

## **FOREWORD BY THE CHAIRMAN**

This advice from the Sentencing Advisory Panel to the Sentencing Guidelines Council proposes guidelines for sentencing both young and adult offenders for breach of an Anti-social Behaviour Order (ASBO).

The number of ASBOs imposed by the courts has increased considerably since the order first became available in 1999, and one in two orders has been breached. The range of prohibitions that can be attached to an ASBO is very wide, and so the ways in which the order can be breached are just as varied.

As the purpose of an ASBO is to prevent behaviour that causes harassment, alarm or distress, the Panel's approach has been to determine the seriousness of a breach by reference to the degree and type of harassment, alarm or distress that was caused or intended. Three levels of seriousness have been identified.

Where no harassment, alarm or distress was caused or intended, the Panel proposes that the starting point for sentencing an adult should be a community order, but custodial starting points are proposed for more serious breaches. The highest penalties are reserved for breaches involving violence, threats, significant intimidation or the targeting of individual victims.

As the sentencing framework that applies to offenders aged under 18 is significantly different from that for adult offenders, the Panel has proposed a number of guiding principles to be followed when sentencing a youth, including guidance on the circumstances in which a custodial sentence might be justified, but has not recommended specific starting points or sentencing ranges. In most cases, the Panel proposes that the appropriate sentence for a young offender breaching an ASBO will be a community order.

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Chairman of the Sentencing Advisory Panel

# SENTENCING FOR BREACH OF AN ANTI-SOCIAL BEHAVIOUR ORDER

## ADVICE

### INTRODUCTION

1. Following a request from the Sentencing Guidelines Council, the Sentencing Advisory Panel has produced advice on sentencing for breach of an Anti-social Behaviour Order (ASBO). Details of the consultation process, including a list of those who responded, are set out in Annex D.

2. The ASBO is one of a range of measures introduced by the Crime and Disorder Act 1998 (CDA) to deal with anti-social behaviour. Research indicates that anti-social behaviour has a significant impact on the lives of a minority of people, particularly in inner cities and areas of social deprivation.<sup>1</sup> 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. Evidence suggests that involvement in anti-social behaviour often leads to offending and that several factors are common to both, particularly with youths.<sup>2</sup> Earlier intervention holds out the possibility of reducing the risk of offending.<sup>3</sup>

3. After relatively little use of the order when it first became available in April 1999, the number of orders made increased from 427 in 2002 to 4,123 in 2005, before falling to 2,706 in 2006 (the last year for which data are available). In 2006, 359 orders were made in Greater London, 225 in Greater Manchester, 217 in West Yorkshire and 189 in the West Midlands. The 990 orders in these four areas accounted for 37% of the orders made in England and Wales.<sup>4</sup> 41% of all orders made between June 2000 and December 2006 were imposed on persons under the age of 18.<sup>5</sup>

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<sup>1</sup> Andrew Millie, Jessica Jacobson, Eraina McDonald and Mike Hough, *Anti-social behaviour strategies: Finding a balance* (2005).

<sup>2</sup> *Young People and Crime: Findings from the 2005 Offending, Crime and Justice Survey*, Home Office Statistical Bulletin 17/06 (a nationally representative self-report study of around 5,000 people in England and Wales).

<sup>3</sup> An Acceptable Behaviour Contract (ABC), made between an individual and an authority such as the housing office and/or local police, is an alternative to legal action which is also designed to curb anti-social behaviour and prevent a transition into offending. In 2005-06 7,500 ABCs were issued, a 90% increase on 2003/04, making them a much more frequently used intervention than an ASBO – [www.respect.gov.uk/members/article.aspx?id=9822](http://www.respect.gov.uk/members/article.aspx?id=9822).

<sup>4</sup> Number of anti-social behaviour orders issued by area: [www.crimereduction.homeoffice.gov.uk/asbos/asbos2.htm](http://www.crimereduction.homeoffice.gov.uk/asbos/asbos2.htm).

<sup>5</sup> *Ibid.* No age details are available for the period April 1999-May 2000.

4. The purpose of the ASBO itself is preventative. However, breach of any of its terms without reasonable excuse is a criminal offence punishable by up to 5 years' imprisonment in the case of an adult offender (two years' detention in the case of a youth aged 12-17<sup>6</sup>). This is the same maximum penalty as for an offence of inflicting grievous bodily harm<sup>7</sup> or assault occasioning actual bodily harm<sup>8</sup> and greater than that presently available for dangerous driving or for any summary offence.

5. As a large proportion of orders are imposed on persons under 18 years of age, this advice includes guidance on sentencing young offenders for breach. The sentencing framework for youths is very different from that for adults, and the Panel has proposed a set of guiding principles for sentencing young offenders rather than a guideline with starting points and sentencing ranges as produced for adult offenders.

6. Since 2004, the Court of Appeal (Criminal Division) and the Divisional Court have considered a number of cases arising from the making of an ASBO or from proceedings for breach of such an order. In addition, the Judicial Studies Board (JSB) has produced 'A Guide for the Judiciary'<sup>9</sup> which summarises the requirements of statute and case law. The Panel's advice refers to existing guidance or authority where appropriate.

7. It is not within the Council's remit to produce guidelines on the making of an order; the JSB is the appropriate source for guidance in this respect. The JSB guide is likely to be amended on a regular basis to reflect both caselaw and developments in practice. However, as the ability to deal appropriately with an order that has been breached depends on it having been properly made, in section 1 of the advice the Panel has summarised the key principles applicable to the making of an order as taken from current case law and as reflected in the current edition of the JSB guide.

