



Sentencing Guidelines Council

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# Breach of an Anti-Social Behaviour Order

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**Consultation Guideline**



## Foreword

The Sentencing Guidelines Council was created in 2004 in order to frame guidelines to assist courts as they deal with criminal cases across the whole of England and Wales.

The Council receives advice from the Sentencing Advisory Panel which consults widely before tendering that advice. The Council then produces a draft guideline on which it seeks the views of a limited group as provided by the Criminal Justice Act 2003.

The Panel's advice and this guideline have drawn on the extensive case law that has come from the Court of Appeal and Divisional Court arising from the making of an order or from proceedings for breach.

The Council has previously set out the approach to dealing with breaches of orders in its guidelines on *New Sentences: Criminal Justice Act 2003*<sup>1</sup> and *Breach of Protective Orders*.<sup>2</sup> The main aim of sentencing for breach of a court order is to achieve the purpose of the order, which in the case of an ASBO is to protect the public from behaviour that is likely to cause harassment, alarm or distress.

Any perception that the courts do not treat seriously a failure to comply with a court order can undermine public confidence and is therefore an important additional consideration.

This guideline applies to the sentencing of adult and young offenders. It is recognised that a large proportion of orders are imposed on persons under 18 years of age. Although the sentencing framework for youths is very different from that for adults, and a guideline for sentencing young offenders will follow in due course, the Council considered that sentencers would find it helpful to have guiding principles for sentencing young offenders for breach of an ASBO.

The advice from the Panel (and the consultation paper that preceded it) contains further background details and is published alongside this draft guideline. All documents can be found at [www.sentencing-guidelines.gov.uk](http://www.sentencing-guidelines.gov.uk) or can be obtained from the Council's Secretariat at 4<sup>th</sup> Floor, 8-10 Great George Street, London SW1P 3AE.

**Responses to the consultation should be received no later than 25 July 2008.** When the consultation period is concluded, the Council will consider any responses received and then issue a definitive guideline to which every court is required to have regard in accordance with section 172 of the 2003 Act.

Chairman of the Council  
May 2008

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<sup>1</sup> Published December 2004: [www.sentencing-guidelines.gov.uk](http://www.sentencing-guidelines.gov.uk).

<sup>2</sup> Published December 2006; [www.sentencing-guidelines.gov.uk](http://www.sentencing-guidelines.gov.uk).



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# BREACH OF AN ANTI-SOCIAL BEHAVIOUR ORDER

## A. Statutory provision

1. Section 1 of the Crime and Disorder Act 1998 provides:

*“(10) If without reasonable excuse a person does anything which he is prohibited from doing by an anti-social behaviour order, he shall be 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.”*

2. Where a person is convicted of an offence of breach of an anti-social behaviour order (ASBO), it is not open to the court to make an order discharging the offender conditionally.<sup>3</sup>

## B. Introduction

3. An ASBO is a preventative order that can be made in either civil or criminal proceedings; its aim is to protect the public from behaviour that causes, or is likely to cause, harassment, alarm or distress. An order may be made on application to a magistrates' court, on conviction, or in conjunction with other proceedings in the County Court.
4. As the ability to deal appropriately with an order that has been breached depends on it having been properly made, the key principles applicable to the making of an ASBO are summarised in Annex A along with details of other considerations at the point at which the order is made.
5. Breach proceedings may be instituted in relation to final and interim orders. Breach of an interim order or of a final order is equally serious.
6. This guideline relates to the sentencing of both adult and young offenders. As the sentencing framework that applies to offenders aged under 18 is significantly different from that for older offenders, the guidance for young offenders is in the form of principles particularly regarding the circumstances in which a custodial sentence might be justified. The maximum penalty in the case of a young offender is two years detention (see Annex D for a summary of the sentencing framework for young offenders).

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<sup>3</sup> Crime and Disorder Act 1998, s.1(11).

7. Breach of this type of order is different from breach of a community order or failure to surrender to custody because it has the potential to affect a community or the public at large in a way that causes direct harm.

**The main aim of sentencing for breach of a court order is to achieve the purpose of the order.** Therefore, the sentence for breach of an ASBO should primarily reflect the harassment, alarm or distress involved; the fact that it constituted breach of a court order is a secondary consideration.

### **C. Assessing Seriousness**

8. The primary factor in considering sentence is the seriousness of the offence; that is determined by assessing the culpability of the offender and any harm which the offence caused, was intended to cause or might foreseeably have caused.<sup>4</sup> A community sentence can be imposed only if a court considers that the offence is serious enough to justify it,<sup>5</sup> and a custodial sentence can be imposed only if a court considers that a community order or a fine alone cannot be justified in view of the seriousness of the offence.<sup>6</sup> The Council has published a definitive guideline on seriousness that guides sentencers through the process of determining whether the respective sentencing thresholds have been crossed.<sup>7</sup>

#### **(i) Culpability and harm**

9. The sentence for breach of an ASBO must be commensurate with the seriousness of the offence, and this is determined by an assessment of both the culpability of the offender and the actual, intended or foreseeable harm involved.<sup>8</sup> In order properly to assess the seriousness of an individual breach, a court needs to be aware of the purpose of the order and the context in which it was made in order to be able to assess the significance of that breach.

