JUDICIAL STUDIES BOARD

Anti-social Behaviour Orders

A Guide for the Judiciary

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Appendices

FOREWORD to the Third Edition

As I said in the foreword to the first edition of this work, the statutory provisions relating to anti-social behaviour orders (ASBOs) are not entirely straightforward and a significant body of case law developed. As ASBOs comprised an important volume of business in the courts, a clear and straightforward guide to the provisions and the case law became necessary.

District Judge Jeremy Coleman, Graham Hooper, the Justices' Clerk for Nottinghamshire, Sarah Johnson and Edmund Hall of the CPS, Martyn Cowlin of the Administrative Court and Gillian Brooks of the DCA formed a working group which produced the first edition of this guide. That edition and the second edition of the guide were reviewed by the Judicial Studies Board and endorsed by them.

This, the third edition of the guide, has been entirely recast under the auspices of the Judicial Studies Board by Judge John Phillips, who was assisted by District Judge Jeremy Coleman, Graham Hooper and Martyn Cowlin. It is a singular achievement to have produced such a comprehensive and clear guide to this increasingly complex area of the law. I warmly welcome it and congratulate Judge Phillips and his team on their industry and learning in producing what is an invaluable handbook to this area of the law.

One of the parts of the guide which I know many will find of assistance is Chapter 3 on the prohibitions that can be included in orders made and Appendices 2 and 3 which respectively set out prohibitions that are valid and those that are invalid. In Crown Prosecution Service v T [2006] EWHC 728 (Admin) Lord Justice Richards, speaking of the second edition of the guide, said that it gave numerous examples of proper forms of prohibitions and that courts could not do better than to adopt and follow the guidance contained in it. I hope that the third edition too will help ensure that the wording of each order is properly formulated for the circumstances of each case. In addition Chapter 6 and Appendix 4 contain a very helpful summary on the law relating to sentencing.

As this guide is published in an electronic format the references to cases and to primary and secondary legislation are hyperlinked to the relevant websites, including BAILII. They can therefore be viewed very quickly by clicking on the citation. This is an example of how co-operation with BAILII by ensuring important judgements are passed on to them can be beneficial to all.

I am sure that judges, justices' clerks, legal advisers and indeed many in the Crown Prosecution Service and in the professions will find this an admirable, clear and immensely practical guide. We are all, I am sure, greatly indebted to Judge Phillips and his team for devoting so much of their own time to this new and recast edition of the guide and for the considerable assistance which we will all derive from it.

Lord Justice Thomas
January 2007

INTRODUCTION

The legislation and its purpose

Anti-social behaviour orders ("ASBOs") were introduced by section 1 of the Crime and Disorder Act 1998 ("the Act") which came into force on 1st April 1999. The Act has since been amended by the Police Reform Act 2002, the Anti-social Behaviour Act 2003 and the Serious Organised Crime and Police Act 2005. The purpose of an ASBO is to protect the community from the anti-social behaviour of individuals. Its purpose is preventative, not punitive.

The courts with power to make an order

An order may be made by:

(1) a magistrates' court sitting in its civil jurisdiction (section 1 of the Act);

(2) the Crown Court, a magistrates' court or a youth court where it convicts a defendant of a relevant offence[1] (section 1C);

(3) a county court in existing proceedings (section 1B);

In each case the court may also make an interim order (section 1D).

This guide

The guide is intended to give practical guidance to the judiciary. It is not a treatise on ASBOs.

Civil orders in the magistrates' courts are dealt with in Part 1. Part 2 deals with orders on conviction in the Crown Court, a magistrates' court or a youth court, orders in the county court and orders against children and young persons, to which special considerations apply. Any court dealing with a person who is under 18 should refer to chapter 11 in Part 2 as well as any other relevant chapter. Four appendices contain additional materials.

The law is stated as at 1st December 2006.

[1] A relevant offence is one committed after the coming into force of section 64 of the Police Reform Act 2002, namely after 2nd December 2002: section 1C (10) of the Act.

1 PROCEDURE FOR APPLYING FOR A CIVIL ANTI-SOCIAL BEHAVIOUR ORDER IN A MAGISTRATES' COURT

1.1 The main provisions

Section 1(1) of the Act provides:

> "An application for an order under this section may be made by a relevant authority if it appears to the authority that the following conditions are fulfilled with respect to any person aged 10 or over, namely—
>
> (a) that the person has acted, since the commencement date,[2] in an anti-social manner, that is to say, 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; and
>
> (b) that such an order is necessary to protect relevant persons from further anti-social acts by him."

1.2 Relevant authority

Only a "relevant authority" may apply for a civil order in the magistrates' court. "Relevant authority" means:

(1) the council for a local government area;
(2) in relation to England, a county council;
(3) the chief officer of police of any police force maintained for a police area;
(4) the chief constable of the British Transport Police Force;
(5) any person registered under section 1 of the Housing Act 1996 (c 52) as a social landlord who provides or manages any houses or hostel in a local government area;
(6) a housing action trust established by order in pursuance of section 62 of the Housing Act 1988;
(7) the Environment Agency;
(8) Transport for London; or
(9) any person or body of any other description specified in an order made by the Secretary of State.[3]

1.3 Relevant persons

The meaning of these words depends on who the applicant is. Where the applicant is the local authority or the police they mean those within the local authority area or local police area respectively. Where the applicant is the British Transport Police they mean persons on or in the vicinity of policed premises or persons likely to be so. Where the applicant is a social landlord or a housing action trust they mean persons residing in, or who are otherwise on or likely to be on, premises managed by that authority, or persons who are in the vicinity of or likely to be in the vicinity of such premises. Where the applicant is the Environment Agency they mean persons on or in the vicinity of its land or

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[2] 1st April 1999.
[3] Sections 1(1A) and 1A of the Act.

persons likely to be so. Where the applicant is Transport for London they mean persons on or in the vicinity of its land or vehicles or persons likely to be so.[4]

1.4 The consultation requirement

Before making an application for an ASBO a relevant authority is under a duty to consult. The council for a local government area must consult the chief officer of police for that area. The chief officer of police must consult the council for the local government area in which the proposed defendant lives. Any other relevant authority must consult both.[5] The duty to consult does not mean that there has to be agreement.[6]

The chief officer of police may delegate his functions to any officer or officers he judges suitable.[7] Although a relevant authority may decide to notify a proposed defendant before starting proceedings there is no legal requirement to do so. Further, a decision not to do so does not infringe the defendant's rights under articles 6 and 8 ECHR.[8]

1.5 Time limits for making an application

Section 127(1) of the Magistrates' Courts Act 1980 provides:

> "Except as otherwise expressly provided by any enactment and subject to subsection (2) below, a magistrates' court shall not try an information or hear a complaint unless the information was laid or the complaint made within 6 months from the time when the offence was committed, or the matter of complaint arose."

Therefore the applicant must prove that at least one act of anti-social behaviour occurred in the 6 months before the complaint was made. (Section 127(2) is irrelevant.) The position is clarified by section 59 of the Violent Crime Reduction Act 2006, which from a day to be appointed inserts the following after section 1(5) of the Act:

> "(5A) Nothing in this section affects the operation of section 127 of the Magistrates' Courts Act 1980 (limitation of time in respect of informations laid or complaints made in magistrates' court)."

Note, however, that section 127 is about jurisdiction and not the admissibility of evidence. Once the court has jurisdiction it may hear evidence of acts of anti-social behaviour which occurred outside the 6 month period. Such acts may show a course of conduct and hence be relevant to the question whether it is necessary to make an order within section 1(1)(b). They may also be relevant to the question whether the defendant has acted in an anti-social manner within

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[4] Section 1(1B) of the Act.
[5] Section 1E of the Act.
[6] For a full discussion of the duty to consult see McClarty and McClarty v Wigan MBC (Beatson J, 30th October 2003, unreported).
[7] Chief Constable of West Midlands Police v Birmingham Justices [2002] EWHC 1087 (Admin).
[8] Wareham v Purbeck District Council [2005] EWHC 358 (Admin).

section 1(1)(a), at least where they constitute similar fact evidence in relation to acts occurring within the 6 month period.[9]

1.6 Applying for a full order

The relevant authority makes its application by complaint to a magistrates' court. This is so even if the defendant is a young person or a child.[10] The Magistrates' Courts (Anti-social Behaviour Orders) Rules 2002 used to require the application to be made in the form set out in Schedule 1 to the rules but they have been amended and the use of that form is now optional.[11]

The relevant authority then obtains a summons which must either be given to the defendant in person or sent by post to his last known address. If so given or sent the summons is deemed to have been received by him unless he proves otherwise.[12] It is suggested that personal service might avoid difficulties later.

The Home Office has recently produced a guide to anti-social behaviour orders which recommends that the applicant should serve the following with the summons:

(1) a copy of the completed application form;
(2) evidence of the statutory consultation;
(3) guidance on how the defendant can obtain legal advice and representation;
(4) notice of any hearsay evidence;
(5) details of the evidence in support; and
(6) a warning to the defendant that it is an offence to pervert the course of justice and that witness intimidation is liable to lead to prosecution.[13]

To that list should be added a draft order containing the prohibitions sought and the proposed length of the ASBO. The final content and length of the ASBO are of course matters for the court.

The actual and potential consequences of an ASBO are serious and procedural fairness requires that the defendant should have proper notice of the allegations against him.[14]

1.7 Applying for an interim order

If, before determining the full application, the court considers that it is just to make an interim order pending the determination of that application, the court may make such an order. The order is one which prohibits the defendant from doing anything described in the order. It must be for a fixed period. It may be varied renewed or discharged and in any event it ceases to have effect on the determination of the main application.[15] The application may be in the form set

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[9] Stevens v South East Surrey Magistrates' Court [2004] EWHC 1456 (Admin), R (Chief Constable of West Mercia Constabulary) v Boorman [2005] EWHC 2559 (Admin).

[10] But note that breach proceedings against young persons and children are heard in the youth court.

[11] SI 2002/2784 as amended by SI 2003/1236.

[12] SI 2002/2784, Rule 7(1).

[13] A guide to anti-social behaviour orders, Home Office, August 2006, at page 33.

[14] See, for example, the remarks of Pitchers J to this effect in W v Acton Youth Court (26th April 2005, unreported).

[15] Section 1D(2), (3) and (4) of the Act.

out in Schedule 5 to the Magistrates' Courts (Anti-social Behaviour Orders) Rules 2002 but the use of this form is optional. The question when it is just to make an interim order is considered in chapter 2.

An application for an interim order may be made either with notice to the defendant or, with leave of the justices' clerk, without notice to the defendant. The justices' clerk must only grant leave if he is satisfied that it is necessary for the application to be made without notice. The question when it is necessary for the application to be made without notice is considered in chapter 2.

If an application made without notice is granted the interim order and the main application (together with a summons giving a date for the defendant to attend court) must be served on the defendant in person as soon as practicable after the making of the interim order. An interim order made without notice does not take effect until it has been served on the defendant. If an interim order made without notice is not served on the defendant within 7 days of being made it ceases to have effect. If an interim order is made without notice and the defendant later applies to the court for the order to be discharged or varied, his application must not be dismissed without giving him the opportunity to make oral representations to the court.

Where the court refuses to make an interim order without notice it may direct that the application be made on notice.[16]

1.8 Directions

The Civil Procedure Rules 1998 do not apply to magistrates' courts and the Criminal Procedure Rules 2005 do not apply because the proceedings are civil. Nevertheless the court presumably has the power to decide its own procedure and to give directions. It is suggested that the court should give directions in the main application either at a directions hearing or when it hears an application for an interim order, unless the application for the interim order is heard without notice. It is good practice to list the first hearing of an application quickly so as to ascertain whether it is contested and, if so, to identify the issues in the case.

Such directions should deal with:

(1) the filing and service of evidence by both parties;
(2) the question whether witness statements are to stand as the witnesses' evidence in chief;
(3) the determination of applications for special measures directions;
(4) reporting restrictions relating to children and young persons;
(5) the provision by the applicant of an agreed, paginated bundle in advance of the final hearing; and
(6) if appropriate, the exchange of skeleton arguments.

There seems to be no reason in principle why the court should not order the filing and service of a defence case statement. The aim of the directions should be to

[16] This paragraph and the preceding two paragraphs summarise the effect of Rule 5 of the 2002 Rules.

make the final hearing fair, quick and effective and to avoid any adjournment of it.

1.9 The final hearing

The proceedings are civil and therefore section 55 of Magistrates' Courts Act 1980 applies. The following is a summary of section 55. If the defendant does not appear, the court may proceed in his absence, provided it is satisfied that the summons was served on him within a reasonable time before the hearing or he has appeared on a previous occasion to answer the complaint. Alternatively it may adjourn the hearing and issue a warrant for the defendant's arrest, subject to the same provisos. Where the defendant is arrested under the warrant the court may, on any subsequent adjournment of the hearing, remand him.