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<sup>6</sup> See further below, para. 48 onwards.

<sup>7</sup> Offences Against the Person Act 1861, s. 20.

<sup>8</sup> *Ibid.* s.47.

<sup>9</sup> Third edition published in February 2007; supplement published November 2007; [www.jsboard.co.uk](http://www.jsboard.co.uk). Previous editions were published by a working group set up by the then Senior Presiding Judge, Lord Justice Thomas. Guidance from the JSB is not binding on a court.

## SECTION ONE: PRINCIPLES APPLICABLE TO THE MAKING OF AN ANTI-SOCIAL BEHAVIOUR ORDER

8. Many of the issues arising from the making of an ASBO have been considered by the Court of Appeal; the most significant decisions are those of *Boness, Bebbington and others*,<sup>10</sup> *H, Stevens and Lovegrove*,<sup>11</sup> and *Wadmore and Foreman*.<sup>12</sup> The latter case concerned two youths, whilst the others concerned both youths and adults. Each case related to orders made upon conviction, but the same principles apply to the making of an ASBO on application to a magistrates' court, or in conjunction with other proceedings in the County Court.

9. The relevant principles can be summarised as follows:

(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

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<sup>10</sup> [2006] 1 Cr App R(S) 120.

<sup>11</sup> [2006] 2 Cr App R(S) 68.

<sup>12</sup> [2006] 2 Cr App R(S) 110.

available for that offence.

(6) The terms of the order made must be precise and capable of being understood by the subject.<sup>13</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 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

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<sup>13</sup> Guidance produced by the JSB provides a list of examples of prohibitions that the higher courts have found to be too wide or poorly drafted; see fn. 9 above.

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.

10. 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>14</sup> 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 youth's behaviour.<sup>15</sup> 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>16</sup>

11. 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>17</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>18</sup>

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<sup>14</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 (see fn. 3 above).

<sup>15</sup> *Ibid.*, s.1AA.

<sup>16</sup> *Ibid.*, s.1G.

<sup>17</sup> *Ibid.*, s.1D.

<sup>18</sup> *Leeds Magistrates' Court, ex parte Kenny; Secretary of State for Constitutional Affairs and another, ex parte M* [2004] 1 All ER 1333.

## SECTION TWO: SENTENCING FOR BREACH OF AN ANTI-SOCIAL BEHAVIOUR ORDER

12. If the subject of an ASBO does anything prohibited by the order, without reasonable excuse, an offence is committed.<sup>19</sup> Between June 2000 and December 2006, 49 per cent of ASBOs imposed by the courts were breached. 6,256 persons were proved to have breached an order at least once; of these, 4,203 (67%) had breached an ASBO more than once, with the average number of breaches per person being 3.4.<sup>20</sup>

13. Although, as already mentioned, the Panel has adopted a different approach to its sentencing proposals for adults and youths, a number of general principles are relevant for all offenders and are discussed below.

### Seriousness

14. 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>21</sup> A 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.

15. As noted in the Panel's consultation paper on Bail Act offences,<sup>22</sup> any perception that the courts do not treat seriously a failure to comply with a court order can undermine public confidence in the effective administration of justice; it is, therefore, important for breach of an ASBO to be sanctioned appropriately. However, the determination of the court to ensure that its orders are not flouted should be considered within the context of the social impact of the behaviour that constituted the breach, as otherwise it may lead to excessive sentences.<sup>23</sup>

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<sup>19</sup> Crime and Disorder Act 1998, s.1(10).

<sup>20</sup> See fn. 4 above.

<sup>21</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).

<sup>22</sup> Published January 2006; see also the subsequent Definitive Guideline published by the Sentencing Guidelines Council in November 2007: [www.sentencing-guidelines.gov.uk](http://www.sentencing-guidelines.gov.uk).

<sup>23</sup> *Lamb* [2006] 2 Cr App R(S) 11.

16. The Sentencing Guidelines Council has set out the approach to dealing with breaches of orders in its guidelines on *New Sentences: Criminal Justice Act 2003*<sup>24</sup> and *Breach of Protective Orders*.<sup>25</sup> It emphasises that 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.<sup>26</sup> 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.

### **Recommendation 1**

*When sentencing an adult or youth for breach of an ASBO, the main aim is to achieve the purpose of the order. Subsidiary aims include the importance of enforcing an order of a court and the need to reassure the public that offenders are dealt with properly.*

### **Culpability**

17. The Council guideline on seriousness<sup>27</sup> states that the culpability of the offender should be the initial factor in determining the seriousness of an offence. The degree of offender culpability associated with breach of an ASBO is variable and has two dimensions:

i) in relation to the breach itself, 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>24</sup> Published December 2004: [www.sentencing-guidelines.gov.uk](http://www.sentencing-guidelines.gov.uk).

<sup>25</sup> Published December 2006.

<sup>26</sup> In *Pennington* [2007] EWCA Crim 507, where the offender had breached an ASBO by sending repeated text messages to a particular individual over a prolonged period, the Court reduced the sentence from 12 to 5 months imprisonment. The principal aim of the sentence was to prevent further anti-social behaviour, and the original court had taken insufficient account of the fact that no contact had occurred during the long delay before the offence came to trial.