10. When a court is considering the seriousness of breach of an order such as an ASBO, it will need to consider two aspects of culpability:

#### **(i) The degree to which the offender intended to breach the order.**

Culpability is variable and an offender may have:

- intended the breach
- been reckless as to whether the order was breached
- been aware of the risk of breach; or
- been unaware of this risk due to an incomplete understanding of the terms of the order.

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<sup>4</sup> Criminal Justice Act 2003, s.143(1).

<sup>5</sup> *ibid.*, s.148(1).

<sup>6</sup> *ibid.*, s.152(2).

<sup>7</sup> *Overarching Principles: Seriousness*, published December 2004; [www.sentencing-guidelines.gov.uk](http://www.sentencing-guidelines.gov.uk).

<sup>8</sup> Criminal Justice Act 2003, s.143; Sentencing Guidelines Council, *Overarching Principles: Seriousness*, published 2004; [www.sentencing-guidelines.gov.uk](http://www.sentencing-guidelines.gov.uk).

(ii) **The degree to which the offender intended to cause the harm that resulted (or could have resulted).**

Culpability will be higher where the offender foresaw the harm likely to be caused by the breach and will be at its highest where such harm was intended.

11. There are also two dimensions to the harm involved in breach of an ASBO:

(i) the breach may itself cause harassment, alarm or distress, which can reduce the quality of life in a community.

(ii) breach of an ASBO contravenes an order of the court, and this can undermine public confidence in the effective administration of justice.

12. The assessment of the seriousness of an individual offence must take into account not only the harm actually caused by an offence but also any harm that was intended or might foreseeably have been caused.<sup>9</sup> A very wide range of prohibitions can be attached to an order, and the degree of harm resulting from breach will vary greatly.

13. The test of foreseeability is objective<sup>10</sup> but as the prohibitions imposed must have been considered by a court to be necessary to prevent anti-social behaviour, some degree of harm must always be foreseeable whenever an order is breached. Where a breach causes harm that was not readily foreseeable, the level of culpability should carry more weight than harm when assessing offence seriousness.<sup>11</sup>

(ii) **Relevance of the originating conduct**

14. The **original conduct** that led to the making of an order is a relevant consideration in so far as it indicates the level of harm caused and whether this was intended.<sup>12</sup>

15. High culpability and/or harm may be indicated if the breach continues a pattern of behaviour against an identifiable victim. Conversely, where there is little connection between the breach and the behaviour that the order was aimed at, this may indicate a less serious offence.

16. The court should examine the terms of the order itself, their necessity and reasonableness in the context of the findings of the court which imposed the order. The court may also wish to examine whether or not the order has been reviewed in any way. If any terms of the order are vague, unduly onerous or no longer necessary it may be appropriate for an application to be made separately for the order to be varied.<sup>13</sup> 5.

<sup>9</sup> Criminal Justice Act 2003, s.143(1)

<sup>10</sup> Harm must have been foreseeable by 'a reasonable person'.

<sup>11</sup> Sentencing Guidelines Council, *Overarching Principles: Seriousness* (2004), [www.sentencing-guidelines.gov.uk](http://www.sentencing-guidelines.gov.uk).

<sup>12</sup> *Breach of Protective Orders* definitive guideline, published December 2006, [www.sentencing-guidelines.gov.uk](http://www.sentencing-guidelines.gov.uk)

<sup>13</sup> under Crime and Disorder Act 1998, ss.1(8) or 1CA. Provision for applications is contained in the Magistrates' Courts (Anti-Social Behaviour Orders) Rules 2002 and s.1CA of the 1998 Act. Where the subject/offender is aged under 18, Practice Direction (Magistrates' Courts: Anti-Social Behaviour Orders: Composition of Benches) [2006] 1

### (iii) Breach of an interim order

17. **Breach of an interim order** or a final order is equally serious and the same approach to sentencing should be taken.
18. Sentence for an breach of an interim order should be imposed as soon as possible. If the hearing regarding the final order can be brought forward, this should be done so that the two issues can be considered together. However, sentencing for the breach of the interim order should not be delayed for this purpose.
19. Where an interim order is breached the court should consider the extent to which an urgent need for specific interim prohibitions was demonstrated, or if the interim order was sought principally to obtain additional time to prepare a case for the full hearing.<sup>14</sup>
20. Where an interim order has been made without notice to the subject, the order does not take effect until it has been served. If doubts arise about the extent to which the subject has understood the prohibitions but the defence of reasonable excuse is not made out, a lack of understanding of the terms of the order may still mitigate the seriousness of the offence through reducing culpability.

### (iv) A breach that also constitutes another criminal offence

21. **Where the conduct involved in breach of an order amounts to an offence other than the breach**, it is desirable that the substantive offence and the breach of the order should be charged separately.<sup>15</sup> Where necessary, consecutive sentences should be considered to reflect the seriousness of the offences and achieve the appropriate totality.
22. The sentence should reflect all relevant aspects of the offence so that, provided the facts are not in issue, the result should be the same regardless of whether one offence or two has been charged.
  - (i) if the substantive offence only has been charged, the fact that it constitutes breach of an ASBO should be treated as an aggravating factor;
  - (ii) if breach of the order only has been charged, the sentence should reflect the full circumstances of the breach, which will include the conduct that could have been charged as a substantive offence.

