that individual judicial decision-making does not subsist in a vacuum. While discretionary decision-making will be influenced by the particular decision to be made in a particular case, many other elements also feature in the decision-making process - such as the wider circumstances of a case, and,

¹¹⁵ C.f. the findings of Cowan et al. in their study of District Judges and possession proceedings (2006)

perhaps most importantly, perceptions of and beliefs about the nature and cause(es) of a particular ‘problem’. The ‘multi-faceted’ nature of judicial discretion was clearly evident in the earlier discussion (Chapter 7) of the differences in approach between sentencers in ASBO cases. However, I stopped short of constructing a typology of judicial discretionary decision-making for two reasons. Firstly, given the size of the interviewing sample, it was felt that a typology may lean towards the presentation of unnecessarily standardized and/or harmonized data findings and, at worst, deceptive results. And secondly, it was not evident that the construction of such a typology would necessarily have been advantageous or appropriate in elucidating the research study findings further, or in contributing to better understanding(s) of the data. Instead, the discussion of the reasons for the differences in approach of the sentencers in Chapter 7 provides a detailed and full analysis of the interview findings.

In terms of the substantive differences in the research findings between England and Wales, and Scotland, there are four particular areas on ASBO procedure and judicial decision-making which display, for the purposes of this research study, the most salient differences: ASBO prohibitions, the use of orders on conviction (CRASBOs), breach proceedings, and the use of ASBOs for children and young people. Let us now briefly consider each in turn. The majority of Sheriffs interviewed stated that they were very uneasy about criminal behaviour forming the basis of ASBO prohibitions. In particular, Sheriffs noted the difficulties for local authorities where an expectation existed among residents in certain locales that the council should be the ‘primary agency’ involved in addressing community problems such as drug dealing and aggressive behaviour. Subsequently, the majority of Sheriffs interviewed stated that they believed that criminal behaviour should remain a matter for the police – and not the local/housing authority. Sheriffs were also of the view that any criminal behaviour that was violent in nature should *not* be a matter to be addressed by the council or housing authority. As previously discussed (in Chapter 6) this issue is specifically pertinent to Scotland, and the Scottish Courts, because in England and Wales the police are empowered under the 2003 Act (as amended) to act as a ‘relevant authority’ for the purposes of ASBO applications. Moreover, during the early stages of the research investigation, it became apparent that the police frequently act as the lead agency in ASBO cases in England and Wales. It is suggested that because ASBOs are often being used in Scotland to prevent behaviour that is, in any event, a criminal offence (particularly with regard to drug dealing and verbal/physical abuse), an amendment to the 2004 Act to enable the police to act as an applicant agency for ASBO

applications in Scotland (in the same way as legislation allows South of the border) would appear to be necessary.

The use of orders on conviction (CRASBOs) also differed substantially between the jurisdictions of England and Wales, and Scotland. Although the reasons for this have been discussed in detail, it is evident that the primary explanation for the low numbers of CRASBOs in Scotland is as a result of the existing legal procedure for CRASBOs which has meant that Sheriffs are not imparted with the relevant information that they feel is necessary to make such an order. It is very unlikely that numbers of orders of conviction will rise substantially in Scotland in the near future, given the strong reluctance of Sheriffs to make use of the orders within the present system, and where no established protocol exists. Similarly, there was an equally strong distinction between the use of orders for children and young people in Scotland, and in England and Wales. While existing literature had shown there to be a strong numerical difference in ASBO use between the jurisdictions, the research study was able to contribute to knowledge(s) by showing a clear distinction in the dispositions of practitioners (solicitors) and the courts in Scotland, and in England and Wales, towards the use of the orders for children and young people. Again, it is suggested that, for the reasons that I have already discussed, the use of ASBOs for children and young people in Scotland is unlikely to increase substantially in the near future given the reluctance of both solicitors, and the courts to make use of the orders in this way – coupled with perceptions (in the Scottish legal system) that ASBOs for children are ‘ineffective’, ‘irrelevant’, and ‘a sanction without punishment’.

While differences existed in the treatment of ASBO breaches between Scotland, and England and Wales, this was not (unlike the use of CRASBOs, or orders for persons under the age of 18) a result of separate and distinct jurisdictional philosophies and/or sensibilities towards this aspect of ASBO procedure. Rather, the differences in the treatment of breach occurred largely as a result of case law being further developed in England and Wales, than in Scotland. However, it was also apparent that inconsistency in sentencing for breach proceedings was prevalent in all jurisdictions, as a result of judicial discretionary decision-making, whereby individual sentencers set the tariff for breach in each case. Subsequently, it has been argued that recent cases demonstrate that judicial discretion has allowed for sentences to be given which continue to be disproportionate to the harm caused.

Finally, let us now consider the ways in which the current research findings connect with existing theory on procedural justice, and judicial discretion. The study

findings show that the quality of legal procedure(s) and the outcome of ASBO cases (in particular, with regard to prohibitions and sentencing for breach) is very variable. The impact of the difference(s) in legal procedure(s) and judicial discretion has combined to produce an indigenous system in each court jurisdiction whereby the treatment of ASBO defendants is in many ways a lottery, depending on court location and the individual Judge presiding over the application. So, if we reflect upon the research findings within the wider paradigm of procedural fairness and access to justice in ASBO cases, several observations are immediately worthy of note.

With regard to procedural fairness, the key notion (as previously discussed at length in Chapter 7) is that it is the *process itself* - and not the outcome that defines procedural justice. Hence, it is important here to consider whether either party to an ASBO application (the defendant or the applicant authority) enjoys an advantage in legal proceedings. On balance, and taking account of interim *ex parte* applications, it is argued that legal procedure(s) in ASBO applications are unduly weighted in favour of the applicant authority. Moreover, variation in the quality of legal representation available to defendants in ASBO applications does, it is fair to state, affect the risk of erroneous deprivation of substantive rights in ASBO cases. The central aim of providing access to justice should be to ensure that every citizen receives implementation of his/her legal rights at the lowest overall cost, not just to litigants, or the courts' budget, but to society as a whole, and it has been argued that the current system is failing ASBO defendants (and parties to civil proceedings more generally) in this regard. The conclusion that we might draw is that in the absence of rigorous and standardised legal procedure(s) in ASBO cases, the courts have an important role to play in developing standards of procedural fairness. Consequently, I have argued (Chapter 7) in favour of an improved approach to evidence gathering and case management should be ascribed the highest priority.