<sup>27</sup> See fn. 21 above.

ii) in relation to the harm resulting or likely to result from the breach, 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 (see below).

18. The subject of an ASBO will have been provided with a copy of the order and will be expected to understand its terms. However, it is important for the court making an order to take steps to ensure that this is the case, especially where the subject is a young offender<sup>28</sup> or has a lower level of understanding due to mental health issues or learning difficulties. A defence of reasonable excuse may be made out where the prohibitions are found to lack clarity,<sup>29</sup> or where there has been a justifiable misunderstanding of the terms of the order.<sup>30</sup>

### **Harm**

19. As with culpability, there are two dimensions to the harm involved in breach of an ASBO. First, the breach may itself cause harassment, alarm or distress, which can reduce the quality of life in a community. As a very wide range of prohibitions can be attached to an order, the degree of harm resulting from breach will vary greatly. Section 143(1) of the Criminal Justice Act 2003 makes it clear that the assessment of 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. It is not necessary that an offender foresaw the harm that might be caused by breaching an order as the test of foreseeability is objective.<sup>31</sup> However, bearing in mind that 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.

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

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<sup>28</sup> Research conducted for the YJB found that youths subject to an ASBO rarely had a complete understanding of its prohibitions: Aikta-Reena Solanki, Tim Bateman, Gwyneth Boswell and Emily Hill, *Anti-social Behaviour Orders*, YJB (2006).

<sup>29</sup> In *CPS v T* [2006] EWHC Admin 728, the court declined to follow the approach in *R(W) v DPP* [2005] EWCA Civ 1333, in holding that the validity of an anti-social behaviour order could not be raised as a defence in proceedings for its breach. The court said that the correct approach is to consider whether: the relevant provision lacked sufficient clarity to warrant a finding that the defendant's conduct amounted to a breach; the lack of clarity provided a reasonable excuse for non-compliance with the order; and if a breach was established, it was appropriate to impose any penalty.

<sup>30</sup> *Nicholson* [2006] 2 Cr App R(S) 30.

<sup>31</sup> Harm must have been foreseeable by 'a reasonable person'.

## ***The originating conduct***

21. Guidance from the Judicial Studies Board suggests that the order itself will normally have been the culmination of a course of persistent anti-social behaviour.<sup>32</sup> Details of why an order was imposed should always be made available to a court. Care must be taken to ensure that it is the findings of the original court that are supplied, rather than the assertions of the prosecution found in the application papers, which may not have been accepted fully by the court. Where the basis of the order is unclear, there may be merit in referring the breach proceedings to a court in which at least one of the sentencers was involved in the making of the order.

22. The Council guideline on breach of protective orders<sup>33</sup> states that the original conduct is relevant in so far as it indicates the level of harm caused and whether this was intended. The Panel takes the view that this approach should be used when sentencing for breach of ASBO and that the anti-social behaviour which led to the making of the order may be considered relevant in interpreting the significance of the action(s) that breached the order and so assessing the culpability of the offender and the harm caused. For example, the original conduct may indicate greater culpability and/or harm if the breach continues a pattern of harassment 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.

23. Consideration of the original conduct will involve examination of the terms of the order itself, their necessity and reasonableness. If the prohibition that has been breached is found to lack sufficient clarity, this may provide a reasonable excuse for non-compliance with the order.<sup>34</sup> 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 the order to be varied. Where there is an application to a magistrates' court for variation or discharge of an order and the subject/offender is aged under 18, the justices constituting the court should normally be qualified to sit in the youth court.<sup>35</sup>

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<sup>32</sup> See JSB 'Guide for the Judiciary', p27; fn. 9 above.

<sup>33</sup> Published 2006; [www.sentencing-guidelines.gov.uk](http://www.sentencing-guidelines.gov.uk).

<sup>34</sup> See para. 18 above.

<sup>35</sup> Practice Direction (Magistrates' Courts: Anti-Social Behaviour Orders: Composition of Benches) [2006] 1 AER 886.

## **Recommendation 2**

*The nature of the original conduct that led to the making of the ASBO is relevant to sentencing an adult or a youth for breach in so far as it allows a judgement to be made about the level of harm caused by the breach and the extent to which that harm was intended by the offender.*

### **Summary**

24. 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 – the degree to which the offender intended to cause the harm that resulted (or could have resulted) and the degree to which the offender intended to breach the order – and two aspects of harm – the degree to which the breach caused harassment, alarm or distress and the degree to which the breach of an order of the court undermines public confidence. 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.

### **Interim orders**

25. The sentencing powers outlined above in paragraph 4 apply equally whether the breach relates to an interim order or a final order, and there is a generally accepted principle that breach of an interim order or a full order is equally serious. The Divisional Court has held that 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.<sup>36</sup> The court stated that the seriousness 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. The Panel agrees with this approach, and suggests that the court may wish to 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>37</sup>

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<sup>36</sup> *Parker v DPP* [2005] EWHC Admin 1485.

<sup>37</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).

26. Sentence for an interim breach should be imposed as soon as possible. If the hearing regarding the full 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.

27. Different considerations may arise in relation to an interim order which has been made without notice to the subject. Although such an order does not take effect until it has been served, doubts may arise about the extent to which the subject has understood the prohibitions. Where the subject can demonstrate ignorance of, or a complete misunderstanding of, the terms of an order made without notice, this may amount to a defence of reasonable excuse to a charge of breach. Where this defence is not made out, a lack of understanding of the terms of the order may still mitigate the seriousness of the offence.