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AER 886 provides for the constitution of the court.

<sup>14</sup> A report commissioned by the YJB concluded that there may be grounds for interim ASBOs only where there is an urgent need for specific prohibitions: Aikta-Reena Solanki, Tim Bateman, Gwyneth Boswell and Emily Hill, *Anti-social Behaviour Orders*, YJB (2006).

<sup>15</sup> *Breach of Protective Orders* definitive guideline, published 2006; [www.sentencing-guidelines.gov.uk](http://www.sentencing-guidelines.gov.uk).

23. Where breach of an ASBO also constitutes another offence with a lower maximum penalty than that for breach of the order, this penalty is an element to be considered in the interests of proportionality, although the court is not limited by it when sentencing an adult or youth for breach.

**(v) Aggravating and mitigating factors**

24. The Council guideline *Overarching Principles: Seriousness* identifies a number of factors that might increase or mitigate the seriousness of an offence. For ease of reference, the factors are set out in Annex B.

**(vi) Personal mitigation**

25. Offender mitigation is particularly relevant to breach of an ASBO as compliance with the order depends on the ability to understand its terms and make rational decisions in relation to these. Sentence may be mitigated where:

- **the offender has a lower level of understanding due to mental health issues or learning difficulties**
- **the offender was acting under the influence of an older or more experienced offender; or**
- **there has been compliance with an Individual Support Order or Intervention Order imposed when the ASBO was made.**

## D. Sentencing guideline - Adult offenders

### Sentencing ranges and starting points

1. Typically, a guideline will apply to an offence that can be committed in a variety of circumstances with different levels of seriousness. It will apply to a “*first time offender*” who has been convicted after a trial. Within the guidelines, a “*first time offender*” is a person who does not have a conviction which, by virtue of section 143(2) of the Criminal Justice Act 2003, must be treated as an aggravating factor.
2. As an aid to consistency of approach, the guidelines describe a number of types of activity which would fall within the broad definition of the offence. These are set out in a column headed ‘Nature of failure & harm’.
3. The expected approach is for a court to identify the description that most nearly matches the particular facts of the offence for which sentence is being imposed. This will identify a starting point from which the sentencer can depart to reflect aggravating or mitigating factors affecting the seriousness of the offence (beyond those contained within the column describing the nature of the failure or of the harm) to reach a provisional sentence.
4. The sentencing range is the bracket into which the provisional sentence will normally fall after having regard to factors which aggravate or mitigate the seriousness of the offence. The particular circumstances may, however, make it appropriate that the provisional sentence falls outside the range.
5. Where the offender has previous convictions which aggravate the seriousness of the current offence, that may take the provisional sentence beyond the range given particularly where there are significant other aggravating factors present.
6. Once the **provisional sentence** has been identified by reference to those factors affecting the seriousness of the offence, the court will take into account any relevant factors of personal mitigation, which may take the sentence beyond the range given.
7. Where there has been a guilty plea, any reduction attributable to that plea will be applied to the sentence at this stage. Again, this reduction may take the sentence below the **range** provided.
8. A court must give its reasons for imposing a sentence of a different kind or outside the range provided in the guidelines.<sup>16</sup>

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<sup>16</sup> Criminal Justice Act 2003, s.174(2)(a).

## **The decision making process**

The process set out below is intended to show that the sentencing approach for the offence of breach of an anti-social behaviour order is fluid and requires the structured exercise of discretion.

### **1. Identify the appropriate starting point**

Identify the description that most nearly matches the particular facts of the offence for which sentence is being imposed.

### **2. Consider relevant aggravating factors, both general and those specific to the type of offence**

This may result in a sentence level being identified that is higher than the suggested starting point, sometimes substantially so.

### **3. Consider mitigating factors and personal mitigation**

There may be offence or offender mitigation which could result in a sentence that is lower than the suggested starting point (possibly substantially so), or a sentence of a different type.

### **4. Reduction for guilty plea**

The court will then apply any reduction for a guilty plea following the approach set out in the Council Guideline *Reduction in Sentence for a Guilty Plea* (revised July 2007).

### **5. Consider ancillary orders**

The court should consider whether ancillary orders are appropriate or necessary.

### **6. The totality principle**

The court should review the total sentence to ensure that it is proportionate to the offending behaviour and properly balanced.

### **7. Reasons**

When a court imposes a sentence of a different type or outside the range provided, it should explain its reasons for doing so.