But how far do the empirical research conclusions contribute to, and build upon, existing socio-legal *theoretical frameworks*? First, let us consider law/power in the socio-legal context of the research findings. This thesis has sought to understand the power of law in ASBO processes: that is to say, this study has paid attention to the structure and organisation of law, its substantive consequences, and the way(s) individuals and organisations seek to employ it, have varying degrees of access to it, or find themselves differentially affected by it. However, as we have seen, 'law has a role not only as a primary technique of governance but also as a significant constituent of social forms, and practices' (Cotterrel, 2002:

643). Moreover, Sommerlad (2004: 347) has observed that law is analogous with other formally organised cultural structures – such as language – in the respect that the inter-relationship between law and the social is fundamentally ambiguous: justice in law is derived from the unbiased employment of legal rules in order to affect rights and duties ('procedural justice'), but – at the same time - Sommerlad observes law's disinterest in 'social justice', which is 'fundamental to law's central role in the reproduction of the existing socio-economic order and general legitimisation of inequality' (2004: 347). In a similar vein, (as discussed in Chapter 7) it was also discerned that the principle function of the judiciary is to support the pillars of government established under the law, to maintain law and order, and to protect the public interest. Traditionally, however, it is not their role to promote or to advocate change, nor is it primarily to protect individual freedoms.

Hence, the empirical research study findings on the role of legal procedure(s) and judicial discretion connect with existing theory on concepts of 'justice' and 'fairness' in legal processes, in the respect that justice in law has been considered (in the course of this thesis) as being achieved through de facto legal procedures, as opposed to outcomes ('procedural justice'). However, the research conclusions also diverge from existing, 'formal' conceptions of justice, and how it is to be achieved in law. Formal justice is traditionally obtained through the deployment of legal procedure(s) and pro forma juridical process(es). In contrast, substantive justice (outcomes) is dependent upon discretion in decision-making (with deference to 'external' elements, such as, for example, social and policy factors). In the context of the empirical research findings embodied within this thesis however, there is, necessarily, a blurring of the boundaries between 'formal' and 'substantive' justice.

By way of illustration, we have observed the structure and organisation of law governing the use of ASBOs, and the formal role of legal procedure(s) in determining processes and substantive outcomes. However, the influence of judicial discretion in both promoting the collective, social values of law, but also in protecting the individual from the over-extending autonomy of the state, is apparent. While the limits of discretion in protecting individual freedoms and in contributing to positive 'social change' has already been observed (see Chapter 6), it is also evident that it is necessarily within the scope of the discretionary autonomy of the judiciary in ASBO cases to decide (and to some extent, to correct) the bounds of fair treatment through their interpretation of symmetry, proportionality and individual rights-based considerations in ASBO applications. Thus, the research conclusions agree with theoretical positions that advocate the need for

improved pro forma legal procedure(s) in order to negate inequality in the formal administration of law, but the findings also serve to highlight that, in considering, and in coming to understand, socially embedded concepts of 'justice', substantive outcomes can also be shaped by *informal* practices, and that subsequently any socio-legal examination of 'justice' or 'fairness' in the mechanism of law, should ensure that practices that impinge on substantive justice outcomes, should be afforded equal analytic weight. Hence, the thesis conclusions have found that both *formal* legal procedure(s), and *substantive* judicial discretionary decision-making fundamentally impact upon the administration, management and outcomes of ASBO use in Britain, but they also impact upon the law's approach to rights' claims, and its overarching concern with justice.

Limitations of the research

The research study was compromised from the outset by my inability to gain access to the courts in England and Wales. Moreover, the small sample size for the online survey in Scotland further reduced the scope and value of the research. This in turn had consequences for the ways in which the research findings could be discussed and applied (see Chapter 7). However, I think that the study has produced some useful results which will be of interest to those other researchers in this field – although the data produced is more limited in scope than was originally intended at the outset of this study. In wider terms, we can also see that the research is also conscribed by virtue of its context. For example, the significant work of Anleu and Mack (2007), while demonstrating the importance of empirical socio-legal research on the decision-making of the judiciary, also serves (in the same way as this study does, I think) to illustrate the contextual limitations of this type of research. Indeed, they note without hesitation that:

'Law itself is not necessarily the most important factor in understanding how society changes; it cannot resolve such problems as inequality – which have their origins elsewhere in market conditions, politics, or ideology – it can only manage disputes or remedy specific injustices that emerge from these problems, which, nonetheless, resurface in other guises and situations.' (Anleu and Mack, 2007: 190)

Hence, this study sought to examine, primarily, *legal* elements of ASBO use within a sociological sphere of analysis. As Anleu and Mack observe, these factors (legal process(es) and judicial decision-making) can impact on social change at a local or

micro level, but any wider understanding of the 'problem' of antisocial behaviour requires a detailed study of economic, social and cultural factors which are beyond the scope of this thesis.

Recommendations for future work

Much more needs to be known about ASBO procedure(s) and outcomes. In particular, an empirical evaluation of their (in)effectiveness in reducing and/or preventing antisocial behaviour is, it is submitted, urgently required. Given the range and number of antisocial behaviour interventions that have been created in recent years (for example, Acceptable Behaviour Contracts (ABCs), Parenting Orders (POs), Parenting Contracts (PCs), Closure Orders, Dispersal Orders), an evaluation of which interventions work best (if at all) is also essential.

Conclusion

In this thesis, I have argued for an approach to the research process which begins with an empirical investigation of decision-making and moves on to consider the influence of legal procedure(s) and judicial discretion on the processes of social construction which comprise the administrative and legal processes in ASBO cases. It is hoped that the research study findings embodied within this thesis will prompt new and renewed debate about ways of improving ASBO procedures to ensure fairness for *all* interested parties. By largely focussing upon the rights of the defendant in ASBO applications, the intention of this research has not been to ignore the rights of the victim in ASBO cases – rather, this study has sought to consider the influence of legal procedure(s) and judicial discretion in ensuring that the victims of antisocial behaviour are protected, but not at the expense of injustice to others. Indeed, if the positive function of law as a 'vital regulatory mechanism' as well as 'a source of individual empowerment' (Sommerlad, 2004: 350) is to be discharged, it is necessary that identified problems in the current system are understood and addressed. If ASBOs are to be continued to be used as a preventative (and protective) order in the future, and not repealed or replaced by future governments, then their use must be legitimate, and it must *be seen to be* legitimate. A procedure that creates civil orders that are illegitimate and ineffective will no doubt be replaced or removed - and so ASBOs must evolve, they must become fairer in their application, their quantifiable effectiveness must be demonstrated by future empirical research, and the conflict between protecting

individuals from antisocial behaviour versus the rights of defendants must be more adequately addressed.