The procedure at the final hearing is governed by rule 14 of the Magistrates' Courts Rules 1981.[17] Usually it will start with an opening by the applicant, after which the applicant calls its evidence. Then the defendant has the right to address the court, whether or not he afterwards calls evidence. There seems little point in him addressing the court at this stage unless the applicant's case is so weak or otherwise flawed as to justify its dismissal.

There follows the evidence for the defendant. The defendant may then address the court if he has not already done so. Either party may, with the leave of the court, address the court a second time, but where the court grants leave to one party it must not refuse leave to the other. Where the defendant obtains leave to address the court for a second time his second address must be made before the second address, if any, of the applicant.

Questions about the nature of the evidence given at the final hearing are dealt with in chapter 5.

If the court decides to make an order it should:

(1) record the facts giving rise to it;
(2) give reasons for making the order;
(3) ensure that the prohibitions in it are valid;[18]
(4) ensure that the prohibitions are precise so that a breach can be readily identified and proved;
(5) word the prohibitions in language capable of being understood by the defendant;
(6) pronounce the terms of the order in open court;
(7) explain their effect and the consequences of breach to the defendant;
(8) serve the defendant with a copy of the order before he leaves court, including a copy of a map clearly delineating any exclusion zone;[19]
(9) in the case of a foreign national, consider the need for the order to be translated into the defendant's native language.[20]

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[17] SI 1981/552 (now revoked in relation to criminal proceedings).
[18] See chapter 3.
[19] It may be necessary to delineate which side of the road forms the boundary.
[20] See generally R (C) v Sunderland Youth Court , Northumbria Police and Crown Prosecution Service [2003] EWHC 2385 (Admin), R v P (Shane Tony) [2004] EWCA Crim 287, and Moat Housing Group-South Limited v Harris and Hartless [2005] 3 WLR 691, [2005] 4 All ER 1051.

2 CONDITIONS FOR MAKING AN ORDER

2.1 The main provisions

Section 1(4) and (5) of the Act provides:

> "(4) If, on such an application, it is proved that the conditions mentioned in subsection (1) above are fulfilled, the magistrates' court may make an order under this section (an 'anti-social behaviour order') which prohibits the defendant from doing anything described in the order. [21]
>
> (5) For the purpose of determining whether the condition mentioned in subsection (1)(a) is fulfilled, the court shall disregard any act of the defendant which he shows was reasonable in the circumstances."

2.2 Burden and standard of proof

Although the proceedings are civil the applicant must prove beyond reasonable doubt that the defendant has acted in an anti-social manner within section 1(1)(a) of the Act.[22] However, this does not apply to the question whether an order is necessary within section 1(1)(b): this is a question of judgment. In *McCann* Lord Steyn said:

> "The inquiry under section 1(1)(b), namely that such an order is necessary to protect persons from further anti-social acts by him, does not involve a standard of proof: it is an exercise of judgment or evaluation."

2.3 Deciding whether the defendant has acted in an anti-social manner

In order to decide whether the conduct in question amounts to anti-social behaviour the court must decide as a question of fact whether it caused or was likely to cause harassment, alarm or distress, these words being given their ordinary, natural meaning. The use of the expression 'likely to cause' means that, in an appropriate case, the applicant can prove anti-social behaviour without calling a witness who actually suffered harassment, alarm or distress as a result of the defendant's conduct.[23]

The Act does not further define anti-social behaviour, so that the court has flexibility in deciding what acts are anti-social. A court may be faced with a range of behaviour, including criminal behaviour. The current Home Office guide to anti-social behaviour orders suggests that the following conduct may be tackled by an ASBO, although the list is not exhaustive:

harassment of residents or passers by
verbal abuse
criminal damage
vandalism
noise nuisance
writing graffiti
engaging in threatening behaviour in large groups

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[21] Section 1(1) of the Act is set out at the beginning of chapter 1.
[22] R (McCann) v Manchester Crown Court [2002] UKHL 39.
[23] See R (Gosport Borough Council) v Fareham Magistrates' Court [2006] EWHC 3047 (Admin).

racial abuse
smoking or drinking alcohol while under age
substance misuse
joyriding
begging
prostitution
kerb-crawling
throwing missiles
assault
vehicle vandalism.[24]

Whether conduct is anti-social is primarily measured by its consequences and the effect it has, or is likely to have, on a member or members of the community within which it is taking place. Given the local nature of the proceedings this may turn on the features of the individual area and the local community. One act of anti-social behaviour may be enough[25] but in most cases the applicant will seek to show a pattern of behaviour over a period of time. If the court is considering a small number of incidents the time between them may be relevant. For the extent to which the court can take into account the conduct of others apart from the defendant (for example, where he is one of a gang) see *Chief Constable of Lancashire v Potter*.[26]

The applicant must also show that harassment, alarm or distress was caused or likely to be caused to one or more persons not of the same household as the defendant. 'Household' is to be given its ordinary meaning.

The applicant does not have to prove an intention on the part of the defendant to cause harassment, alarm or distress. If there are co-defendants the applicant must prove anti-social behaviour in the case of each and for this purpose the behaviour of each could be different.

In deciding whether the defendant has acted in an anti-social manner the court must disregard any act of the defendant which he shows (on a balance of probabilities) was reasonable in the circumstances.

2.4 Deciding whether an order is necessary

The court must also be satisfied that an order is *necessary to protect relevant persons* from further anti-social acts by the defendant. The necessity test emphasises the fact that the purpose of an ASBO is preventative, not punitive. The Court of Appeal has highlighted its importance on a number of occasions.[27] In the case of each proposed prohibition the court must ask itself, "Is this prohibition necessary to protect relevant persons from further anti-social acts by the defendant?" [28]

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[24] At page 8.
[25] Compare the Protection from Harassment Act 1997 which requires a course of conduct, namely conduct on at least two occasions (section 7(3)).
[26] [2003] EWHC 2272 (Admin).
[27] See, for example, R v Kirby [2005] EWCA Crim 1228.
[28] R v Boness [2005] EWCA Crim 2395.

Relevant considerations will be:

(1) the nature of the conduct;
(2) its frequency and duration;
(3) its impact;
(4) the steps taken by the applicant and others, short of applying for an ASBO, to prevent it;
(5) the likelihood of repetition if an order is not made;
(6) whether the defendant has breached any interim order; and
(7) the defendant's age, personal characteristics, potential for change and relevant previous convictions.

An order may still be made even where the conduct complained of has ceased by the time the application is made. In *S v Poole Borough Council*[29] a youth aged 15 had been engaged in anti-social behaviour for 18 months up to the date of the application. The magistrates' court hearing was concluded 5 months later and the Crown Court appeal 7.5 months after that. The defendant argued that there was no necessity for an order as there had been no anti-social behaviour for over a year. Describing this argument as hopeless Simon Brown LJ said:

> "It must be expected that, once an application of this sort is made, still more obviously once an ASBO has been made, its effect will be likely to deter future misconduct. That, indeed, is the justification for such orders in the first place……The conduct on which the magistrates' court and in turn the Crown Court should concentrate in determining whether such an order is necessary is that which underlay the authority's application for the order in the first place."

The same reasoning would seem to apply if there has been no further anti-social behaviour following the making of an interim order. However, the fact that the anti-social behaviour ceased some time before the original application was made will remain a relevant factor.

It is a frequent occurrence for a defendant to consent to the making of an ASBO and to its terms. In *R (T) v Manchester Crown Court*[30] it was held that an order cannot be made merely on the basis of the defendant's consent: the court must still satisfy itself about both limbs of the test. Nevertheless the consent of the defendant is a relevant factor in deciding that issue.

The necessity test also has to be satisfied before an order can be made on conviction for a criminal offence. In that different context an additional factor has to be considered, namely the impact of the sentence on the necessity for an order: the one may make the other unnecessary. Orders on conviction are dealt with in chapter 9, where there is further discussion of the necessity test.

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[29] [2002] EWHC 244 (Admin).

[30] [2005] EWHC 1396 (Admin). A cynic might say that it is in the interests of a defendant to agree to terms which are so imprecise as to be unenforceable in the event of an alleged breach. The court should prevent this.

2.5 Deciding whether it is necessary for an application for an interim order to be made without notice

As stated in chapter 1, this is a decision for the justices' clerk. In *R (Manchester City Council) v Manchester City Magistrates' Court*[31] the Divisional Court held that the justices' clerk should have regard to the following (non-exhaustive) list of factors:

(1) the likely response of the defendant on receiving notice of the application;
(2) whether such response was likely to prejudice the complainant, having regard to the complainant's vulnerability;
(3) the gravity of the alleged conduct within the scope of conduct tackled by ASBOs generally, as opposed to previous conduct experienced in the locality;
(4) urgency;
(5) the nature of the prohibitions sought;
(6) the right of the defendant to know about the proceedings;
(7) the counterbalancing protections for the rights of the defendant, namely
    (a) the ineffectiveness of the order until it is served;
    (b) the limited period of time the order would be effective;
    (c) the defendant's right to apply to discharge or vary the order.[32]

2.6 Deciding whether it is just to make an interim order

This is a decision for the magistrates alone, whether the application is made without or with notice. As regards making an interim order on a without notice application the principles are:

(1) it is a balancing exercise;
(2) the court must balance the need to protect the public against the impact the order sought will have on the defendant;
(3) the court must consider the seriousness of the behaviour in issue, the urgency with which it is necessary to take steps to control it, and whether it is necessary for an order to be made without notice for it to be effective;
(4) on the other side of the equation the court must consider the degree to which the order will impede the defendant's rights as a free citizen to go where he pleases and to associate with whosoever he pleases.[33]

In the same case in the Court of Appeal Kennedy LJ said:

> "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 in a case such as this the fact that the application has been made without notice. Obviously the court must consider whether the application for the final order has been properly made, but there is no justification for requiring the magistrates' court, when considering whether to make an interim order, to decide whether the

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[31] [2005] EWHC 253 (Admin).

[32] Note that the without notice procedure is not incompatible with a defendant's article 6 rights: R (Kenny) v Leeds Magistrates' Court, R (M) v Secretary of State for Constitutional Affairs and another [2003] EWHC 2963 (Admin) and, in the Court of Appeal, [2004] 1 WLR 2298.

[33] See the case referred to in note 32.

> evidence in support of the full order discloses an extremely strong prima facie case."

It is suggested that similar principles will apply to making an interim order on a with notice application.

3 PROHIBITIONS IN AND DURATION OF THE ORDER

3.1 The main provisions

Section 1(4), (6) and (7) of the Act provides:

> "(4) If, on such an application, it is proved that the conditions mentioned in subsection (1) above are fulfilled, the magistrates' court may make an order under this section (an 'anti-social behaviour order') which prohibits the defendant from doing anything described in the order.
>
> (6) The prohibitions that may be imposed by an anti-social behaviour order are those necessary for the purpose of protecting persons (whether relevant persons or persons elsewhere in England and Wales) from further anti-social acts by the defendant.
>
> (7) An anti-social behaviour order shall have effect for a period (not less than two years) specified in the order or until further order."

3.2 Deciding what prohibitions should be in the order

No prohibition may be imposed unless it is *necessary* for the purpose of protecting persons, whether relevant persons or persons elsewhere in England and Wales, from further anti-social acts by the defendant. The leading case is *R v Boness*.[34] From that and other cases[35] the following principles emerge:

(1) The requirement that a prohibition must be necessary to protect persons from further anti-social acts by the defendant means that the use of an ASBO to punish a defendant is unlawful.

(2) Each separate prohibition must be targeted at the individual and the specific form of anti-social behaviour it is intended to prevent. The order must be tailored to the defendant and not designed on a word processor for generic use. Therefore the court must ask itself when considering a specific order, "Is this order necessary to protect persons in any place in England and Wales from further anti-social acts by the defendant?"

(3) Each prohibition must be precise and capable of being understood by the defendant. Therefore the court should ask itself before making an order, "Are the terms of this order clear so that the defendant will know precisely what it is that he is prohibited from doing?" [36] For example, a prohibition should clearly delineate any exclusion zone by reference to a map and clearly identify those whom the defendant must not contact or associate with.

(4) Each prohibition must be prohibitory and not mandatory: this means substantially and not just formally prohibitory.

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[34] [2005] EWCA Crim 2395.

[35] Notably R v P (Shane Tony) [2004] EWCA Crim 287, R v McGrath [2005] EWCA Crim 353 and W v DPP [2005] EWCA Civ 1333.

[36] So that unfamiliar words like 'curtilage' and 'environs' should be avoided, as should vague ones like 'implement' or 'paraphernalia'.

(5) The terms of the order must be proportionate in the sense that they must be commensurate with the risk to be guarded against. This is particularly important where an order may interfere with an ECHR right protected by the Human Rights Act 1998, e.g. articles 8, 10 and 11.