## Factors to take into consideration

1. The starting points and sentencing ranges are for a 'first time offender' who pleaded not guilty. In this guideline, a "first time offender" is one who does not have a previous conviction for breach of an ASBO.
2. Where a court determines that there are other convictions which it is reasonable to treat as a factor aggravating the seriousness of the breach,<sup>17</sup> that factor will be taken into account at stage 2 of the sentencing process set out on page 9..
3. An ASBO may be breached in a very wide range of circumstances. The examples given below are intended to illustrate, rather than provide comprehensive definitions of, the levels of seriousness:
  - **Serious harm caused or intended** - breach at this level of seriousness will involve the use of violence, significant threats or intimidation or the targeting of individuals or groups of people in a manner that leads to a fear of violence.
  - **Lesser degree of harm intended or likely** – examples may include lesser degrees of threats or intimidation, the use of seriously abusive language, or causing more than minor damage to property.
  - **No harm caused or intended** - in the absence of intimidation or the causing of fear of violence, breaches involving being drunk or begging may be at this level, as may prohibited use of public transport or entry into a prohibited area, where there is no evidence that harassment, alarm or distress was caused or intended.
4. The suggested starting points are based on the assumption that the offender had the highest level of culpability.
5. Aggravating and mitigating factors specifically relevant to sentencing for breach of an ASBO are included in the guideline. Care needs to be taken to ensure that there is no double counting where an element of the breach determines the level of seriousness, where it might in other circumstances be an aggravating factor. When assessing the seriousness of an offence, the courts must always refer to the full list of aggravating and mitigating factors in the Council guideline on Seriousness (see Annex B).<sup>18</sup>
6. In the most serious cases, involving repeat offending and a breach causing serious harassment together with the presence of several aggravating factors, such as the use of violence, a sentence beyond the range will be justified.
7. Once the provisional sentence has been identified by reference to factors affecting the seriousness of the offence, the court will take into account any relevant factors of personal mitigation (see paragraph 25 above), and consider reducing the sentence where a guilty plea was entered in accordance with the Council guideline.<sup>19</sup>
8. When imposing a community order, the court must ensure that the requirements imposed are proportionate to the seriousness of the breach, compatible with each other,<sup>20</sup> and also with the prohibitions of the ASBO if the latter is to remain in force. Even where the threshold for a custodial sentence is crossed, a custodial sentence is not inevitable.<sup>21</sup>
9. An offender may be sentenced for more than one offence of breach, which occurred on different days. While consecutive sentences may be imposed in such cases, the overall sentence should reflect the totality principle.

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<sup>17</sup> in accordance with Criminal Justice Act 2003, s.143(2)

<sup>18</sup> Overarching Principles: Seriousness, pages 6-7, published 16 December 2004, [www.sentencing-guidelines.gov.uk](http://www.sentencing-guidelines.gov.uk)

<sup>19</sup> Reduction in Sentence for a Guilty Plea, published 16 December 2004, [www.sentencing-guidelines.gov.uk](http://www.sentencing-guidelines.gov.uk)

<sup>20</sup> See guideline *New Sentences: Criminal Justice Act 2003* (published 2004); [www.sentencing-guidelines.gov.uk](http://www.sentencing-guidelines.gov.uk).

<sup>21</sup> Ibid.

## BREACH OF AN ANTI-SOCIAL BEHAVIOUR ORDER\*

Crime and Disorder Act 1998, s. 1(10)

**Maximum Penalty:** 5 years imprisonment

**Note:** A conditional discharge is not available as a sentence for this offence

Where the conduct amounting to a breach also constitutes a separate offence, that offence would normally be charged separately. These sentencing ranges are based on the premise that such conduct has either been prosecuted separately as an offence or is not of a character sufficient to justify prosecution of it as an offence in its own right.

Nature of failure & harm	Starting point	Sentencing range
<b>Serious</b> harassment, alarm or distress has been caused or where such harm was intended	<b>26 weeks custody</b>	<b>Custody threshold - 2 years custody</b>
<b>Lesser degree</b> of harassment, alarm or distress, where such harm was intended, or where it would have been likely if the offender had not been apprehended	<b>6 weeks custody</b>	<b>Community Order (MEDIUM) - 26 weeks custody</b>
<b>No</b> harassment, alarm or distress was actually caused by the breach and none was intended by the offender	<b>Community Order (LOW)</b>	<b>Fine Band B - Community Order (MEDIUM)</b>
Aggravating factors	Mitigating factors	
<ol style="list-style-type: none"> <li>1. Offender has a history of disobedience to court orders.</li> <li>2. Breach was committed immediately or shortly after the order was made.</li> <li>3. Breach was committed subsequent to earlier breach proceedings arising from the same order.</li> <li>4. Targeting of a person the order was made to protect or a witness in the original proceedings.</li> </ol>	<ol style="list-style-type: none"> <li>1. Breach occurred after a long period of compliance.</li> <li>2. The prohibition(s) breached was not fully understood, especially where an interim order was made without notice.</li> </ol>	

\* The guideline as it will appear in the Magistrates' Court Sentencing Guidelines is provided at [Annex C](#).

## **E. Sentencing principles: Young Offenders**

26. The approach to assessing the seriousness of a breach outlined above at paragraphs 8 to 25 applies equally to youths. A court must impose a community or custodial sentence only if such a sentence is warranted by the seriousness of the offence and no lesser sentence can be justified.
27. When sentencing a young offender, the normal approach is for the penalty to reflect both the reduction in culpability (for example, due to a lesser ability to foresee the consequences of actions) and the more onerous effects of punishments on their education and personal development in comparison with an adult offender.
28. The maximum penalty for this offence when committed by a young offender is a 24 month Detention and Training Order (DTO). With the exception of a conditional discharge,<sup>22</sup> the full range of disposals of the youth court is available, and these are also outlined in Annex D.<sup>23</sup>
29. However, the sentencing framework that applies to offenders aged under 18 is significantly different from that for adult offenders and key principles are set out in Annex D.
30. In most cases of breach by a young offender convicted after a trial, the appropriate sentence will be a community order.<sup>24</sup> There are several types of order available, and a range of requirements can be attached to each; the court will consider the seriousness of the breach, which order will best prevent further offending and the individual circumstances of the offender.
31. The court must ensure that the requirements imposed by the order are compatible both with each other and with the prohibitions of the ASBO if the latter is to remain in force, and that the combination of both is not so onerous as to make further breaches likely.
32. The particular stage of intellectual or emotional maturity of the individual (which may not correspond with actual age) will also influence sentence. A young offender is likely to perceive a particular time period as being longer in comparison with an adult, and this may be of relevance when considering how much time has elapsed between imposition and breach of the order.