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- European Convention on Human Rights
- Human Rights Act 1998
- Magistrates' Courts Act 1980
- NHS and Community Care Act 1990
- Police Reform Act 2002
- Protection from Harassment Act 1997

Sex Offenders Act 2003

Serious Organised Crime and Police Act 2005

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R (A) v Leeds' Magistrates Court and Leeds City Council [2004] EWHC 554 (Admin)

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Appendices

Appendix 1

Ethical approval (University of Stirling) application

RESEARCH PROPOSAL FOR ETHICAL CONSIDERATION

JANE DONOGHUE

ID: 1318592

Aims of research project

The subject of the main study is an investigation that seeks to understand the contribution and influence of the court system and judiciary in deciding ASBO applications in both Scotland, and in England & Wales.

From analysis of existing research (Campbell, 2002; Burney, 2002; CIHS, 2003; Scottish Executive, 2004; 2005; Brown, 2004), specific gaps in the knowledge and understanding of ASBO use in Britain has been identified. What has been overlooked in current research on the use of ASBOs in Britain, is a deeper insight into the fundamental contribution and situs of the court system and legal process in determining the manifold functions of the ASBO, and, their statutory limitations within the law on antisocial behaviour.

Although research on behalf of the Scottish Executive, for example, notes that a significant factor in 'influencing regional variations...was the varying attitude of the courts' (2005: 2.27), more detailed and extensive research into the use of ASBOs requires an analysis of legislation, court files, stated cases, legal precedents/case law, and interviews conducted with judges and solicitors to be correlated. It is the objective of this research to correlate these aspects of the legal and court processes to provide more comprehensive and developed research on ASBO applications in Britain.

There are also no comparative studies in existence that analyse the differences/similarities between the ASBO application procedure in Scotland, and South of the border. Hence, it is also the purpose of this research project to provide a comparative analysis of court procedure in Scotland, and in England & Wales, in ASBO applications. It is hoped that clearly identifying the successes and encountered difficulties in the application process within the separate jurisdictions, will be a relevant, and hopefully useful, contribution to research in this area.

Methodology

Online survey questionnaire

The research fieldwork is to be conducted in two stages. The first stage consists of an online survey questionnaire to be answered by local authority solicitors involved in ASBO applications in both Scotland, and in England & Wales.

The online survey questionnaire is interested in local authority solicitors' experiences of ASBO cases and their opinions on court procedure, legislation and case law, evidentiary requirements, and any difficulties that they may have encountered with ASBO proceedings in court.

It is proposed that an email will be sent to individual local authority antisocial behaviour co-ordinators or community safety officers. [Part 1 of the Antisocial Behaviour Etc. (Scotland) Act 2004 places a statutory duty on each local authority and relevant chief constable in Scotland to prepare a strategy for dealing with antisocial behaviour in the authority's area. Moreover, The Crime & Disorder Act 1998 also places a statutory duty on chief police officers and local authorities in England & Wales to work together to develop and implement a strategy for reducing crime and disorder, hence individual authorities in both Scotland, and in England & Wales, possess antisocial behaviour co-ordinators, or community safety officers, for the purposes of their statutory duties in respect of reducing antisocial behaviour, crime, and disorder.]

Contact details for antisocial behaviour co-ordinators/community safety officers are available on local authority web sites and also on the Home Office's 'Together' website (www.together.gov.uk). It is proposed that the antisocial behaviour co-ordinators/community safety officers of each local authority will be contacted directly, giving details about my institution and the research project that I am conducting. I will then ask if they will then consider forwarding their solicitor(s) an email from me, detailing the nature of the research project and providing the link to the online survey questionnaire (please see appendix 1).

In Scotland, there are 32 local authorities and I will contact the antisocial behaviour co-ordinator/community safety officer for each authority as detailed above. In England & Wales, there are 410 local authorities and I will contact the antisocial behaviour co-ordinator/community safety officer for each local authority. However, unlike in Scotland, where it is only the local authority or Registered Social Landlord (RSL) which acts as the relevant agency for the purposes of ASBO applications (s. 2 of the Antisocial Behaviour Etc. (Scot) Act 2004), in England & Wales, a relevant authority can be a local authority, registered social landlord (RSL) or the police (s.2 of the Antisocial Behaviour Act 2003).

Registered Social Landlords (RSLs) are also empowered under the relevant legislation (Antisocial Behaviour Act 2003; Antisocial Behaviour Etc. (Scotland) Act 2004) to make ASBO applications. However, research has shown that the number of ASBOs originating directly from RSLs is small. For example, in Scotland, 13% of full ASBOs were found to originate from RSLs/housing associations/co-ops, (Scottish Executive, 2005: 4.1). Due to the high number of RSLs in existence in Scotland (296), and in England & Wales (over 1,800 in England alone), it is proposed that it would not be prudent or expeditious for the purposes of this research study to contact RSLs to try to contact solicitors involved in ASBO applications that they may be pursuing.

Care will be taken when initiating contacting procedures so that the individual solicitors' privacy is respected. As detailed above, local authority antisocial behaviour co-ordinators will be approached first to ask if they will consider approaching their solicitor(s) regarding their possible participation in the research. Email solicitations can be considered 'spamming' (Madge, 2006) so it is necessary to obtain permission from the antisocial behaviour co-ordinators/community safety officers to contact their affiliated solicitor(s) at the outset. Antisocial behaviour co-ordinators/community safety officers act as gatekeepers to the solicitors, and

access to the solicitors will be entirely dependent upon whether or not the antisocial behaviour co-ordinator/community safety officer is willing to contact the solicitor(s) themselves to forward details of the research survey on to them.

Each email will be sent directly to a single recipient and more than one address will never be listed in the 'to' or 'cc' field. This will ensure that the recipient's anonymity and privacy is respected. My own valid email address will be listed in the 'from' field and the 'subject' field will be listed as 'ASBO Research'. The email will not possess any attachments, so recipients will hopefully be less concerned about virus threats. The email message will be kept as short as possible, but will still contain all the relevant information which will include: the aims of the study, research procedure, researcher's details, institutional affiliation et cetera. The URL for the survey questionnaire will be included which will take potential respondents directly to the online survey questionnaire.

Hence, once the solicitors have received details of the survey questionnaire, they will then be able to obtain any further details about the research by asking questions and/or providing comments about the research, by contacting either the researcher (myself), or by contacting the research supervisors, or they can simply follow the URL provided, which will take them directly to the online questionnaire (please see appendix 2).

If they choose to follow the URL, the first page of the survey questionnaire that they will be able to view will give more details about the research project, and will also ensure that informed consent is obtained before they choose to continue to the next page and begin the survey questionnaire. In both the email message, and the first page of the survey questionnaire, the anonymity of respondents is guaranteed. It will also be explained that participation is entirely voluntary and that they need not answer every (or any of the) survey questions.