(6) There is no requirement that the prohibited acts should by themselves give rise to harassment, alarm or distress.

(7) An ASBO should not be used merely to increase the sentence of imprisonment which an offender is liable to receive;

(8) Different considerations may apply if the maximum sentence is only a fine, but the court must still go through all the steps to make sure that an ASBO is necessary.

3.3 Prohibiting a defendant from committing a specified criminal offence

The fact that an order prohibits a defendant from committing a specified criminal offence does not automatically invalidate it. However, the court should not make such an order if the sentence which could be passed following conviction for the offence would be a sufficient deterrent.[37] In addition the Court of Appeal has indicated that prohibiting behaviour that is in any event a crime does not necessarily address the aim of an ASBO, which is to prevent anti-social behaviour.[38] The better course is to make an anticipatory form of order, namely an order which prevents a defendant from doing an act preparatory to the commission of the offence, thereby helping to prevent the criminal offence being committed in the first place. For example, an order might prevent a defendant from entering a shopping centre rather than stealing from shops.

In *Boness* Hooper LJ gave other examples, drawing an analogy with bail conditions designed to prevent a defendant from committing further offences. He said:[39]

> "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.
>
> 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 (anti-social 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

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[37] Boness at paragraph 31.

[38] Boness at paragraph 36. For recent examples of the application of these principles see Hills v Chief Constable of Essex Police [2006] EWHC 2633 (Admin) and Gillbard v Caradon District Council [2006] EWHC 3233 (Admin).

[39] At paragraphs 36 and 37.

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."

3.4 Examples of prohibitions

Orders in common use include orders preventing a defendant from entering a defined area (an exclusion zone), preventing him from associating with named persons in a public place and orders amounting to a curfew.[40] Further examples of valid prohibitions are given in Appendix 2 whilst Appendix 3 contains prohibitions found by the courts to be too wide or badly drafted.

3.5 Duration of the order

A full order has effect for a period (not less than two years) specified in the order or until further order. There is no maximum period.

The length of the order will depend on the facts of each individual case. Chapter 2 sets out various factors the court should take into account in deciding whether an order is necessary. It is suggested that similar factors will govern the length of the order.[41]

In *R (Lonerghan) v Lewes Crown Court* [42] Maurice Kay LJ said:

> "Just because the ASBO must run for a minimum of two years it does not follow that each and every prohibition within a particular order must endure for the life of the order. A curfew for two years in the life of a teenager is a very considerable restriction of freedom. It may be necessary but in many cases I consider it likely that either the period of curfew could properly be set at less than the full life of the order or that, in the light of behavioural progress, an application to vary the curfew under section 1(8) might well succeed."

This suggests that, provided at least one prohibition is ordered to have effect for at least two years, others need not. Some have queried whether this interpretation is consistent with section 1(7) of the Act but in *Boness* [43] the Court of Appeal said that Maurice Kay LJ was right.

An interim order must be for a fixed period, may be varied, renewed or discharged and in any event ceases to have effect on the determination of the full application.[44]

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[40] In R (Lonerghan) v Lewes Crown Court [2005] EWHC 457 (Admin) the court held that the curfew in question was substantially prohibitive rather than mandatory.

[41] For an example of a case in which the Court of Appeal reduced an indefinite order to an order for two years see R v Hall [2004] EWCA Crim 2671.

[42] [2005] EWHC 457 (Admin).

[43] At paragraph 27.

[44] Section 1D(4) of the Act.

4 ANCILLARY ORDERS

4.1 The three ancillary orders

These are intervention orders, individual support orders and parenting orders. A detailed discussion of them is beyond the scope of this guide and reference should be made to the standard criminal textbooks. What follows is a summary.

4.2 Intervention orders

Section 20 of the Drugs Act 2005 inserts sections 1G and 1H in the Act and came into force on 1st October 2006.[45] Sections 1G and 1H introduce the intervention order, an order which may be made against a defendant whose anti-social behaviour is connected with drug abuse.

By section 1G a relevant authority[46] may make an application for an intervention order if, in relation to a person who has attained the age of 18, it:

(1) makes an application for an ASBO (including in the county court);
(2) has obtained a report from an appropriately qualified person relating to the effect of drugs misuse on the defendant; and
(3) has engaged in consultation with such persons as the Secretary of State by order prescribes to ensure that appropriate activities will be available.

If the court makes an ASBO and is satisfied that the relevant conditions are met it may also make an intervention order. The relevant conditions are that:

(1) an intervention order is desirable to prevent a repetition of the behaviour which led to the ASBO being made (trigger behaviour);
(2) appropriate activities relating to the trigger behaviour or its cause are available for the defendant;
(3) the defendant is not subject to another intervention order or to any other treatment relating to the trigger behaviour or its cause; and
(4) the court has been notified by the Secretary of State that arrangements for implementing intervention orders are available in the area where the defendant resides.

An intervention order is an order which requires the defendant to comply, for a period not exceeding six months, with such requirements as are specified in the order and with any directions given by an authorised person with a view to implementing those requirements.

A relevant authority may also make an application for an intervention order in relation to a person against whom an ASBO has already been made.[47]

Section 1H requires the court to explain to the defendant in ordinary language the effect of the order and also deals with breach, variation and discharge of the order.

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[45] The Drugs Act 2005 (Commencement No.4) Order 2006, SI 2006/2136.
[46] This means a relevant authority for the purposes of section 1 of the Act : see section 1G(10).
[47] Section 1(G)(12) of the Act.

4.3 Individual support orders

Section 322 of the Criminal Justice Act 2003 inserted sections 1AA and 1AB in the Act and came into force on 1st May 2004.[48] Sections 1AA and 1AB introduce the individual support order ("ISO"), an order which supplements an ASBO and is designed to prevent repetition of the behaviour which led to it being made in the first place. Whereas an intervention order may be made only against a defendant who is 18 or over, an ISO may be made only against children or young persons (i.e. those 10-17 years old).

Where a court makes an ASBO[49] in respect of a defendant who is 10-17 years old when that order is made, it must consider whether the individual support conditions are fulfilled. If it is satisfied that they are, it must make an ISO, an order which requires the defendant to comply, for a period not exceeding six months, with such requirements as are specified in the order and with any directions given by the responsible officer with a view to implementing those requirements.

Before making an ISO the court must obtain from a social worker or a member of a youth offending team any information it considers necessary in order to determine whether the individual support conditions are fulfilled, or to determine what requirements should be imposed by the ISO.

The individual support conditions are that:

(1) an ISO is desirable to prevent a repetition of the behaviour which led to the ASBO being made;

(2) the defendant is not already subject to an ISO; and

(4) the court has been notified by the Secretary of State that arrangements for implementing ISOs are available in the area where the defendant resides.[50]

If the court is not satisfied that the individual support conditions are fulfilled, it must state in open court that it is not so satisfied and why it is not.

Section 1AA goes on to specify the nature and duration of the requirements that may be included in an ISO. Section 1AB requires the court to explain to the defendant in ordinary language the effect of the order and also deals with breach, variation and discharge of the order.

4.4 Parenting orders

These are dealt with in sections 8, 9 and10 of the Act. A parenting order may be made in several different circumstances, including where a court makes an ASBO in respect of a child or young person. In that case the court, if it is satisfied that the relevant condition is fulfilled, may make a parenting order in the case of a 16 or 17 year old and *must* do so in the case of a person under 16. The relevant condition is that the parenting order would be desirable in the interests

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[48] SI 2004/829.

[49] This means a final order following an application under section 1. An ISO may not be made on the making of an interim order. In addition an ISO may not be made on conviction or by a county court.

[50] Every court in England and Wales has received this notification: Home Office Circular 025/2004.

of preventing any repetition of the kind of behaviour which led to the ASBO being made.

A parenting order is an order which requires the parent to comply, for a period not exceeding twelve months, with such requirements as are specified in the order and to attend, for a concurrent period not exceeding three months, such counselling or guidance programme as may be specified in directions given by the responsible officer. In certain circumstances the counselling or guidance programme may be or include a residential course.

Where the person against whom the ASBO is made is under 16 the court must, before making a parenting order, obtain and consider information about the person's family circumstances and the likely effect of the order on those circumstances.

Section 9 deals with, amongst other things, the requirement to explain the effect of the parenting order to the parent and with breach, variation and discharge of the order. Section 10 concerns appeals against parenting orders.

5 EVIDENCE

5.1 The live issues

The main issues likely to be in dispute at the final hearing are:

(1) whether the defendant has acted in a manner that caused or was likely to cause harassment, alarm or distress;
(2) whether an order is necessary to protect relevant persons;
(3) what prohibitions the order should contain; and
(4) for how long the order should last.

However, not all these issues may be disputed. The court should identify those that are and limit the evidence accordingly.

5.2 Disclosure of material

It appears that there are no rules governing the disclosure of material to a defendant in civil proceedings in a magistrates' court. The code for disclosure contained in the Criminal Procedure and Investigations Act 1996 does not apply as the proceedings are civil. The Criminal Procedure Rules 2005 do not apply for the same reason. The Civil Procedure Rules 1998 do not apply to magistrates' courts.

It is suggested that the absence of a formal procedure for disclosure imposes a burden on the applicant to disclose voluntarily material which might reasonably be considered capable of undermining its own case or assisting the defendant's.[51] Otherwise there is a risk that the defendant's rights under article 6 ECHR will be breached.

5.3 Categories of evidence

The evidence on behalf of the applicant may include:[52]

evidence of breach of an ABC (acceptable behaviour contract)
witness statements of officers who attended incidents
witness statements of people affected by the behaviour
evidence of complaints recorded by the police, housing providers or other agencies
witness statements from professional witnesses, for example council officials, health visitors or truancy officers
video or CCTV evidence
supporting statements or reports from other agencies, for example probation reports

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[51] In August 2006 the Crown Prosecution Service issued its own guidance concerning anti-social behaviour which deals mainly with orders on conviction. Paragraph 12.3 states that where a prosecutor is aware of material that should be disclosed to the defence in the interests of justice, such a disclosure should be made. The guidance also deals with the situation where a prosecutor is in possession of sensitive material that cannot be disclosed.

[52] This list is taken from the guide to anti-social behaviour orders produced by the Home Office in August 2006, at page 22.

previous relevant civil proceedings, such as an eviction order for similar behaviour
previous relevant convictions
copies of custody records of previous arrests relevant to the application
information from witness diaries.

5.4 Hearsay evidence

It is obvious from the above list that some of the evidence sought to be relied on by the applicant will be hearsay evidence. For example, local residents may have complained to the council about the defendant's behaviour but be unwilling to give oral evidence in court for fear of the consequences. The council's officers will want to give evidence of what the local residents told the council.

The admissibility of hearsay evidence is governed by the Civil Evidence Act 1995. It is generally admissible. By section 1(1) of the 1995 Act in civil proceedings evidence shall not be excluded on the ground that it is hearsay. Section 1(2)(a) defines 'hearsay' as a statement made otherwise than by a person while giving oral evidence in the proceedings which is tendered as evidence of the matters stated. Section 1(2)(b) makes it clear that references to hearsay include hearsay of whatever degree. Therefore multiple hearsay is admissible, though the weight to be attached to it may be correspondingly less.

Section 2(1) requires a party who proposes to adduce hearsay evidence to give notice of his intention to the other party or parties. However, a failure to comply with this requirement does not affect the admissibility of the evidence, although it may be taken into account as a matter adversely affecting the weight to be given to it.[53] Section 4 lists the overall considerations the court must take into account in weighing the evidence, their main purpose being to promote a proper assessment of its *reliability*. Section 5 deals with the competence of the maker of the original statement and also with the admissibility of other evidence affecting his credibility.

If the 1995 Act deals with the admissibility of hearsay evidence the Magistrates' Courts (Hearsay Evidence in Civil Proceedings) Rules 1999 deal with the procedure for admitting it.[54] In particular rule 3 makes provision for the service of hearsay notices, rule 5 for the service of a notice where another party wants to attack the credibility of the maker of the original statement, and rule 6 for the service of documents.

There are a number of decisions dealing with hearsay evidence in applications for ASBOs. In *R (McCann) v Manchester Crown Court* [55] Lord Hope stressed that the use of hearsay evidence will be necessary in many cases if the magistrates are to be properly informed about the scale and nature of the relevant anti-social behaviour and the prohibitions that are needed for the protection of the public.

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[53] Section 2(4).
[54] SI 1999/681.
[55] [2002] UKHL 39.