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<sup>22</sup> Crime and Disorder Act 1998, s.1(11) and s.1C(9).

<sup>23</sup> If the young offender has also been charged with a grave crime under s.91 Powers of Criminal Courts (Sentencing) Act 2000, the case may be committed to the Crown Court.

<sup>24</sup> though see paragraph 33 below.

33. The principles to be followed when sentencing a youth for breach of an ASBO are as follows:

**'First time offender'<sup>25</sup> pleading guilty:** the court must make a referral order unless it imposes an absolute discharge, a custodial sentence or a hospital order;

**In all other cases:**

- (i) in some less serious cases, such as where the breach has not involved any harassment, alarm or distress, a fine may be appropriate if it will be paid by the offender, or otherwise a reparation order;
- (ii) in most cases, the appropriate sentence will be a community order;
- (iii) the custody threshold should be set at a significantly higher level than the threshold applicable to adult offenders;
- (iv) the custody threshold usually will not be crossed unless the breach involved serious harassment, alarm or distress through either the use of violence, threats or intimidation or the targeting of individuals/groups in a manner that led to a fear of violence;
- (v) exceptionally, the custody threshold may also be crossed where a youth is being sentenced for more than one offence of breach (committed on separate occasions within a short period) involving a lesser but substantial degree of harassment, alarm or distress;
- (vi) even where the custody threshold is crossed, the court should normally impose a community order in preference to a DTO, as custody should be used only as a measure of last resort; and
- (vii) where the court considers a custodial sentence to be unavoidable, the starting point for sentencing should be 4 months detention, with a range of up to 12 months. Where a youth is being sentenced for more than one breach involving serious harassment, alarm or distress, sentence may go beyond that range.

<sup>25</sup> For the purpose of this requirement, a 'first time offender' is an offender who has never been convicted by or before a court in the United Kingdom of any offence other than the offence and any connected offence; Powers of Criminal Court (Sentencing) Act 2000, s.17(1)(b)

## **Aggravating and mitigating factors**

34. As with adult offenders, factors that are likely to aggravate an offence of breach of an anti-social behaviour order are:

- **history of disobedience of court orders**
- **the breach was committed immediately or shortly after the order was made**
- **the breach was committed subsequent to earlier breach proceedings arising from the same order**
- **targeting of a person the order was made to protect or of a witness in the original proceedings.**

35. Factors that are likely to mitigate the seriousness of the breach are:

- **the breach occurred after a long period of compliance**
- **the prohibition(s) breached was not fully understood, especially where an interim order was made without notice.**

### **(iii) Personal mitigation**

36. Offender mitigation is particularly relevant to breach of an ASBO as compliance with the order depends on the ability to understand its terms and make rational decisions in relation to these. Sentence may be mitigated where:

- **the offender has a lower level of understanding due to mental health issues or learning difficulties**
- **the offender was acting under the influence of an older or more experienced offender; or**
- **there has been compliance with an Individual Support Order or Intervention Order imposed when the ASBO was made.**

37. Other offender mitigating factors that may be particularly relevant to young offenders include peer pressure and a lack of parental support.

**SUMMARY OF PRINCIPLES RELEVANT TO THE MAKING OF AN ANTI-SOCIAL BEHAVIOUR ORDER**

1. Proceedings for the imposition of an ASBO are civil in nature, so that hearsay evidence is admissible, but a court must be satisfied to a criminal standard that the individual has acted in the anti-social manner alleged.
2. The test of 'necessity' requires the exercise of judgement or evaluation; it does not require proof beyond reasonable doubt that the order is "necessary".
3. It is particularly important that the findings of fact giving rise to the making of the order are recorded by the court.
4. As the ASBO is a preventative order it is unlawful to use it as a punishment; so, when sentencing an offender, a court must not allow itself to be diverted into making an ASBO as an alternative or additional sanction.
5. The police have powers to arrest an individual for any criminal offence, and the court should not impose an order which prohibits the subject from committing an offence if it will not add significantly to the existing powers of the police to protect others from anti-social behaviour by the subject. An order must not prohibit a criminal offence merely to increase the sentence range available for that offence.
6. The terms of the order made must be precise and capable of being understood by the subject.<sup>26</sup> Where the subject is aged under 18, it is important for both the subject and the parent or guardian to confirm their understanding of the order and its terms. The prohibitions must be enforceable in the sense that they should allow a breach to be readily identified and capable of being proved.
7. An order should not impose a 'standard list' of prohibitions, but should identify and prohibit the particular type of anti-social behaviour that gives rise to the necessity of an ASBO. Each separate prohibition must be necessary to protect persons from anti-social behaviour by the subject, and each order must be specifically fashioned to deal with the individual concerned.
8. The order must be proportionate to the legitimate aim pursued and commensurate with the risk guarded against. The court should avoid making compliance very difficult through the imposition of numerous prohibitions, and those that will cause great disruption to the subject should be considered with particular care. It is advisable to make an order for a specific period; when considering the duration of an order 15.