Semi-structured interviews

It is hoped that the second stage of the research fieldwork will consist of semi-structured interviews with sheriffs in Scotland, and district judges and lay magistrates in England & Wales. The interviews will be conducted to gain an in-depth understanding of unique and common issues and concerns related to ASBO applications.

It is proposed that a series of (ideally) 10 semi-structured interviews in sheriff courts across Scotland will be conducted within the next 4 months. Interview schedules will be provided in advance to participants.

In accordance with the Scottish Executive's access protocol for the courts and the judiciary, all interviews will be anonymous. The anonymity of interview participants will be protected using the following methods: (a) all identifying information will be stripped from the transcribed interview after validation, (b) quotations used for publication will be framed in such a way that the individual's identity is masked, and (c) coding (e.g. S1, S2) will be used where necessary.

The transcripts of interviews will be provided to interviewees (should they wish) for validation. Transcripts will then be analysed for common and emergent themes using a constant comparison method, and sorted into major themes using a combination of categories derived from prior research (Campbell, 2002; Scottish Executive, 2004; 2005).

In accordance with the Scottish Executive's access protocol for the courts and judiciary, the Lord President and Sheriff(s) Principal have been contacted (please see appendix 3) following the relevant procedure(s).

It is also proposed that a series of (ideally) 10 semi-structured interviews in district and magistrates courts in England & Wales will also be conducted within the next 4 months. The ethical procedures followed in conducting the interviews will be the same as above, except that it is Her Majesty's Court Data Approval Panel that is to be contacted in order to request access to the judiciary..

Hence, I would like to apply for ethical approval from the Department of Applied Social Science, Stirling University, to conduct the above detailed fieldwork as part of the above detailed research project on Antisocial Behaviour Orders (ASBOs) & The Court System.

Appendix 2

Letter to local authority/CDRP antisocial behaviour unit managers

Dear X,

UNIVERSITY OF STIRLING RESEARCH PROJECT: ANTISOCIAL BEHAVIOUR ORDERS (ASBOs) & THE COURT SYSTEM

I am a doctoral researcher at the University of Stirling conducting research on the use of Antisocial Behaviour Orders (ASBOs) in Britain.

In particular, this research is interested in solicitors' experiences of ASBO cases and their opinions on court procedure, legislation and case law, evidentiary requirements, and any difficulties that they may have encountered with ASBO proceedings in court.

As part of this research, I am conducting an online survey questionnaire with police, CDRP and local authority affiliated solicitors involved in ASBO cases. Hence, I would be extremely grateful indeed if you were able to pass on the attached web link for the questionnaire to your internal/external solicitor(s) in the hope that he/she might consider participating in this study please? In light of their experience, their view(s) would add invaluable insight into this research project.

All responses to this survey are anonymous. Further details about the research are available by following the web link or by contacting the principal investigator, Jane Donoghue (my email address) or the research supervisor (supervisor's email address).

The link for the survey questionnaire is:

Clicking on the link will take you directly to the survey. I very much hope that you will be able to pass on the survey web link, and I am most grateful for your time and consideration in this matter.

Yours faithfully,

Jane Donoghue

[Researcher's contact details]

Appendix 3

Online Survey Questionnaire Template

Thank you very much for your interest in this research.

This survey questionnaire is part of a research project of the Department of Applied Social Science at Stirling University, UK.

The research is concerned with Antisocial Behaviour Orders (ASBOs) and the court system. In particular, this study is interested in local authority solicitors' experiences of ASBO cases and their opinions on court procedure, legislation and case law, evidentiary requirements, and any difficulties that they may have encountered with ASBO proceedings in court.

All responses to this survey are anonymous. If you have any questions about or comments on this project, or if you have specific concerns about your rights as a participant, please contact the principal investigator, Jane Donoghue [my email address] or the research supervisors, [supervisors' email addresses].

- **As most of the questions are multiple-choice, completion will take approximately 15-20 minutes.**
- Your participation is entirely voluntary and you need not answer every question – any information that you provide, no matter how small, will be valuable.
- **The information provided by you will be held anonymously and you will not be identified in any presentation or publication of this research. It will be impossible to trace your data back to you individually. In accordance with the UK Data Protection Act, this information may be retained indefinitely.**
- At the end of the study you will be provided with additional information and feedback on this research should you wish to receive it
- Your participation is very much appreciated and will provide invaluable insight to this project.

Principal Investigator:
[contact details]

Principal Supervisor:
[contact details]

SECTION 1: The Consultation Process. This first part of the questionnaire asks you about your involvement in the consultation process in ASBO applications. Please only tick ONE box throughout the questionnaire unless otherwise specified.

1. When potential ASBO applications are being considered by your local authority, is the internal solicitor:

- Usually involved at the earliest stages (either asked to be present at the ASBO application problem-solving meetings or consulted beforehand so their advice can be discussed at meetings)?
- Usually only consulted once it has **already** been agreed by the local authority and council staff that an ASBO action should be pursued?
- Usually only consulted when evidence has already been gathered and files are then passed to the in-house solicitor?

2. Who most frequently presents an ASBO application in court?

- Internal Solicitor?
- External Counsel?

3. Who makes the decision *not* to proceed with an ASBO application? (you may select more than one option)

- Internal Solicitor?
- Decision of other professionals within the applicant agency?
- Collective decision of all agencies involved?
- Other? Please state:

4. What factors may determine the decision *not* to proceed with an ASBO application? (you may select more than one option)

- Lack of evidence?
- Lack of witnesses?
- Overburdened caseload?
- Use of alternative methods, ABCs, mediation etc?
- Other? Please state:

5. Do you think that internal solicitors should have more control in the decision-making process on whether to proceed with an ASBO application?

- Yes
- No

6. If yes, in what way?

7. From your own experience, are targets being set relating to the number of ASBOs to be obtained by a local authority?

- Yes
- No

8a. If yes, who sets the targets?

8b. And are these targets being met?

- Yes
- No

9. If targets are not being met, why do you think this is? (you may select more than one option)

- Overburdened workload/time constraints of local authority staff?
- ASBO applications frequently unsuccessful in court?
- Local authority pursues alternative remedies instead; ABCs, mediation etc?
- Other? Please state:

SECTION 2: Type of Evidence. In this section you will be asked about the various types of evidence used in ASBO applications, their frequency of use, any associated problems and their contribution towards a successful application.

Please rate how frequently each type of evidence is used in both interim ASBO and ASBO cases.