### **Recommendation 3**

***Both interim and full ASBOs are orders of the court, and the same broad approach to sentencing for breach should be adopted. When sentencing an adult or youth for breach of an interim order, the court may wish to consider the degree to which the subject could have been expected to understand the prohibitions, particularly where the order was made without notice.***

### **A breach that also constitutes another criminal offence**

28. The Council guideline on breach of a protective order states that, where the conduct involved in breach of an order amounts to a substantive offence, it is desirable that the substantive offence and the breach of the order should be charged separately.<sup>38</sup> Where necessary, consecutive sentences should be considered to reflect the seriousness of the offences and achieve the appropriate totality.

29. Adopting a similar approach, the Panel considers that if the substantive offence only has been charged, the fact that it constitutes breach of an ASBO should be treated as an aggravating factor. If breach of the order only has been charged, the sentence should reflect the full circumstances of the breach, which will include the

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<sup>38</sup> Published 2006; [www.sentencing-guidelines.gov.uk](http://www.sentencing-guidelines.gov.uk).

conduct that could have been charged as a substantive offence. The basic principle is that 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 count or two has been charged.

30. The correct approach to sentencing for a breach which also constitutes a substantive offence with a lower maximum penalty than that provided for breach of an ASBO has been considered quite extensively by the Court of Appeal. After initial authorities suggesting that sentence for such a breach should be restricted to the maximum available for the offence itself had it not been a breach of an ASBO,<sup>39</sup> in *H, Stevens and Lovegrove*<sup>40</sup> the Court confirmed that the court is not limited in this way as the breach is an offence in its own right with its own statutory maximum penalty. However, the maximum sentence for the substantive offence is a feature to be borne in mind by the sentencing court in the interests of proportionality. The Panel agrees with this approach.

#### **Recommendation 4**

***Where breach of an Anti-social Behaviour Order 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.***

#### ***Levels of seriousness***

31. The harm resulting from, intended, or likely to have resulted from a breach is the most obvious indicator of offence seriousness and has formed the basis of the three levels of seriousness suggested below. However, 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>41</sup>

32. An order may be breached in a very wide range of circumstances, varying greatly even within the levels of seriousness identified below. The examples given are

<sup>39</sup> See e.g. *Morrison* [2006] 1 Cr App R(S) 85.

<sup>40</sup> [2006] 2 Cr App R(S) 68.

<sup>41</sup> Sentencing Guidelines Council, *Overarching Principles: Seriousness* (2004), [www.sentencing-guidelines.gov.uk](http://www.sentencing-guidelines.gov.uk).

intended to illustrate, rather than provide comprehensive definitions of, these levels of seriousness. The Panel's proposals relate only to sentencing for the breach of an ASBO. In some cases, breach may also involve the commission of a separate offence, the implications of which are discussed above.

#### *Level 1*

33. Offences falling into the highest level of seriousness are those where serious harassment, alarm or distress has been caused or where such harm was 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.<sup>42</sup>

#### *Level 2*

34. Offences in the middle seriousness range are those which cause a lesser degree of harassment, alarm or distress, where such harm was intended, or where it would have been likely if the offender had not been apprehended. Examples may include lesser degrees of threats or intimidation, the use of seriously abusive language, or causing more than minor damage to property.

#### *Level 3*

35. The lowest level of seriousness is intended to capture those offences where no harassment, alarm or distress was actually caused by the breach and where none was intended by the offender. In the absence of intimidation or the causing of fear of violence, breaches involving being drunk or begging may be at this level. Other examples may include the 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.

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<sup>42</sup> An example is the case of *Anthony* [2006] 1 Cr App R(S) 74, which involved a prolonged breach of two prohibitions designed to protect vulnerable key workers in the National Health Service from abuse. See also *Braxton* [2005] 1 Cr App R(S) 167, where an offender with numerous previous convictions, including breaches of the current ASBO, was convicted of two breaches involving aggressive begging, intimidation and assault.

## **Aggravating and mitigating factors particular to breach of an ASBO**

36. The Council guideline on seriousness<sup>43</sup> includes a list of aggravating and mitigating factors that are generally regarded as indicating higher or lower degrees of culpability or harm. This list is reproduced at Annex B. The Panel has identified further aggravating and mitigating factors which may be of particular relevance to breach of an ASBO. The factors listed here apply to both young and adult offenders; mitigating factors particular to youths are set out below in paragraph 52.

### **37. Factors likely to aggravate the seriousness of the breach:**

- **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**

### **38. Factors likely to mitigate the seriousness of the breach:**

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

## **Offender mitigation**

39. 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:**

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<sup>43</sup> See fn. 21 above.

- 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.

## SENTENCING OF ADULT OFFENDERS

40. In the case of an adult sentenced in the Crown Court, the maximum penalty for breach is 5 years imprisonment and/or a fine. It is an either-way offence, currently punishable in a magistrates' court by a maximum of 6 months imprisonment and/or a fine of £5,000. It is not possible to impose a conditional discharge.<sup>44</sup>

41. 43 per cent of ASBOs imposed on adults between June 2000 and December 2006 were breached during the same period.<sup>45</sup> Of the 13,023 breaches that were dealt with by the courts during that period:

7,023 (54%) resulted in a custodial sentence;

2,408 (18%) a community sentence;

1,391 (11%) a fine;

413 (3%) a discharge; and

1,788 (14%) were otherwise dealt with.

