Prohibited Behaviour Orders and Indigenous Overrepresentation in the Criminal Justice System

Introduction

It is now 20 years since the Report of the Royal Commission into Aboriginal Deaths in Custody ('RCIADIC') (Johnston 1991) drew attention to the disproportionately high level of Indigenous people in custody. Since that time, the rate of Indigenous overrepresentation has continued to rise and the causes of this shameful situation have been well-documented. Despite this, Australian governments continue to adopt crime and disorder measures without regard for their likely impact on the rate of Indigenous incarceration. This is particularly concerning when laws and policies are adopted from other jurisdictions without a thorough consideration of their operation overseas and even less consideration of their likely effect in an Australian context. One recent example of such policy transfer comes from Western Australia (WA), which, under the *Prohibited Behaviour Orders Act 2010* (WA) ('PBO Act'), introduced Prohibited Behaviour Orders ('PBOs') based on the UK's Anti-Social Behaviour Orders ('ASBOs'). This model was adopted despite a recent announcement by the UK Home Secretary that ASBOs are not effective at combating anti-social behaviour (BBC News UK 2010). The negative impacts identified in the UK, such as disproportionate targeting of the disadvantaged, over-criminalisation and net-widening, should alone be sufficient reason to thoroughly investigate the appropriateness of adopting this model of crime and disorder control in Australia (see Crofts 2011). More worrying, however, is that insufficient attention was paid to the effect that such orders might have in an Australian context, particularly in a State that 'has the highest rate of Aboriginal imprisonment in the nation' (WA Law Reform Commission 2006:174). This Comment will identify some of the aspects of the PBO model that make it likely to exacerbate enmeshment of Indigenous people in the criminal justice system.

Prohibited Behaviour Orders ('PBOs')

Prohibited Behaviour Orders are based on a version of ASBOs initially introduced through the *Crime and Disorder Act 1998* (UK) ('CDA'). ASBOs are civil orders, akin to an injunction, which prohibit certain types of anti-social, but otherwise perfectly lawful, behaviour. These orders are imposed where the court considers it necessary to make an order to prevent repetition of this type of behaviour. Anti-social behaviour is defined as acting 'in a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself' (CDA s 1(1)(a)). Breach of the order is a criminal offence carrying a maximum penalty of five years' imprisonment. In 2002, a second form of ASBO was introduced which is often referred to as a 'CRASBO' because these orders can only be made after a person has been convicted of a criminal offence. The WA PBO model follows the CRASBO model in that the orders cannot simply be imposed because a person has engaged in anti-social behaviour. Rather, a PBO can only be imposed on a person who appears before the Court convicted of an anti-social offence and who also has been convicted of a 'relevant offence' at least once within the previous three years. This is a modification to the UK model, which is designed to ensure that PBOs only apply to persistent offenders. A 'relevant offence' is one that involves anti-social behaviour, which is defined in similar terms to the UK model. The definition is, however, extended in the WA

legislation in two significant ways: first, it also includes behaviour that causes or is likely to cause 'fear or intimidation'; and secondly, it includes 'damage to property' (PBO Act s 3(1)). Upon repeat conviction for a 'relevant offence', if the court considers it likely that the person will commit another 'relevant offence' if not constrained, the court may make an order constraining a person from any lawful behaviour that it considers necessary (PBO Act s 8(2)). Breach of a PBO carries a penalty of up to two years' imprisonment if the order is made in the Children's or Magistrate's Court, or five years if the order is made in the District or Supreme Court.

Ways in which PBOs could accelerate Indigenous overrepresentation

There are many features of the PBO model that could accelerate Indigenous enmeshment and overrepresentation in the criminal justice system. These include the definition of the triggering event; the types of conditions that may be imposed; and the inappropriateness of the model as a means of combating anti-social behaviour.