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<sup>26</sup> 'A Guide for the Judiciary' produced by the JSB (Third edition published February 2007, supplement published November 2007) provides a list of examples of prohibitions that the higher courts have found to be too wide or poorly drafted; [www.jsboard.co.uk](http://www.jsboard.co.uk).

imposed on a youth, the potential for the subject to mature may be a relevant factor.

9. Not all prohibitions set out in an ASBO have to run for the full term of the ASBO itself. The test must always be what is necessary to deal with the particular anti-social behaviour of the offender and what is proportionate in the circumstances. At least one of the prohibitions must last for the duration of the order but not all are required to last for the 2 years that is the minimum length of an order. The court can vary the terms of an order at any time upon application by the subject (or the applicant in the case of an order made upon application).
10. When making an order upon conviction, the court has the power to suspend its terms until the offender has been released from a custodial sentence. However, where a custodial sentence of 12 months or more is imposed and the offender is liable to be released on licence and thus subject to recall, an order will not generally be necessary. There might be cases where geographical restraints could supplement licence conditions.

Other considerations:

- (i) Where an ASBO is imposed on a subject aged 10-17, the court must consider whether a **Parenting Order** would be desirable in the interests of preventing repetition of the anti-social behaviour.<sup>27</sup> Such an order must be made where the offender is aged under 16 and the condition is met, but is discretionary where the offender is aged 16 or 17.
- (ii) Where a magistrates' court imposes a stand-alone ASBO, it must also consider whether an **Individual Support Order (ISO)** would be desirable to tackle the underlying causes of the behaviour.<sup>28</sup>
- (iii) In the case of an adult, the court may make an **Intervention Order** if the underlying causes of the anti-social behaviour are drug-related and appropriate treatment is available.<sup>29</sup>

Interim orders:

Where a decision to impose an order (either upon application or conviction) is pending, the court may make an interim order if it considers it just to do so.<sup>30</sup> The court must balance the seriousness of the behaviour and the urgency with which it is necessary to take steps to control it, with the likely impact of an interim order upon the potential subject.<sup>31</sup>

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<sup>27</sup> Crime and Disorder Act 1998, s.8. The Anti-social Behaviour Act 2003 now provides for a court to impose stand-alone Parenting Orders, if it is satisfied that the child has engaged in criminal or anti-social behaviour. The ASBA also provides for certain agencies to enter into Parenting Contracts which, as an alternative to legal action, have much in common with the non-statutory Acceptable Behaviour Contracts.

<sup>28</sup> *ibid.*, s.1AA.

<sup>29</sup> *ibid.*, s.1G.

<sup>30</sup> *ibid.*, s.1D.

<sup>31</sup> *Leeds Magistrates' Court, ex parte Kenny; Secretary of State for Constitutional Affairs and another, ex parte M* [2004] 1 All ER 1333.

Aggravating and mitigating factors identified in the Council guideline  
*Overarching Principles: Seriousness*

**THE FACTORS BELOW APPLY TO A WIDE RANGE OF OFFENCES.  
NOT ALL WILL BE RELEVANT TO THE OFFENCE OF BREACH OF AN  
ANTI-SOCIAL BEHAVIOUR ORDER**

**Factors indicating higher culpability:**

- Offence committed whilst on bail for other offences
- Failure to respond to previous sentences
- Offence was racially or religiously aggravated
- Offence motivated by, or demonstrating, hostility to the victim based on his or her sexual orientation (or presumed sexual orientation)
- Offence motivated by, or demonstrating, hostility based on the victim's disability (or presumed disability)
- Previous conviction(s), particularly where a pattern of repeat offending is disclosed
- Planning of an offence
- An intention to commit more serious harm than actually resulted from the offence
- Offenders operating in groups or gangs
- 'Professional' offending
- Commission of the offence for financial gain (where this is not inherent in the offence itself)
- High level of profit from the offence
- An attempt to conceal or dispose of evidence
- Failure to respond to warnings or concerns expressed by others about the offender's behaviour
- Offence committed whilst on licence
- Offence motivated by hostility towards a minority group, or a member or members of it
- Deliberate targeting of vulnerable victim(s)
- Commission of an offence while under the influence of alcohol or drugs
- Use of a weapon to frighten or injure victim
- Deliberate and gratuitous violence or damage to property, over and above what is needed to carry out the offence
- Abuse of power
- Abuse of a position of trust

**Factors indicating a more than usually serious degree of harm:**

- Multiple victims
- An especially serious physical or psychological effect on the victim, even if unintended
- A sustained assault or repeated assaults on the same victim
- Victim is particularly vulnerable
- Location of the offence (for example, in an isolated place)

- Offence is committed against those working in the public sector or providing a service to the public
- Presence of others e.g. relatives, especially children or partner of the victim
- Additional degradation of the victim (e.g. taking photographs of a victim as part of a sexual offence)
- In property offences, high value (including sentimental value) of property to the victim, or substantial consequential loss (e.g. where the theft of equipment causes serious disruption to a victim's life or business)

