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35,
From: Lorraine Cordell <lorraine32@blueyonder.co.uk>
Sent time: 04/02/2016 09:08:23 PM
To: Rewired <re_wired@ymail.com>
Subject: FW: Simon Cordell Skeleton Argument Papers
Attachments: Simon Cordell Skeleton Argument.pdf
Simon Cordell Skeleton Argument (2).pdf
Simon Cordell Skeleton Argument (3).pdf
here just got from Josey well Patrick
From: Patrick Mc Elligott
mailto: patrick@michaelcarrollandco.com
Sent: 04 February 2016 17:35
To: lorraine32@blueyonder.co.uk
Cc: josie@michaelcarrollandco.com; clarence@michaelcarrollandco.com
Subject: Re: Simon Cordell Skeleton Argument Papers
Dear Ms Cordell,

Please find the papers attached. Could you please provide us with your son's email address as well too.
Regards.
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This view as to the meaning of the phrase "criminal charge" is
reinforced by the third criterion, which is the nature and degree of severity of the penalty. The formulation of this criterion in the early case of ***Engel v The Netherlands*** (No 1) r EHRR 647, 678-679, para 82 is instructive**:**

"['Supervision by the court] would generally prove to be illusory if it did not also take into consideration the degree of severity of the penalty that the person concerned risks incurring. In a society subscribing to the B rule of law, there belong to the 'criminal' sphere deprivations of liberty liable to be imposed as a punishment, except those which by their nature, duration or manner of execution cannot be appreciably detrimental. The seriousness of what is at stake, the traditions of the contracting states and the importance attached by the Convention to respect for the physical liberty of the person all require that this should be so."

The underlying idea is that proceedings do not lie within the criminal sphere for the purposes of article 6 unless they are capable of resulting in the imposition of a penalty by way of punishment. In ***B v Chief Constable of Avon and Somerset Constabulary*** [2001] 1 WLR 340, 353, para 28 Lord Bingham of Cornhill CJ said that he was aware of no case in which the European Court has held a proceeding to be criminal even though an adverse outcome for the defendant cannot result in any penalty. I agree. Although there are other aspects of the procedure which suggest that in proceedings for the imposition of an anti-social behaviour order the person Is not "charged with a criminal offence", the critical question as 1 see it is whether the making of such an order amounts to the imposition of a penalty. But it is first necessary to consider whether either of the first two criteria are satisfied.

The first criterion: classification in domestic law
A finding that the proceedings were classified as criminal in domestic law is likely to be conclusive. But a finding that they are civil is of relative weight and serves only as a starting poin**t:** ***Benham v United Kingdom*** 22 EHRR 293, 323, para 56. In ***Lauko v Slovakia*** (1998) 33 EHRR 994, 1010-1011, para 57 the court observed that the criteria are alternative and ^ not cumulativ**e:** see also ***Garyfallou AEBE v Greece*** (1997) EHRR 344. As it was put in ***Ozturk v Germany 6*** EHRR 409, 424, para 54, one criterion cannot be applied so as to divest an offence of a criminal character if that has been established under another criterion. But it was recognised in ***Lauko v Slovakia***, at p ion, para 57, that a cumulative approach may be adopted if the separate analysis of each of them does not lead to a clear conclusion as to the existence of a "criminal charge". For the reasons already given, I consider that the position under domestic law is that the proceedings are classified as civil proceedings and not criminal. In their helpful written submissions which were developed before us in oral argument Liberty, to whom leave was given to intervene in these appeals, have contended that the essential question is how domestic law classifies the conduct which is at issue, not the proceedings themselves, d hey submit that the conduct which requires to be demonstrated falls within the scope of the criminal law, and that for this reason the proceedings should be treated as criminal proceedings in domestic law for the purposes of the Convention. They

point out that the definition of "anti-social behaviour" in section 1(1) of the Crime and Disorder Act 1998 is modelled on

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A "harassment" in the Protection from Harassment Act 1997, which is a criminal offence under section z of that Act, and that such conduct may also be treated as criminal under section 5 of the Public Order Act 1986 and a variety of other statutory provisions dealing with offences such as assault, theft and burglary. They also invoke section 3 of the Human Rights Act 1998 in support of the proposition that an application made under section 1 of the Crime and Disorder Act 3 998 should be construed in domestic law as 6 criminal proceedings in the absence of an express provision in the legislation to the contrary.

• 1 would reject these arguments. The question is whether, as it was put in ***Engel v The Netherlands (No 1)*** 1 EHRR 647, 678, para 81, the provision defining the offence belongs to criminal law, disciplinary law or both concurrently. It cannot be answered without examining the nature and purpose of the proceedings in which the conduct is alleged. The analogies to which Liberty refer are all examples of situations in which the conduct described is defined in the statute for the purpose of enabling a charge to be brought with a view to the imposition of a penalty. In ***Engel v The Netherlands*** (No 1), at p 677, para 79 the court described the aim of repressing the applicants' conduct through penalties as an objective which was analogous to the "general goal of the criminal law". I hat is not the 0 purpose for which proceedings for the imposition of an anti-social behaviour order are brought. Their purpose is to protect the public from further antisocial acts by the defendant. As for the argument regarding section 3 of the Human Rights Act 1998, it is, as Liberty themselves recognise, circular. According to the jurisprudence of the Strasbourg Court, the first criterion is how the proceedings are classified according to the legal system of the £ respondent stat**e: *Engel v The Netherlands*** (No 1), at p 678, para 8z. Section z of the Human Rights Act 1998 provides that a court or tribunal determining a question which has arisen in connection with a Convention right must take the Strasbourg jurisprudence into account. Strasbourg jurisprudence tells us that the question of classification is a matter for our own domestic system. Under our system, for the reasons already given, the proceedings arc civil proceedings and not criminal.

The second criterion: the nature of the offence

• This question looks to the nature of the offence charged. But there is a preliminary question that has to be examined. Do proceedings for the imposition of an anti-social behaviour order involve the bringing of a charge at all? For the reasons already given, 1 think that the answer to this question in domestic law is clear. They do not involve the bringing of a charge because the purpose of the procedure is to impose a prohibition, not a penalty. But the domestic answer to this question does not resolve the issue, because for tire purposes of the Convention it is necessary to look at the substance of what is involved and not the form. Moreover, the question cannot be answered according to what Parliament is thought to have intended. In this context it is the effect of what Parliament has done that has H to be examined. The court looks behind the appearances and investigates the realities of the procedu**re: *Deweer v Belgium (1980) z EHRR.*** 439, 438, para 44.

• The grounds for making the application involve making an allegation against the defendant that he has acted in a manner which may

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we'll have involved criminal conduct. A formal accusation is made, and the court to which it is made has to reach a decision as to whether or not the allegation has been made out. The situation can be distinguished from that where a sex offender order is sought under section 2 of the Crime and Disorder Act 1998, as it is a precondition for the making of the application that the defendant is already a sex offender as defined in section 3(1) of the Act. It can also be distinguished from that where a confiscation order is sought under the Drug Trafficking Offences Act 1986, as it is a precondition for the making of an application for such an order that the person against whom the order is sought has been convicted of a drug trafficking offence as defined in the Act. A previous conviction for the acts which are said to have amounted to anti-social behaviour is not required for the purposes of section 1 of the Crime and Disorder Act 1998. For the defendants it was contended that these features of the proceedings showed that they were ***directed*** at the world at large, rather than a pre-defined or limited class of persons, and that offences which were of this character were apt to be regarded as involving a criminal charge within the meaning of article 6.
I do not think that the fact that no previous criminal conviction is required before an application for an and-social behaviour order can be made under section 1 of the Crime and Disorder Act .1998 has the significance which the defendants seek to attach to it. A distinction is drawn in the jurisprudence of the Strasbourg court between charges which are addressed to a pre-defined or limited class of persons, such as those who are serving in the armed forces or are serving sentences of imprisonment as in ***Engel v The Netherlands (No 1) 1*** EHRR 647 and ***McEeeley v United Kingdom*** (1980) 3 EHRR 161 or those who take part in proceedings before
a court as in **Ravnsborg v Sweden 1**8 EHRR 38, on the one hand and charges which are directed to the world at large on the other, as in ***Ben denoun u France*** (1994) 18 EHRR 54 which was concerned with a provision in the tax code applicable to all citizens. The distinction which is drawn here is between proceedings which are disciplinary in character and those which are criminal. Where a limited group of persons possessing a special status is involved the conclusion is more readily drawn that the proceedings are ^ disciplinary. But that is not a distinction which falls to be drawn in this case.
The question is whether the person against whom an anti-behaviour order is being sought is "charged" with an offence at all. There are several indications that this is not so.
The conduct which requires to be demonstrated is not necessarily conduct which would be capable of being treated as criminal. It has to be shown that the defendant has acted in a manner that caused or was likely to cause harassment, alarm, or distress. But in order to prove that an offence under section 1of the Public Order Act 1986 was committed by him it would be necessary to go further and prove that he intended to cause these consequences. In order to prove that an offence was committed under section 1 of the Protection from Harassment Act 1997 it would be necessary
to prove that he was engaged in a course of conduct which in fact amounted to harassment and that he knew or ought to have known that his conduct amounted to harassment.
Furthermore, the decision whether or not to make the order does not depend solely on proof of the defendant's conduct. The application may only be made if it appears to the local council or the chief constable that an

An order is necessary to protect persons in the area, and consultation between them is required before the application is made. Thus, the proceedings are identified from the outset as preventive in character rather than punitive or disciplinary. This is a strong indication that they are not proceedings for the determination of a criminal charge against the defendant. In ***Lattko v Slovakia*** 33 EHRR 9514, ion, para 58 the court said that the fine imposed in that case was intended as a punishment to deter re-offending and that it had 6 "a punitive character, which is the customary distinguishing feature of criminal penalties". In ***Guzzardi v Italy*** (3980) 3 EHRR 333, 369-37°, para o the court said that proceedings under which the applicant, as a suspected Mafioso, had been placed under special supervision with an obligation of compulsory residence within a restricted area did not involve the determination of a criminal charge against him within the meaning of C article**.** see also ***Raimondo v Italy*** 18 EHRR 137. In ***M v Italy*** (199r) 70 DR 59, the commission held that article 6(2) did not apply to confiscation of property belonging to a person suspected of being a member of a mafia- type organisation. In neither of these cases was the imposition of the order regarded as being punitive. In ***Gough v Chief Constable of the Derbyshire Constabulary*** [2002] QB 459 the Divisional Court held that the imposition of a banning order under the Football (Spectators) Act 1989 as amended by the Football (Disorder) Act 2000, which was designed to combat what Laws I.J described as "the shame and menace of football hooliganism", was not in conflict with article 6. This decision has been affirmed by the Court of Appeal [2002] QB 1 2T 3.

In contrast to those decisions, which support the proposition that a distinction is drawn between proceedings for the imposition of preventive measures and those for the imposition of a penalty or punishment, there is ***Steel v United Kingdom*** 28 FJIRR 603, In that case the court held that article 6(3) applied to proceedings in which the applicants, who had been arrested and charged with breach of the peace, were brought before a magistrate and bound over to keep the peace. As in the case of applications for an anti-social behaviour order, the procedure is initiated under section 51 of the Magistrates' Courts Act 1980 by a complaint, and a bind over order ^ does not constitute a criminal conviction. It was contended foi the defendants that that decision is directly in point in this case and indistinguishable, and that contention was strongly supported by Liberty.

But I would hold that it is distinguishable, for the reasons which were given by Lord Phillips of Worth Matravers MR. in the Court of Appeal in the ***McCann*** case [2001] rWLRro84, 1100H—1 to b. As he pointed out, in contrast to proceedings for breach of the peace, there is no power of arrest for the purpose of proceedings under section 1 of the Crime and Disorder Act 1998. The fact that a warrant may be issued for the defendant's arrest if he fails to attend the hearing or an adjourned hearing does not show that they are criminal proceedings. Rather it shows that he has failed to respond to a summons by the court. In itself this is far from conclusive, as there are numerous offences in English law which are non-arrestable. But it has to be ^ taken together with the other factors. Proof of anti-social behaviour is not the only criterion for the making of the order, nor is proof that the defendant is likely to cause further anti-social acts in the future. 'the orders must be shown to be necessary for the purpose of protecting people against further such behaviour by him. This is not a distinction of form rather than

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substance at all. The last criterion is of fundamental importance to the A decision as to the prohibitions that are required. And in contrast to proceedings for breach of the peace, which can lead to the immediate imposition of a sentence of imprisonment under section 11.5(3) of the Magistrates' Courts Act 1980 for up to six months if the defendant fails to comply with the order because he does not agree to enter into a recognisance to keep the peace or to be of good behaviour, proceedings under section 1 of g the Crime and Disorder Act 1998 cannot in themselves result in the immediate imposition of a penalty.