The trigger

The requirement that there must first be a repeat conviction for a 'relevant offence' before a person can receive a PBO is designed to be a limiting factor. However, in the case of Indigenous people who already have a disproportionately high rate of contact with the criminal justice system, this factor does not represent much of a barrier to the application of a PBO. The reasons for the higher rate of contact with the criminal justice system are complex, interrelated and well-documented in the academic literature and a proliferation of government reports (see Johnston 1991; House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs 2011; Cunneen and White 2011:149; Blagg et al 2005; Behrendt, Cunneen and Libesman 2009:115). Most recently, the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs expressed dismay that the 'underlying factors' identified 20 years ago by the RCIADIC Report as contributing to the overrepresentation of Indigenous people in custody still exist and are continuing to make the situation worse. Those factors include 'poor relations with police, alcohol and substance abuse, poor education, unemployment, inadequate housing and entrenched poverty' (House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs 2011:2). Authors such as Cunneen, White and Blagg argue that it was colonial policies — such as removal of Indigenous children from their parents — and, more recently, neo-colonial policies[1] that have produced these 'underlying factors' (Cunneen and White 2011:154; Blagg 2008:10; Blagg et al 2005). As a result, Indigenous people not only come into initial contact with the criminal justice system at a higher rate, but are also more likely to reoffend and, thus, become enmeshed within the system. Indeed, recidivism has been identified as a factor contributing to the overrepresentation of Aboriginal people in custody. A recent report by the New South Wales (NSW) Bureau of Crime Statistics and Research (BOCSAR) suggests that reducing recidivism would 'exert a much larger effect on Indigenous over-representation in prison than diverting Indigenous offenders from prison who had never been to prison before' (BOCSAR 2010:1). PBOs are a perfect example of a criminal justice measure that is likely to increase rather than reduce the

[1] Cunneen uses the term 'neo-colonialism' to refer to a particular time period in Australia's history where there was a move from the overtly colonising policies of assimilation to formal equality. He argues that although overtly colonising policies of assimilation no longer exist, formal equality has resulted in colonial practices becoming 'embedded within institutions' (Cunneen 2001:7–8).

rate of recidivism, because they fail to take into account the sort of factors identified in the RCIADIC Report.

There are three features of the triggering offence that will make it difficult for an offender to resist the imposition of a PBO: (1) there is a broad definition of what amounts to a 'relevant offence', ie what is anti-social; (2) there is a broad list of 'prescribed offences' that are presumed to be anti-social; and (3) the presumption that an offence is a 'relevant offence' will be difficult to rebut given the broad definition of anti-social behaviour.

Broad definition of what amounts to a relevant offence

A relevant offence is defined as one involving anti-social behaviour, which is 'behaviour which causes or is likely to cause harassment, alarm, distress, fear or intimidation to one or more persons' or 'damage to property' (PBO Act s 3(1)). Although most offences could be viewed as anti-social simply by their very nature as breaches of the criminal law, as Behrendt, Cunneen and Libesman (2009:116–17) point out, criminal behaviour is socially defined: 'Behaviour which is criminal is not fixed, but changes with changing social attitudes'. Added to this, the vague definition of anti-social behaviour does nothing to limit the potentially broad sweep of this legislation. In fact, defining anti-social behaviour in terms of subjective emotions (ie, the feeling of harassment, alarm etc) means that virtually any offence, no matter how trivial, could satisfy this definition, depending on whether it fits general expectations of behaviour for the time or area (see Whitehead, Stockdale and Razzu 2003). Compounding this subjectivity is the fact that the offence need not necessarily have caused any harassment etc, if there is a perception that harassment was likely to be caused by the offence. This widens the possibility of an offence being viewed as anti-social because of fears about what the behaviour might lead to. An example is where a person is convicted of trespass,[2] this could be found to be a relevant offence (ie anti-social) not because the 'hanging around' has caused harassment in itself, but because of the anxiety about what may flow from the 'hanging around'. Such a process can clearly be seen in relation to the young, where '"youths hanging about" have become a universal symbol of disorder and menace' (Burney 2002:473). Fear, intolerance and stereotypes about groups in society may, thus, filter into the definition of what is anti-social and there is no objective element in the definition to prevent this occurring.