**Factors indicating significantly lower culpability:**

- A greater degree of provocation than normally expected
- Mental illness or disability
- Youth or age, where it affects the responsibility of the individual defendant
- The fact that the offender played only a minor role in the offence

## Annex C

### Guideline for inclusion in the Magistrates' Court Sentencing Guidelines

<b>Breach of an Anti-Social Behaviour Order</b>	Crime and Disorder Act 1998, s.1(10)
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Triable either way:

Maximum when tried summarily: Level 5 fine and/or 6 months      Maximum when tried on indictment: 5 years

Note: A conditional discharge is not available as a sentence for this offence

<b>OFFENCE SERIOUSNESS (CULPABILITY AND HARM)</b> <b>A. IDENTIFY THE APPROPRIATE STARTING POINT</b> <b>Starting points based on first time offender pleading not guilty</b>		
Examples of nature of activity	Starting point	Range
Breach where no harassment, alarm or distress was caused or intended	Low level community order	Fine Band B to medium level community order
Breach involving a lesser degree of actual or intended harassment, alarm or distress than in the box below, or where such harm would have been likely had the offender not been apprehended	6 weeks custody	Medium level community order to 26 weeks custody
Breach involving the use of violence, significant threats or intimidation <b>or</b> the targeting of individuals/ groups in a manner that leads to a fear of violence	26 weeks custody	Custody threshold to Crown Court

<b>OFFENCE SERIOUSNESS (CULPABILITY AND HARM)</b> <b>B. CONSIDER THE EFFECT OF AGGRAVATING AND MITIGATING FACTORS</b> <b>(OTHER THAN THOSE WITHIN EXAMPLES ABOVE)</b>	
<b>Common aggravating and mitigating factors are identified in Annex B. The following may be particularly relevant:</b>	
<u>Factors indicating higher culpability</u> 1. Offender has a history of disobedience to court orders. 2. Breach was committed immediately or shortly after the order was made. 3. Breach was committed subsequent to earlier breach proceedings. 4. Targeting of a person the order was made to protect or a witness in the original proceedings.	<u>Factors indicating lower culpability</u> 1. Breach occurred after a long period of compliance. 2. The prohibition(s) breached was not fully understood, especially where an interim order was made without notice.

<b>FORM A PRELIMINARY VIEW OF THE APPROPRIATE SENTENCE, THEN CONSIDER OFFENDER MITIGATION</b> <b>Common factors are identified in the pullout card</b>
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<b>CONSIDER A REDUCTION FOR A GUILTY PLEA</b>
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<b>CONSIDER ANCILLARY ORDERS, INCLUDING COMPENSATION</b> <b>Refer to paragraphs xx for guidance on available ancillary orders</b>
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<b>DECIDE SENTENCE</b> <b>GIVE REASONS</b>
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**Notes:**

- (a) An ASBO may be breached in a very wide range of circumstances. The examples given below are intended to illustrate, rather than provide comprehensive definitions of, the levels of seriousness:
- **No harm caused or intended** - in the absence of intimidation or the causing of fear of violence, breaches involving being drunk or begging may be at this level, as may prohibited use of public transport or entry into a prohibited area, where there is no evidence that harassment, alarm or distress was caused or intended.
  - **Lesser degree of harm intended or likely** – examples may include lesser degrees of threats or intimidation, the use of seriously abusive language, or causing more than minor damage to property.
  - **Serious harm caused or intended** - breach at this level of seriousness will involve the use of violence, significant threats or intimidation or the targeting of individuals or groups of people in a manner that leads to a fear of violence.
- (b) The suggested starting points are based on the assumption that the offender had the highest level of culpability.
- (c) In the most serious cases, involving repeat offending and a breach causing serious harassment together with the presence of several aggravating factors, such as the use of violence, a sentence beyond the range will be justified.
- (d) When imposing a community order, the court must ensure that the requirements imposed are proportionate to the seriousness of the breach, compatible with each other,<sup>32</sup> and also with the prohibitions of the ASBO if the latter is to remain in force. Even where the threshold for a custodial sentence is crossed, a custodial sentence is not inevitable.<sup>33</sup>
- (e) An offender may be sentenced for more than one offence of breach, which occurred on different days. While consecutive sentences may be imposed in such cases, the overall sentence should reflect the totality principle.

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<sup>32</sup> See guideline *New Sentences: Criminal Justice Act 2003* (published 2004); [www.sentencing-guidelines.gov.uk](http://www.sentencing-guidelines.gov.uk).

