



Sentencing Guidelines Council

Breach of an Anti-Social Behaviour Order

Response to Consultation

December 2008

Foreword

The guideline has been agreed by the Council after careful consideration of advice from the Sentencing Advisory Panel and of responses to its consultation guideline, published simultaneously on 23 May 2008.

This document sets out the main issues raised in the responses, the conclusions of the Council and the reasoning behind the conclusions.

The Council is grateful for the comments and suggestions received which have resulted in the development of some parts of the guideline.

The definitive guideline can be found at www.sentencing-guidelines.gov.uk or can be obtained from the Sentencing Guidelines Secretariat, 4th Floor, 8-10 Great George Street, London SW1P 3AE.

Chairman
Sentencing Guidelines Council
December 2008

1. The consultation guideline was published on 23 May 2008. Those invited to respond were:
 - Lord Chancellor and Secretary of State for Justice
 - Home Secretary
 - Attorney General
 - Justice Committee
 - Party Leaders and the Convenor of the Crossbench Peers in the House of Lords
2. The Lord Chancellor responded to the consultation, incorporating the views of the Home Secretary and Attorney General, stating that Ministers were content with the guideline. No issues were raised for further consideration by the Council.
3. The Justice Committee decided not to respond to this consultation guideline. In a letter to the Council, the Chairman indicated that the Committee had had an opportunity to consider the Panel's work and had found that much of the information examined related to the making of anti-social behaviour orders rather than to breach.
4. Additional responses were received from:
 - HH Judge Gilbert QC
 - Crown Prosecution Service
 - Social Landlords Crime and Nuisance Group
 - Legal Committee of Her Majesty's District Judges (Magistrates' Courts)
 - The Children's Society
 - Release
5. Some of the points raised in the additional responses were beyond the remit of the Council or scope of a guideline and could not be considered. Of the remainder, the main points and the decision of the Council are detailed below under the appropriate section heading in the consultation guideline.

Relevance of originating conduct

6. One respondent suggested that it was not appropriate for a court dealing with breach of an order to review the necessity or reasonableness of the terms of the order, or to consider whether the order had been reviewed at any time as this could be interpreted as indicating that a court dealing with a breach could exercise an appellate or review function without the benefit of the evidence and submissions originally presented.
7. Another respondent suggested that, in relation to certain categories of offender, inappropriate terms are imposed in orders with the result that breach would amount to commission of an offence other than the breach and so render the offender liable to double prosecution. It was proposed that such cases should be dealt with by way of an absolute discharge and a referral made for the order to be reviewed with a view to revocation.

8. The principle of taking into account the originating conduct was established in the Council's guideline '*Breach of a Protective Order*'. It is relevant to breach of an anti-social behaviour order in relation to interpreting the significance of the actions of the offender for the purpose of assessing both culpability (in terms of intention) and the type and level of harm caused or intended.
9. The Council considered that whilst a court dealing with breach of an order would not be able to review or vary the terms, it was appropriate to take into account the original conduct in the circumstances set out above. It would be of most relevance to older anti-social behaviour orders made prior to guidance that has gradually evolved.

The Council determined that the wording of the guideline should be amended to clarify the relevance of considering originating conduct. To avoid confusion, reference to the process for variation of an order would be moved to a footnote.

Breach of an interim order

10. A respondent disagreed that the court should consider the extent to which an urgent need for specific interim prohibitions was demonstrated, as to do so would require the court to exercise an appellate or review function.
11. The Council's view was that this is a legitimate consideration relevant to the assessment of seriousness. The court should have regard to whether the breach conduct was the same as that which led to the making of the interim order, whether the conduct affected those persons that the prohibitions were designed to protect, and how soon the interim order was breached after it was made.

The Council considered that no change was required.