The third criterion: is an antisocial behaviour order a penalty

This question looks to the nature of the penalty. But here again there is a preliminary question that has to be examined. Is an anti-social behaviour order a penalty at all? The essential characteristics of an antisocial behaviour order are that the defendant is prohibited from doing something. The purpose of the prohibition is to protect people in the area to which the order relates. Section ***1(6)*** of the Crime and Disorder Act 1998 provides that the prohibitions that may be imposed are those necessary for the purposes of protecting persons from further anti-social conduct that is, from conduct which will cause, or is likely to cause, them harassment, alarm D or distress. It is true that no limits are set as to the prohibitions that may he imposed, so long as they are found to be necessary. The defendants say that prohibitions which banish the defendant from an area of the city where he lives, or which expose him to harsher penalties than he would normally face if he commits an offence, have all the characteristics of a penalty for the antisocial acts which he is found to have committed.

An anti-social behaviour order may well restrict the freedom of the defendant to do what he wants and to go where he pleases. But these restrictions are imposed for preventive reasons, not as punishment. 1 he tests that has to be applied under section 1(6) is confined to what is necessary foi the purpose of protecting persons from further anti-social acts by the defendant. The court is not being required, nor indeed is it permitted, to consider what an appropriate sanction would be for his past conduct. Moreover, while the court may restrict the defendant's liberty where this is shown to be necessary to protect persons in the area from further anti-social acts by him, it may not deprive him of it nor may it impose a fine on him.

Conclusion on classification

For these reasons I do not think that any of the criteria for a finding ***c*** that proceedings under section r of the Crime and Disorder Act 1998 have the character of criminal proceedings for the purposes of article 6 are satisfied. The consequence of so holding is of fundamental importance to the future of this legislation. Cases such as ***Unterpertinger v Austria*** **(**1986) 13 FURR .**175,** ***Kostovski v The Netherlands*** (1989) 1.1 F.HRR 434 and ***Saidi v France*** (1993) 17 EHRR 2.51 illustrate the reluctance of the Staatsburg court to accept that the use of hearsay evidence is compatible with a defendant's right under article 6(3)(d) to examine or have examined witnesses against him. But I would hold that article 6(3) does not apply to these proceedings and that the rules of evidence that are to be applied are the civil evidence rules. This means that hearsay evidence under the Civil

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A Evidence Act 1995, the use of which will be necessary in many cases if the magistrates are to be properly informed about the scale and nature of the anti-social behaviour and the prohibitions that are needed for the protection of the public, is admissible.

Are the proceedings civil proceedings?

Counsel for the respondents and the Secretary of State were agreed that, if your Lordships were to hold that the specific guarantees in article 6(2.) and article 6(3) did not apply to these proceedings, they were nevertheless subject to the provisions of article 6(1). The question of classification is critical in this case, so it is important that the basis for these concessions should be clearly understood. They could only be accepted as well-founded if it was clear that the proceedings involved the determination of the defendant's civil rights and obligations. At first sight an order which prohibits a person from behaving in an anti-social manner has nothing to do with his civil rights and obligations. He has no right in domestic private law to use or engage in abusive, insulting, offensive, threatening language or behaviour or to threaten or engage in violence or damage against any person or property, which are among the acts which the defendants have been prohibited from doing in the ***McCann*** case. But, as Lord Nicholls of Birkenhead said in ***In re S (Minors) (Care Order: Implementation of Care Plan)*** [2002] AC 291, 32,0, para 71., by virtue of the Human Rights Act 1998 the right to respect for private and family life which is guaranteed by article 8 of the Convention is now part of a person's civil rights in domestic law for the purposes of article 6(1}. In my opinion the same can be said of the rights to freedom of expression and of assembly and association which are guaranteed by articles 10 and 1 r.

Section 1(6) of the Crime and Disorder Act 1998 sets no limits to the prohibitions that may be imposed, except that they must be necessary for the protection of people in the local government area against further anti-social acts by the defendant. Among the range of orders that might reasonably be thought to be necessary are orders which may interfere with the defendant's private life, his freedom to express himself either by words or conduct and his freedom to associate with other people. Although the jurisprudence of the Strasbourg court appears to me as yet to be unclear on this point, 1 would hold that the fact that prohibitions made under section I(d) of that Act may have this effect is sufficient to attract the right to a fair trial which is guaranteed by article 6(1). This means that the court must act with scrupulous fairness at all stages in the proceedings. When it is making its assessment of the facts and circumstances that have been put before it in evidence and of the prohibitions, if any, that are to be imposed, it must ensure that the defendant does not suffer any injustice.

Standard of proof

As Lord Phillips of Worth Matravers MR observed in the Court of Appeal in the ***McCann case*** [2001I t WLR 1.084, riot, para 65, anti-social behaviour orders have serious consequences. It was with this point in mind that', at p 1101, para 67, he commended the course which, the Recorder of Manchester followed in the Crown Court when he said that, without- intending to lay down any form of precedent, the court had decided to apply

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the standard of being satisfied so that they were sure that the statutory conditions were fulfilled before they would consider the making of an order in the case of each defendant. I too would endorse this approach, for the following reasons.

Mr Crow for the Secretary of State said that his preferred position was that the standard to be applied in these proceedings should be the civil standard. His submission, as it was put in his

written case, was that g although the civil standard was a single, inflexible test, the inherent probability or improbability of an event was a matter to be taken into account when the evidence was being assessed. He maintained that this view was consistent with the position for which lie contended, that these were civil proceedings which should be decided according to the civil evidence rules. But it is not an invariable rule that the lower standard of proof must be applied in civil proceedings. I think that there are good reasons, in the interests of fairness, for applying the higher standard when allegations are made of criminal or quasi-criminal conduct which, if proved, would have serious consequences for the person against whom they are made.

This, as I have already mentioned, was the view which the Court of Session took in ***Constanda v M*** 1997 SC 217 when it decided that proof to the criminal standard was required of allegations that a child had engaged in p criminal conduct although the ground of referral to a children's hearing was not that he had committed an offence hut that he was exposed to moral danger. There is now a substantial body of opinion that, if the case for an order such as a banning order or a sex offender order is to be made out, account should be taken of the seriousness of the matters to be proved and the implications of proving them. It has also been recognised that if this is done the civil standard of proof will for all practical purposes be ***E*** indistinguishable from the criminal standard: see **B *u Chief Constable of Avon and Somerset Constabulary*** [2001] 1 WLR 340, 354, para 31, per Lord Bingham of Cornlii.il CJ; ***Gough v Chief Constable of the Derbyshire Constabulary*** [2002] QB 1213, 1242-1243, para 90, per Lord Phillips of Worth Matravers MR. As Mr Crow pointed out, the condition in section I(1)(b) of the Crime and Disorder Act 1998 that a prohibition order is necessary to protect persons in the local government area from further anti-social acts raises a question which is a matter for evaluation and assessment. But the condition in section I(I)(a) that the defendant has acted in an anti-social manner raises serious questions of fact, and the implications for him of proving that he has acted in this way are also serious. I would hold that the standard of proof that ought to be applied in these cases to allegations about the defendant's conduct is the criminal standard.

Conclusion

In the ***Clingham*** case I would make the same order as that proposed by Lord Steyn. In the ***McCann*** case I would dismiss the appeals.

Lord Hutton

My Lords, section 1 of the Crime and Disorder Act 1998 was enacted to remedy a grave social problem. In some parts of England, particularly in urban areas, there are vulnerable people who live in constant fear and distress as a result of the anti-social behaviour of others. The anti-social behaviour can take different forms and may consist of

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Insults and abuse and threats or assaults or damage to houses by stone throwing or the painting of graffiti. Those who are victims of such behaviour are often too frightened to be willing to go into the witness box in criminal proceedings to give evidence against those who make their lives a misery, because they fear that they will be harassed or intimidated for so doing.

The remedy provided by section I of the 1998 Act is to give power to a magistrates' court to make an order which imposes on the defendant the prohibitions which are necessary for the purpose of protecting persons in the local area from further anti-social, acts by him. Such an

order will frequently prohibit the defendant from entering a defined area where he has been particularly troublesome and from using or engaging in any abusive, insulting, offensive, threatening or intimidating language or behaviour or from threatening or engaging in violence or damage against any person or property within a somewhat wider area.
Section 1 (to) provides that if a person does anything which he is prohibited from doing by an anti-social behaviour order he shall be liable oil summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding a specified amount, or to both, or on conviction on indictment to imprisonment for a term not exceeding five years or to a fine, or to both.
The remedy given by section 1 has operated effectively because the courts have held that proceedings under section 1 are civil proceedings and not criminal proceedings. Therefore, it has not been necessary for those who allege that they have suffered as a result of anti-social behaviour on the part of the defendant to go into the witness box to give evidence against him, because hearsay evidence can be given of their complaints and allegations pursuant to section 1 of the Civil Evidence Act 1995 which provides that in civil proceedings evidence shall not be excluded on the ground that it is hearsay.
It is rulings that applications for anti-social behaviour orders are civil proceedings which are challenged by the defendants in these appeals. They submit that both under domestic law and under the jurisprudence of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") the proceedings against them under section 1 of the 1998 Act are criminal proceedings and constitute criminal charges against them so that hearsay evidence is not admissible. They contend in their submissions in reliance on the **Convention that the use of hearsay evidence against them violates their human rights.**
The facts of the present cases and the proceedings before the magistrates and on appeal have been fully set out in the speeches of my noble and learned friends Lord Steyn and Lord Hope of Craighead. I gratefully adopt their accounts and I therefore turn to consider the submissions advanced on behalf of the defendants.
Domestic law
Counsel for the defendants submitted that an application for an antisocial behaviour order is a criminal proceeding because the complaint against the defendant alleges anti-social behaviour which, in effect, is an allegation of the commission of criminal offences. 1 bus the complaint against the defendant Clingham alleged:
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It appears to the local authority, the Royal Borough of Kensington and Chelsea, that the following conditions are fulfilled with respect to you, namely—(a) chat you have acted between 9 December 1999 and 15 April 2.000 on or in the vicinity of the Wornington Green Estate, London W10 in an anti-social manner, that is to say, in a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as yourself, namely by: assaulting residents, threatening to assault children of residents, verbally abusing residents and police officers, threatening and intimidating shopkeepers, engaging in car related crime, throwing objects at persons and property and entering property as a trespasser; and (b) that an anti-social behaviour order is necessary to protect persons in the Royal Borough of Kensington and Chelsea in which the harassment, alarm or distress was caused, or was likely to be caused from further anti-social acts by you .
Counsel submitted that the great majority of this conduct constituted the commission of separate criminal offences. They also relied on the dose similarity between the wording of

section I(I)(a) of the 1998 Act and the wording of sections 4A and 5 of the Public Order Act 1986. Section 4A, as inserted by section 154 of the Criminal justice and Public- Order Act 1994, provides:
"(1) A person is guilty of an offence if, with intent to cause a person harassment, alarm or distress, he—(a) uses threatening, abusive or insulting words or behaviour, or disorderly behaviour, or (b) displays any writing, sign or other visible representation which is threatening, abusive or insulting, thereby causing that or another person harassment, alarm or distress."
Section 5 provides:
"(1) A person is guilty of an offence if he—(a) uses threatening, abusive or insulting words or behaviour, or disorderly behaviour, or (b) displays any writing, sign or other visible representation which is threatening, abusive or insulting, within the hearing or sight of a person likely to be p caused harassment, alarm or distress thereby."
Section 1. (1) of the 1998 Act provides:
"An application for an order under this section may be made by a relevant authority if it appears to the authority that the following conditions are fulfilled with respect to any person aged ten or over, namely—(a) that the person has acted, since the commencement date, in an anti-social manner, that is to say, in a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself. .
In reliance on authorities, the majority of which were considering the meaning of the term "criminal cause or matter", counsel further submitted that an application under section r of the 1998 Act. is a criminal proceeding because it can result under section 1(10) in the imposition of a term of imprisonment. Counsel cited ***Proprietary Articles Trade Association v Attorney General for Canada*** [1-931] AC 310, 324 where Lord Atkin stated:

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"It appears to their Lordships to be of little value to seek to confine
crimes to a category of acts which by their very nature belong to the domain of 'criminal jurisprudence1; for the domain of criminal jurisprudence can only be ascertained by examining what acts at any particular period are declared by the state to be crimes, and the only common nature they will be found to possess is that they are prohibited by the state and that those who commit them are punished."
In ***Exp Alice Woodbail (***1888) io QBD 832, 837-838, Lindley LJ stated:
"Can we say that the application in the present case is not an application in a criminal cause or matter? I think that in substance it certainly is. Its whole object is to enable the person in custody to escape being sent for trial in America upon a charge of forgery."
In ***Amand v Home Secretary*** [1943] AC 147,156 Viscount Simon LC stated:
"If the matter is one the direct outcome of which may be trial of the applicant and his possible punishment for an alleged offence by a court claiming jurisdiction to do so, the matter is criminal."
Lord "Wright stated, at p 162:
"if the cause or matter is one which, if carried to its conclusion, might
result in the conviction of the person charged and in a sentence of some punishment, such as imprisonment or fine, it is a 'criminal cause or matter'." I am unable to accept these submissions. The application for an anti-social behaviour order does not charge the defendant with having committed a crime. The purpose of the application is to obtain an order

prohibiting the defendant from doing anti-social acts in the future and its object is not the obtaining of a conviction against him resulting in the imposition of a punishment. I am in respectful agreement with the statement of Lord Bingham of Cornhili CJ in ***Customs and Excise Comrs v City of London Magistrates' Court*** [2000] 1 WLR 2020, 2025 that**:** "criminal proceedings involve a formal accusation made on behalf of the state or by a private prosecutor that a defendant has committed a breach of the criminal law, and the state or the private prosecutor has instituted proceedings which may culminate in the conviction and condemnation of the defendant." The passages in the judgments relied on by the defendants do not, in my opinion, assist them because they emphasise that the imposition of a conviction may be a consequence of the proceedings in which the application is brought. Thus in the ***Proprietary Articles Trade Association*** case j T 9 31] AC 310, 324 Lord Atkin stated that "those who commit them are punished"; in ***Ex p Alice Woodball*** 20 QBD 832, 838 Lindley LJ stated: "[the] whole object [of the application] is to enable the person in custody to escape being sent for trial in America upon a charge of forgery"; in ***Amand s*** case 11:9431 AC 147 Viscount Simon LC stated, at p T 56, that the matter is criminal if it is one "the direct outcome of which may be trial of the applicant and his possible punishment"; and Lord Wright stated, at p 162, that a matter is a criminal one which, "if carried to its conclusion, might result in

conviction and punishment. But an application for an anti-social behaviour order, if carried to its conclusion, will not result in conviction and punishment, it will result in the making of an order which cannot be regarded as a punishment. A conviction and punishment will only be imposed if the defendant, by his own choice, subsequently breaches the order and separate and distinct proceedings are brought against him.

I further consider that a complaint brought against a defendant under section 1(3} of the 1998 Act does not constitute an allegation of a crime. The fact that the background to the complaint will very often be the alleged commission of a number of criminal offences does not mean that the complaint constitutes a charge of a criminal offenc**e:** see ***S v Miller*** 2001 SC 977, 989-990, para 23 cited subsequently in paragraph 1.02 of this opinion.

There are two further considerations which support the conclusion C that an application for an anti-social behaviour order is a civil proceeding and not a criminal proceeding. First, section 1 is contained in Part I of the Act under the heading "Prevention of crime and disorder" whereas Part II under the heading "Criminal law" creates a number of offences and provides for their punishment. Secondly, section 1(3) provides that an application for an anti-social behaviour order shall be made by complaint to a magistrates' court, and a complaint is the appropriate procedure for commencing civil proceedings in a magistrates' cour**t:** see section 51 of the Magistrates 'Courts Act 1980.

Accordingly, I conclude that under domestic law an application for an anti-social behaviour order is not a criminal proceeding but is a civil proceeding.

The European Convention on Human Rights

Article 6(1) provides: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing. Article 6(3) provides: "Everyone charged with a criminal offence has the following minimum rights . . . (d) to examine . . . witnesses against him . . ." The defendants submitted that under the jurisprudence of the Convention an application for an anti-social behaviour order is a

criminal charge, and accordingly the defendants will not have a fair hearing under article 6 if the evidence against them of anti-social behaviour is hearsay evidence and they do not have the opportunity to cross-examine in court the persons who have made allegations of such behaviour against them. In these submissions the defendants were supported by the submissions advanced by counsel on behalf of Liberty which was given leave to intervene in these appeals.
room in deciding whether there is a criminal charge for the purposes of **article *6* the European** Court of Human Rights stated in ***Engel v The Netherlands (No 1)*** r EHRR 647, 678, para 82. that it has regard to three criteria, which are the classification of the proceedings in domestic law, the nature of the offence, and the severity of the penalty which may be imposed. Whilst I am satisfied that the application for an anti-social behaviour order is a civil proceeding in domestic law the European Court has stated that the classification of the proceedings in domestic law is of limited value and that the other two criteria are considerations of greater weigh**t:** see ***Oztiirk v Germany*** 6 EHRR 409, 422, para 52.
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rot in relation to the second and third criteria the European Court stated in ***Oztiirk,*** at pp 423-414, para 53:
"according to the ordinary meaning of the terms, there generally come within the ambit of the criminal law offences that make their perpetrator liable to penalties intended, inter alia, to be deterrent and usually consisting of fines and of measures depriving the person of his liberty . . . the general character of the rule [of law infringed by the applicant] and the purpose of the penalty, being both deterrent and punitive, suffice to show that the offence in question was, in terms of article 6 of the Convention, criminal in nature."
The complaints against the defendants under section 1 of the 1998 Act do not allege the commission of criminal offences for which punishment is sought. The fact that the backgrounds to the complaints were the alleged commission of a number of criminal offences does not mean that the complaints constituted charges of criminal offences. In LS' ***v Miller*** 2001 SC 977, the Inner House was considering section 52.(a.)(I) of the Children (Scotland) Act 1995 which provides that a child may be in need of compulsory measures of supervision where he "has committed an offence", and Lord President Rodger stated, at pp 989-990, para 23:
"In my view, once the procurator fiscal has decided not to proceed with the charge against a child and so there is no longer any possibility of proceedings resulting in a penalty, any subsequent proceedings under the 1995 Act are not criminal for the purposes of article 6**.** Although the reporter does indeed intend to show that the child concerned committed an offence, this is not for the purpose of punishing him but in order to establish a basis for taking appropriate measures for his welfare. That being so, the child who is notified of grounds for referral setting out the offence in question is not thereby 'charged with a criminal offence' in terms of **article 6.**"
In relation to the third criterion, I consider that the making of an anti-social behaviour order does not constitute a punishment or penalty imposed on the defendant. In my opinion the magistrate who heard the complaint against the defendant Clingham was correct when in the case stated for the opinion of the High Court he stated:

“These were civil proceedings of an injunctive nature imposing no penalty on the appellant but providing such measure of restraint as the court may find necessary to protect members of the public from his misbehaviour.”
The defendants relied on the decision of the European Commission of Human Rights (“the commission”) and of the European Court in ***Steel v United Kingdom*** 28 EHRR 603. In that case some of the applicants who had been charged with a breach of the peace were committed to prison for refusing to agree to be bound over to keep the peace. The applicants complained (inter alia) that their rights under article 5 and article 6(3)(a) had been violated. In considering the claims of the applicants both the commission and the European Court expressed the opinion that, notwithstanding that breach of the peace is not classified as a criminal offence under English law, breach of the peace must be regarded as an

“offence” within the meaning of article y (I)(c). The commission stated in its A opinion, at pp 61 5-616:
The commission notes that under the domestic legal system, breach of the peace is not a criminal offence and binding over is a civil procedure. However, as the European Court of Human Rights has held ***[Ozturk v Germany*** (1984) 6 EHRR 409, 4x3-424, para 53]: ‘[There generally come within the ambit of the criminal law offences that make their perpetrator liable to penalties intended, inter alia, to be deterrent and usually consisting of fines and of measures depriving the person of his liberty. The rule at issue prescribes conduct of a certain kind and makes the resultant requirement subject to a sanction that is punitive . . . the general character of the rule and the purpose of the penalty, being both deterrent and punitive, suffice to show that the offence was, in terms of article 6 of the Convention, criminal in nature.’
“67. The proceedings brought against the first applicant for breaching the peace also display these characteristics: their deterrent nature is apparent from the way in which a person can be arrested for breach of the peace and subsequently bound over ‘to keep the peace or be of good behaviour’, in which case no penalty will be enforced, and the punitive element derives from the fact that if a person does not agree to be bound over, he will be imprisoned for a period of up to six months.
“68. In these circumstances, the commission considers the charge of breach of the peace to be a criminal offence and binding over proceedings to be ‘criminal’ in nature, for the purposes of article 6 of the Convention.”
The court stated, at pp 63 5-636:
“48. Breach of the peace is not classed as a criminal offence under ^ English law. However, the court observes that the duty to keep the peace is in the nature of a public duty; the police have powers to arrest any person who has breached the peace or whom they reasonably fear will breach the peace; and the magistrates may commit to prison any person who refuses to be bound over not to breach the peace where there is evidence beyond reasonable doubt that his or her conduct caused or was likely to cause a breach of the peace and that he or she would otherwise cause a breach of the peace in the future.
“49. Bearing in mind the nature of the proceedings in question and the penalty at stake, the court considers that breach of the peace must be regarded as an ‘offence’ within the meaning of article 5(r)(c).”
The defendants’ principal submission in reliance on ***Steel*** was that both in proceedings for a breach of the peace and in proceedings for an antisocial behaviour order there was a two-

stage process. First, there was a finding of a breach of the peace or a finding of anti-social behaviour and, secondly, there was imprisonment if the defendant refused to be bound over or if the defendant chose to disobey the anti-social behaviour order. Accordingly, if binding over proceedings are criminal proceedings for the purposes of article 6 it follows that an application for an anti-social behaviour order is also a criminal proceeding within the meaning of article 6.
I am unable to accept the defendants' submissions for the reasons given by Lord Phillips of Worth Matravers MR in his judgment in ***McCann***
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[zoo1] I WLR 1084, 1100-1101, para 62, with which I am in respectful agreement. In particular I consider that the view expressed by the European Commission and the court is primarily based on the consideration that in the proceedings for breach of the peace before the magistrates' court the court has power in those proceedings themselves to commit the defendant to prison if he or she refuses to be bound over. Thus, the commission stated, at 28 EHRR 603, 616, para ***6***7: "the punitive clement derives from the fact that if a person does not agree to be bound over, he will be imprisoned for a period of up to six months" and the court stated, at p 636, para 45:
"Bearing in mind the nature of the proceedings in question and the penalty at stake, the court considers that breach of the peace must be regarded as an 'offence' within the meaning of article 5 (1) (c) The importance of the distinction between the power to commit to prison immediately on refusal to be bound over and the need for a subsequent prosecution to impose a punishment for breach of an anti-social behaviour order or a sex offender order under section 2 of the 1998 Act is referred to by Lord Bingham of Cornhill C] in ***B v Chief Constable of Avon and Somerset Constabulary*** [2001] 1 WLR 340, 353, para 27:
"In ***Percy v Director of Public Prosecutions*** I1995I 1 WLR 1382 the defendant had a choice between agreeing to be bound over and going to prison. Her refusal to agree to be bound over had an immediate and obvious penal consequence without any intervening stage. The threat of imprisonment was no doubt intended to be coercive, but it was also punitive, in my judgment that is a crucial distinction between ***Percy's*** case and any injunctive procedure such as in play here."
The fact that the defendant would be liable to imprisonment under section 1(10) of the 1:998 Act if he chooses within the period specified in the order without reasonable excuse to do anything which he is prohibited from doing by the order, does not mean that the order itself constitutes a punishment or penalty. In my opinion, the reasoning of Lord Bingham of Cornhill CJ in ***B v Chief Constable of Avon and Somerset Constabulary*** [LOOT] IWLR 340, 3 52, para 25 in respect of a sex offender order made under section 2 of the 1998 Act applies with equal force to section ***1:*** "The rationale of section 2 was, by means of an injunctive order, to seek to avoid the contingency of any further suffering by any further victim. It would also of course be to the advantage of a defendant if he were to be saved from further offending. As in the case of a civil injunction, a breach of the court's order may attract a sanction. But, also as in the case of a civil injunction, the order, although restraining the defendant from doing that which is prohibited, imposes no penalty or disability upon him."
The jurisprudence of the European Court recognises that proceedings taken to obtain an order designed to prevent future harmful conduct, but not to impose a penalty for past offences, does not constitute the bringing of a criminal charge. In ***Guzzardi v Italy*** 3 EHRR 333 the

complainant, a suspected Mafioso, by an order of the Milan Regional Court was placed under special supervision for three years with an obligation to reside within an area of 2.5 square kilometres on an island. He brought