1a. In interim ASBO cases:

Hearsay:

Always	Frequently	Sometimes	Rarely	Never
--------	------------	-----------	--------	-------

Video Evidence:

Always	Frequently	Sometimes	Rarely	Never
--------	------------	-----------	--------	-------

Photographs:

Always	Frequently	Sometimes	Rarely	Never
--------	------------	-----------	--------	-------

PNC & Intelligence Printouts:

Always	Frequently	Sometimes	Rarely	Never
--------	------------	-----------	--------	-------

Incident diaries:

Always	Frequently	Sometimes	Rarely	Never
--------	------------	-----------	--------	-------

Non-Professional Witness Evidence:

Always	Frequently	Sometimes	Rarely	Never
--------	------------	-----------	--------	-------

Professional Witness Evidence:

Always	Frequently	Sometimes	Rarely	Never
--------	------------	-----------	--------	-------

1b. In ASBO cases:

Hearsay:

Always	Frequently	Sometimes	Rarely	Never
--------	------------	-----------	--------	-------

Video Evidence:

Always	Frequently	Sometimes	Rarely	Never
--------	------------	-----------	--------	-------

Photographs:

Always	Frequently	Sometimes	Rarely	Never
--------	------------	-----------	--------	-------

PNC & Intelligence Printouts:

Always	Frequently	Sometimes	Rarely	Never
--------	------------	-----------	--------	-------

Incident diaries:

Always	Frequently	Sometimes	Rarely	Never
--------	------------	-----------	--------	-------

Non-Professional Witness Evidence:

Always	Frequently	Sometimes	Rarely	Never
--------	------------	-----------	--------	-------

Professional Witness Evidence:

Always	Frequently	Sometimes	Rarely	Never
--------	------------	-----------	--------	-------

2. On average, how many (non-professional) witnesses are used per interim ASBO case?

- 0
- 1-6
- 7-15
- 16+

3. On average, how many professional witnesses are used per interim ASBO case?

- 0
- 1-6
- 7-15
- 16+

4. On average, how many (non-professional) witnesses are used per ASBO case?

- 0
- 1-6
- 7-15
- 16+

5. On average, how many professional witnesses are used per ASBO case?

- 0
- 1-6
- 7-15
- 16+

6a. Have you ever experienced difficulties in securing witnesses for ASBO cases?

- Yes
- No

6b. If you have experienced difficulties securing witnesses, with what proportion of cases?

All cases	The majority of cases	About half of all cases	Less than half of all cases	A very small proportion of cases
-----------	-----------------------	-------------------------	-----------------------------	----------------------------------

6c. If you have experienced difficulties securing witnesses, was this a result of: (You may select more than one option)

- Witness intimidation/fear of reprisals?
- Witness reluctance?
- Unreliable witness?
- Witness Memory Decay?
- Witness Unobtainable?
- Other? Please state:

7. On average, how many witness statements are used per interim ASBO case?

- 0
- 1-10
- 11-30
- 31-50
- 51+

8. On average, how many witness statements are used per ASBO case?

- 0
- 1-10
- 11-30
- 31-50
- 51 +

9. How often are you successful in obtaining an Interim ASBO based only on hearsay evidence? (please tick)

Always	Frequently	Sometimes	Rarely	Never
--------	------------	-----------	--------	-------

10. Have you ever successfully obtained a full ASBO based only on hearsay evidence?

- Yes
- No

11. If yes, approximately how many times?

12. Out of the total number of ASBOs obtained by your local authority, how many of these ASBOs have been made following a conviction?

All of them	The majority of cases	In about half of all cases	In less than half of all cases	In a very small proportion of cases
-------------	-----------------------	----------------------------	--------------------------------	-------------------------------------

13. How easy do you find it to obtain an ASBO made on conviction?

Much easier than an ASBO on application	Easier than an ASBO on application	Same as an ASBO on application	More difficult than an ASBO on application	Much more difficult than an ASBO on application
---	------------------------------------	--------------------------------	--	---

14. Have you ever *attempted* to obtain an ASBO following a criminal conviction at a hearing where the criminal offence was not related to the antisocial behaviour problem?

- Yes
- No

15. If yes, were you successful?

- Yes
- No

16. If you *have* previously obtained an ASBO following a criminal conviction at a hearing where the criminal offence was not related to the antisocial behaviour problem, how frequently have you been successful in obtaining an ASBO in this way?

- Every time I have attempted to obtain an ASBO in this way?
- The majority of attempts have been successful?
- About half of attempts have been successful?
- Less than half of attempts have been successful?
- In only a very small number of cases?

17. Do you think that it is appropriate for ASBOs to be granted at criminal trials where the criminal behaviour is unrelated to the antisocial behaviour problem?

- Yes
- No

SECTION 3: Court Procedure. In this section you will be asked about the duration of ASBO cases, how frequently applications are contested and how often successful applications are appealed.

1. What is the approximate average length of time an ASBO case takes to come before the court, from Summons to Final Hearing?

- 1-6 weeks
- 7-12 weeks
- 13-18 weeks
- 19 + weeks

2. From your own experience, how frequently are ASBO applications contested at the initial hearing in both interim and full ASBO cases?

	Always	In more than half of cases	In about half of cases	In less than half of cases	Never
Interim ASBO					
ASBO					

3. From your own experience, how frequently are ASBO applications contested at the final hearing in both interim and full ASBO cases?

	Always	In more than half of cases	In about half of cases	In less than half of cases	Never
Interim ASBO					
ASBO					

4. From your own experience, how frequently are orders successfully contested in both interim and full ASBO cases?

	Always	In more than half of cases	In about half of cases	In less than half of cases	Never
Interim ASBO					
ASBO					

5. From your own experience, on what basis are cases most commonly contested?

6. From your own experience, how frequently are cases appealed?

	Always	In more than half of cases	In about half of cases	In less than half of cases	Never
Interim ASBO					
ASBO					

From your own experience, how frequently are cases successfully appealed?

	Always	In more than half of cases	In about half of cases	In less than half of cases	Never
Interim ASBO					
ASBO					

SECTION 4: Defence Counsel. This section asks you questions about your experiences of defence council in ASBO cases, including any problems that you may have encountered.

1. Have you encountered ASBO cases whereby you believe that Defence Counsel has acted unfairly/unprofessionally in terms of how they have presented their case in court?

- Yes
- No

2. If yes, did this relate to: (you may select more than one option)

- The adversarial nature of their counsel?
- The cross-examination of witnesses?
- A set period of notice being required for the use of hearsay evidence?
- Defence counsel arguing every prohibition?
- Ability of defence counsel to appeal by way of rehearing without needing to state reasons?
- Attempts to draw out the application/court process?
- Other? Please state:

3. From your own experience, how often are problems of this nature encountered during ASBO and interim ASBO cases?

	Always	Frequently	Sometimes	Rarely	Never
Interim ASBO					
ASBO					

4. In a recent report (2005), The Home Affairs Committee stated that ASBO cases in which the right of appeal is not being taken, highlights 'the variable quality of legal representation rather than any difficulties with the current provisions for variation and appeal'. Would you agree with this statement?