In *Moat Housing Group-South Limited v Harris and Hartless*[56], on the other hand, the Court of Appeal pointed out the dangers of hearsay evidence. Brooke LJ said:

> "While nobody would wish to return to the days before the Civil Evidence Act 1995 came into force, when efforts to admit hearsay evidence were beset by complicated procedural rules, the experience of this case should provide a salutary warning for the future that more attention should be paid by claimants in this type of case to the need to state by convincing direct evidence why it was not reasonable and practicable to produce the original maker of the statement as a witness. If the statement involves multiple hearsay, the route by which the original statement came to the attention of the person attesting to it should be identified as far as practicable. It would also be desirable for judges to remind themselves in their judgment that they are taking into account the section 4(2) criteria…….so far as they are relevant."

Clearly each case will depend on its own facts. The task of the court will be to assess the reliability of the hearsay evidence and for that purpose to pay close attention to the factors set out in section 4(2) of the 1995 Act and any other circumstances it considers relevant.

5.5 Evidence of previous convictions

The applicant may wish to rely on the defendant's previous convictions as evidence that he acted in an anti-social manner, as evidence that an order is necessary, or for both purposes. Further it may wish to rely on the mere *fact* of a conviction or on the *facts* of it as well.

By section 11(1) of the Civil Evidence 1968 the fact of a conviction for an offence is admissible to prove, where to do so is relevant to any issue in those proceedings, that the defendant committed that offence. The defendant is then taken to have committed the offence unless he proves the contrary. The conviction may be proved by obtaining a certificate of conviction from the relevant court.

As regards the facts of a conviction section 11(2)(b) of the 1968 Act provides:

> "Without prejudice to the reception of any other admissible evidence for the purpose of identifying the facts on which the conviction was based, the contents of any document which is admissible as evidence of the conviction, and the contents of the information, complaint, indictment or charge-sheet on which the person in question was convicted, shall be admissible in evidence for that purpose."

These documents may not be enough to prove the facts of the conviction. In that case the applicant will have to adduce other evidence to prove them. This may include hearsay evidence.

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[56] [2005] 3 WLR 691, [2005] 4 All ER 1051. See also Leeds City Council v Harte [1999] EWCA Civ 568.

There is no doubt that the facts relied on to prove the commission of a criminal offence may also be relied on to prove that the defendant acted in an anti-social manner. Their use for the one purpose does not preclude their use for the other.[57]

5.6 Special measures directions

Section 1L of the Act enables the court to give special measures directions on an application for a civil ASBO in a magistrates' court, including an application for an interim order. The section achieves this by providing that Chapter 1 of Part 2 of the Youth Justice and Criminal Evidence Act 1999 (special measures directions in the case of vulnerable and intimidated witnesses) applies to the proceedings as it applies in relation to criminal proceedings. However, Chapter 1 of Part 2 applies with the omission of various provisions which are relevant only to criminal proceedings[58] and with "any other necessary modifications". These modifications are not specified.

In general terms a witness is eligible for assistance by a special measures direction if:

(1) he is under the age of 17 at the time of the hearing;[59]

(2) the quality of his evidence is likely to be diminished by reason of mental disorder, significant impairment of intelligence and social functioning, physical disability or physical disorder; or

(3) the quality of his evidence is likely to be diminished by reason of fear or distress in connection with testifying in the proceedings.[60]

A detailed account of the provisions governing eligibility and the giving of special measures directions is beyond the scope of this guide. Reference should be made to the standard criminal textbooks.

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[57] S v Poole Borough Council [2002] EWHC 244 (Admin).

[58] Section 1L(2)(a) and (3).

[59] This means the hearing at which the application for the special measures direction is determined.: section 16(3) of the Youth Justice and Criminal Evidence Act 1999.

[60] Sections 16 and 17 of the 1999 Act.

6 BREACH AND SENTENCING FOR BREACH

6.1 The main provisions

Section 1(10) and (11) of the Act provides:

> "(10) If without reasonable excuse a person does anything which he is prohibited from doing by an anti-social behaviour order, he is guilty of an offence and liable-
>
> (a) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum, or to both; or
>
> (b) on conviction on indictment, to imprisonment for a term not exceeding five years or to a fine, or to both.
>
> (11) Where a person is convicted of an offence under subsection (10) above, it shall not be open to the court by or before which he is so convicted to make an order under subsection (1)(b) (conditional discharge) of section 12 of the Powers of Criminal Courts (Sentencing) Act 2000 in respect of the offence."

6.2 The prosecutor

Once the defendant has been arrested the Crown Prosecution Service is likely to be the prosecuting authority by reason of its duties under section 3 of the Prosecution of Offences Act 1985. However, proceedings may be brought by a council which is a relevant authority or the council for the local government area in which the defendant resides or appears to reside.[61]

6.3 Which court?

Those aged 18 or over will be brought before a magistrates' court and those aged under 18 will be brought before a youth court, irrespective of which court originally made the order. The offence is triable either way and so there may be a committal for trial. There is currently no mode of trial guidance in relation to this offence. The sentencing guidance in section 6.7 and in the cases set out in appendix 4 will be relevant to the decision.

An adult defendant may be committed to the Crown Court for sentence if the magistrates' court is of the opinion that the offence was so serious that greater punishment should be inflicted for the offence than the court has power to impose.

6.4 Proving the original order

A copy of the original order, certified as such by the proper officer of the court which made it, is admissible as evidence of its having been made and of its contents to the same extent that oral evidence of those things is admissible.[62]

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[61] Section 1(10A) of the Act.
[62] Section 1(10C) of the Act.

6.5 Proving a breach of the order

The prosecution must prove a breach of the order to the criminal standard. If the defendant raises the evidential issue of reasonable excuse it is for the prosecution to prove lack of reasonable excuse.[63]

In R v Nicholson[64] R was a committed animal rights activist who was charged with breach of an ASBO prohibiting her from being within 500 metres of a proposed primate testing laboratory in Oxford. Her defence was that she had not carefully checked the order, that she had no recollection of having heard any reference to the place concerned and that she had mistakenly believed that she was entitled to be there. The trial judge ruled that, as a matter of law, ignorance of, forgetfulness as to, or misunderstanding of the terms of the ASBO could not amount to a reasonable excuse. R then pleaded guilty and appealed against conviction. The CA held that the matters relied on by R were capable of amounting to a reasonable excuse and should have been left to the jury as an issue of fact and value judgment.

In *Crown Prosecution Service v T* [65] the Crown Prosecution Service appealed by way of case stated from a decision of a DJ(MC) who had dismissed a charge against T of breach of an ASBO on the ground that the relevant provision of the order was unenforceable and void. The Divisional Court held that it was not open to the judge to rule that the original order was unenforceable and void within breach proceedings. That issue must be raised either by an application to vary the order, or by an appeal against the order, or possibly by an application for judicial review. Accordingly the contention that the order was itself unenforceable and void could not found a defence in later breach proceedings.

The approach the judge should have adopted was to consider whether:

(1) the relevant provision lacked sufficient clarity to warrant a finding that T's conduct amounted to a breach;

(2) the lack of clarity provided a reasonable excuse for non-compliance with the order; and

(3) if a breach was established, it was appropriate to impose any penalty.

6.6 Sentencing powers on breach

(1) On summary conviction an adult may be sentenced to a maximum of six months' imprisonment and/or a fine not exceeding the statutory maximum, presently £5000.

(2) On conviction on indictment an adult may be sentenced to a maximum of five years' imprisonment and/or a fine.

(3) On conviction in the youth court the maximum sentence that may be imposed on a person aged between 12 and 17 is a detention and training order for two years, of which twelve months is served in custody and the remainder in the community. If the person is aged between 12 and 14 at conviction the court must also be of the opinion that he is a persistent offender before it can pass such a sentence.

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[63] See the comparable provisions of section 5(5) of the Protection from Harassment Act 1997 and R v Evans (Dorothy) [2005] 1 Cr.App.R. 32 (at page 546).

[64] [2006] 2 Cr.App.R. 30 (at page 429).

[65] [2006] EWHC 728 (Admin).

(4) On conviction in the youth court a person aged 10 or 11 may be made subject to a community order.
(5) There is no power to make an order of conditional discharge in any case.
(6) These sentencing powers are the same whether the order breached is an interim order or a final order.

6.7 Sentencing for breach: general guidance

This section sets out general guidance on sentencing for breach under six heads.

First, the seriousness of the breach and the sentence for it must be determined in accordance with sections 143 – 153 of the Criminal Justice Act 2003 and the following three definitive guidelines issues by the Sentencing Guidelines Council:
Overarching Principles: Seriousness
Reduction in Sentence for a Guilty Plea
New Sentences: Criminal Justice Act 2003.

Second, according to the present Magistrates' Courts Sentencing Guidelines[66] the starting point in the case of a first-time offender pleading not guilty is, "Is it so serious that only custody is appropriate?" Aggravating factors (not exhaustive) are breach of a recently imposed order, a breach amounting to the commission of an offence, a breach which continues the pattern of behaviour the order sought to prohibit, group action and the use of violence, threats or intimidation. Suggested mitigating factors are age, health (physical or mental), co-operation with the police, evidence of genuine remorse and voluntary compensation.

Third, the Judicial Studies Board has given the following guidance to magistrates:

> "Breach of an order is a criminal offence and is itself a serious matter. A court should be wary of treating the breach of an ASBO as just another minor offence. It should be remembered that the order itself would normally have been a culmination of persistent anti-social behaviour. An ASBO will only be seen to be effective if breaches of it are taken seriously. Further breaches of a court order should be treated very seriously and may need to be referred to the Crown Court for more severe sentencing. The sentence should be both proportionate to the seriousness of the breach and importantly reflect the impact of the anti-social behaviour."

Fourth, where breaches do not involve harassment, alarm or distress, community penalties should be considered to help the offender learn to live within the terms of the ASBO to which he is subject. An example would be mere entry into an exclusion zone with no accompanying anti-social behaviour. Where in such a case there is no available community penalty a custodial sentence necessary to maintain the authority of the court can be kept as short as possible. However, such short sentences are not appropriate if the breach of the ASBO itself involves

[66] Effective from 1st January 2004.

harassment, alarm or distress to the public of the type the legislation was designed to prevent.[67]

Fifth, the interrelationship between ASBOs and conduct which constitutes a criminal offence may arise in two separate contexts and it is important not to confuse them. In the first place the question may arise whether a court should prohibit by an ASBO conduct which already amounts to a criminal offence. This is dealt with in chapter 3. Secondly the question may arise in breach proceedings. If an ASBO does prohibit conduct which already constitutes a criminal offence, to what extent should the court have regard to the maximum sentence for that offence in sentencing for the breach?

Hitherto the authorities on this point appeared to be inconsistent.[68] In *R v H, Stevens and Lovegrove* the Court of Appeal resolved the inconsistency in these terms:[69]

> "It is obvious that when passing sentence for breach of an anti-social behaviour order the court is sentencing for the offence of being in breach of that order. Plainly any sentence, in any court, must be proportionate or, to use the word with which all sentencers are familiar, "commensurate". Therefore, if the conduct which constitutes the breach of the anti-social behaviour order is also a distinct criminal offence, and the maximum sentence for the offence is, say, 6 months' imprisonment, that is a feature to be borne in mind by the sentencing court in the interests of proportionality.
>
> It cannot, however, be right that the court's power is thereupon limited to the 6 months' maximum imprisonment for the distinct criminal offence. That would treat the breach as if it were a stand alone offence, which at the time it was committed did not amount to a breach of the court order. In reality the breach is a distinct offence in its own right, created by statute, punishable by up to 5 years' imprisonment. We therefore reject the submission that it was wrong in principle for the judge to have imposed a custodial sentence where, for the instant offence of drunkenness, the maximum sentence would have been a fine. To the extent that the submission of the appellant on this particular aspect of the appeal is supported by *Morrison*[70], we respectfully conclude that its authority has been wholly undermined."

Sixth, according to the Divisional Court the absence from a final order of a prohibition inserted at the interim stage does not necessarily affect the gravity or otherwise of a breach of the interim prohibition. The gravity of the breach should be ascertained by reference to all the circumstances of the case, including 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.[71]

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[67] R v Lamb [2005] EWCA Crim 2487.
[68] See R v Tripp [2005] EWCA Crim 2253 and compare R v Morrison [2006] 1 Cr. App. R. (S) 488 (85)
[69] [2006] EWCA Crim 255 at paragraphs 26 and 27 (Sir Igor Judge PQBD).
[70] [2006] 1 Cr. App. R. (S) 488 (85), where the Court of Appeal had held that the sentence for breach should not normally exceed the statutory maximum for the criminal offence.
[71] Parker v DPP [2005] EWHC 1485 (Admin).

6.8 Sentencing for breach: practice

Appendix 4 sets out recent examples of sentences passed for breaches of ASBOs, though of course each case will depend on its own facts. They are arranged according to the severity of the sentence, starting with the lowest.