This subjectivity is unlikely to be problematic where there is a clear agreement about what sort of behaviour is acceptable in a certain space, however, where there are different expectations, or different cultural uses of public space, conflicts may arise (Millie 2006). Thus, differential usage of public space by Indigenous people may more readily be viewed as anti-social because it does not fit the expectations of non-Indigenous society. The RCIADIC found that the public nature of Aboriginal life and disagreement about the appropriate use of public space brings Indigenous people into conflict with the police and draws them into the criminal justice system (Johnston 1991:[13.2.17]):

> Non-Aboriginal Australian society has never been able to accommodate the essentially public nature of Aboriginal life nor the ways in which this renders much behaviour visible. The kinds of appropriate behaviour that belong to Aboriginal definitions of the use of public space are often precisely the kinds of behaviour that bring them into strife with police: socialising and

[2] This offence is used here to an example only. It should be noted that this offence is one which through regulations is presumed to have an anti-social element and therefore in such a case there need not be an assessment of whether it actually is anti-social unless the defence challenge this presumption. For further details, see below.

> drinking in the open, lingering outside shops, sitting on the ground in the street and fighting are all behaviours which, in conventional law, fall into the category of street order offences (Johnston 1991:[13.2.23]).[3]

This may be especially problematic regarding Indigenous young people who may congregate in public spaces for a number of reasons including safety, kinship and absence of appropriate recreational activities (Taylor and Walsh 2007:170).

Broad list of prescribed offences

The WA Attorney-General made clear during the legislative passage of the Prohibited Behaviour Orders Bill 2010 (WA) that he did not wish there to be a restrictive interpretation of what offences could be deemed to involve anti-social behaviour (Porter 2010:4673). To this end, the Regulations accompanying the PBO Act contain a broad list of offences that are presumed to involve anti-social behaviour, thus making it easier to satisfy the conditions for the imposition of a PBO (*Prohibited Behaviour Order Regulations 2011* (WA)). These offences are called 'prescribed offences'. Alongside more serious offences (such as robbery, criminal damage and dangerous driving causing death), Schedule 1 to the PBO Regulations contains an array of other offences, such as: threatening violence; disorderly behaviour in public; obstructing police officers; serious assault (assault on a police officer); failing to comply with a police officer's order; remaining in an area adjacent to a licensed premises after being refused entry or required to leave the premises; and consuming liquor in a public place. In other words, the list includes exactly the sort of offences that were identified by the RCIADIC Report 20 years ago as disproportionately bringing Indigenous people into contact with the criminal justice system (Johnston 1991:[7], [10.7.10], [13.2.20]).

Difficulty rebutting the presumption

Where an offence has been declared a 'prescribed offence', it is presumed to be anti-social unless the offender proves otherwise. Rebutting the presumption will be difficult given the broad list of prescribed offences and the broad definition of what constitutes anti-social behaviour. It also leaves little room for judicial discretion. As such there is a very real danger that PBOs will be routinely imposed and rarely challenged due to difficulties in rebutting the presumption.

Inappropriate conditions

The second main feature of PBOs that make them likely to increase recidivism is the wide power given to the court to impose constraints. The court may constrain otherwise lawful behaviour if it is reasonably necessary to do so to reduce the likelihood of a person committing another relevant offence (PBO Act s 10(2)). A non-exhaustive list of the sorts of constraints that may be imposed are included in the PBO Act. These include, for instance, not being in or near a certain place, not associating with certain people and not possessing certain items (PBO Act s 10(3)). In announcing the introduction of the orders the WA Attorney-General gave some examples of the types of constraints that he envisaged might be imposed: 'For example, a serial graffiti offender might be banned from using public transport, a shoplifter might be banned from a shopping precinct, or a violent offender might be banned from being out after dark or drinking alcohol' (Porter 2011). Aside from the concern that there is nothing in the WA legislation to stop the more outlandish constraints

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[3] This is not to say that all these forms of behaviour are acceptable to Indigenous communities, but that they should not necessarily lead to an arrest (Johnston 1991:[13.2.26]).

that have been seen in the UK[4] the danger is that constraints may be culturally inappropriate, thus increasing the likelihood of non-compliance.