- Yes
- No

5. In your own opinion, how varied is the quality of legal representation available to defendants in ASBO cases?

Highly Variable	Varied but generally of good quality	Not particularly varied, of about an average standard	Consistent poor standard	Consistent good standard
-----------------	--------------------------------------	---	--------------------------	--------------------------

SECTION 5: District Judges/Lay Magistrates. This section asks you about your experience of Judges and Magistrates in ASBO cases, including any problems that you may have encountered.

1. In your own experience, have ASBO applications been most frequently heard by:

- District judges?
- The Lay Benches?

2. Have you ever encountered problems with Judges/Magistrates during ASBO cases?

- Yes
- No

3. If yes, what is the most common difficulty that you have encountered?

4. How often are problems encountered during ASBO and interim ASBO cases?

	Always	Frequently	Sometimes	Rarely	Never
Interim ASBO					
ASBO					

SECTION 6: Antisocial Behaviour Legislation. This section asks you for your opinions about current antisocial behaviour legislation, its effectiveness and any associated problems that you have encountered with it.

1. Do you think that the legal definition of antisocial behaviour as behaviour that causes, or is likely to cause 'harassment, alarm or distress' is too wide?

- Yes
- No

2. As far as you are aware, has the flexibility of the definition resulted in inconsistency in administration across different local authorities?

- Yes
- No

3. If yes, do you think that this is problematic?

- Yes
- No

4. If yes, in what way?

5. From your own experience, how often does the antisocial behaviour referred to in ASBO applications relate in part (but not necessarily exclusively) to non-criminal behaviour?

Always	Frequently	Sometimes	Rarely	Never
--------	------------	-----------	--------	-------

6. Have you ever been involved in pursuing ASBO applications where you believed that an ASBO was an inappropriate response to the behaviour in question?

- Yes
- No

7. If yes, how often?

Always	Frequently	Sometimes	Rarely	Never
--------	------------	-----------	--------	-------

8a. Do you think that the definition of antisocial behaviour should be restricted to criminal acts already proscribed by legislation?

- Yes
- No

8b. Please state why:

9. As the antisocial behaviour definition includes behaviour that is already a criminal offence, do you think that this can lead to a twin-track approach to identical criminal acts?

- Yes
- No

10. As statutory guidance states that it is not necessary to prove intention on the part of a defendant to cause harassment, alarm or distress, does this result in potential mitigating factors then being missed in court?

- Yes
- No

11. From your own experience, would you agree that an ASBO is purely a preventative order?

- Yes
- No

12. From your own experience, have you found ASBOs to also have punitive consequences?

- Yes
- No

13. If yes, what are they? (you may tick more than one option)

- Access to social housing?
- Employment opportunities?
- Stigmatisation?
- Other? Please state:

14. Do you think that it is problematic that civil rules of evidence are used in ASBO cases when [the equivalent of] a criminal standard of proof applies?

- Yes
- No

15. Please state why:

16. Given that a zero tolerance approach to antisocial behaviour would be impossible to sustain in practical terms, and given that the courts can only deal with some of the less serious infringements of the law, what type of behaviour do you think that the courts should primarily be addressing in ASBO cases?

17. From your own experience, have you ever found that the conditions of some ASBOs have necessarily invited breach?

- Yes
- No

18. If yes, how frequently has this been the case?

Always	Frequently	Sometimes	Rarely	Never
--------	------------	-----------	--------	-------

SECTION 7: Naming & Shaming. This section asks you about the practice of using publicity to inform the public of those with ASBOs.

1. Do you agree with the ‘naming and shaming’ of children and young persons (under 18) who have ASBOs?

Yes, Always	Yes, but where appropriate exceptions are made	Sometimes, but only when it seems essential	Rarely, I don't generally agree with the practice	Never, I disagree with the practice
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2. In your experience, how often are children and young people who are granted ASBOs also granted protection in court from being publicly identified?

Always	Frequently	Sometimes	Rarely	Never
--------	------------	-----------	--------	-------

3. In your experience, how often are children and young people who breach ASBOs also granted protection in court from being publicly identified?

Always	Frequently	Sometimes	Rarely	Never
--------	------------	-----------	--------	-------

4. Do you think that there should be a presumption against publicising details [of children and young people with ASBOs] unless the magistrate/judge specifically adjudicates that it is in the public interest to do so?

- Yes
- No

5. From your own experience of ASBO cases, do you agree that the prospect of being named in court is a powerful deterrent to antisocial behaviour in adults?

Strongly agree	Agree	Not sure	Disagree	Strongly Disagree
----------------	-------	----------	----------	-------------------

6. From your own experience of ASBO cases, do you agree that the prospect of being named in court is a powerful deterrent to antisocial behaviour in children?

Strongly agree	Agree	Not sure	Disagree	Strongly Disagree
----------------	-------	----------	----------	-------------------

7. From your own experience, do you think that the use of ASBOs risks young children needlessly being brought into the criminal justice system?

- Yes
- No

8. From your own experience, do ASBOs appear to be leading to an increase in custody for young offenders?

- Yes
- No

SECTION 8: Possible Improvements to Current System. This final section asks you about any changes that you think could/should be made to the application process or court system.

1. What areas (if any) are most problematic for you when pursuing an ASBO application?

2. What changes would you like to see made to improve the ASBO application process and the nature of ASBO proceedings in court?

Thank you very much for your help in this research.

The data that has been collected as a result of your participation will be held anonymously.

If you choose to supply your email address for further contact, this will be stored separately from your data. It will only be used to contact you for this particular purpose and will not be shared with any third party.

In case you have any comments on this study, I would be grateful if you would share them with me by adding them on the following page or by contacting me by email: [my email address]

Once again, thank you very much for supporting this research.

If you wish to receive feedback on the outcome of this research, please provide your email address below and you will be contacted with further details in due course.

Email address:

Comments:

Appendix 4

Access request to Lord President

Lord President
Court of Session
Parliament House
Parliament Square
Edinburgh
EH1 1RQ

Dear Lord President,

UNIVERSITY OF STIRLING RESEARCH PROJECT: ANTISOCIAL BEHAVIOUR ORDERS (ASBOs) & THE COURT SYSTEM

I am a doctoral researcher at the University of Stirling conducting research on the use of Antisocial Behaviour Orders (ASBOs) in Britain.