7 VARIATION AND DISCHARGE

7.1 The main provisions

Section 1(8) and (9) of the Act provides:

> "(8) Subject to subsection (9) below, the applicant or the defendant may apply by complaint to the court which made the anti-social behaviour order for it to be varied or discharged by a further order.
>
> (9) Except with the consent of both parties, no anti-social behaviour order shall be discharged before the end of the period of two years beginning with the date of service of the order."

Section 1D(4) of the Act deals with interim orders and provides:

> "An order under this section-
> (a) shall be for a fixed period;
> (b) may be varied, renewed or discharged;
> (c) shall, if it has not previously ceased to have effect, cease to have effect on the determination of the application….."

7.2 Procedure

This is set out in rule 6 of the Magistrates' Courts (Anti-social Behaviour Orders) Rules 2002[72] and, with one exception, applies equally to final and interim orders.

The application is made in writing to the magistrates' court which made the order and must specify the reason why the applicant believes the court should vary or discharge the order.

Where the court considers that there are no grounds upon which it might conclude that the order should be varied or discharged it may determine the application without hearing representations from the applicant or anyone else. In the case of an interim order made without notice, however, a defendant's application to vary or discharge the order must not be dismissed without the opportunity for him to make oral representations to the court.

Where, on the other hand, the court considers that there are grounds upon which it might conclude that the order should be varied or discharged, the designated officer for the court must issue a summons giving not less than 14 days' notice in writing of the hearing.

Note that, as regards interim orders, the 2002 Rules do not have the effect of shifting the burden of proof to the defendant to show why the order should be varied or discharged. The test remains that set out in section 1D(2) of the Act, namely whether it is just to make an order pending the determination of the full application, and the burden of showing that it is just remains on the party who wants the order.[73]

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[72] SI 2002/2784.

[73] R (Kenny) v Leeds Magistrates' Court, R (M) v Secretary of State for Constitutional Affairs and another [2003] EWHC 2963 (Admin).

8 APPEALS, COSTS AND LEGAL REPRESENTATION

8.1 The main provisions relating to appeals

Section 4(1) and (2) of the Act provides:

> "(1) An appeal shall lie to the Crown Court against the making by a magistrates' court of an anti-social behaviour order, an individual support order, an order under section 1D above……[74]
>
> (2) On such an appeal the Crown Court-
> (a) may make such orders as may be necessary to give effect to its determination of the appeal; and
> (b) may also make such incidental or consequential orders as appear to it to be just."

8.2 Appeal by the defendant

The defendant may appeal to the Crown Court against either an interim or a final order. The fact that section 4(1) refers to an appeal against the *making* of an order does not prevent him from appealing against the *terms* of the order itself.[75] By virtue of section 79(3) of the Supreme Court Act 1981 the appeal is a full rehearing. It should ordinarily be heard before a circuit judge. It is doubtful whether a right of appeal lies to the Crown Court against a refusal to vary an order.[76]

The fact that the defendant consented to the making of an order in the magistrates' court is not a jurisdictional bar to an appeal but it counts against him on the merits.[77]

The defendant may ask the magistrates' court to state a case for the opinion of the High Court under section 111 of the Magistrates' Courts Act 1980. However, he must be careful: by section 111(4) he loses his automatic right of appeal to the Crown Court if he does so. Under section 114 of the 1980 Act the court will not be required to state a case until the defendant has been required to enter into a recognizance, with or without sureties, conditioned to prosecute the appeal without delay, to submit to the judgment of the High Court and to pay such costs as the court may award. It is common practice for justices' clerks and magistrates' courts to require such a recognizance to be provided.[78]

In certain limited cases an application for judicial review of the decision of the magistrates' court may be the correct procedure for a defendant to follow. The circumstances in which this is appropriate are beyond the scope of this guide.[79]

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[74] The remaining words of the subsection have been repealed.
[75] R v Manchester Crown Court ex parte Manchester City Council [2001] ACD 53.
[76] R (Lee) v Leeds Crown Court, dealing with restraining orders under the Protection from Harassment Act 1997, The Independent, 30th October 2006.
[77] R (T) v Manchester Crown Court [2005] EWHC 1396 (Admin).
[78] A substantial fee, currently £382, is also payable unless a statutory exemption applies.
[79] For a fuller discussion of the various appeal routes see R (A) v Leeds Magistrates' Court [2004] EWHC 554 (Admin).

8.3 Appeal by the applicant

A relevant authority which fails to get an order can only ask the magistrates' court to state a case for the opinion of the High Court under section 111 of the Magistrates' Courts Act 1980.

8.4 Costs on the hearing of the complaint

The power to award costs on the hearing of a complaint made to a magistrates' court is contained in section 64 of the Magistrates' Courts Act 1980. The court may in its discretion order costs to be paid by either party to the other, as it considers just and reasonable. If the court does make an order it must specify the amount in the order. Any costs awarded are enforceable as a civil debt.[80]

8.5 Legal representation

Although applications under section 1 of the Act are civil proceedings, the nature of these proceedings involves the determination of the civil rights and obligations of the defendant and therefore engages article 6 ECHR. The right to representation is clearly established.

A defendant faced with an application under section 1 or 1D of the Act is treated by the Legal Services Commission as being subject to criminal proceedings.[81] The right to representation may be granted by the Legal Services Commission.[82] The mechanism for the making of such a grant is contained in the general criminal contract under which solicitors provide legal services to the LSC. In effect the solicitors determine their client's eligibility for advice and assistance (including advocacy assistance) without reference to the court.

A defendant charged with breaching an anti-social behaviour order will apply to the court for a representation order. Since the current sentencing guidelines contained in the Judicial Studies Board's Adult Court Bench Book suggest that a custodial sentence should be considered on conviction, the defendant should normally be granted a representation order subject to the means assessment.

A defendant seeking a variation of an ASBO or appealing to the Crown Court against the making of such an order may seek advice and assistance, including advocacy assistance, from a solicitor in the same way as he would if faced with an application under section 1.

All defendants seeking publicly funded representation, whether in civil proceedings, criminal proceedings, variation applications or appeals, must establish financial eligibility. The financial eligibility provisions of the Access to Justice Act 1999 as amended by the Criminal Defence Services Act 2006 are beyond the scope of this guide.

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[80] For guidance on the relevant principles see City of Bradford Metropolitan District Council v Booth [2000] 164 JP 485.

[81] See Regulation 3(2)(b) of the Criminal Defence Service (General) (No 2) Regulations 2001. The right to representation may be granted by the Legal Services Commission.

[82] See paragraph 3 of schedule 3 to the Access to Justice Act 1999.

9 ORDERS ON CONVICTION IN THE CROWN COURT, A MAGISTRATES' COURT OR A YOUTH COURT

9.1 The main provisions

Section 1C(1), (2), (3) and (4)of the Act provides:

> "(1) This section applies where a person (the 'offender') is convicted of a relevant offence.[83]
>
> (2) If the court considers-
> (a) that the offender has acted, at any time since the commencement date, in an anti-social manner, that is to say 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, and
> (b) that an order under this section is necessary to protect persons in any place in England and Wales from further anti-social acts by him,
>
> it may make an order which prohibits the offender from doing anything described in the order.
>
> (3) The court may make an order under this section-
> (a) if the prosecutor asks it to do so, or
> (b) if the court thinks it is appropriate to do so.
>
> (4) An order under this section shall not be made except-
> (a) in addition to a sentence imposed in respect of the relevant offence; or
> (b) in addition to an order discharging him conditionally."

9.2 Introduction

The proceedings in which the defendant is convicted are obviously criminal. The proceedings in which an ASBO is applied for are civil, even though they are conducted by a criminal court.[84] Further, it is not the purpose of an ASBO to punish a defendant.[85] Certain things follow. First, the question whether to make an order is not part of the sentencing process: it is better to decide the appropriate sentence and then decide whether to make an ASBO, whether at the sentence hearing or a later hearing. Second, an argument in mitigation that the court should make an ASBO instead of passing a custodial (or other) sentence is irrelevant and the court must not be diverted in that way.[86]

9.3 Procedure: applying for a full order

An order on conviction may be made after a trial or a guilty plea. By section 1(3) of the Act the prosecutor may ask the court to make an order or alternatively the court

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[83] A relevant offence is one committed after the coming into force of section 64 of the Police Reform Act 2002, namely after 2nd December 2002: section 1C (10) of the Act.
[84] R (W) v Acton Youth Court [2005] EWHC 954 (Admin).
[85] See section 2.4.
[86] R v Boness [2005] EWCA Crim 2395 at paragraph 30.

may make one of its own motion. There are no rules setting out the procedure to be followed. There is, however, some help.

In *R v W and F*[87] the Court of Appeal quashed ASBOs made against two young persons because it was not satisfied that a proper procedure had been followed in making them and because, in the absence of specific findings of fact as to anti-social behaviour, the conclusion that they were necessary could not be upheld. Having noted that there was no specific procedure for the making of an order on conviction the Court of Appeal went on to give general guidance as follows:

(1) It is imperative that the prosecution identifies the particular facts said to constitute anti-social behaviour, as opposed to the evidence to be adduced to prove them;
(2) If the defendant accepts those facts they should be put in writing, in the same way as a basis of plea;
(3) If he does not accept them they must be proved to the criminal standard before the court can act on them;
(4) The defendant should have a proper opportunity to consider the evidence advanced by the prosecution in support of an ASBO, especially where it wishes to rely on material going far wider than the evidence adduced in relation to the offence of which the defendant was convicted;
(5) Hearsay evidence is presumably capable of being adduced in support of an application under section 1C since the proceedings are civil in nature and so subject to the Civil Evidence Act 1995;
(6) A procedure analogous to that set out in the Magistrates' Courts (Hearsay Evidence in Civil Proceedings) Rules 1999 should be followed; [88]
(7) The court should state its findings of fact expressly and they should be recorded in writing on the order made by the court in accordance with rule 50.4 of the Criminal Procedure Rules 2005.

The court may adjourn any proceedings in relation to an order under section 1C of the Act even after sentencing the offender, a step which may be necessary to ensure that he has a proper opportunity to meet the case against him.[89] If the offender does not appear for any adjourned proceedings the court may further adjourn them or issue a warrant for his arrest, provided it is satisfied that he had adequate notice of the time and place of the adjourned proceedings.[90]

9.4 Procedure: applying for an interim order

The court has power to make an interim order pursuant to section 1D of the Act. There are no rules specifically governing an application for an interim order on conviction.

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87 [2006] EWCA Crim 686. For another striking example of the need form procedural fairness and thoroughness see R (C) v Sunderland Youth Court [2003] EWHC 2385 (Admin).
88 SI 1999/681.
89 Section 1C(4A) of the Act.
90 Section 1C(4B) and (4C) of the Act.

9.5 Conditions for making an order

With one exception the two conditions for making an order on conviction are the same as those for making a free-standing order in a magistrates' court.[91] The exception is that the words "relevant persons" in section 1(1)(b) of the Act are replaced with the words "persons in any place in England and Wales". To that limited extent the conditions for making an order on conviction are less restrictive than those for making a free-standing order.

The first condition is that the defendant has acted in an anti-social manner, namely 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. Unless, therefore, the facts of the offence of which the defendant has been convicted show this, the prosecution must prove it by reference to other facts going beyond the facts of the conviction.

For example, in *R v Lovegrove* [92] an order made under section 1C prohibited the defendant from engaging in behaviour that caused or was likely to cause harassment, alarm or distress, from entering specified parts of Hounslow and from committing any act of theft. The order followed upon his pleas of guilty to two offences of theft for which he was conditionally discharged. The Court of Appeal quashed the order, pointing out amongst other things that the offences of theft did not demonstrate that members of the public were likely to be harassed, alarmed or distressed by his behaviour.

In this connection section 1C(3A) and (3B) of the Act are important. Subsection (3A) provides that for the purpose of deciding whether to make an order the court may consider evidence led by the prosecution and the defence. By subsection (3B) it is immaterial whether evidence led in pursuance of subsection (3A) would have been admissible in the original criminal proceedings.

The second condition is that an order must be *necessary to protect persons* in any place in England and Wales from further anti-social acts by the defendant. In chapter 2 it was pointed out that, with orders on conviction, an additional factor has to be considered, namely the impact of the sentence on the necessity for an order, since the one may make the other unnecessary. It is suggested that relevant considerations will be:

(1) the nature and length of the sentence;
(2) its likely effect on the defendant;
(3) the nature, length and effect (if any) of previous sentences;
(4) the duration, conditions and likely effect of any period of licence.

There follow three examples of the approach taken by the Court of Appeal, though each case will depend on its own particular facts.