Lack of cultural sensitivity in the criminal justice system combined with the underlying factors of disadvantage discussed above give rise to practical reasons why PBOs may be difficult for Indigenous people to comply with. Even a standard constraint on associating with certain people or being in certain areas may ignore the cultural reality of Indigenous people's lives. Indigenous familial units differ materially from those in the mainstream community as they are based on Kinship and extended family structures. The centrality of Kinship to Indigenous society was noted by the WA Law Reform Commission (2006:66):

> Kinship is at the heart of Aboriginal society and underpins the customary law rules and norms ... Importantly, kinship governs all aspects of a person's social behaviour and prescribes the obligations or duties a person has toward others as well as the activities or individuals that a person must avoid.

The importance of Kinship means that PBOs constraining a person from associating with certain people have the potential to lead to conflict with customary obligations. Furthermore, traditional Kinship responsibilities, even among urban households, can lead to more fluid living situations with regular movement between extended family housing units (see Johnston 1991:[18.3.5]). This can be seen particularly in relation to the raising of children where:

> the family unit in Aboriginal societies is extended with many relatives, and often whole communities, sharing child-rearing responsibilities with the biological parents. As a result of this, child-rearing practices in Aboriginal Australia are not underwritten by the permanence and stability of a single home that is typical of non-Aboriginal Australian families (WA Law Reform Commission 2006:276).

Aside from cultural factors, issues of disadvantage may result in extended kin members living in the same house for economic reasons. In such circumstances, issuing a non-association order is likely to be obtuse to the reality of Indigenous living circumstances.

Similar issues may arise in relation to constraints on entering or remaining in certain areas. In relation to move-on orders, the Aboriginal Legal Service of WA has expressed concern that the boundaries of exclusion areas are unreasonably broad and often tend to cover the entire city or town centres (Eggington and Allingham 2006). This can cut the person off from public transport hubs and centrally located welfare and support services, which 'is particularly problematic for Aboriginal people who generally suffer from poor health and social and economic disadvantage' (Eggington and Allingham 2006). If this pattern is replicated with PBOs, it will make the orders difficult to comply with and likely to be breached.

Eggington and Allingham (2006:13–15) also note the parallels between the use of move-on orders and the prohibited areas legislation of the first half of the 20th century:

> The *Aborigines Act 1905* (WA) allowed for designated areas to be declared prohibited to Aboriginal people unless they could show they were in "lawful employment". In an amendment to the Act, Perth was made a prohibited area in 1927 and Aboriginal people

[4] For example, a 16-year-old boy banned from showing his tattoos, wearing a single golf glove, or wearing a balaclava in public anywhere in the country; an 87-year-old forbidden from being sarcastic to his neighbours or a 26-year-old banned from 'playing loud music, stamping his feet and dropping objects' (National Association of Probation Officers 2005).

> committed an offence if they came within five kilometres of the city centre after 6 pm. ... Although not overtly racially discriminatory, the move on laws are racially discriminatory in their implementation. The control over the use of public space and over who occupies public space and how, is central to both the prohibited areas legislation and the move on laws.

As PBOs can be used to control access to, and behaviour within, public space, the PBO Act may also be viewed as a form of neo-colonial law. Although not overtly racist, there is a very real danger that PBOs will replicate patterns of discriminatory treatment and social exclusion.