The subject of the main study is an investigation that seeks to understand the contribution and influence of the court system and judiciary in deciding ASBO applications in both Scotland, and in England & Wales.

Aims of research project

From analysis of existing research (Campbell, 2002; Burney, 2002; CIHS, 2003; Scottish Executive, 2004; 2005; Brown, 2004), specific gaps in the knowledge and understanding of ASBO use in Britain has been identified. What has been overlooked in current research on the use of ASBOs in Britain, is a deeper insight into the fundamental contribution and situs of the court system and legal process in determining the manifold functions of the ASBO, and, their statutory limitations within the law on antisocial behaviour.

Although research on behalf of the Scottish Executive, for example, notes that a significant factor in 'influencing regional variations...was the varying attitude of the courts' (2005: 2.27), more detailed and extensive research into the use of ASBOs requires an analysis of legislation, court records, stated cases, legal precedents/case law, and interviews conducted with sheriffs, district judges, lay magistrates, and solicitors to be correlated. It is the objective of this research to correlate these aspects of the legal and court processes to provide more comprehensive and developed research on ASBO applications in Britain.

There are also no comparative studies in existence that analyse the differences/similarities between the ASBO application procedure in Scotland, and South of the border. Hence, it is also the purpose of this research project to provide a comparative analysis of court procedure in Scotland, and in England & Wales, in ASBO applications. It is hoped that clearly identifying the successes and encountered difficulties in the application process within the separate jurisdictions, will be a relevant, and hopefully useful, contribution to research in this area.

Methodology

The research fieldwork is to be conducted in two stages. The first stage has been completed and consisted of an online survey questionnaire which was answered by local authority solicitors involved in ASBO applications in both Scotland, and in England & Wales.

The online survey questionnaire was interested in local authority solicitors' experiences of ASBO cases and their opinions on court procedure, legislation and case law, evidentiary requirements, and any difficulties that they may have encountered with ASBO proceedings in court.

It is hoped that the second stage of the research fieldwork will consist of semi-structured interviews with sheriffs in Scotland, and district judges and lay magistrates in England & Wales. The interviews will be conducted to gain an in-depth understanding of unique and common issues and concerns related to ASBO applications.

It is proposed that a series of (ideally) 10 semi-structured interviews in sheriff courts across Scotland (please see below) would be conducted within the next 4 months. Interview schedules would be provided in advance to participants.

In accordance with the Scottish Executive's access protocol for the courts and the judiciary, all interviews would be anonymous. The anonymity of interview participants would be protected using the following methods: (a) all identifying information would be stripped from the transcribed interview after validation, (b) quotations used for publication would be framed in such a way that the individual's identify is masked, and (c) pseudonyms would be used where necessary.

The transcripts of interviews would be provided to interviewees (should they wish) for validation. Transcripts will then be analysed for common and emergent themes using a constant comparison method, and sorted into major themes using a combination of categories derived from prior research (Campbell, 2002; Scottish Executive, 2004; 2005).

Access Request

Hence, I would like to request permission to seek the participation of sheriffs in Scotland to participate in the above research project please.

I am most grateful indeed for your consideration in this matter and I await your response in due course.

Yours faithfully,

Jane Donoghue

[my contact details]

Appendix 5

Access request letter template (Sheriffs Principal)

Dear Sheriff Principal X,

UNIVERSITY OF STIRLING RESEARCH PROJECT: ANTISOCIAL BEHAVIOUR ORDERS (ASBOs) & THE COURT SYSTEM

Access Request

I am a doctoral researcher at the University of Stirling and I would like to request permission to seek the participation of sheriffs in Scotland in research on the use of Antisocial Behaviour Orders (ASBOs) in Britain.

I would like to interview A sheriffs in B Sheriff Court, C sheriffs in D Sheriff Court, and E sheriffs in F Sheriff Court. I am writing to the Lord President, and Sheriffs Principal U, V, W, Y and Z in similar terms.

Aims of research project

The subject of the main study is an investigation that seeks to understand the contribution and influence of the court system and judiciary in deciding ASBO applications in both Scotland, and in England & Wales.

From analysis of existing research (Campbell, 2002; Burney, 2002; CIHS, 2003; Scottish Executive, 2004; 2005; Brown, 2004), specific gaps in the knowledge and understanding of ASBO use in Britain has been identified. What has been overlooked in current research on the use of ASBOs in Britain, is a deeper insight into the fundamental contribution and situs of the court system and legal process in determining the manifold functions of the ASBO, and, their statutory limitations within the law on antisocial behaviour.

Although research on behalf of the Scottish Executive, for example, notes that a significant factor in 'influencing regional variations...was the varying attitude of the courts' (2005: 2.27), more detailed and extensive research into the use of ASBOs requires an analysis of legislation, court records, stated cases, legal precedents/case law, and interviews conducted with sheriffs, district judges, lay magistrates, and solicitors to be correlated. It is the objective of this research to correlate these aspects of the legal and court processes to provide more comprehensive and developed research on ASBO applications in Britain.

There are also no comparative studies in existence that analyse the differences/similarities between the ASBO application procedure in Scotland, and South of the border. Hence, it is also the purpose of this research project to provide a comparative analysis of court procedure in Scotland, and in England & Wales, in ASBO applications. It is hoped that clearly identifying the successes and encountered difficulties in the application process within the separate jurisdictions, will be a relevant, and hopefully useful, contribution to research in this area.

Methodology

The research fieldwork is to be conducted in two stages. The first stage has been completed and consisted of an online survey questionnaire which was answered by local authority solicitors involved in ASBO applications in both Scotland, and in England & Wales.

The online survey questionnaire was interested in local authority solicitors' experiences of ASBO applications and their opinions on court procedure, legislation and case law, evidentiary requirements, and any difficulties that they may have encountered with ASBO proceedings in court.

It is hoped that the second stage of the research fieldwork will consist of semi-structured interviews with sheriffs in Scotland, and district judges and lay magistrates in England & Wales. The interviews will be conducted to gain an in-depth understanding of unique and common issues and concerns related to ASBO applications.

It is proposed that a series of (ideally) 10 semi-structured interviews in sheriff courts across Scotland would be conducted within the next 4 months. Interview schedules would be provided in advance to participants.

In accordance with the Scottish Executive's access protocol for the courts and the judiciary, all interviews would be anonymous. The anonymity of interview participants would be protected using the following methods: (a) all identifying information would be stripped from the transcribed interview after validation, (b) quotations used for publication would be framed in such a way that the individual's identify is masked, and (c) coding (e.g. S1, S2) would be used where necessary.