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proceedings challenging the order and the proceedings terminated in the Court of Cassation which dismissed Guzzardi's appeal. The European Court held that article 6 was not engaged and stated, at pp 369-370, para 108:

"In the court's opinion, those proceedings did not involve the 'determination ... of a criminal charge', even when these words are construed within the meaning of the Convention. Whether the right to liberty, which was at stake (see paragraph 62 above), is to be qualified as a 'civil right' is a matter of controversy; in any event, the evidence does not reveal any infringement of paragraph 1 of article 6."

no In ***Raimondo v Italy*** 18 F.HRR 237 the applicant who was suspected of association with a Mafia-type organisation, was made subject to preventive measures which included being placed under special police supervision. He complained (inter alia) that the proceedings relating to his appeal against the special supervision had taken an unreasonable time in violation of article 6(1) of the Convention. The European Court rejected his complaint and held, referring to ***Guzzardi***, at p 264, para 43 of its judgment:

"The court shares the view taken by the Government and the commission that special supervision is not comparable to a criminal sanction because it is designed to prevent the commission of offences. It follows that proceedings concerning it did not involve 'the determination, of a criminal charge'."

in in the present cases the determination of the applications did not involve "the determination, of a criminal charge" and the orders were designed to prevent the commission of anti-social behaviour in the future.

A fair bearing in the determination of civil rights

1.12 A further question arises whether the admission of hearsay evidence against the defendants constitutes a violation of their rights under article 6 to have a fair hearing in the determination of their civil rights.

A person against whom an anti-social behaviour order is made can have no valid claim that those parts of the order which prohibit him from using or engaging in any abusive, insulting, offensive, threatening or intimidating language or behaviour or from threatening or engaging in violence or damage against any person or property relate to his civil rights. A person has no civil right under domestic law to engage in such behaviour. To the extent that the order prohibits a defendant from entering a particular area or engaging in some activity which is prima facie lawful it can be argued that part of the order affects his civil rights so that article 6(1) is engaged. Articles 8(2) and 11(2} of the Convention permit such restrictions on the rights specified in them as are necessary in a democratic society for the prevention of disorder or crime or for the protection of the rights and freedoms of others, and Lord Nicholls of Birkenhead has discussed the relationship between civil rights under domestic law {to which article 6(1) relates) and the rights guaranteed by the Convention in paragraphs 65 to 72 of his judgment in ***In re S (Minors) (Care Order: Implementation of Care Rian)*** [2002] 2 AC 291, 319-3 20. I wish to reserve my opinion on the question whether article 6(r) is engaged, but if there is a valid argument that the hearing of an application for an anti-social

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behaviour order against a defendant involves a determination of his civil rights and engages article 6(I), I am of the opinion that there is no unfairness in the admission of hearsay evidence against him, because the provisions of section 4 of the Civil Evidence Act 1995 lay down considerations which ensure that hearsay evidence is fairly weighed and assessed, section 4 providing:
"(1) In estimating the weight (if any) to be given to hearsay evidence in civil proceedings the court shall have regard to any circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence.
"(z) Regard may be had, in particular, to the following—(a) whether it would have been reasonable and practicable for the party by whom the evidence was adduced to have produced the maker of the original statement as a witness; (b) whether the original statement was made contemporaneously with the occurrence or existence of the matters stated; (c) whether the evidence involves multiple hearsay; (d) whether any person involved had any motive to conceal or misrepresent matters; (e) whether the original statement was an edited account, or was made in collaboration with another or for a particular purpose; (f) whether the circumstances in which the evidence is adduced as hearsay are such as to suggest an attempt to prevent proper evaluation of its weight."
The submissions of counsel on behalf of the defendants and on behalf of Liberty have laid stress on the human rights of the defendants. However, the European Court has frequently affirmed the principle stated in ***Sporrong and Lonnroth v Sweden*** 5 F.HRR 35, 52, para 69, that the search for the striking of a fair balance "between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights" is inherent in the whole of the Convention. In these cases which your Lordships have held are not criminal cases under the Convention and therefore do not attract the specific protection given by article 6(3)(d) (though even in criminal cases the European Court has recognised that "principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify": see ***Doorson v The Netherlands*** (1996) F.HRR 330, 358, para 70), and having regard to the safeguards contained in section 4 of the 1995 Act, I consider that the striking of a fair balance between the demands of the general interest of the community (the community in this case being represented by weak and vulnerable people who claim that they are the victims of anti-social behaviour which violates their rights) and the requirements of the protection of the defendants' rights requires the scales to come down in favour of the protection of the community and of permitting the use of hearsay evidence in applications for anti-social behaviour orders.
The standard of proof
I am in agreement with the opinions of my noble and learned friends Lord Steyn and Lord Hope of Craighead on this point and for the reasons which they give I would hold that in proceedings under section 1 of the 1998 Act the standard of proof that ought to be applied to allegations about the defendants' past behaviour is the criminal standard.
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Lord Hutton
For the reasons which I have given I would dismiss the appeals of A the McCann defendants and would declare that the House had no jurisdiction to hear the appeal of the defendant Clingham.
LORD HOBHOUSE OF WOODBOROUGH
My Lords, for the reasons given by my noble and learned friends Lord Steyn and Lord Hope of Craighead and in agreement with the opinion
of my noble and learned friend Lord Hutton, in particular what he has said e in paragraph 113 of his opinion, I too would make the orders proposed.
LORD SCOTT OF FOSCOTE
My Lords, I agree that for the reasons given in the opinions of my noble and learned friends, Lord Steyn, Lord Hope of Craighead and Lord Hutton, the appeal in the McCann case should be dismissed and in the Clingham case the House should make the order proposed by Lord Steyn.
I, like my noble and learned friend Lord Hobhouse of Woodborough, am in full agreement with what Lord Hutton has said in paragraph 1.13 of his opinion.
Appeals in McCann case dismissed. Declaration that no jurisdiction to hear appeal in Clingham case.
Solicitors: Peter Kandler & Co; Burton Copeland, Manchester; James Welch; Director of Legal Services, Kensington, and Chelsea Royal London Borough Council; Winckworth Sherwood; Treasury Solicitor.
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COURT OF APPEAL (Lord Justice Hooper, Mr Justice Roderick Evans, and Mr Justice Pitchers): October 14, 2005
[2005] EWCA Crim 2395; [2006] I Cr. App. R. (S.) 120
Anti-social behaviour orders; Sentencing guidelines
Crime and Disorder Act 1998, S. 1 C—antisocial behaviour order on conviction—general considerations
H2 Observations on the considerations which are relevant to the making of orders under the Crime and Disorder Act 1998, s. 1C.
H3 Bones: the appellant pleaded guilty to one count of burglary of a dwelling and one of handling stolen goods. The appellant and another person entered an unoccupied house and stole items to the value of £4,800. Following another burglary, the next day, a search of the appellant's home resulted in the discovery of property stolen in that burglary. The appellant had six previous appearances for offences involving vehicle crime, attempted burglary, violence, handling stolen goods and using threatening behaviour. He was subject to two community orders at the time of the offences. Sentenced to three years' detention in a young offender institution, and subjected to an order under the Crime and Disorder Act 1998, S.1 for a period of five years' prohibiting him from entering any public car park within a specified area except in the course of lawful employment, entering any land or building on land which formed part of educational premises except as an enrolled pupil, wearing or having with him in any public place anything which covered or could be used to cover the face or part the face, having with him in a public place any item which could be used in the commission of a burglary or theft from vehicles except one door or bicycle lock key, having possession of any article or carried in public any vehicle that could be used as a weapon, remaining on any shop, commercial or hospital premises if asked to leave by staff or entering

any premises from which he was barred, entering any private land adjoining any dwelling premises or commercial premises outside the opening hours of those premises without express permission, touching or entering any unattended vehicle without the express permission of the owner, acting or inciting others to act in an anti-social manner, congregating in

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groups in a manner causing or likely to cause any person to fear for their safety or congregating in groups of more than six persons in an outdoor public place, doing anything which might cause damage, not being anywhere but his home address or at an alternative address agreed in advance between the hours of 23.30 and 07.00, being carried on any vehicle other than a vehicle in lawful use, and being in company with 12 named individuals. The order was to run for five years from the appellant's release from custody.

H4 Bebbington and others: nine appellants pleaded guilty and one was convicted of affray or, in the case of Bebbington, threatening behaviour. The appellants with others were supporters of Chester City EC. They were drinking in a public house in Chester when a group of supporters of Wrexham EC. arrived at Chester station on their way home from a match. The appellants were warned by police not to leave the public house. The appellants did leave the public house and a confrontation occurred between them and the Wrexham supporters. The confrontation involved the singing of loud and abusive songs and threats of violence. Sentenced (except in the case of the appellant Bebbington) to custodial sentences of between four months and two years' imprisonment, with an order under the Crime and Disorder Act 1998 S.1C prohibiting the defendant from entering any premises for the purpose of attending any football matches in England and Wales which were regulated for the purposes of the Football Spectators Act 1989, entering a specified area on any day on which Chester City were playing at home, during a period beginning three hours before kick-off and ending six hours after kick off, attending within a 10-mile radius of any premises outside Chester at which Chester City were playing on the day of any away match, and on any day on which England or Wales played a regulated football match in England or Wales, going within a three-mile radius of the stadium where the match was being played during the period commencing three hours before kick-off and ending six hours after kick off. The orders were to last between four years and eight years in the different cases.

Held: the power to make an anti-social behaviour order was introduced by the Crime and Disorder Act 1998, which came into force on April 1, 1999. There were various procedures which could lead to the making of an order, in particular one which involved an application by a relevant authority to a magistrates' court. The Court was concerned with the power to make an order following a conviction for a relevant offence. The power was granted by the Crime and Disorder Act 1998 s. 1C, as inserted by the Police Reform Act 2002, and subsequently amended by the Anti-Social Behaviour Act 2003, s.86. The section provided that if the court considered that the offender had acted, at any time since April 1, 1999, in an anti-social manner, and that an order under the section was necessary to protect persons in any place in England and Wales from further anti-social acts by him, the court might make an order prohibiting the offender from doing anything described in the order. It had been held in ***McCann*** v ***Manchester Crown Court*** [2003] 1 Cr. App. R. 27 that proceedings on complaint under s. 1 of the Act were civil in nature, that hearsay evidence was admissible, and that the magistrates' court had to be satisfied to the criminal standard that the defendant had acted in an anti-social manner. The test for whether the order was necessary