In *R v P (Shane Tony)* [93] the Court of Appeal held that where a substantial custodial sentence is imposed, on release from which the offender would be on licence and liable to recall, it was not possible to determine that an order was necessary to protect members of the public at a future date: there was the real possibility that the custodial

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[91] See chapter 2.
[92] [2006] EWCA Crim 255. See also R v Hall [2004] EWCA Crim 2671.
[93] [2004] EWCA Crim 287. As a further example, the availability of a community order with an exclusion requirement may render an ASBO with an exclusion zone disproportionate and unnecessary.

element would prove effective. There the court found that it was wrong to impose an order on a 15 year old prolific robber of mobile phones on whom a four year custodial sentence had been imposed. The court reduced the sentence to three years and quashed the ASBO. However, it did not rule out the use of an order in appropriate cases and circumstances.

In *R v Scott Parkinson*[94], on the other hand, an ASBO was held to be necessary even when combined with a lengthy period of custody. The defendant was aged 19 and convicted of robbery. Unlike *P* he had an extensive criminal record and there was evidence of persistent anti-social behaviour which had led to his being evicted. The Court of Appeal upheld a custodial sentence of three years followed by an ASBO of two years. The court stated:

> "It is apparent that in this appellant's case almost every means of sentencing him has been tried with apparent lack of success. He has served custodial sentences on four occasions, although not for as long as three years. In the present case he will be eligible for release after 18 months."

In several cases concerning orders made on conviction the Court of Appeal has reinforced the principle that an order should not be made simply for the purpose of extending the penalty for committing an offence. In *R v Kirby* [95] the defendant had a lengthy record for driving offences and was convicted of dangerous driving and driving whilst disqualified. A ten year order was imposed which prohibited him from (1) driving, attempting to drive or being carried in a vehicle that had been taken without the authority of the owner or other lawful authority and (2) driving or attempting to drive any vehicle whilst disqualified. The judge stated that he had imposed the order "because that actually increases the penalty that the court can impose to five years". The Court of Appeal held that an order should not be made where its underlying objective was to give the court greater sentencing powers in the event of future similar offending.[96]

As regards the conditions for making an interim order it is suggested that the same principles will apply as those set out in chapter 2 under the heading "Deciding whether it is just to make an interim order". The court may want to consider making an interim order if it adjourns an application for a full order under section 1C(4A).

9.6 Prohibitions in and duration of the order

As regards the prohibitions in the order the same principles apply as those set out in chapter 3.

As regards the duration of the order a full order has effect for a period (not less than two years) specified in the order or until further order. There is no maximum period.[97]

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[94] [2004] EWCA Crim 2757.
[95] [2005] EWCA Crim 1228.
[96] To similar effect see R v Adam Lawson [2006] 1 Cr. App. R. (S) 323 and R v Williams [2006] 1 Cr. App. R. (S) 305.
[97] Sections 1C(9) and 1(7) of the Act.

The length of the order will depend on the facts of each individual case. Chapter 2 sets out various factors the court should take into account in deciding whether an order is necessary. It is suggested that similar factors will govern the length of an order made on conviction**.**

In *R v H*[98] the defendant, aged 15, appealed against the terms of an ASBO made against him following a violent attack on a neighbour, whom he wrongly believed to be a paedophile. The court sentenced him to 3 years' detention and imposed an ASBO for 10 years prohibiting him from contacting the victim and from entering a specified area near his home. The Court of Appeal reduced the duration of the order to 5 years "to reflect a sufficient time for this young man to have reached the necessary level of maturity". It also varied the terms of the order to make it less onerous.

Likewise in *R v Rush*[99] the Court of Appeal approved in principle an ASBO made under section 1C against a son, aged 26, who had harassed and intimidated his parents but reduced its length from 10 to 5 years: this would give his parents adequate protection upon the defendant's release from custody after serving 12 months' imprisonment for burglary of their house.

An order under section 1C takes effect on the day it is made, but the court may provide that such requirements of the order as it may specify shall, during any period when the offender is detained in legal custody, be suspended until his release from that custody.[100] Presumably all the requirements of the order may be suspended in this way.

An interim order must be for a fixed period, may be varied, renewed or discharged and in any event ceases to have effect on the determination of the full application.[101]

9.7 Evidence

See chapter 5. The proceedings are civil proceedings. Hearsay evidence is admissible pursuant to the Civil Evidence Act 1995. Section 1L of the Act enables the court to give special measures directions in proceedings for an order on conviction in a magistrates' court or the Crown Court and in proceedings for an interim order in a magistrates' court. It appears that the Crown Court may not give special measures directions in proceedings for an interim order in that court.[102]

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98 [2006] EWCA Crim 255.
99 [2006] 1 Cr. App. R. (S) 200 (35).
100 Section 1C(5) of the Act.
101 Section 1D(4) of the Act.
102 Section 1L(1) of the Act.

9.8 Breach and sentencing for breach

Breach of an order made on conviction, whether a final or interim order, is a criminal offence and the applicable provisions and principles are those set out in chapter 6.[103]

9.9 Variation and discharge

The variation and discharge of an order made on conviction, whether a full order or an interim order, are dealt with in section 1CA of the Act.[104] In summary the defendant, the Director of Public Prosecutions or a relevant authority may apply for the order to be varied or discharged. A relevant authority may apply only if it appears to it that, in the case of variation, the protection of relevant persons from anti-social acts by the defendant would be more appropriately effected by a variation or, in the case of discharge, the order is no longer necessary.

The application is made to the court which made the order except that, in the case of an order made by a magistrates' court, it may be made to any magistrates' court acting in the same local justice area as that court.

A full order must not be discharged for two years beginning with the day on which it took effect unless, in the case of an application by the defendant, the Director of Public Prosecutions consents or, in any other case, the defendant consents. An interim order must be for a fixed period, may be varied, renewed or discharged and in any event ceases to have effect on the determination of the full application.[105]

In the case of an order made by a magistrates' court the application to vary or discharge the order should be made in accordance with the procedure set out in rule 6 of the Magistrates' Courts (Anti-social Behaviour Orders) Rules 2002.[106]

9.10 Appeals

A defendant against whom an order is made in a magistrates' court has a right of appeal to the Crown Court.[107] The appeal is a rehearing and should ordinarily be heard before a circuit judge. An appeal against the ruling of the Crown Court on the appeal is by an application for judicial review or by way of case stated.[108]

A defendant against whom an order is made in the Crown Court should appeal to the Criminal Division of the Court of Appeal, even thought the order is not strictly part of the sentencing process.[109]

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[103] There is one small exception. Whilst the council for the local government area in which the defendant resides or appears to reside may bring breach proceedings, a relevant authority may not: section 1C(9A) of the Act.

[104] In relation to interim orders see section 1D(6)(b) of the Act.

[105] Section 1D(4) of the Act.

[106] See chapter 7.

[107] Section 108 of the Magistrates' Courts Act 1980.

[108] See sections 28 and 29 of the Supreme Court Act 1981.

[109] R v P (Shane Tony) [2004] EWCA Crim 287.

9.11 Legal representation in relation to orders on conviction

The defendant who is subject to criminal proceedings may have been granted a representation order in those proceedings. If, following conviction, the prosecutor invites the court to consider making an order under section 1C of the Act or the court raises the issue of its own motion, the defendant is not required to seek an extension of the representation order or apply for a separate order to cover the application. The Legal Services Commission treats the issue as "incidental to the principal criminal proceedings". Solicitors should, however, note that their claim should be made as part of the standard or non-standard fee claim. The application or order does not attract a separate fee.

Occasionally a defendant charged with a criminal offence will refer to the likelihood of an order under section 1C being considered on conviction and seek to persuade the court (which grants representation orders on behalf of the LSC) that the risk of an order establishes a right to representation in the interests of justice. The Justices' Clerks' Society Guidance on the Interests of Justice Test published in October 2006 is silent on this issue. It is suggested that if consideration of an order is a real likelihood on conviction the court should normally grant the order subject to the entitlement being established on the means assessment.

10 ORDERS IN THE COUNTY COURT

10.1 The main provisions

Section 1B(1), (2) and (4) of the Act provides:

> "(1) This section applies to any proceedings in a county court ("the principal proceedings").
>
> (2) If a relevant authority-
> (a) is a party to the principal proceedings, and
> (b) considers that a party to those proceedings is a person in relation to whom it would be reasonable for it to make an application under section 1,
> it may make an application in those proceedings for an order under subsection (4).
>
> (4) If, on an application for an order under this subsection, it is proved that the conditions mentioned in section 1(1) are fulfilled as respects that other party, the court may make an order which prohibits him from doing anything described in the order."

Further, section 1B(3) enables a relevant authority to apply to be joined to the principal proceedings in order to apply for an order against a party to those proceedings. Conversely, section 1B(3A) and (3B) enables a relevant authority which is a party to the principal proceedings to apply for an order joining a person who is not a party in order to apply for an order against him. In that case, however, he may only be joined if his anti-social acts are material in relation to the principal proceedings.

10.2 Introduction

The substantive law is very similar to that governing the grant of civil orders in criminal courts. The criteria for the making of an order and the definition of "relevant authority" are the same.[110] However, there are significant procedural differences. One of the key distinctions between applications for orders in criminal and county courts is that county courts have no power to grant "free-standing" ASBOs. Any application for an order in a county court must be made in the "principal proceedings".

10.3 Procedure: applying for a full order

Procedure in the county court is governed by CPR Part 65 and its Practice Direction. They came into effect on 30 June 2004.

If the relevant authority is the claimant in the principal proceedings, an application for an order under section 1B(2) must be made in the claim form. Where the relevant authority is a defendant in the principal proceedings, the application must be made by an application notice in Form N244 which must be filed with the defence. If the relevant authority becomes aware of the circumstances which lead it to apply for an order after its claim is issued or its defence filed, the application must be made by application notice as soon as possible thereafter. If the application is made by

[110] See chapters 2 and 3 above.

application notice, it should normally be made on at least three days' notice to the person against whom the order is sought.[111]

If the relevant authority is not a party to the principal proceedings, applications under section 1B(3) to be made a party and for an order must be made in accordance with CPR Part 19 and on notice in Form N244. Such applications must be made as soon as possible after the authority becomes aware of the principal proceedings and should normally be made on notice to the person against whom the order is sought.[112]

An application under section 1B(3B) by a relevant authority which is a party to the principal proceedings to join a person who is not yet a party must be made in accordance with CPR Part 19. It should be made as soon as possible after the relevant authority considers that the criteria in section 1B(3A) are met. The application notice should be in Form N244 and must contain the relevant authority's reasons for claiming that the person's anti-social acts are material to the principal proceedings and details of the anti-social acts alleged. The application should normally be made on notice.[113]

As to the relationship between ASBOs and possession claims based upon anti-social behaviour see, for example, *Knowsley Housing Trust v McMullen* [114] and *Manchester City Council v Higgins.* [115]

The order has effect for a period (not less than two years) specified in the order or until further order. There is no maximum period.[116]

An order made under section 1B(4) must be served personally on the defendant.[117] District judges have jurisdiction to make orders under section 1B.[118]

10.4 Procedure: applying for an interim order

An application for an interim order may be made under section 1D. It must be made in accordance with CPR Part 25. Such an application should normally be made in the claim form or application notice seeking the order and on notice to the person against whom the order is sought. An application may be made without notice if it appears to the court that there are good reasons for not giving notice. The written evidence in support must state the reasons why notice has not been given.[119]

It is suggested that the decision whether to make an interim order, whether with or without notice, will be governed by the same factors as apply in a magistrates' court.

The order must be for a fixed period but may be varied, renewed or discharged. To vary, renew or discharge an interim order an application under CPR Part 23 would be

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111 CPR 65.22 and CPR 23.3, but see CPR 23.4.
112 CPR 65.24.
113 CPR 65.23.
114 [2006] EWCA Civ 539; [2006] Times, May 22nd.
115 [2005] EWCA Civ 1423; [2006] HLR 14.
116 Sections 1B(7) and 1(7) of the Act.
117 PD 65, paragraph 13.1.
118 PD 2B, paragraph 8.1A.
119 CPR 25.3.

required. Neither CPR Part 65 nor its Practice Direction contains any express provision dealing with such an application.

An interim order under section 1D must be served personally on the defendant. District judges have jurisdiction to make interim orders.

10.5 Conditions for making an order

See chapter 2.

10.6 Prohibitions in and duration of the order

See chapter 3.

10.7 Ancillary orders

A county court has jurisdiction to make an intervention order if it makes an ASBO and if certain conditions are satisfied: see paragraph 4.2 above.