Of the 7,023 custodial sentences imposed for breach, 23 per cent were for no more than a month. The average sentence length was 3.8 months; only 28 breaches (0.4 per cent) resulted in a sentence of more than two years. It should be borne in mind that all disposals may be influenced by other offences sentenced at the same time, as well as by any previous convictions.

### The Panel's proposals

42. The proposed guideline is for sentencing for breach of an ASBO alone and is based on the nature and number of breaches and the degree of harassment, alarm or distress involved. The impact on sentence where the breach also constituted a separate offence has already been discussed at paragraphs 28 to 30. The Panel's proposals for sentencing an adult offender are set out in the table below and relate to a first time offender pleading not guilty. In this instance, 'first-time offender' means an offender who has breached an ASBO for the first time.

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<sup>44</sup> Crime and Disorder Act 1998, s.1(11) and s.1C(9).

<sup>45</sup> See fn. 4 above.

43. The suggested starting points are based on the assumption that the offender had the highest level of culpability, intending the breach and any resulting harm; a lower level of culpability should be reflected in a reduced starting point within the sentencing range. Definitions of 'starting point' and 'sentencing range' can be found at Annex A; the definition of 'first-time offender' must be read in conjunction with the explanation in the paragraph above.

44. The Panel is of the view that breach of an ASBO normally will be serious enough to warrant the imposition of a community order on the basis that it will always involve the possibility, at least, of harassment, alarm or distress being caused to one or more victims, as well as the contravention of a court order. 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>46</sup> and also with the prohibitions of the ASBO if the latter is to remain in force.

45. The Panel considers that the custody threshold normally will be crossed where the breach caused harassment, alarm or distress or where such harm was intended even where it did not result. In line with normal sentencing practice, even where that threshold is crossed a custodial sentence is not inevitable.<sup>47</sup>

46. In the very small number of most serious cases, a sentence beyond the range will be justified. Such a case will involve repeat offending and a breach causing serious harassment together with the presence of several aggravating factors, such as the use of violence, threats or intimidation against previous victims.

47. An offender may be sentenced for more than one offence of breach, for example where breaches have occurred on different days. While consecutive sentences may be imposed in such cases, the overall sentence should reflect the totality principle. Where a breach has been committed whilst on bail, this will aggravate the offence.

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<sup>46</sup> Sentencing Guidelines Council, *New Sentences: Criminal Justice Act 2003* (published 2004); [www.sentencing-guidelines.gov.uk](http://www.sentencing-guidelines.gov.uk).

<sup>47</sup> *Ibid.*

**Recommendation 5**

*Breach of an ASBO by an adult will normally be serious enough to warrant the imposition of a community order.*

**Recommendation 6**

*The custody threshold normally will be crossed where breach of an ASBO by an adult involved actual or intended harassment, alarm or distress.*

## BREACH OF AN ANTI-SOCIAL BEHAVIOUR ORDER

*Breach of an Anti-social Behaviour Order: s.1(10) Crime and Disorder Act 1998*

**Maximum Penalty:** 5 years imprisonment and/or a fine

NB: A conditional discharge is not available for this offence

**Mode of trial:** Either way

**The following guideline applies to a first time offender convicted (see para. 42 above) after trial.**

**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.**

Type/nature of activity	Sentencing range
<p><b>Level 1</b> Breach causing serious harassment, alarm or distress or where such harm was intended</p>	<p>Starting point – 26 weeks imprisonment Range - Custody threshold to 2 years imprisonment</p>
<p><b>Level 2</b> Breach involving a lesser degree of actual or intended harassment, alarm or distress, or where such harm would have been likely had the offender not been apprehended</p>	<p>Starting point – 6 weeks imprisonment Range – Community Order (MEDIUM) to 26 weeks imprisonment</p>
<p><b>Level 3</b> Breach where no harassment, alarm or distress was caused or intended</p>	<p>Starting point – Community Order (LOW) Range – Fine Band B to Community Order (MEDIUM)</p>
Additional aggravating factors	Additional 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.</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. Breach was of the less significant of a range of prohibitions.</li> <li>3. The prohibition(s) breached was not fully understood, especially where an interim order was made without notice.</li> </ol>

## SENTENCING OF YOUNG OFFENDERS

48. The approach to assessing the seriousness of a breach outlined above at paragraphs 14 to 39 applies equally to youths. However, the sentencing framework that applies to offenders aged under 18 is significantly different from that for adult offenders. 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>48</sup> the full range of disposals of the youth court is available, and these are outlined below.<sup>49</sup> Guidance on sentencing is provided by the Youth Court Bench Book.<sup>50</sup>

49. 61 per cent of ASBOs imposed on youths between June 2000 and December 2006 were breached during the same period.<sup>51</sup> Of the 8,163 breaches that were dealt with by the courts during that period:

- 2,652 (32%) resulted in a detention and training order;
- 4,082 (50%) a community sentence (including reparation orders);
- 518 (6%) a fine;
- 332 (4%) a discharge; and
- 579 (7%) were otherwise dealt with (including referral orders).

Over half of the detention and training orders imposed for breach were for four months, the minimum length available; the average was six months. Ten per cent of orders were for more than 10 months. As with adult offenders, it should be borne in mind that all disposals may be influenced by other offences sentenced at the same time, as well as by any previous convictions.