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required an exercise of judgement or evaluation. That did not require proof beyond a reasonable doubt. In ***A* v *Acton Youth Court*** (unreported, April 26, 2005) it had been said that the actual and potential consequences of an order made it particularly important that procedural fairness should be scrupulously observed. In ***(Shane Tony)*** [2004] 2 Cr. App. R. (S.) 63 (p.343) the Court had stated that the terms of the order must be precise and capable of being understood by the offender, the findings of fact giving rise to the making of the order must be recorded, the order must be explained to the offender, the exact terms of the order must be pronounced in open court and a written order must accurately reflect the order as pronounced. Because an order must be precise and capable of being understood, a court should ask itself before making an order "are the terms of this order clear so that the offender will know precisely what it is that he is prohibited from doing?" The Home Office had published guidance on the use of anti-social behaviour orders.
H6 An order under s. 1C took effect on the day on which it was made, but a court might provide that requirements be suspended until the offender was released from custody. The Court had observed that where custodial sentences in excess of a few months were passed and offenders were liable to be released on licence, the circumstances in which there would be a demonstrable necessity to make a suspended anti-social behaviour order to take effect on release would be limited, although there would be cases in which geographical restraints could properly supplement licence conditions. In ***Vittles*** [2005] 1 Cr. App. R. (S.) 8 (p.3!) a suspended order had been upheld.
An order had effect for the period specified, not less than two years, or until further order. In ***lonergan*** v ***Lewes Crown Court*** [2005] EWHC 457 (Admin), it was said that just because an order must run for a minimum of two years, it did not follow that each prohibition must endure for the life of the order.
H8 The essential requirement of the section was that an order could be made only if it was necessary to protect persons in any place in England and Wales from further anti-social acts by the offender. The lest for making an order prohibiting the offender from doing something was necessity. Each separate order prohibiting a person from doing a specified thing must be necessary to protect persons from further anti-social acts by him. Any order should be tailor-made for the individual offender, not designed on a word processor for use in every case. The court must ask itself when considering any specific order prohibiting the offender from doing something, "is this order necessary to protect persons in any place in England and Wales from further anti-social acts by him?" The purpose of an order was not to punish an offender. This followed from the requirement that the order must be necessary to protect persons from further anti-social acts by him. The Court had been told that the imposition of an order was sometimes sought by the defendant's advocate at the sentencing stage, in the hope that the court might make an order as an alternative to a custodial sentence. A court must not allow itself to be diverted in this way—it might be better to decide the appropriate sentence and then move on to consider whether an order should be made or not after the sentence had been passed, albeit at the same hearing.
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H9 It followed from the requirement that the order must be necessary to protect persons from further anti-social acts by the offender, that the court should not impose an order which prohibited an offender from committing a specified criminal offence if the sentence which could be passed following a conviction for the offence should be a sufficient deterrent. If following a conviction for the offence, the offender would be liable to imprisonment, then the order would add nothing other than to increase the sentence, if the sentence for the offence was less than five years' imprisonment. If the offender was not deterred from compelling the offence by a sentence of imprisonment for the offence, the order was not likely further to deter and therefore was not necessary. It had been said in that the Court was not persuaded that the inclusion of matters among the prohibitions which were criminal offences was to be actively discouraged. The Court in that case took the view that there was no harm in reminding offenders that certain matters did constitute criminal conduct. The Court would only comment that the test for making an order was not whether the offender needed reminding that certain matters did constitute criminal conduct, but whether the order was necessary.
H10 It had been held, rightly in the Court's view, that an order should not be used merely to increase the sentence of imprisonment which an offender was liable to receive. In ***Kirby*** [2006] 1 Cr. App. R. f S.) 26 (p. 151) an order had been made prohibiting the offender from driving, attempting to drive or allowing himself to be carried in any motor vehicle which been taken without the consent of the owner, and driving or attempting to drive a motor vehicle until the expiration of the appellant's period of disqualification. The judge's purpose in making the order was to secure the result that if the appellant committed such offence again the court would not be limited to the maximum penalty for the offences themselves but would be able to impose up to five years' imprisonment for breaches of the anti-social behaviour order. The Court in ***Kirby*** considered that this was not a way in which the power should normally be exercised. This decision was in conflict with ***Hall*** |2005] 1 Cr. App. R. (S.) 118 (p.671), but in ***Williams*** [2006] 1 Cr. App. R. f S.) 56 (p.305) the Court preferred ***Kirby*** to ***Hall.*** The Court in the present case also agreed with ***Kirby.*** Different considerations might apply where the maximum sentence was only a fine, but the court must still go through all the steps to make sure that an order was necessary.
HI I The aim of an order was to prevent anti-social behaviour. What the police or other authorities needed was to be able to lake action before the anti-social behaviour look place. If for example a court was faced by an offender who caused criminal damage by spraying graffiti, then the order should be aimed at facilitating action to be taken to prevent graffiti being sprayed by him or others. An order in clear and simple terms preventing the offender from being in possession of a can of spray paint in a public place gave the police or others responsible for protecting property an opportunity to take action in advance of the actual spraying and made it clear lo the offender that he had lost the right to carry such a can for the duration of the order.
H12 In addition to the court considering that the order prohibiting the offender from doing something was necessary to protect persons from further anti-social acts by the offender, the terms of the order must be proportionate in the sense that they

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must be commensurate with the risk to be guarded against. This was particularly important where the order might interfere with Convention rights protected by the Human Rights Act 1998. In considering the order made against the appellant Bones, the Court accepted that the

appellant had consistently engaged in antisocial behaviour over a period of approximately three years. He was a persistent prolific offender. His anti-social behaviour included threatening behaviour, vehicle crime and offences of dishonesty including burglary. He was sentenced to a custodial sentence of three years' detention and was thus subject to a period on licence subject to recall or return to custody. It was far from clear that it was necessary to make an order in respect of the appellant. Considering the detailed terms of the order, some of the terms were unnecessary or unclear. The order would be quashed. In the case of Bebbington and others it was not necessary to make an order in respect of all but two of the appellants in view of their antecedent history. So far as the other two appellants were concerned, all the prohibitions would be quashed except the prohibitions relating to attending football matches played at the home ground of Chester City, and orders would be added in both cases restricting the appellants concerned from entering a specified area in the vicinity of Chester railway station on any day on which Wrexham were playing a regulated football match away from their home stadium, during a period commencing three hours before the beginning of that match and ending six hours after the beginning of that match.

Cases cited:

McCann v Manchester Crown Court [2002] UKHL 39; [2003] 1 A.C. 787; [2003] 1Cr.App. R. 27 (p.419),

Lonergan v Lewes Crown Court [2005] EWHC 457.1 W.L.R. 2570; [2005] A.C.D. 84,

Kirby [2005] EWC1A Crim 1228.I Cr. App. R. (S.) 26 (p. 151),

Hall [2004] EWCA Crim 2671; [2005]! Cr. App. R. (S.) 118 (p.671),

Williams [2006] EWCA Crim 1796; [2006] 1 Cr. App. R. (S.) 56 (p.305)

References: orders under the Crime and Disorder Act 1998, ***Current Sentencing Practice***

Commentary: [2006] Crim. L.R 160

J.G.J. Sharp for the appellant Bones.

CLP. Hennell for the appellants in Bebbington and others.

M. Sullivan and./. ***Rees*** for the Crown in the appeal of Bones.

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JUDGMENT

Hooper L.J.: On April 7, 2005 we reduced the sentence of imprisonment passed on the appellant Dean Bones and adjourned the appeal against the making of an anti-social behaviour order ("ASBO") to enable the CPS to instruct counsel who would be able to give us both general assistance about ASBOs and specific assistance about the ASBO in this case. We resumed the hearing on July 5, 2005 and announced, at the conclusion, that the ASBO was quashed for reasons which we would give later. Mr Rees had prepared a comprehensive skeleton argument and we are particularly grateful to him for his help and to those in the Home Office who have assisted him. We have incorporated much of what he wrote into the judgment.

On July 5, we also heard the appeals of Shaun Anthony Bebbington and others.

We granted leave to appeal and any necessary extensions of time. At the conclusion of the hearing we announced our decision to reduce the sentence of 2 years' imprisonment passed on Lee William Schofield and substitute for it a sentence of 18 months' imprisonment. We look the view that a sentence of that length was sufficient. That was the only sentence of imprisonment which we were asked to consider (the other appellants had served their sentences). We quashed all the ASBOs other than those in respect of Schofield and Ian Jeremy Stuart Bruce. In these two cases we announced that we would alter the terms of the orders substantially but, given that we needed further material, we said that the precise detail

of the amended orders would be announced with our reserved judgment. We have now received that detail.

Bones

On April 7, Pilchers J. gave the following reasons for reducing the sentence of imprisonment passed on Bones:

a. This 18-year-old appellant pleaded guilty to one count of dwelling house burglary and one of the handing stolen goods in the Basingstoke Magistrates' Court and was committed to the Crown Court for sentence. On 17th December 2004 at the Crown Court at Winchester he was sentenced to a total of three years' custody and made subject to an Anti-Social Behaviour Order for a period of five years to run from the date of his release.

b. The events of burglary were committed during the morning of 23rd October 2004 at an unoccupied house in Basingstoke. The appellant and another entered through a kitchen window and carried out an untidy search, stealing items to the value of £4,800, some of which were of great sentiment value to the owner. When the appellant was arrested a watch, which had been taken during the burglary was recovered from him.

c. There was another burglary the next day from a house in Basingstoke. When the appellant was arrested, his home was searched and property from that burglary was recovered. He admitted buying these items knowing they were stolen.

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The appellant has a number of previous convictions. He was before the courts on six occasions during 2002, 2003 and 2004 for offences involving vehicle crime, attempted burglary, an offence of violence, handling stolen goods and using threatening behaviour. He received a series of community orders and in respect of two of them he was in breach by reason of these offences.

The judge heard evidence in addition to that which he found sufficient to make the ASBO as we have indicated. That, as we have also indicated, will be considered in detail and in principle on a later occasion.

For the purposes of today's hearing, we deal simply with the custodial sentence. It is argued by counsel that the sentence of three years was loo long following a very early plea of guilty. Applying the principles contained in the well-known case of ***Mainerney*** we are satisfied that this sentence for offences in respect of which early pleas had been entered is too long. Bearing in mind the clear refusal of the appellant to comply with community orders, a sentence of custody was inevitable.

However, the dwelling house burglary, although of quite high value and causing considerable distress, fell into the category of an offence committed by a first-time burglar, albeit with those two aggravating features. There was also the receiving of stolen goods which the appellant must have known had come from a dwelling house burglary. The total sentence appropriate for that offending, in our judgment, would be one of 18 months.

We therefore allow the appeal to the extent of reducing the sentences to 18 months and six months concurrently. To that extent, as we say, the appeal in relation to the custodial term is allowed."

The ASBO was in the following form:

"The court found that

(i) The defendant had acted in an anti-social manner which caused or was likely to cause harassment, alarm, or distress to one or more persons not of the same household as himself as shown by:

a. The present conviction.
b. His previous convictions; and
c. The summary of anti-social behaviour acts set out in the request form attached
And that
(**ii**) an order was necessary to protect persons in England and Wales from further anti-social acts by him.
It is ordered that the defendant, Dean Bones is prohibited from:
In England and Wales:
Entering any public car park within the Basingstoke and Deane Borough Council area, except in the course of lawful employment.
Entering any land or building on the land which forms a part of educational premises except as an enrolled pupil with the agreement of the head of the establishment or in the course of lawful employment.
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In any public place, wearing, or having with you anything which covers, or could be used to cover, the face or part of the face. This will include hooded clothing, balaclavas, masks, or anything else which could be used to hide identity, except that a motorcycle helmet may be worn only when lawfully riding a motorcycle.
Having any item with you in public which could be used in the commission of a burglary, or theft of or from vehicles except that you may carry one door key for your house and one motor vehicle or bicycle lock key. A motor vehicle key can only be carried if you are able to inform a checking officer of the registration number of the vehicle and that it can be ascertained that the vehicle is insured for you to drive it.
Having possession of any article in public or carried in any vehicle, that could be used as a weapon. This will include glass bottles, drinking glasses and tools.
Remaining on any shop, commercial or hospital premises if asked to leave by staff. Entering any premises from which barred.
Entering upon any private land adjoining any dwelling premises or commercial premises outside of opening hours of that premises without the express permission of a person in charge of that premises. This includes front gardens, driveways and paths. Except in the course of lawful employment. Touching or entering any unattended vehicle without the express permission of the owner.
Acting or inciting others to act in an anti-social manner, that is to say, a manner that causes or is likely to cause harassment, alarm, or distress to one or more persons not of the same household.
Congregating in groups of people in a manner causing or likely to cause any person to fear for their safety or congregating in groups of more than SIX persons in an outdoor public place.
Doing anything which may cause damage.
Not being anywhere but your home address as listed on this order between 2330 hours and 0700 hours or at an alternative address as agreed in advance with the prolific and priority offender officer or anti-social behaviour coordinator at Basingstoke Police Station.
Being carried on any vehicle other than a vehicle in lawful use.
Being in the company of Jason Arnold, Richard Ashman, Corrine Barlow, Mark Bicknell, Joseph (Joe) Burford, Sean Condon, Alan Dawkins, Simon Lee, Daniel (Danny) Malcolm, Michael March, or Nathan Threshie. This order to run for 5 years after release from custody."