10.8 Evidence

All applications for orders under section 1B(4) must be accompanied by written evidence, which must include evidence that s1E (the consultation requirement) has been complied with.[120] Such written evidence may either be contained in Part C of the application notice in Form N244 or in a separate witness statement. County courts are obliged to consider whether the relevant authority has complied with the consultation requirements of section 1E.[121]

Hearsay evidence is admissible under the Civil Evidence Act 1995. However "the willingness of a civil court to admit hearsay evidence carries with it inherent dangers". Claimants should state, by convincing direct evidence, why it is not reasonable and practicable to produce the original makers of statements as witnesses. If statements involve multiple hearsay, the route by which the original statement came to the attention of the person attesting to it should be identified as far as practicable. When hearing such applications, it is better for judges to start their judgements with an analysis of the direct oral evidence received, and then to move onto the evidence of the absent named witnesses and anonymous witnesses.[122]

The provisions in the Youth Justice and Criminal Evidence Act 1999 enabling a court to give special measures directions do not apply in the county court. However, under CPR 32.3 the county court has power to allow a witness to give evidence "through a video link or by other means". This provision seems to give the judge a very broad discretion.

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[120] CPR 65.25.
[121] Manchester City Council v M [2006] EWCA Civ 423, 20th March 2006.
[122] Moat Housing Group South Ltd v Harris and Hartless [2005] 3 WLR 691, [2005] 4 All ER 1051.

10.9 Breach and sentencing for breach

Breach of an order made in the county court is a criminal offence and the applicable provisions and principles are those set out in chapter 6. Proceedings for breach are heard in a magistrates' court even though the order was made in the county court.

It has been suggested that ASBOs made in the county court order under section 1B(4) are a species of injunction, so that, if the order is endorsed with a penal notice, breach can be dealt with by an application to the county court for committal. Dyson LJ, Deputy Head of Civil Justice, has indicated to judges that even if (which he doubts) the county court does have jurisdiction to exercise the power to commit for breach of an order made under s1B(4), it should not be exercised as a matter of practice, because the statute provides a clear alternative sanction for breach under section 1(10). For this reason it is good practice not to endorse a county court ASBO with a standard form county court injunction penal notice. A modified penal notice should be substituted, as follows:

"IMPORTANT NOTICE TO THE CLAIMANT/ DEFENDANT. If you break [any of the terms of] this order you will be guilty of a criminal offence."

The use of this wording will also help to avoid confusion between ASBOs and very similar orders made under the Housing Act 1996.

It is good practice for the order to state in express terms that it is either an interim order or a final order. Further, as emphasised by Brooke LJ in *Moat Housing Group South Limited v Harris and Hartless*, the findings of fact giving rise to the making of the order must be recorded.[123] This can be done in the body of the order or by way of a schedule annexed to it

10.10 Variation and discharge

The party to the principal proceedings against whom an order has been made and the relevant authority on whose application that order was made may apply to the county court which made the order for it to be varied or discharged by a further order. However, except with the consent of the relevant authority and the person subject to the order, no order can be discharged until two years from the date of service of the order.[124]

To vary or discharge an order an application under CPR Part 23 would be required. Neither CPR Part 65 nor its Practice Direction contains any express provision dealing with such an application.

10.11 Appeals

These are governed by CPR Part 52 and its Practice Direction. Permission to appeal is required from the first instance judge or the appeal judge. The normal time limit for applying for permission from the appeal judge or lodging the appeal if the first instance judge gives permission is 21 days. An appeal from a district judge is to a circuit judge

[123] [2005] 3 WLR 691, [2005] 4 All ER 1051.
[124] Section 1B(5) and (6) of the Act.

and an appeal from a circuit judge is to a High Court judge, unless the decision is a final decision in a claim expressly allocated to the multi-track, in which case the appeal is to the Court of Appeal.

10.12 Costs

There are no costs rules specifically applicable to ASBOs. Therefore CPR Parts 43 to 48 will apply, including the power to make a summary assessment at the end of the case. Where a party fails to pay the costs the order may be enforced as set out in the CPR. If a party has a public funding certificate the costs protection afforded by section 11 of the Access to Justice Act 1999 applies.

11 ORDERS AGAINST CHILDREN AND YOUNG PERSONS

11.1 Introduction

Applications for ASBOs are made very frequently in relation to children (persons aged 10 - 13) and young persons (persons aged 14 – 17). By section 44(1) of the Children and Young Persons Act 1933 every court in dealing with a child or young person who is brought before it, either as an offender or otherwise, shall have regard to the welfare of the child or young person and shall in a proper case take steps for removing him from undesirable surroundings, and for securing that proper provision is made for his education and training. At present a county court has no jurisdiction to make an order against persons under 18: see paragraph 11.11 below.

11.2 Procedure

See chapter 1 for the procedure for applying for a free-standing civil order.

The intended defendant may already be in the care of the local authority which has it in mind to apply for the order. In that case a conflict of interest arises between its duty to the public under section 17 of the Act and its duties to the child under the Children Act 1989. In *R (M) v Sheffield Magistrates' Court*[125] Newman J held that the existence of the conflict did not prevent a local authority from making an application against a child in its care. He went on to give guidance as to the procedures to be adopted by the local authority where this situation arose.

The current Home Office guidance to anti-social behaviour orders recommends that, when a relevant authority applies for an order against a child or young person, there should also be an assessment of his circumstances and needs.[126] A defendant might rely on the absence of such an assessment in support of an argument that an order is not yet necessary within section 1(1)(b) of the Act.

Even if the defendant is a child or young person a relevant authority still makes its application under section 1 of the Act by complaint to a magistrates' court. On 24th February 2006 the President of the Queen's Bench Division, with the agreement of the Master of the Rolls, issued a *Practice Direction* entitled *Magistrates' Courts (Anti-Social Behaviour Orders) Composition of Benches*.[127] This specifies that, where there is an application to a magistrates' court for an order under section 1 or for an order to be varied or discharged under section 1(8), and the person against whom the order is sought is under 18, the justices constituting the court should normally be qualified to sit in the youth court.[128] However, the direction does not apply if it is not practicable to

[125] [2004] EWHC 1830 (Admin).
[126] A guide to anti-social behaviour orders, Home Office, August 2006, at page 39.
[127] [2006] 1 AER 886.
[128] Of course, this includes a DJ(MC) who is qualified to sit in the youth court. However, applications should not be listed before a DDJ(MC).

constitute a bench in that way, in particular where to do so would result in a delayed hearing.[129]

If the defendant is under 16 his parent or guardian must attend at court during all the stages of the proceedings, unless and to the extent that the court is satisfied that it would be unreasonable to require such attendance.[130]

11.3 Conditions for making an order

See chapter 2. To what extent is the welfare of the child or young person a relevant consideration? In *R (A) v Leeds' Magistrates Court and Leeds City Council* [131] the court held that his interests were *a* primary consideration but not *the* primary consideration: the interests of the public were themselves a primary consideration. Thus it is a question of balancing the one against the other, always having regard, of course, to the statutory test set out in section 1(1) of the Act.

11.4 Prohibitions in and duration of an order

See chapter 3. The current Home Office guidance to anti-social behaviour orders recommends that there should be an administrative review of orders made against children and young persons every year, given their continually changing circumstances. Possible outcomes will be an application by the relevant authority to discharge the order or to vary it by strengthening the prohibitions in it.[132]

11.5 Ancillary orders

See chapter 4. The orders to be considered are individual support orders and parenting orders.

11.6 Evidence

See chapter 5. Note that witnesses under 14 give their evidence unsworn.[133]

11.7 Breach and sentencing for breach

See chapter 6. Proceedings for breach of an ASBO by a child or young person are heard in the youth court. The purposes of sentencing set out in section 142 of the Criminal Justice Act 2003 do not apply to an offender who is under 18 at the time of conviction.[134] However, section 37(1) of the 1998 Act provides that it shall be the principal aim of the youth justice system to prevent offending by children and young persons.

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[129] The Practice Direction also specifies that applications for interim orders under section 1D of the Act, including those made without notice, may be listed before justices who are not qualified to sit in the youth court.

[130] Section 34A(1) of the Children and Young Persons Act 1933.

[131] [2004] EWHC 554 (Admin).

[132] At page 45.

[133] Section 55(2) of the Youth Justice and Criminal Evidence Act 1999 and section 98 of the Magistrates' Courts Act 1980.

[134] Section 142(2) of the 2003 Act.

On conviction in the youth court the maximum sentence that may be imposed on a person aged between 12 and 17 is a detention and training order for two years, of which twelve months is served in custody and the remainder in the community. If the person is aged between 12 and 14 at conviction the court must also be of the opinion that he is a persistent offender before it can pass such a sentence. On conviction in the youth court a person aged 10 or 11 may be made subject to a community order.

11.8 Variation and discharge

See chapter 7. As regards the composition of the bench on the hearing of an application to vary or discharge an order see section 11.2 above.

11.9 Appeals, costs and legal representation

See chapter 8.

11.10 Orders on conviction in the Crown Court, a magistrates' court or a youth court

See chapter 9.

11.11 Orders in the county court

Unlike criminal courts, county courts were not initially able to make ASBOs against persons under 18, but from 1 October 2004 pilot arrangements were operating in a number of county courts allowing such orders to be made. That pilot scheme has now come to an end.[135] Therefore the current position is that county courts have no power to make orders against persons under 18.

11.12 Reporting restrictions

This is an important topic. Applicants are often keen to publicise the making of full or interim orders, firstly because disclosure of the defendant's identity may improve the prospect of the order being enforced, and secondly because the public have an interest in knowing who is committing anti-social acts.

As regards proceedings for a civil order in a magistrates' court there are no reporting restrictions unless the court imposes them in the exercise of its discretion under section 39 of the Children and Young Persons Act 1933. In *R (T) v St Albans Crown Court and others* [136] Elias J referred to the principles set out in another case[137] concerning section 39 and approved them in the context of ASBOs. The factors relevant to the exercise of the court's discretion are:

(1) Whether there are good reasons for naming the defendant;

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[135] Anti-social Behaviour Act 2003 (Commencement No. 4) Order 2004, SI 2004/2168 and Anti-social Behaviour Act 2003 (Commencement No. 4) (Amendment) Order 2006, SI 2006/835.

[136] [2002] EWHC 1129 (Admin).

[137] R v Winchester Crown Court ex parte B [2000] 1 Cr. App. R. 11.

(2) In reaching that decision the court will give considerable weight to the age of the defendant and the potential damage to any young person of public identification as a criminal before he has the benefit or burden of adulthood;
(3) By virtue of section 44 of the 1933 Act the court must have regard to the welfare of the child or young person;
(4) The prospect of being named in court with the accompanying disgrace is a powerful deterrent and the naming of a defendant in this context serves as a deterrent to others: these deterrents are proper objectives for the court to seek;
(5) There is a strong public interest in open justice and in the public knowing as much as possible about what has happened in court, including the identity of those who have committed crime;
(6) The weight to be attributed to the different factors may shift at different stages of the proceedings and, in particular, after the defendant has been found, or pleads, guilty and is sentenced: it may then be appropriate to place greater weight on the interests of the public in knowing the identity of those who have committed crimes, particularly serious and detestable crimes;
(7) The fact that an appeal has been made may be a material consideration.

Where the court is concerned with interim proceedings further factors come into play. The court should bear in mind the important considerations that at that stage no findings of fact have been made, the allegations have not been proved and the defendant has had no opportunity to challenge the allegations.[138] In practical terms the court may be more willing to make a section 39 order restricting publicity in interim proceedings than after it has made a final order.

As regards orders made on conviction the position is similar. Whilst section 49 of the 1933 Act imposes restrictions on reports of proceedings before the youth court, section 1C(9C) of the 1998 Act provides that section 49 does not apply in relation to a child or young person against whom an order on conviction is made *insofar as the proceedings relate to the making of the order*. This means that, unless the court exercises its discretion under section 39 of the 1933 Act, details of the child or young person the subject of the order may be published. However, details of the criminal offence which led to the order being made remain subject to automatic reporting restrictions.

As regards proceedings for breach of an order, section 1(10D) of the 1998 Act provides that again section 49 of the 1933 Act does not apply. However, subsection (10D) goes on to state that section 45 of the Youth Justice and Criminal Evidence Act 1999 (power to restrict reporting of criminal proceedings involving persons under 18) does apply. Since section 45 is not yet in force this should presumably be read as a reference to section 39 of the 1933 Act.

[138] R (Keating) v Knowsley Metropolitan Borough Council [2004] EWHC 1933 (Admin).

APPENDIX 1

[This Appendix will contain the following sections of the Crime and Disorder Act 1998, as amended:

1, 1B, 1C, 1CA, 1D, 1E, 1L and 4.]

APPENDIX 2
VALID PROHIBITIONS

The following schedule does not include a list of standard prohibitions to be lifted for inclusion in an ASBO. It is intended to provide a reference which assists the judiciary in drafting the prohibitions in an ASBO to prevent further anti-social behaviour. It includes comments to assist in determining issues such as the proportionality of the prohibitions and their likely effectiveness.