50. The principal aim of the youth justice system is to prevent offending by children and young persons.<sup>52</sup> Under domestic law, the court must have regard to the welfare of the child or young person when imposing sentence.<sup>53</sup> In accordance with

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<sup>48</sup> Crime and Disorder Act 1998, s.1(11) and s.1C(9).

<sup>49</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>50</sup> Judicial Studies Board, March 2006; [www.jsboard.co.uk](http://www.jsboard.co.uk).

<sup>51</sup> See fn. 4 above.

<sup>52</sup> Crime and Disorder Act 1998, s.37.

<sup>53</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.

obligations under international conventions and treaties, the best interests of the child must be a primary consideration.<sup>54</sup> A sentence designed to prevent re-offending also helps to promote the welfare of the young offender. Restorative justice is an important underlying principle in all youth justice disposals, from referral and reparation orders to action plan and supervision orders,<sup>55</sup> as well as reducing the harm done,<sup>55</sup> it can also help prevent re-offending.

51. As with adult offenders, a court must impose a community or custodial sentence only if such a sentence is warranted by the seriousness of the offence. The normal approach in sentencing young offenders is that the penalty is scaled down to reflect both reduced 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. For the same reasons, the sentencing framework differs significantly depending on the age of the young offender (see further below).

52. The particular stage of intellectual or emotional maturity of the individual, which may not correspond with actual age, will also often influence sentence. A young offender is likely to perceive a particular time period as being longer than perceived by an adult, and this may be of relevance when considering how much time has elapsed between imposition and breach of the order. Other offender mitigating factors that may be particularly relevant to young offenders include peer pressure and a lack of parental support.

53. The Code for Crown Prosecutors states that a youth should be prosecuted only where there are clear public interest factors in favour of doing so, and that in making this decision the interests of the youth must be considered.<sup>56</sup> Specific guidance on anti-social behaviour states that the police, in consultation with the youth offending team (YOT), should make an assessment of both the seriousness of the breach and the young person's offending history. A final warning may be appropriate where the breach of an ASBO is a first criminal offence,<sup>57</sup> provided the breach was

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<sup>54</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>55</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>56</sup> [www.cps.gov.uk/legal/index.html](http://www.cps.gov.uk/legal/index.html).

<sup>57</sup> This is the approach recommended in *A guide to the role of youth offending teams in dealing with anti-social behaviour*, YJB (2006); [www.yjb.gov.uk](http://www.yjb.gov.uk).

not a flagrant one. Where the breach was flagrant, then the expectation would be to charge, unless there were some very unusual circumstances.<sup>58</sup>

54. 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 is appropriate or it considers the offence to be so serious that only a custodial sentence is appropriate.<sup>59</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>60</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 to be re-sentenced.

55. 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

56. 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>61</sup> In the case of breach of an ASBO, there will often be

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<sup>58</sup> Crown Prosecution Service, *Anti-social Behaviour Guidance* (August 2006); [www.together.gov.uk/cagetfile.asp?rid=952](http://www.together.gov.uk/cagetfile.asp?rid=952).

<sup>59</sup> Powers of Criminal Courts (Sentencing) Act 2000, s.16. The Criminal Justice and Immigration Bill would 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>60</sup> *Ibid.*, s.20.

<sup>61</sup> *Ibid.*, s.73.

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.

57. 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.

58. 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>62</sup> These are:

- a curfew order
- an exclusion order
- an attendance centre order
- an action plan order
- a supervision order.

59. A curfew order may be imposed for a maximum of 6 months, or 3 months for those under 16. An exclusion order is available for offenders aged under 16, and prohibits the offender from entering a specified place for a maximum of 3 months. An attendance centre order requires a total of 12-36 hours attendance (maximum 24 hours for offenders under 16), generally in two-hour blocks at the weekend, and usually involves group work learning basic skills. An action plan order provides a short (3 months) but intensive period of supervision, and is intended to be individually tailored by means of a series of requirements, such as repairing the harm done to the community. Supervision orders can impose an even wider range of requirements and can 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>62</sup> If enacted and brought into force, the Criminal Justice and Immigration Bill will replace these with the Youth Rehabilitation Order, a generic community order for youths.

60. 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>63</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.

61. 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>64</sup> In relation to sentencing those aged under 18, the YJB has suggested that detention should only be considered as a last resort in cases of serious or persistent breach.<sup>65</sup> Such offenders are vulnerable, dependent and still developing, and they may feel isolated or insecure in custody.<sup>66</sup> Detention may not lower the chances of reoffending as it will remove the offender from any positive family relationships, as well as disrupting access to mainstream services such as education and training.<sup>67</sup>

## The Panel’s proposals

62. In most cases of breach by a young offender convicted after a trial, the appropriate sentence will be a community order.<sup>68</sup> As outlined above, there are several types of order available, and a range of requirements that can be attached to each; the court will consider which order will best prevent further offending. The individual circumstances of the offender and the seriousness of the breach will be relevant factors. The court must ensure that the requirements imposed by the order

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<sup>63</sup> Powers of Criminal Courts (Sentencing) Act 2000, ss.41, 46 and 51 respectively. These orders may also be replaced by the Youth Rehabilitation Order; see fn. 62 above.

<sup>64</sup> *Ibid.*, s.100.

<sup>65</sup> *A guide to the role of youth offending teams in dealing with anti-social behaviour*, YJB (2006); see fn. 55 above.