Breach that also constitutes another criminal offence

12. One response invited the Council to re-consider whether there was a need to refer to the prosecutorial decision where breach of a term of an anti-social behaviour order also constitutes a substantive offence. Guidance from the Court of Appeal has evolved in relation to the making of orders and framing of prohibitions to reduce instances of this situation arising.
13. The Council considered that, as a result both of the guidance that has evolved and of the expiry of older orders, it will become rare for breach of an order to also amount to a substantive offence. However, there is a need for guidance as to the approach where such cases arise and the approach to sentencing (derived from the '*Breach of a Protective Order*' guideline) is appropriate.

The Council agreed to remove reference to the decision to be made by the prosecutor.

Aggravating and mitigating factors

14. One respondent raised the issue of a court dealing with a case that involved breach of more than one prohibition. It was suggested that multiple breaches should be treated as an aggravating factor, and conversely a single breach of a term that did not cause harm to an individual should be a mitigating factor.
15. The view of the Council was that the appropriate category of seriousness should be based on the degree of harm caused or intended. The number of prohibitions breached may be relevant to that assessment but is not determinative in itself.

The Council agreed that this approach should be made clearer in the guideline.

Personal mitigation

16. In one response it was suggested that additional factors of personal mitigation relevant to young people should be included in order to recognise that lack of maturity can hinder understanding of prohibitions and affect the ability of a young person to remember and comply with them. Whilst compliance with an Individual Support Order (ISO) may be put forward as personal mitigation, lack of an ISO or failure of the local authority to provide support should also feature in the list.
17. A high proportion of anti-social behaviour orders are made in relation to and breached by young people. Therefore, this guideline, unlike most offence guidelines produced by the Council, includes guidance in relation to making an ASBO (drawing attention to factors of relevance where the subject is a youth) and dealing with youths convicted of breaching an order. The guideline specifically includes factors that would mitigate the seriousness of the breach as well as matters of personal mitigation that are most likely to be present where the offender is a youth.

The Council determined that there should be no change.

First-time offender

18. One respondent pointed out that two different definitions of a first-time (adult) offender were included in the guideline which might cause confusion, one being the standard definition used in Council offence guidelines, and the other a definition specific to the offence of breach of an anti-social behaviour order.
19. The Council had determined that a distinction was to be made for the purposes of this guideline as whilst some orders would have been made in civil proceedings, the majority would be imposed following conviction for a criminal offence, and the subjects would therefore have previous convictions. The suggested starting points and sentencing ranges were therefore based on a person who had not previously breached an anti-social behaviour order, rather

than someone who had no previous convictions that might be relevant and thus treated as aggravating the seriousness of the breach under section 143(2) of the Criminal Justice Act 2003.

The Council agreed that the definitions should be aligned to avoid confusion.

Starting points and sentencing ranges

20. Two respondents made submissions in relation to the starting points and ranges in the guideline. One suggested that the guidelines were too high across the levels of seriousness on the basis that sentencing for breach of an order should be proportionate to that for public orders and other offences which involve the harm that an order is intended to prevent. The other was concerned that there is great disparity between the maximum penalty for breach of an order (five years custody in relation to an adult offender) and the top of the range for the highest category of seriousness in the guideline.
21. The categories of seriousness and the associated starting points and ranges were carefully formulated to reflect the range of behaviour that could give rise to breach of an order. The elements of culpability and harm are described in the guideline. The starting points assume the highest level of culpability, intention to breach and cause harm. The three categories are designed to be flexible to allow the court to consider the seriousness of the harm actually caused or intended (or foreseeable) and the examples of harm are not exhaustive.
22. As regards sentencing for more serious breaches, statistical information considered by the Council showed that a very low proportion of sentences imposed for breach of an order were for more than two years custody. Like all Council guidelines for offences, this one is based on a first-time offender who pleaded not guilty, and the Council considered that very few such cases would require a custodial sentence longer than two years. Where an offender has previous convictions which aggravate the breach or there are significant other aggravating factors, a sentence beyond the range given may be appropriate.

The Council agreed that no change to the guideline was required.