Bebbington and others
The appellants are: Regina v Shaun Anthony Bebington (21), Mark Graham Bateman (19); Lee William Schofield (37); Ian Jeremy Stuart Bruce (now 36); Dale Anthony Cooper (19); Howard John Stocking (19); Thomas Philip Sheridan (17); Russell Keeley (now 20); Thomas Turner (now 18) and John O' Hanlon (17)
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On September 13, 2004 at the Crown Court at Chester Bateman, Bruce, Cooper, Stocking, Sheridan, Keeley, Turner and O'Hanlon pleaded guilty. On November 17, 2004 Bebbington pleaded guilty on re-arraignment. On January 5, 2005 Schofield was convicted. On January 7, 2005 (H.H. Judge Woodward) they were sentenced as follows:
Bebbington
Threatening behaviour—Community Punishment Order for 160 hours; anti-social behaviour order for four years.
Bateman
Affray—five months' detention in a young offender institution; anti-social behaviour order for eight years
Schofield
Affray—two years' imprisonment; anti-social behaviour order for 10 years
Bruce
Affray—eight months' imprisonment (E.D.R. 7/5/2005); anti-social behaviour order for 10 years
Cooper
Threatening behaviour—Community Punishment Order for 160 hours; anti-social behaviour order for four years.
Stocking
Affray—five months' detention in a young offender institution; anti-social behaviour order for eight years
Sheridan
Affray—four months' detention and training order; anti-social behaviour order for six years
Keeley
Affray—five months' detention in a young offender institution; anti-social behaviour order for eight years
Turner
Affray—four months' detention and training order; anti-social behaviour order for six years
O'Hanlon
Affray—four months' detention and training order; six-year anti-social behaviour order.
- There were three convicted co-defendants:
Carl Graham Wood (d.o.b. 9/10/70) pleaded guilty to affray and was sentenced to 16 months' imprisonment and a 10-year anti-social behaviour order.
Graham Jones (d.o.b. 7/12/71) pleaded guilty to affray and was sentenced to eight months' imprisonment and a 10-year anti-social behaviour order. Adam Paul Fulcher (d.o.b. n/k) pleaded guilty to affray and was sentenced to a four-month detention and training order and a six-year anti-social behaviour order.
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The ASBOs were in the terms of a football banning order, the court having no jurisdiction to pass an actual football banning order.
"The defendant must not for the duration of the order,
Enter any premises for the purpose of attending any football matches in England and Wales that are regulated for the purposes of the Football Spectators Act 1989.
On any day that Chester City AFC play at a regulated football match at the Deva Stadium during the period commencing three hours prior to kick off and ending six hours after kick-off, enter any area inside the shaded boundary as defined in the two attached maps.
Attend within a 10-mile radius of any premises outside Chester at which football matches are played by Chester AFC on the day of any away match.
On any day that England or Wales play a regulated football match in England or Wales, during the period commencing three hours prior to kick-off and ending six hours after lick-off, go within a 3-mile radius of the relevant stadium where the match is being played.
We take the facts from the CACD summary:
"At about 7pm on 10 January 2004, there was a confrontation between supporters of Wrexham football club and Chester City football club in the centre of Chester. The applicants were all supporters of Chester City and some members of the two rival groups associated themselves with the hard core of the hooligan element attached to both football clubs. The two rival gangs came together through a mutual interest in football and they had stayed together because of a mutual interest in hooliganism and there had been a long-standing and deep antipathy between the two groups. The supporters of Wrexham had travelled back from a game at Chesterfield and had alighted at the station in Chester. The applicants were drinking in a public house and had been warned by the police not to leave the public house when the police became aware that the Wrexham group were at the station. However, the group did leave the public house and went across the road to the station with the intention of fighting with the group from Wrexham. There was an element of pre-meditation about the incident because the group left the public house as the group of Wrexham supporters arrived at the station and attempted to leave the station. The group from Chester did not enter the station because the groups were kept apart by police officers. The actions of the Chester group were caught on CCTV, they were heard responding to the taunts of the Wrexham group and began singing loud and abusive songs. Members of the public, employees at the station and the police officers felt threatened by their actions.
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The applicants all played different roles in the incident, some having substantially more involvement than others and, on the prosecution's case, some of the defendants, particularly Wood and Schofield, were the ringleaders and orchestrated the threats of violence. The CCTV evidence was the basis of the prosecution case against the applicants."
We have watched the CCTV evidence.
All of the appellants were of good character other than Schofield and Bruce. Schofield had a previous conviction for affray as well as other offences. Bruce had one relevant previous conviction in 2004 for being drunk and disorderly. The authors of the various pre-sentence reports recommended non-custodial sentences given the low risk of reoffending. As the judge said in passing sentence all of the defendants other than Schofield had expressed remorse. Some of the appellants had good character references, including Bruce.

In passing sentence, the judge said that the defendants had deliberately left the public house with the intention of fighting the group from Wrexham. There could be no other sensible explanation as to what happened that day and it was clearly shown on the video. He said that the people of Chester and visitors to the city had to know that the courts would take a firm stand against this type of criminal behaviour. In addition, the evidence at Schofield's trial indicated that the numbers of the younger element in the football hooligans in Chester had grown significantly over the last two years and that was an issue that could not be ignored. The courts would not tolerate such behaviour and a message had to be sent out to people like them that such behaviour would not be tolerated. All bar Schofield had pleaded guilty and they would receive credit for those pleas. Wood was the most prominent of the protagonists. He threw a bottle at the police and he had a bad record for offences of violence, including one for an offence very similar to this. Schofield was not only the oldest of the defendants, but he also directed others. He was not shown outwardly playing an active role, but by his mere presence he made sure that others were there. He was seen shouting and on a number of occasions had clearly instructed others to do things and they had followed his lead and instructions. He was the controlling mind behind what was going on. He also had a previous conviction for a very similar offence. The others had all expressed their remorse and had acted out of character.

ASBOs

The power to make an ASBO was introduced by s. 1 of the Crime and Disorder Act 1998 (CDA 1998) which came into force on April 1, 1999. In ***McCann v Manchester Crown Court*** [2002} UKHL 39; [2003] 1 A.C. 787; [2003] 1 Cr. App. R. 27 (p.419) Lord Sleyn described the social problem that S.1 of the 1998 Act was designed to address. He referred to the fear, misery and distress that might be caused by outrageous anti-social behaviour, usually in urban areas, often by young persons and groups of young persons. He said:

"In recent years this phenomenon became a serious problem. There appeared to be a gap in the law. The criminal law offered insufficient protection to communities. Public confidence in the rule of law was undermined by a not unreasonable view in some communities that the law failed them."

There are various procedures which can lead to the making of an ASBO, in particular, that which involves an application by a relevant authority (e.g., a local authority) to a magistrates' court. We are concerned with the power to make an ASBO following conviction for a relevant offence, a power granted to avoid the need to invoke the procedure in the magistrates' court and thus a further hearing. The power was granted by s. 1C of the Crime and Disorder Act 1988 ("CDA 1998)", as inserted by s.64 of the Police Reform Act 2002 and amended by s.86 of the Anti-Social Behaviour Act 2003. However, the principles are the same irrespective of the procedural route.

Section 1 C (2) of CDA 1998 provides:

"If the court considers—

1. that the offender has acted, at any time since the commencement date [1st April 1999] in an anti-social manner, that is to say in a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself; and

2. that an order under this section is necessary to protect persons in any place in England and Wales from further anti-social acts by him,

it may make an order which prohibits the offender from doing anything described in the order." (Underlining added)
An ASBO is an order prohibiting a person from doing the "thing" described in the order.
We deal first with some procedural points. In ***McCann*** the House of Lords held that the proceedings on complaint by a relevant authority under s. 1 of CDA 1998 were civil in nature, that hearsay evidence was admissible, that the magistrates' court had to be satisfied to the criminal standard that the defendant had acted in an anti-social manner, The test for whether the order was necessary required an exercise of judgment or evaluation and did not require proof beyond a reasonable doubt. In ***W. v Acton Youth Court*** [2005] EWHC 954 (Sedley L.J. and Pitchers J.) confirmed that proceedings under s. 1C are civil proceedings.
In that case Pitchers J. said tha**t:**
"The actual and potential consequences for the subject of an ASBO make it particularly important that procedural fairness is scrupulously observed."
(Shane Tony) [2004] EWCA Grim 287; [20041 2 Cr. App. R. (S.) 63 (p.343) Henriques J. giving the judgment of the Court (presided over by Lord Woolf C.J.) said (para.[34]):
"In our judgment the following principles clearly emerg**e:**
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The terms of the order must be precise and capable of being understood by offender.
The findings of fact giving rise to the making of the order must be recorded.
The order must be explained to the offender.
The exact terms of the order must be pronounced in open court and the written order must accurately reflect the order as pronounced."
Because an ASBO must obviously be precise and capable of being understood by the offender, a court should ask itself before making an order: "Are the terms of this order clear so that the offender will know precisely what it is that he is prohibited from doing?"
The Home Office in a 2002 publication entitled "A Guide to Anti-Social Behaviour Orders and Acceptable Behaviour Contracts" gave examples of the types of anti-social behaviour which the Home Office considered could be tackled by ASBOs. The list (which does not purport to be exhaustive) comprises: harassment of residents or passers-by, verbal abuse, criminal damage, vandalism, noise nuisance, writing graffiti, engaging in threatening behaviour in large groups, racial abuse, smoking or drinking alcohol while under age, substance misuse, joyriding, begging, prostitution, kerb-crawling, throwing missiles, assault and vehicle crime.
Home Office guidance suggests that prohibitions, should amongst other things:
be reasonable and proportionate; be realistic and practical.
be in terms which make it easy to determine and prosecute a breach.
In the report of the working group set up under Thomas L.J. there is a section which identifies elements of best practice adopted within the courts when dealing with the terms of an ASBO. Included amongst these elements are:
the prohibition should be capable of being easily understood by the defendant.
the condition should be enforceable in the sense that it should allow a breach
to be readily identified and capable of being proved.
exclusion zones should be clearly delineated with the use of clearly marked
maps.
individuals whom the defendant is prohibited from contacting or associating with should be clearly identified.

in the case of a foreign national, consideration should be given to the need for the order to be translated.
The report of the working group also provides examples of general prohibitions imposed by the courts which in their view were specific and enforceable and could be incorporated in ASBOs in order to protect persons from a wide range of anti-social behaviour. These include conditions prohibiting the offender from.

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living anywhere other than a specified address without the permission of a nominated person.
entering an area edged in red on the attached map including both footways of any road which forms the boundary area.
visiting a named individual unless accompanied by a parent or legal guardian.
associating with a named individual in a public place.
leaving his home between certain hours except in the case of emergency etc.
An order made under s. 1C lakes effect on the day on which it was made, but the court may provide in any such order that such requirements of the order as it may specify shall, during any period when the offender is detained in legal custody, be suspended until his release from that custody (S.1C(5)). In the Court observed that where custodial sentences in excess of a few months were passed and offenders were liable to be released on licence (and therefore subject to recall) the circumstances in which there would be a demonstrable necessity to make a suspended anti-social behaviour order, to take effect on release, would be limited, although there would be cases in which geographical restraints could properly supplement licence conditions.
Anthony Malcolm Vittles]2004] EWCA Crim 1089 [20051 1 Cr. App. R.(S.) 8 is an example of a case in which the Court of Appeal decided that there was a demonstrable necessity to make a "suspended" ASBO, despite the fact that the appellant was sentenced to a total of three years and 10 months' imprisonment, The appellant, who was a heavy drug user, admitted breaking into between 10 and 30 vehicles belonging to American servicemen who lived off airbases used by American forces. The offences involved theft of items from the motor cars to a value of £3,500. In upholding the making of the order, although reducing the term, the Court of Appeal referred to and said that they took the view that the transient, vulnerable, nature of the American population, specifically targeted by the appellant, made it appropriate that, exceptionally, an antisocial behaviour order should be made, notwithstanding the imposition of a substantial prison sentence.
An order shall have effect for a period (not less than two years) specified in the order or until further order (S, l C (9) and 1C (7)). In ***Lonergan*** v ***Lewes Crown Court*** |20()5] EWHC 457; [2005] 1 W.L.R. 2570; [2005] A.C.D. 84 (Admin) Maurice Kay L.J. said in the course of delivering the judgment that just because an ASBO must run for a minimum of two years, it does not follow that each and every prohibition within a particular order must endure for the life of the order. Although doubt was expressed about this in the report of the working group set up by Thomas L.J., in our view Maurice Kay L.J. is right. It may be necessary to include a prohibition which would need to be amended or removed after a period of Lime for example when the offender starts work (provided that at least one prohibition is ordered to have effect for at least two years). Maurice Kay L.J. also said (para. [7)] that the statute requires the order to be "substantially and not just formally prohibitory."