<sup>66</sup> A 2006 survey found that a third of youths in custody felt unsafe: *Young People in Custody 2004-2006: an analysis of children’s experiences of prison*, HM Inspectorate of Prisons and YJB (2006);

<http://inspectors.homeoffice.gov.uk/hmiprisonsthematic-reports1/YoungPeople04-06.pdf?view=Binary>.

<sup>67</sup> <http://www.yjb.gov.uk/Publications/Scripts/prodView.asp?idproduct=334&eP=>.

<sup>68</sup> As explained above in para. 54, where a young first-time offender pleads guilty, the court must make a referral order unless it imposes an absolute discharge, a custodial sentence or a hospital 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.

63. Where breach has not involved any harassment, alarm or distress, a fine may be appropriate if it will be paid by the offender rather than parents or carers. A reparation order may be appropriate where a fine is unsuitable.

64. In accordance with international obligations, including the United Nations Convention on the Rights of the Child, custody should be used for a youth only as a measure of last resort;<sup>69</sup> hence evidence of a much more serious level of offending behaviour is needed to justify a custodial sentence for a young offender than for an adult. In most cases, the Panel considers that the custody threshold will be crossed only where the breach caused serious harassment, alarm or distress through either: the use of violence, threats or intimidation; or the targeting of individuals or groups in a manner that led to a fear of violence. Exceptionally, the custody threshold may be crossed where a youth is being sentenced for more than one breach (committed on separate occasions within a short period) involving a lesser but substantial degree of harassment, alarm or distress.

65. Even where the custody threshold is crossed, the court should normally choose a community order in preference to a DTO, unless it is satisfied that all appropriate community orders have been tried and cannot prevent the youth from re-offending. Other circumstances which may lead a court to conclude that a community order is impractical or impossible include:

- the offender is serving a custodial sentence for a separate offence, or is in custody awaiting deportation;
- the YOT cannot work with the offender, for example because of past threatening or violent behaviour; or
- the youth makes it clear that the order will not be complied with.

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<sup>69</sup> United Nations Convention on the Rights of the Child, Article 37(b); see fn. 54 above.

66. The younger the offender, the more likely that perseverance with community orders will be more effective in preventing re-offending than detention. With this in mind, the court may wish to consider imposing a community order which requires participation in the ISSP.

67. Where the court considers a custodial sentence to be unavoidable, the Panel proposes a starting point of four months detention, with a range of up to 12 months. Where a youth is being sentenced for more than one offence of breach involving serious harassment, and some of the more serious aggravating factors - such as the use of violence, threats or intimidation against previous victims – are present, sentence may go beyond the range, subject to the maximum of 24 months. Any detention and training order must be made for the shortest appropriate period of time,<sup>70</sup> and the court should take account of any time spent on remand in custody.<sup>71</sup>

**68. The principles to be followed when sentencing a youth for breach of an ASBO are:**

***First time offender pleading guilty***

- (i) the court must make a referral order unless it imposes an absolute discharge, a custodial sentence or a hospital order;**

***First time offender pleading not guilty***

- (ii) in some less serious cases, a fine may be appropriate if it will be paid by the offender, or otherwise a reparation order;**
- (iii) in most cases, the appropriate sentence will be a community order;**
- (iv) the custody threshold should be set at a significantly higher level than the threshold applicable to adult offenders;**
- (v) the custody threshold usually will not be crossed unless the breach involved serious harassment, alarm or distress through**

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<sup>70</sup> Ibid.

<sup>71</sup> Where offender was remanded in custody in connection with the offence, or any other offence the charge for which was founded on the same facts or evidence: Powers of Criminal Courts (Sentencing) Act 2000, s.101(8).

either the use of violence, threats or intimidation or the targeting of individuals/ groups in a manner that led to a fear of violence;

- (vi) exceptionally, the custody threshold may also be crossed where a youth is being sentenced for more than one offence of breach involving a lesser but substantial degree of harassment, alarm or distress;
- (vii) 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
- (viii) where the court considers a custodial sentence to be unavoidable, the starting point for sentencing should be four 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.

### **Ancillary orders**

69. Where the offender is aged 16 or 17, the court may impose a Parenting Order on the parents or carers for a period not exceeding 12 months, if it considers that such an order would be desirable in the interests of preventing the commission of any further offence.<sup>72</sup> The court *must* impose such an order if this condition is satisfied in the case of a subject aged under 16.

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<sup>72</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 (see fn. 3 above).

## MEANING OF “RANGE”, “STARTING POINT” AND “FIRST TIME OFFENDER” WITHIN SENTENCING GUIDELINES COUNCIL GUIDELINES

A Council guideline is generally for a *first time offender* convicted after a trial. It commonly provides a *starting point* based on an assessment of the seriousness of the offence and a *range* within which sentence will normally fall for most cases.

**NB: The definition of ‘first time offender’ must be read in conjunction with paragraph 42 of the Panel’s advice.**

### Assessing the seriousness of the offence

1.
  - a) A typical Council 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.
  - b) As an aid to consistency of approach, a guideline will describe a number of types of activity which would fall within the broad definition of the offence. These will be set out in a column generally headed “type/nature of activity”.
  - c) 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 in the description itself) to reach a **provisional sentence**.
  - d) The 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.
2. 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.

### Personal Mitigation

3. 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. Again, this may take the provisional sentence outside the range.