The transcripts of interviews would be provided to interviewees (should they wish) for validation. Transcripts will then be analysed for common and emergent themes using a constant comparison method, and sorted into major themes using a combination of categories derived from prior research (Campbell, 2002; Scottish Executive, 2004; 2005).

I am most grateful indeed for your consideration in this matter and I await your response in due course.

Yours faithfully,

Jane Donoghue

[my contact details]

Appendix 6

Interview consent form

Consent Form

Antisocial Behaviour Orders (ASBOs) & The Court System Research Study

Aims & Scope

The subject of the main study is an investigation that seeks to understand the contribution and influence of the court system and judiciary in deciding ASBO applications in both Scotland, and in England & Wales.

Methodology

The research fieldwork is to be conducted in two stages. The first stage has been completed and consisted of an online survey questionnaire which was answered by local authority solicitors involved in ASBO applications in both Scotland, and in England & Wales. The second stage of the research fieldwork (this stage) consists of semi-structured interviews with sheriffs in Scotland. The interviews will be conducted to gain an in-depth understanding of unique and common issues and concerns related to ASBO applications.

Semi-structured interview schedules will be provided in advance to participants.

In accordance with the Scottish Executive's access protocol for the courts and the judiciary, all interviews will be anonymous. The anonymity of interview participants will be protected using the following methods: (a) all identifying information will be stripped from the transcribed interview after validation, (b) quotations used for publication will be framed in such a way that the individual's identify is masked, and (c) coding (e.g. S1, S2) will be used where necessary.

The transcripts of interviews will be provided to interviewees (should they wish) for validation. Transcripts will then be analysed for common and emergent themes using a constant comparison method, and sorted into major themes using a combination of categories derived from prior research (Campbell, 2002; Scottish Executive, 2005a; 2005b).

Please provide written consent that you agree to the following interview being conducted, in accordance with the above stipulated conditions, for the purposes of the aforementioned research study:

.....

(name of interviewee)

.....

(date)

.....

(signature)

.....

(name of researcher)

.....

(date)

.....

(signature)

Appendix 7

Semi-structured interview schema

1. Standard of proof

From the survey questionnaire that was completed by solicitors in Scotland, it was apparent that the standard of proof in ASBO and interim ASBO cases was an area of law that a considerable amount of respondents found quite confusing. And they cited a lack of case law in this area, coupled with the existence of conflicting cases suggesting different standards of proof.

- From your experience, have you encountered difficulties arising from a solicitor's or applicant authority's uncertainty relating to the standard of proof required for interim/ASBO applications?
- And in terms of full ASBOs, are they generally judged to quasi-criminal standard, rather than on the balance of probabilities?

2. Interim orders

- Because there is no requirement that evidence should be led at the interim stage, does this mean that interim orders are most often granted on a prima facie basis without the hearing of any evidence or lodging of any witness statements or productions?
- As there is no explicit provision for any representations to be made by or on behalf of the respondent before an interim ASBO is granted, it has been argued that interim orders should perhaps not carry criminal sanctions in the event that they are breached. I'm aware that there is a case pending in the inner house on this issue but what would be your view as regards criminal sanctions for interim orders?
- Is there an issue with regard to persons who are the subject of an order being so chaotically organised that they don't organise opposition, they don't defend it?
- Do you think that the court should have the power to initiate inquiry before granting interim orders? For example, a social inquiry report of the kind produced for sentencing community based orders?

3. Prohibitions in and duration of the order

- In your experience, to what extent have you found the prohibitions proposed by applicant authorities to be generally proportional to the antisocial behaviour in question?
- How often, in your experience, are amendments made (by the judiciary) to the prohibitions of ASBO applications?
- How often are amendments made (by the judiciary) to the duration of ASBO conditions specified in the prohibitions?
- Do you find that ASBO prohibitions more often relate to behaviour that could be preparatory to the commission of an offence? And in that way could be described as more of an anticipatory type of order? Or do prohibitions more often relate to behaviour that is essentially criminal?

4. ASBO breach

In terms of the research study that I am currently conducting, the area that I am most interested in relating to breach is with regard to the corollary of breaches which have occurred as the result of criminal behaviour.

- If the conditions of an ASBO prohibit conduct which already constitutes a criminal offence, to what extent does the court have regard to the maximum sentence for that offence in sentencing for the breach?
- Do you agree with the approach adopted in England and Wales, that the court's power should not be limited to the statutory maximum for the criminal offence?
- Because the statutory definition of antisocial behaviour includes behaviour that is already criminally sanctioned, following the breach of an order, could this lead to a twin-track approach to identical criminal acts? And if so, do you foresee this as being problematic (in terms of public confidence, the effectiveness of the relevant legislation, et cetera)?
- On a related issue - What would be your view in terms of how behaviour that is criminal or, behaviour that is likely to escalate to the criminal level, should be dealt with? Do you think that this type of behaviour should be dealt with by local authorities and/or housing associations?

5. Antisocial Behaviour Legislation

- Existing research carried out on the use of ASBOs in Scotland, found that addiction, mental health problems and learning difficulties are common features of ASBO cases. As statutory guidance states that it is not necessary to prove intention on the part of a defendant to cause harassment, alarm or distress, could this result in potential mitigating factors then being missed in court?

6. Orders on conviction

- The main reason cited by solicitors for the low use of ASBOs on conviction in Scotland was that because fiscals, and the crown prosecution, are not involved in the sentencing process in criminal trials, fiscals are generally disinclined to suggest orders on conviction as a sentencing option to sheriffs. What would be your view in terms of the role of fiscals in this instance? And do you, in any circumstances, consider it appropriate for the fiscal to suggest an order on conviction to a sheriff?
- Have you ever experienced applicant authorities attempting to obtain orders on conviction to extend the penalty for a criminal offence?

7. ASBOs and children

- Do you believe that the statutory requirement for inter-agency consultation (and a 'level of agreement' among interested parties to be reached) inhibits the use of ASBOs against children?
- Some local authority practitioners have expressed the view that 'an ASBO should be seen as a warning [to children and young people], not a last resort'. Are you of the view that it would be appropriate to use orders in this way?
- In view of the existence of statutory measures which prevent children from being detained for breaching the prohibitions of their order, it has been argued that the extension of the use of ASBOs to children and young people in Scotland, was little more than a 'paper exercise' with limited value. Would you agree?

8. Use of publicity

- It has been proposed by the current administration that new powers should be created to enable local authorities to publicise the names of under 16s who have been given ASBOs. Are you of the opinion that applicant authorities should be given statutory powers to enable them to publicly identify persons under 16 in certain ASBO cases, or are you of the view that this should remain a matter for the sheriff in such a case?
- Are you aware of any cases in which the automatic reporting restrictions have been lifted in interim/ASBO cases involving children?