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There are provisions for applications to vary or discharge an order (see s. 1 C (6) and s. 140 of the Serious Organised Crime and Police Act 2005 which inserts s. 1CA of the CD A 1998).
We turn to the requirement that an order can only be made if it is necessary to protect persons in any place in England and Wales from further anti-social acts by the offender. Following a finding that the offender has acted in an anti-social manner (whether or not the act constitutes a criminal offence), the lest for making an order prohibiting the offender from doing something is one of necessity. Each separate order prohibiting a person from doing a specified thing must be necessary to protect persons from further anti-social acts by him. Any order should therefore be tailor-made for the individual offender, not designed on a word processor for use in every case. The court must ask itself when considering any specific order prohibiting the offender from doing something, "Is this order necessary to protect persons in any place in England and Wales from further anti-social acts by him?"
The purpose of an ASBO is not to punish an offender (see ***Lonergan,*** para.[10]}. This principle follows from the requirement that the order must be necessary to protect persons from further anti-social acts by him. The use of an ASBO to punish an offender is thus unlawful. We were told during the course of argument that the imposition of an ASBO is sometimes sought by the defendant's advocate at the sentencing stage, hoping that the court might make an ASBO order as an alternative to prison or other sanction. A court must not allow itself to be diverted in this way—indeed it may be better to decide the appropriate sentence and then move on to consider whether an ASBO should be made or not after sentence has been passed, albeit at the same hearing.
It follows from the requirement that the order must be necessary to protect persons from further anti-social acts by him, that the court should not impose an order which prohibits an offender from committing a specified criminal offence if the sentence which could be passed following conviction for the offence should be a sufficient deterrent. If following conviction for the offence the offender would be liable to imprisonment, then an ASBO would add nothing other than to increase the sentence if the sentence for the offence is less than five years' imprisonment. But if the offender is not going to be deterred from committing the offence by a sentence of imprisonment for that offence, the ASBO is not likely (it may be thought) further to deter and is therefore not necessary. In, Henriques J. said (para. [3()]):
"Next, it is submitted that (two of] the prohibitions are redundant as they prohibit conduct which is already subject to a general prohibition by the Public Order Act 1986 and the Prevention of Crime Act 1953 respectively. In that regard we are by no means persuaded that the inclusion of such matters is to be actively discouraged. So far as more minor offences are concerned, we Lake the view that there is no harm in reminding offenders that certain matters do constitute criminal conduct, although we would only encourage the inclusion of comparatively minor criminal offences in the terms of such orders."
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We would only make one comment on this passage. The test for making an order is not whether the offender needs reminding that certain matters do constitute criminal conduct, but whether it is necessary.

It has been held, rightly in our view, that an ASBO should not be used merely to increase the sentence of imprisonment which an offender is liable to receive. In ***Kirby*** [2005] EWCA Crim 1228; [2006] I Cr. App. R. (S.) 26 (p.S51) an ASBO had been made prohibiting the offender from driving, attempting to drive or allowing himself to be carried in any motor vehicle which had been taken without the consent of the owner or other lawful authority, and driving or attempting to drive a motor vehicle until after the expiration of his period of disqualification. As the Court (presided over by Maurice Kay LJ) found, the judge's purpose in making this order was to secure the result that if the appellant committed such offences again the court would not be limited to the maximum penalty for the offences themselves but would be able to impose up to five years' imprisonment for breach of the anti-social behaviour order. David Clarke J giving the judgment of the Court said:
"In our judgment this decision of the court **[**in ***R.*** **r P]** and the earlier case of [C v ***Sunderland Youth Court*** [2003] EWHC 2385; [2004] 1 Cr. App. R. (S.) 76 (p.443)] serve to demonstrate that to make an anti-social behaviour order in a case such as the present case, where the underlying objective was to give the court higher sentencing powers in the event of future similar offending, is not a use of the power which should normally be exercised."
That decision was in conflict with an earlier decision ***Hall*** [2004] EWCA Crim 2671; [2005] 1 Cr. App. R. (S.) 118 (p.671) (Hunt and Tugenhat J. J.), the correctness of which was doubled by Dr Thomas ([2005] Crim. L.R. 152). In ***Williams*** [2006] 1 Cr. App. R. (S.) 56 (p.305), the Court (Mance L.J., Elias J. and Sir Charles Mantell) preferred ***Kirby*** to ***Hall.*** We also agree with the decision in ***Kirby.***
Different considerations may apply if the maximum sentence is only a fine, but the court must still go through all the steps to make sure that an ASBO is necessary.
There is another reason why a court should be reluctant to impose an order which prohibits an offender from, or merely from, committing a specified criminal offence. The aim of an ASBO is to prevent anti-social behaviour. To prevent it the police or other authorities need to be able to take action before the anti-social behaviour it is designed to prevent takes place, if, for example, a court is faced by an offender who causes criminal damage by spraying graffiti then the order should be aimed at facilitating action to be taken to prevent graffiti spraying by him and/or his associates before it takes place. An order in clear and simple terms preventing the offender from being in possession of a can of spray paint in a public place gives the police or others responsible for protecting the property an opportunity to lake action in advance of the actual spraying and makes it clear to the offender that he has lost the right to carry such a can for the duration of the order.
If a court wishes to make an order prohibiting a group of youngsters from racing cars or motor bikes on an estate or driving at excessive speed (anti-social

behaviour for those living on the estate), then the order should not (normally) prohibit driving whilst disqualified. It should prohibit, for example, the offender whilst on the estate from taking part in, or encouraging, racing, or driving at excessive speed. It might also prevent the group from congregating with named others in a particular area of the estate. Such an order gives those responsible for enforcing order on the estate the opportunity to take action to prevent the anti-social conduct, it is to be hoped, before its takes place. Neighbours can alert the police who will not have to wait for the commission of a particular criminal offence. The ASBO will be breached not just by the offender driving but by his giving encouragement by

being a passenger or a spectator. It matters not for the purposes of enforcing the ASBO whether he has or has not a driving licence entitling him to drive.
Not only must the court before imposing an order prohibiting the offender from doing something consider that such an order is necessary to protect persons from further anti-social acts by him; the terms of the order must be proportionate in the sense that they must be commensurate with the risk to be guarded against. This is particularly important where an order may interfere with an ECHR right protected by the Human Rights Act 1998, e.g., Arts 8, 10 and 11.
We think that bail conditions provide a useful analogy. A defendant may be prohibited from contacting directly or indirectly a prosecution witness or entering a particular area near the alleged victim's home. The aim is to prevent the defendant trying to tamper with witnesses or committing a further offence. But the police do not have to wait until he has tampered or committed a further offence and thus committed a very serious offence. If he breaks the conditions even without intending to tamper, he is in breach of his bail conditions and liable to be remanded in custody. The victim has the comfort of knowing that if the defendant enters the prescribed area, the police can be called Lo Lake action. The victim does not have to wait for the offence to happen again.
We look at some examples of how the Divisional Court and this Court have approached ASBOs.
In ***McGrath*** [2005] EWCA Crim 353; [2005] 2 Cr. App. R. (S.) 85 (p.529) considered the terms of an ASBO made under s. 1C in respect of an appellant, aged 25, with an appalling record who pleaded guilty to a count of theft which involved breaking into a car in a station car park and stealing various compact discs. The ASBO contained (amongst others) the following prohibitions:
Entering any other car park whether on payment or otherwise within the counties of Hertfordshire, Bedfordshire, or Buckinghamshire.
Trespassing on any land belonging to any person whether legal or natural within those counties.
Having in his possession in any public place any window hammer, screwdriver, torch or any tool or implement which could be used for the purpose of breaking into motor vehicles."
In respect of term 2, the Court of Appeal held that it was unjustifiably draconian and loo wide; it would, for example, prevent the appellant from entering, even as a passenger, any car park in a supermarket. Similar considerations

applied lo term 3.11"the appellant look a wrong turn on a walk and entered someone's property, he would be at risk of a five-year prison sentence. The Court of Appeal look the view that term 4 was unacceptably wide. The meaning of the words "too! or implement" was impossible to ascertain. Insofar as the wording of term 4 was sufficiently qualified by the final wording "which could be used for the purpose of breaking into motor vehicles", the Court of Appeal observed that, effectively, the term overlaps with the offence of going equipped.
In IV v ***DPP*** [2005] EWHC 1333 held that a clause in an ASBO made in respect of a young offender which prohibited him from committing any criminal offence was plainly loo wide and unenforceable. There was a danger that W would not know what a criminal offence was and what was not. It was well established that an order had to be clear and in terms that would enable an individual to know what he could and could not do. A general restriction

was not necessary where specific behaviour restrictions were in place. Brooke L.J. said (para.[8]) that, given the offender's previous convictions for theft, a prohibition against committing theft "might not have been inappropriate". We have already expressed our reservations about such a prohibition.
In the Court expressed doubt about whether an ASBO is appropriate if the anti-social conduct is itself a serious offence, such as robbery. The Court reviewed the propriety of making an anti-social behaviour in respect of an appellant, aged 15 at the Lime of the offences, who pleaded guilty to assault with intent to rob, robbery, theft, false imprisonment, and attempted robbery. He was involved in a number of incidents in which he approached younger boys, threatened them and in one case struck a boy with a stick and stole their mobile phones. The appellant was made the subject of an order under S.1C of CDA 1998. The effect of the order was Lo prevent the appellant from acting in various ways, principally excluding him from two parks and an airport. In the course of the judgment, Henriques J. giving the judgment observed:
"It will be readily observed from a consideration of the Home Office 'Guide Lo anti-social behaviour orders' that the conduct primarily envisaged as triggering these orders was for a less grave offence than street robbery, namely graffiti, abusive and intimidating language, excessive noise, fouling the street with litter, drunken behaviour and drug dealing. Doubtless in drafting that report the Home Office had in mind that courts have considerable powers to restrain robbers. We do not go so far as to suggest that anti-social behaviour orders are necessarily inappropriate in cases with characteristics such as the present."
We see no reason why, in appropriate circumstances, an order should not be made of the kind in excluding an offender from two parks and an airport if that is where he is committing robberies (or committing other anti-social behaviour). Such an order enables those responsible for the safety of the prescribed areas an opportunity to act before a robbery is committed by the offender.
In ***Werner*** [2004] EWCA Grim 2931 the female appellant had committed a number of offences over a relatively short period of time which involved stealing credit cards, a cheque book, and other items from hotel rooms while the occupants

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were out and using the cards to obtain services and goods. In addition to passing a sentence of imprisonment, the judge made the appellant the subject of an ASBO under s. 1C of CDA 1998, prohibiting her from entering any hotel, guesthouse, or similar premises anywhere within the Greater London Area, It was submitted on the appellant's behalf that this was an inappropriate and improper use of the power because the behaviour it sought to protect the public from was only anti-social in the sense that all criminal offences were anti-social and it was not the sort of behaviour that ASBOs were meant to target. The Court of Appeal declined to express a definitive view on this issue and quashed the order on a different ground, but they did make the following observations. The forms of conduct listed on p.8 of the 2002 Home Office guide have a direct or indirect impact on the quality of life of people living in the community. They are different in character from offences of dishonesty committed in private against individual victims, distressing though such offences are to the victims. The Court said that it would not like Lo be taken to say that in no case could offences of this sort attract such an order.
It seems to us that there is another problem with the kind of order in ***Werner.*** In the absence of a system to warn all hotels, guesthouses, or similar premises anywhere within the Greater