### Reduction for guilty plea

4. Where there has been a guilty plea, any reduction attributable to that plea will be applied to the sentence at this stage. This reduction may take the sentence below the **range** provided.

Sentencing Guidelines Council  
Sentencing Advisory Panel  
May 2007

**AGGRAVATING AND MITIGATING FACTORS IDENTIFIED IN THE  
SENTENCING GUIDELINES COUNCIL GUIDELINE 'OVERARCHING  
PRINCIPLES: SERIOUSNESS'**

**Aggravating factors**

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)

**Mitigating factors**

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

**Personal mitigation**

- Genuine remorse
- Admissions to police in interview
- Ready co-operation with authorities

## SUMMARY OF RECOMMENDATIONS

### Recommendation 1

When sentencing an adult or youth for breach of an ASBO, the main aim is to achieve the purpose of the order. Subsidiary aims include the importance of enforcing an order of a court and the need to reassure the public that offenders are dealt with properly.

### Recommendation 2

The nature of the original conduct that led to the making of the ASBO is relevant to sentencing an adult or a youth for breach in so far as it allows a judgement to be made about the level of harm caused by the breach and the extent to which that harm was intended by the offender.

### Recommendation 3

Both interim and full ASBOs are orders of the court, and the same broad approach to sentencing for breach should be adopted. When sentencing an adult or youth for breach of an interim order, the court may wish to consider the degree to which the subject could have been expected to understand the prohibitions, particularly where the order was made without notice.

### Recommendation 4

Where breach of an Anti-social Behaviour Order also constitutes another substantive 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.

### Recommendation 5

Breach of an ASBO by an adult will normally be serious enough to warrant the imposition of a community order.

### Recommendation 6

The custody threshold normally will be crossed where breach of an ASBO by an adult involved actual or intended harassment, alarm or distress.

## THE CONSULTATION

In accordance with the duty imposed by 171(3) of the Criminal Justice Act 2003, the Panel issued a consultation paper on 16 August 2007. The Panel's provisional views on sentencing guidelines for breach of an ASBO were set out.

Copies of the consultation paper were sent to 429 individuals and organisations including the Panel's 33 regular consultees and Resident Judges at each Crown Court Centre in England and Wales and to the Chair of each Youth Panel. It was also published on the Panel's website and in the Justice of the Peace journal. 66 responses were received.

### **Responses were received from the following:**

Association of Chief Police Officers  
 Council of Her Majesty's Circuit Judges  
 Crown Prosecution Service  
 Justices' Clerks' Society  
 Law Society  
 Magistrates' Association  
 National Association for the Care and Resettlement of Offenders  
 National Bench Chairmen's Forum  
 Police Federation of England and Wales  
 YJB (Youth Justice Board)

### **Responses were also received from:**

Stu Allerton JP, Chairman, South Worcestershire Youth Panel  
 Arun District Council  
 Association of Convenience Stores  
 Zena Berlyne, Chair, City of Salford Magistrates' Court  
 Bridgend Youth Panel  
 Brighton & Hove Anti-social Behaviour Unit and Sussex Police – Brighton and Hove  
 Bristol Youth Court  
 Coventry Community Safety Partnership  
 Anthony Edwards, defence solicitor and member of the Sentencing Guidelines Council  
 Fawcett Society  
 W M Forrest, Bench Chairman, North Tyneside Magistrates' Court  
 Carole Freeman Dunn JP, Chair, Langbaugh East & Middlesbrough Combined Youth Panel  
 Caroline Graham, Anti-social Behaviour Team, Redcar and Cleveland BC  
 Harrogate Magistrates' Bench  
 London Borough of Havering  
 Homezone Housing Ltd  
 Graham Hooper, Justices' Clerk, Nottingham  
 Islington Anti-social Behaviour Team  
 Justice for Children  
 Stephen Keaney, Merseyside Police  
 Keighley Youth Bench  
 Kent Police

Knowsley Metropolitan Borough Council  
Joan Lawson, Chair, Shrewsbury and North Shropshire Youth Panel  
Manchester City Council  
Manchester City Magistrates' Bench  
Merseyrail  
Jason Murphy, Operational Manager (Southampton City Team), Wessex YOT  
National Association for Youth Justice  
National Youth Agency  
Newcastle upon Tyne Crown Court Circuit Judges  
NHS Security Management Service  
Sue Pawson, North-east Suffolk Youth Panel  
Colin Peake, Stroud Area CDRP  
Superintendent Paul Phillips, Dyfed-Powys Police  
Portsmouth Anti-social Behaviour Unit and Police  
Quaker Crime, Community and Justice Group  
Revolving Doors Agency and Elmore Team  
Safer Gateshead (Community Safety Partnership)  
Sainsbury Centre for Mental Health  
St Albans Anti-Social Behaviour Unit  
Sandwell Metropolitan Borough Council  
Sheffield Youth Offending Service  
Southern (train operating company)  
Standing Committee for Youth Justice  
Superintendent Robert Spencer, West Midlands Police  
Sunderland Youth Offending Service  
Sussex Area Youth Chairman Forum  
Telford & South Shropshire Youth Panel  
George Tranter, solicitor and former Justices' Clerk  
Wakefield Youth Panel  
Walsall and Aldridge Magistrates  
West Yorkshire Magistrates  
Whitefriars Housing Group Limited  
Malcolm Woodhall, private individual  
Jim Wylie, South-east Suffolk Youth Panel

**1 anonymous response was also received**