Type of anti-social behaviour	**Possible prohibitions**	**Comment**
Criminal damage through regular spray-can graffiti.	An order prohibiting the defendant from being in possession of any can of spray paint in a public place.	See *R v Boness [2005] EWCA Crim 2395*. Defining the geographical area of application can result in the offender committing further acts elsewhere.
Fly posting.	An order prohibiting the defendant from carrying posters, paste and any material designed for sticking publicity material on buildings and public facilities, or an order prohibiting the use of a motor vehicle containing these items and materials.	Could consider the use of disqualification under s.146 of the PCC(S)A 2000 if the fly posting was carried out from a motor vehicle.

Car racing on public roads, common land or on play area.	Prohibitions which aim to curtail involvement in the activity are better than those which restate a pre-existing offence eg not to drive on land not forming part of the road. So include:- • Not to congregate with others to race motor cars. • Not to associate with named persons (others known to race cars).	Courts have been criticised for imposing orders on persistent offenders in order to increase the potential punishment. The order must be justified on preventative grounds.
Begging, particularly aggressive pursuit of donations where connected to drug misuse.	The order might include a prohibition of begging or loitering for the purpose of begging in a clearly defined area. Consider a prohibition of entry into a defined area subject to controlled exceptions eg to attend drug rehabilitation treatment.	Caution should be exercised over prohibitions which apply over wide areas. Although the risk exists that the individual will relocate to beg in another area, wide area prohibitions may be disproportionate. Note the availability of Intervention Orders under the Drugs Act 2005.
Attending school premises to cause nuisance.	Order prohibitions which could include:- • Not to go to named schools or to go within a defined area around the schools. • Not to approach staff or pupils of a named school.	Prohibitions must clearly address the type of behaviour and should prevent the opportunity to cause a nuisance arising in the first place. Delineation of areas should be supported by a map appended to the order.
Threatening, abusive behaviour particularly when directed to public servants such as social workers, hospital staff or housing officers.	Not to go within a specific distance of the offices of the relevant departments. Not to approach staff of the departments.	If included in a prohibition, the term "anti-social behaviour" requires further definition or limitation so as to provide clarity to the defendant. Any prohibition relating to the commission of further "acts causing harassment, alarm or distress" would not be appropriate without further limitation: *CPS –v- T [2006] EWHC 629 (Admin).*

Persistent drunken, abusive behaviour within an identifiable area or neighbourhood.	An order including prohibitions such as :- • Not to consume alcohol in a public place (defined if appropriate). • Not to leave an identified property during prescribed periods of the day. • Not to meet identified individuals.	Prevention is best achieved through prohibitions which are comparable to bail conditions; non-association, curfews, keeping out of defined areas. Care needs to be exercised over the extent and duration of prohibitions such as curfews. See *R (on the application of Lonerghan – v- Lewes Crown Court [2005] EWHC 457 (Admin).*
Prostitution	The prohibition should prevent entry into a clearly defined area. The order might include a prohibition of loitering for the purpose of prostitution.	Prohibiting prostitutes from entering an area may lead to the problem arising in another area. However, care needs to be exercised over proportionality. The second prohibition might offend the principle that the prohibition should be preventative rather than add to the potential punishment for a criminal offence.
Kerb crawling	Exclusion from a defined area. Prohibition of approaching female pedestrians in a specific area.	Driving disqualification can be effective in cases such as this.
Nuisance and dangers caused by the use of quad bikes, motorbikes, mini-motos and scooters.	Prohibitions which prevent the defendant sitting on any type of vehicle – clearly described. Non-association with other users (named) of similar vehicles.	The identity of others with whom the defendant must not assemble must be clearly noted in as much detail as possible in the ASBO.
Noise nuisance caused by raves, rowdy games and chanting by gangs (eg football supporters).	Non-association clauses in ASBOs are more effective in enabling prevention of anti-social behaviour than orders not to cause nuisance. Exclusion from a defined area is effective.	Prohibition which attempts to prevent the possession of equipment for playing music or games can be effective but often the defendant is not the owner, but merely a participant in the rowdy behaviour.

APPENDIX 3
INVALID PROHIBITIONS

The following prohibitions have been found to be too wide or poorly drafted:

- Act in an anti-social manner in the city of Manchester. (Too wide on grounds of lack of definition or limitation of the behaviour and also breadth of geographical areas: *CPS v Michael T [2006] EWHC 728 (Admin)).*

- Not to be a passenger in or on any vehicle, whilst any other person is [sic] committing a criminal offence in England or Wales. (A breach could be occasioned by travelling in a bus the driver of which, unknown to him, was driving without a licence: *R (W) v Acton Magistrates' Court [2005] EWHC 954 (Admin)).*

- Not to associate with any person or persons whilst such a person or persons is engaged in attempting or conspiring, to commit any criminal offence in England or Wales. (A similar result to the above in that if he was associating with someone who, unknown to him, was conspiring to commit an offence he would be in breach of the order).

- Entering any other car park whether on payment or otherwise within the counties of X and Y. (This was considered to be too draconian as it would prevent the defendant from entering, even as a passenger, any car park in a supermarket: *R v McGrath [2005] EWCA Crim 353).*

- Trespassing on any land belonging to any person whether legal or natural within those counties. (As above in that any wrong turn onto someone else's property would risk custody).

- Having in his possession in any public place any window hammer, screwdriver, torch or any tool or implement which could be used for the purpose of breaking into motor vehicles. (Unacceptably wide as the meaning of 'any tool or implement' is impossible to ascertain).

- Entering any land or building on the land which forms a part of educational premises except as an enrolled pupil with the agreement of the head of the establishment or in the course of lawful employment. (The term 'educational premises' lacks clarity. For example, it may include teaching hospitals or premises where night classes are held. Also there was a danger that the defendant might unwittingly breach the order if he played on playing fields associated with educational premises: *R v Boness [2005] EWCA Crim 2395).*

- In any public place, wearing, or having with you anything which covers, or could be used to cover, the face or part of the face. This will include hooded clothing, balaclavas, masks or anything else which could be used to hide identity, except that a motorcycle helmet may be worn only when lawfully riding a motorcycle. (Found to be too wide and a breach could occur by the wearing of a scarf or carrying a newspaper).

- Doing anything which may cause damage. (Far too wide as may include the defendant scuffing his shoes).

- Committing any criminal offence. (Taken with other prohibitions the Divisional Court commented that this was very plainly too wide: *R (W) v DPP [2005] EWHC 1333 (Admin)*).

Further examples and consideration of prohibitions made for football related violence may be found in *R v Boness [2005] EWCA Crim 2395*.

APPENDIX 4
CASES ON SENTENCING FOR BREACH

These cases are arranged according to the severity of the sentence, starting with the lowest.

R v Lamb[139]
L, aged 18, pleaded guilty before a magistrates' court to three offences of breach of an ASBO and was committed to the Crown Court for sentence. He had 25 previous court appearances for numerous offences and had been subject to community penalties and two sentences of detention. The ASBO prohibited him from entering a town centre as defined on a map, from entering the Metro transport system and from consuming alcohol or being drunk in any public place. He had breached the ASBO on several previous occasions. The present breaches consisted of being present on the Metro transport system on three occasions. The sentencing judge imposed a sentence of 22 months' detention in a young offender institution.

The CA observed that it was confronted with the picture of an offender who, without committing crime or harassing or causing distress to any member of the public, repeatedly breached the order of the court. It held that merely being found in the proscribed area without any evidence of associated anti-social behaviour did not deserve to be visited with such a long sentence and substituted a total sentence of **6 months' detention in a young offender institution**. It underlined the fact that such short sentences were not appropriate if the breach of the order itself involved harassment, alarm or distress to the public.

R v Ward[140]
W stole expensive car wheels professionally in order to feed his addiction to drugs. An ASBO imposed in August 2004 prohibited him from having in his possession any articles in connection with the removal of motor vehicle wheels or alloys. In December 2004 he was found in possession of articles which could be used to remove motor vehicle wheels. He pleaded guilty to breach of the ASBO and the CA upheld a sentence of **6 months' imprisonment.**

R v Stevens [141]
S, aged 56, pleaded guilty to breach of an ASBO by being drunk and urinating in a public place. He had 135 previous convictions for over 200 offences, including 44 offences relating to drunkenness. The judge originally deferred sentence but three days later S stole a bottle of whisky from a Tesco store. The CA upheld a sentence of **9 months' imprisonment** for breach of the ASBO and 3 months' imprisonment consecutive for the theft.

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[139] [2006] 2 CAR (S) 84 (11)
[140] [2005] EWCA Crim 2713
[141] [2006] EWCA Crim 255

R v Tripp[142]
T was subject to an ASBO which prohibited him from using threatening, abusive or insulting words or behaviour or disorderly behaviour within the sight or hearing of a person. Subsequently he abused a project worker at a night shelter and was at the same time drunk and disorderly. T was 44 years old, had a large number of previous convictions and had been made the subject of a community order only 10 days earlier. He pleaded guilty before a magistrates' court to a breach of the order and was committed for sentence.
The judge sentenced him to 12 months' imprisonment and the CA reduced it to **9 months' imprisonment**, holding that the original sentence was disproportionate to the nature of the breach.

R v Kearns[143]
K was a persistent shoplifter. He was subject to an ASBO imposed in April 2004 which prevented him from entering shops in a designated area in a town centre. Since then he had breached the order eight times. In January 2005 he breached it for a ninth time by entering the exclusion zone, an offence to which he pleaded guilty. The judge sentenced him to 15 months' imprisonment and the CA reduced it to **9 months' imprisonment**, having regard to the nature of the breach and the prompt guilty plea.

R v Bulmer [144]
B, a 37 year old incurable alcoholic of limited intelligence, pleaded guilty before a magistrates' court to two offences of breach of an ASBO and was committed to the Crown Court for sentence. One of the terms of the order was that she should not use threatening, abusive or insulting words or disorderly behaviour. She had already breached the order on a number of occasions. The present breaches consisted of behaving abusively to a police officer and three days later behaving abusively to paramedics who found her lying on a road.

The judge sentenced her to 21 months' imprisonment concurrent for each offence. The CA bore in mind the need not only to protect the public but also to keep the sentence in proportion to the culpability of B's conduct. A proportionate sentence was **12 months' imprisonment** concurrent for each offence.

R v Caiger [145]
C, a 56 year old man with a deep-rooted alcohol problem, pleaded guilty before a magistrates' court to common assault, assaulting a police officer and breach of an ASBO. He was committed to the Crown Court for sentence. One of the terms of the order was that he should not cause harassment, alarm or distress to anyone within a specified hospital or its grounds. He had previously breached the order and been sentenced to 12 months' imprisonment.

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142 [2005] EWCA Crim 2253
143 [2005] EWCA Crim 2038
144 [2006] 2 CAR (S) 55 (6)
145 [2006] 2 CAR (S) 59 (7)

On the day of his release he collapsed outside a public house and assaulted a paramedic and a police officer who came to his assistance (common assault and assaulting a police officer). The police took C for treatment to the hospital specified in the order. This was against C's wishes because he knew he was prohibited from going there by the terms of the order. When there he swore at hospital staff and behaved in an abusive manner by spitting (breach of the ASBO).

The judge sentenced him to 3 years' imprisonment for breach of the ASBO with 6 months' imprisonment concurrent for the other two offences. The CA gave weight to the fact that C had made a genuine attempt not to be taken to the hospital and reduced the sentence for breach of the ASBO to **18 months' imprisonment**, with 4 months concurrent for the other two offences.

R v Anthony (Emma Louise) [146]
The ASBO prohibited A, aged 29, from (1) abusing any member of staff working for any general practitioner's surgery or any NHS Trust hospital in England and Wales, and (2) being drunk or consuming alcohol in any public place within England and Wales. The day after the order was made A breached it by attending at a hospital when drunk, racially abusing a nurse and pushing and spitting at a security officer. Later she struck a doctor in the face with her fist, continued to be abusive and kicked a female security officer. She pleaded guilty. She had been before the courts for a decade for petty crime, criminal damage, public order offences and, most recently, for anti-social behaviour (8 previous breaches of ASBOs).

The CA reduced a sentence of 4 years' imprisonment for breach of the ASBO to **3 years 3 months' imprisonment**, with 6 months concurrent on four counts of common assault.

R v Curtis Braxton[147]
An ASBO made in October 2001 prevented B from entering Birmingham City Centre and from using or engaging in any threatening, abusive, offensive, intimidating or insulting language or behaviour. The duration of the order was 5 years. Within two months of the order being made he breached it twice and was sentenced to 2 years' imprisonment.

In July 2003, shortly after his release and whilst on licence, he breached the order twice more by acting in an aggressive manner whilst begging. He pleaded not guilty, was convicted by a magistrates' court and committed for sentence.

B was aged 39 and had appeared before the courts on 37 occasions, often for public order or violent offences. The CA upheld sentences of **3 years 6 months' imprisonment** concurrent for each offence.

[146] [2006] 1 CAR (S) 393 (74)
[147] [2004] EWCA Crim 1374