Inappropriate model

PBOs will provide another framework for negative interactions between Indigenous people and police. Due to a confluence of the above factors, Indigenous people who are subjected to them are likely to breach, exposing them to the imposition of a custodial term. This likelihood is increased because the orders are framed in negative terms, ie, they prohibit behaviour rather than requiring positive forms of behaviour. Prohibiting a person from acting in a certain way makes little sense in the absence of support measures to encourage or facilitate compliance. So, for instance, ordering a person not to drink alcohol (suggested as a possible order by the WA Attorney-General: Porter 2011) at best sets them up to fail if they have alcohol dependency issues and no support is provided to help deal with that dependency. Worse, compliance with the order may actually 'be medically inappropriate, as an enforced sudden withdrawal from alcohol in the case of an alcoholic can … be dangerous and even result in fatality' (JUSTICE 2005:[19]). In this way, the orders fail to recognise that crime and anti-social behaviour are not purely the result of choice, but are due to a complex combination of factors (Squires and Stephen 2005:520) and that people may need positive assistance to comply with the orders.

In relation to Indigenous communities, there are not only issues of deprivation, but also questions of legitimacy. PBOs may be viewed as imposing standards of behaviour of 'the dominant non-Aboriginal, largely white, Australian group' (Johnston 1991:[13.2.24]). Hence, they may be viewed by Indigenous people as a further set of colonising rules forming part of a foreign justice system 'that alienates them from their land and culture' (*Victorian Aboriginal Justice Agreement*, Department of Justice 2000:13). The orders, therefore, have the very real potential to inflame existing feelings of resentment and alienation that may encourage deliberate non-compliance. This process could lead to the unfortunate development of a 'badge of honour' mentality, as has been found with young people in the UK (Youth Justice Board of England and Wales 2006) or that the orders become incorporated into the Indigenous experience of white criminal justice and, as such, become a 'rite of passage' (Ogilvie and van Zyl 2001). Thus, rather than deter further anti-social behaviour, PBOs could well cement such behaviour and lead to recidivism.

Concluding remarks

Scant attention was given to the already well-documented negative effects of this model of crime and disorder control and the reasons for its abandonment in the UK when its adoption was being considered in WA. More worryingly, little concern was shown for the effects that PBOs might have in a WA context, particularly on the rate of Indigenous overrepresentation in the criminal justice system. This is particularly disappointing given that 20 years on from the RCIADIC, the rate of Indigenous overrepresentation continues to rise and governments

are still adopting crime and control measures that can and do exacerbate this situation. The PBO model is just the latest example of a measure that is inconsistent with many of the recommendations made by the RCIADIC and has the very real potential to perpetuate the enmeshment of Indigenous people in a self-perpetuating cycle of criminalisation and exclusion from mainstream society. This brief analysis has shown how Indigenous people are more likely to be subjected to PBOs, more likely to find it difficult to comply with constraints, more likely to breach and more likely to receive a custodial sentence. PBOs are an example of laws that will contribute to the cycle of criminalisation, described by Cunneen (2001:8–9), which 'ensures exclusion from social participation'. One might even describe PBOs as 'neo-colonial', with the potential to perpetuate 'institutional racism'. Thus, while the PBO legislation on its face applies equally to all, it is likely to have a disproportionate impact upon Indigenous people because it does not take into account cultural differences and underlying disadvantage. This is not to say that the 'neo-colonial' effect is a deliberate policy decision, but that more needs to be done to address governmental blindness to the effects of crime and disorder policies on this shameful situation. It may well be time for more direct measures, such as a requirement that when any new criminal law policy is being considered legislatures are required to report on how the policy will impact on the rate of Indigenous overrepresentation in the criminal justice system. Such a report must be done in consultation with Indigenous communities as recommended by the RCIADIC Report (Johnston 1991:Recommendations 48, 62, 235 and 236; Behrendt, Cunneen and Libesman 2009:110, Cunneen and White 2011:171). This might not prevent the introduction of such measures in the current law and order climate, but at least it could bring the issue more directly to the public arena and engender more robust debate.

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