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

## Summary of sentencing framework and principles relating to young offenders

1. The principal aim of the youth justice system is to prevent offending by children and young persons.<sup>34</sup>
2. Under domestic law, the court must have regard to the welfare of the child or young person when imposing sentence.<sup>35</sup> In accordance with obligations under international conventions and treaties, the best interests of the child must be a primary consideration.<sup>36</sup> A sentence designed to prevent re-offending also helps to promote the welfare of the young offender.
3. Restorative justice is an important underlying principle in all youth justice disposals, from referral and reparation orders to action plan and supervision orders;<sup>37</sup> as well as reducing the harm done, it can also help prevent re-offending.
4. Where a young offender pleads guilty and is being sentenced for the first time, the court must impose a **referral order** unless either it considers the offence to be of such a nature that an absolute discharge or hospital order is appropriate or it considers the offence to be so serious that only a custodial sentence is appropriate.<sup>38</sup>
  - Such an order refers the offender to a youth offender panel, and the court may (or 'shall' in the case of a child aged under 16) require at least one parent or guardian to attend the panel meetings unless this would be unreasonable.<sup>39</sup>
  - Panel meetings are intended to result in a youth offender contract, which is aimed at repairing the harm caused by the offence and addressing the causes of the offending behaviour (including requirements such as unpaid work in the community).
  - The terms of the 'contract' are determined by the panel, but the court must specify the period for which it is to have effect (between 3 and 12 months), which will depend on the seriousness of the breach.
  - If the offender does not agree to the contract, fails to abide by its terms, or re-offends while it is in force, the case is returned to the youth court

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<sup>34</sup> Crime and Disorder Act 1998, s.37.

<sup>35</sup> Children and Young Persons Act 1933, s.44. In *R (A) v Leeds Magistrates' Court* [2004] EWHC Admin 554 the High Court held that where the person against whom the order is sought is a child, the child's best interests are a primary consideration but so are the interests of the public.

<sup>36</sup> United Nations Standard Minimum Rules for the Administration of Juvenile Justice ('The Beijing Rules'), adopted by General Assembly resolution 40/33 of 29/11/1985; [www.ohchr.org](http://www.ohchr.org). See also United Nations Convention on the Rights of the Child, Article 3; [www2.ohchr.org/english/law/crc.htm](http://www2.ohchr.org/english/law/crc.htm).

<sup>37</sup> YJB, *A guide to the role of youth offending teams in dealing with anti-social behaviour* (2006); [www.yjb.gov.uk](http://www.yjb.gov.uk).

<sup>38</sup> Powers of Criminal Courts (Sentencing) Act 2000, s.16. When in force, the Criminal Justice and Immigration Act 2008 will widen the circumstances in which a referral order can be made, to include where the offender has been bound over previously, or where the offender has one conviction in respect of which a referral order was not imposed.

<sup>39</sup> *ibid*, s.20.

5. If the offender has previous convictions or has been found guilty after a trial the court has the following options:
- absolute discharge
  - reparation order
  - fine
  - community order
  - detention and training order
6. A **reparation order** requires a young offender to make reparation to the victim(s) of the offence, and before making such an order the court will obtain the views of anyone so affected.<sup>40</sup> In the case of breach of an ASBO, there will often be no identifiable victim, but the legislation provides for reparation to be made to the community at large. This work must last no longer than 24 hours and be completed within 3 months.
7. The court may impose a **fine** of up to £250 for offenders aged between 10 and 14, and up to £1,000 for those aged 15-17. Where the offender is under 16, the court must order that the fine is paid by the offender's parent unless that would be unreasonable; in the case of an offender aged 16 or 17, the court has discretion to do so.
8. Where a community sentence is imposed, it may consist of one or more of five **youth community orders** set out in section 147(2) of the Criminal Justice Act 2003.<sup>41</sup> These are:
- a **curfew order** – order to remain at a specified place for a designated period for a maximum of 6 months, or 3 months for those under 16
  - an **exclusion order** - available for offenders aged under 16, prohibits the offender from entering a specified place for a maximum of 3 months
  - an **attendance centre order** – attendance at a designated place for a total of 12-36 hours (maximum 24 hours for offenders under 16)
  - an **action plan order** - a short (3 months) but intensive period of supervision, intended to be individually tailored by means of a series of requirements
  - a **supervision order** - can impose a wide range of requirements and last for up to 3 years. A supervision order may also involve participation in the Intensive Supervision and Surveillance Programme (ISSP). Introduced in 2001, ISSP is the most rigorous non-custodial intervention available for young offenders, and offers the court an alternative to a short DTO.

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<sup>40</sup> Powers of Criminal Courts (Sentencing) Act 2000, s.73.

<sup>41</sup> When in force, the Criminal Justice and Immigration Act 2008 will replace these with the Youth Rehabilitation Order, a generic community order for youths.

9. Additionally, where the offender is 16 or 17, the court may impose a **community rehabilitation order** (which may require participation in the ISSP), a **community punishment order**, or a **community rehabilitation and punishment order** (combining both).<sup>42</sup> A community rehabilitation order lasts between six months and three years, and may involve reparation and/or programmes to address the offending behaviour. A community punishment order involves unpaid community work for a total of 40-240 hours.
10. Where a custodial sentence is imposed in the youth court, it must be a **Detention and Training Order (DTO)**, which can only be for 4, 6, 8, 10, 12, 18 or 24 months. Where the offender is aged 10 or 11, no custodial sentence is available in the youth court. Where the offender is aged between 12 and 14, a custodial sentence may be imposed only if the child is a "persistent offender".<sup>43</sup>

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<sup>42</sup> Powers of Criminal Courts (Sentencing) Act 2000, ss.41, 46 and 51 respectively. These orders will be replaced by a generic community order, the Youth Rehabilitation Order, when the relevant provisions in the Criminal Justice and Immigration Act 2008 are in force.

<sup>43</sup> Ibid, s.100.