London Area, there is no practical way of policing the order. The breach of the ASBO will occur at the same time as the commission of any further offence in a hotel, guesthouse, or similar premises. The ASBO achieves nothing— if she is not to be deterred by the prospect of imprisonment for committing the offence, she is unlikely to be deterred by the prospect of being sentenced for breach of the ASBO. By committing the substantive offence, she will have committed the further offence of being in breach of her ASBO, but to what avail? The criminal statistics will show two offences rather than one. If on the other hand she "worked" a limited number of establishments, it would be practical to supervise compliance with the order. The establishments could be pull on notice about her and should she enter the premises the police could be called, whether her no Live in entering the premises was honest or not.
In ***Rush*** **12005]** EWCA Grim 1316; [2006] 1 Cr. App. R. (S.) 35 (p.200) the appellant appealed against a sentence of 30 months' imprisonment and an ASBO of 10 years' duration following a plea to burglary. The burglary involved pushing into his parents' house (where he no longer lived) and stealing cigarettes from a cupboard. The appellant had a history of previous offending that was almost entirely targeted at his parents. The Court of Appeal reduced the sentence for the burglary to 12 months' imprisonment and the duration of the ASBO to five years. In so doing, they said that the making of an ASBO should not be a normal part of the sentencing process especially if the case did not involve harassment or intimidation. Imposing an ASBO was a course to be taken in particular circumstances.
In ***McGrath*** the Court observed that ASBOs should be treated with a proper degree of caution and circumspection. They were not cure-alls and were not lightly to be imposed (para.fi 2]),

In ***Lonergan*** the Divisional Court held that it was lawful for a prohibition in the nature of a curfew to be included in an ASBO made under s. 1 CDA 1998 if its imposition was necessary to provide protection for others.
With these general observations in mind, we turn to the appeals against the ASBOs.
The Dean Bones ASBO
In favour of making an ASBO was the fact that the appellant had consistently engaged in anti-social behaviour over a period of approximately three years. He was a persistent prolific offender and had admitted to drug misuse in the community. There were three main aspects to his anti-social behaviour: threatening behaviour (two incidents), vehicle crime (three incidents) and other offences of dishonesty such as burglary and theft (three incidents and other incidents of handling stolen goods). On the other hand, he was being sentenced to a custodial sentence of three years' detention in a young offender institution and was thus subject to a period on licence and subject to recall or return to custody.
The respondent accepts, on the authorities and in particular having regard to (para.[25] above) that it is far from clear that it was ***necessary*** to make an ASBO in respect of the appellant. We agree.
We turn to the various orders. The first order prohibited the appellant from:
Entering any public car park within the Basingstoke and Deane Borough Council area, except in the course of lawful employment.
The respondent submits:
"The antecedent information does not state whether any of the vehicle crimes committed by the appellant took place in a public car park. However, it is submitted that it could sensibly be argued that a person intent on committing vehicle crime is likely to be attracted to car parks.

The prohibition as drafted does not appear to allow the offender to park his own vehicle in a public car park or, for example, to be a passenger in a vehicle driven into a public car park in the course of a shopping trip. Thus, in the absence of evidence showing that the appellant committed vehicle crime in car parks, there would appear to be a question mark over whether the prohibition is proportional, particularly as prohibition (3) seems to be drafted with a view to allowing the appellant to ride a motorcycle. If the court contemplated the lawful use of a motorbike as an activity which the appellant could pursue, then this prohibition would significantly limit the places he might be able to park it. It is of note that in ***McGrath*** the Court of Appeal held a similar prohibition to be too wide, although it covered a much larger geographical area."
We agree. Even if the order was necessary to prevent anti-social behaviour by the appellant, it was not proportionate.
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The second order prohibited the appellant from:
Entering any land or building on the land which forms a part of educational premises except as an enrolled pupil with the agreement of the head of the establishment or in the course of lawful employment.
As to this the respondent submits:
"It is not clear what information provided the basis for making this prohibition. There is nothing in the appellant's previous offending history which suggests that he engages in anti-social behaviour in educational premises. It is submitted that the term 'educational premises' arguably lacks clarity; for example, does it include teaching hospitals or premises where night classes are held? There also appears to be a danger that the appellant might unwittingly breach the terms of the order were he, for example, to play sport on playing fields associated with educational premises."
We agree with this analysis.
The order was not necessary and is, in any event, unclear.
The third order prohibited the appellant from:
In any public place, wearing, or having with you anything which covers, or could be used to cover, the face or part of the face. This will include hooded clothing, balaclavas, masks, or anything else which could be used to hide identity, except that a motorcycle helmet may be worn only when lawfully riding a motorcycle.
The respondent submits:
"It is presumed that this prohibition was based upon the assertion that the appellant is forensically aware and will use items to attempt to prevent detection. It is submitted that the terms of the prohibition are too wide, resulting in a lack of clarity and consequences which are not commensurate with the risk which the prohibition seeks to address. The phrase "having with you anything which could be used to cover the face or part of the face" covers a huge number of items. For example, it is not unknown for those seeking to conceal their identity to pull up a jumper to conceal part of the face, but surely the prohibition cannot have been intended to limit so radically the choice of clothing that the appellant can wear? It seems that the appellant would potentially be in breach of the order were he to wear a scarf or carry a newspaper in public."
We agree.
The fourth order prohibited the appellant from:

Having any item with you in public which could be used in the commission of a burglary, or theft of or from vehicles except that you may carry one door key for your house and one motor vehicle or bicycle lock key. A motor

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vehicle key can only be carried if you are able to inform a checking officer of the registration number of the vehicle and that it can be ascertained that the vehicle is insured for you to drive it. We agree with the respondent's submission tha**t:** the first part of this prohibition has been drafted too widely and lacks clarity."

The respondent points out that there are many items that might be used in the commission of a burglary, such as a credit card, a mobile phone, or a pair of gloves. Was the appellant being prohibited from carrying such items? If so, the order is neither clear nor proportionate,

The fifth order prohibited the appellant from:

Having possession of any article in public or carried in any vehicle, that could be used as a weapon. This will include glass bottles, drinking glasses and tools.

The respondent submits and we agree:

"that the necessity for such a prohibition is not supported by the material pull forward in support of the application. There is very Little in the appellant's antecedent history which indicates a disposition to use a weapon. Furthermore, it is submitted that the wording of the prohibition is obviously too wide, resulting in lack of clarity and consequences which are not commensurate with the risk. Many otherwise innocent items have the capacity to be used as weapons, including anything hard or with an edge or point. This prohibition has draconian consequences. The appellant would be prohibited from doing a huge range of things including having a drink in a public bar."

We have already noted judicial criticism of the use of the word "tool" (see para.[42] above).

The sixth order prohibited the appellant from:

Remaining on any shop, commercial or hospital premises if asked to leave by staff. Entering any premises from which barred.

The respondent submits:

"The appellant has convictions for offences of dishonesty, including an attempted burglary of shop premises and he has been reprimanded for shoplifting. Thus, there appears to be a foundation for such a prohibition. It is submitted that this term is capable of being understood by the appellant and is proportionate given that it hinges upon being refused permission to enter/ remain on particular premises by those who have control of them."

We agree, although we wonder whether the appellant would understand the staccato sentenc**e:** "Entering any premises from which barred."

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The seventh order prohibited the appellant from:

Entering upon any private land adjoining any dwelling premises or commercial premises outside of opening hours of that premises without the express permission of a person in charge of that premises. This includes front gardens, driveways and paths. Except in the course of lawful employment.

The respondent points out that in ***McGrath*** the Court of Appeal held that a term which prohibited the appellant from "trespassing on any land belonging to any person whether legal or natural within those counties" was too wide and harsh. If the appellant looks a wrong turn on a walk and entered someone's property, he would be at risk of a five-year prison sentence. In our view this prohibition, albeit less open to criticism than the one in ***McGrath*** is also loo wide and harsh. Although certain pieces of land might easily be identified as being caught by the prohibition (such as a front garden, driveway, or path) it might be harder to recognise, say, in more rural areas. The absence of any geographical restriction reinforces our view. Furthermore, there is no practical way that compliance with the order could be enforced, at least outside the appellant's immediate home area (see para.[47] above).
The eighth order prohibited the appellant, from:
Touching or entering any unattended vehicle without the express permission of the owner.
The respondent submits:
"The appellant has previous convictions for aggravated vehicle taking and interfering with a motor vehicle and has been reprimanded for theft of a motorcycle. It is submitted that the prohibition is sufficiently clear and precise and is commensurate with the risk it seeks to meet."
We agree generally but we would have preferred a geographical limit so as to make it feasible to enforce the order. Local officers, aware of the prohibition, would then have a useful weapon to prevent the appellant committing vehicle crime. They would not have to wait until he had committed a particular crime relating to vehicles,
The ninth order prohibited the appellant from:
Acting or inciting others to act in an anti-social manner, that is to say, a manner that causes or is likely to cause harassment, alarm, or distress to one or more persons not of the same household.
The respondent submits that this was a proper order to make and is in accordance with the Home Office guidance. We would prefer some geographical limit, in the absence of good reasons for having no such limit.
The tenth order prohibited the appellant from:
Congregating in groups of people in a manner causing or likely to cause any person to fear for their safely or congregating in groups of more than six per- sons in an outdoor public place.
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Given the appellant's previous history the first part of the prohibition can be justified as necessary. As the respondent points out, the final clause would appear to prohibit the appellant from attending sporting or other outdoor events. Such a prohibition is, in our view, disproportionate. Although, as the respondent points out, the appellant would be able to argue that he had a reasonable excuse for attending the event, this is, in our view, an insufficient safeguard.
The eleventh order prohibited the appellant from:
Doing anything which may cause damage.
The respondent submits that this prohibition, even if justified (which is far from clear), is far too wide. In the words of the respondent**:** "Is the appellant prohibited from scuffing his shoes?" We agree.
The twelfth order prohibited the appellant from:

Not being anywhere but your home address as listed on this order between 2330 hours and 0700 hours or at an alternative address as agreed in advance with the prolific and priority offender officer or anti-social behaviour coordinator at Basingstoke Police Station.
Although curfews can properly be included in an ASBO, we doubt, as does the respondent, that such an order was necessary in this case. Although the offences of interfering with a motor vehicle and attempted burglary (for which the appellant was sentenced on 16/5/02) were both committed between 10pm and midnight on the same evening, there is no suggestion that other offences have been committed at night. Moreover, the author of the pre-sentence report states that the appellant's offending behaviour did not fit a pattern which could be controlled by the use of a curfew order.
We would go further than the respondent. Even if an ASBO was justified a 5-year curfew to follow release is not, in our view, proportionate.
The thirteenth order prohibited the appellant from:
Being carried on any vehicle other than a vehicle in lawful use.
The respondent submits this prohibition is sufficiently clear and proportionate. We are not convinced. We do not find the expression "lawful use" to be free from difficulty. If "the carrying" is likely to constitute a specific criminal offence (e.g. one of the family of taking without consent offences), what does this order add? We would also have preferred some geographical limit.
The final order prohibited the appellant from:
Being in the company of Jason Arnold, Richard Ashman, Corrine Barlow, Mark Bicknell, Joseph (Joe) Burford, Sean Condon, Alan Dawkins, Simon Lee, Daniel (Danny) Malcolm, Michael March, or Nathan Threshie.
The respondent submits:
"This prohibition seems to be based on the assertion in PC Woods' document that the appellant is associating with other criminals who were also nominated as persistent prolific offenders. The appellant admitted that the
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offending spree which recently brought him before the court was the result of being contacted by an old friend. It is submitted that care has been taken to identify the individuals with whom the appellant is not to associate."
The respondent, however, has doubts whether a prohibition that prevents the appellant from associating with any of the named individuals for five years after his release, even in a private residence where one or more resides, is disproportionate to the risk of anti-social behaviour it is designed to prevent. We share those doubts.
Bebbington and others— the ASBOs
We have no doubt that in respect of all the appellants, other than Schofield and Bruce, it was not "necessary" to make any ASBO, given their antecedent history, reports, and references.
Counsel on behalf of Schofield attacked the judge's findings of fact. The judge conducted the trial and was in the best position to decide upon Schofield's role.
For Scofield and Bruce, given their history and the judge's findings, an order could properly have been made to prevent a repetition of the disgraceful conduct of that night. The judge was entitled, absent any special circumstances, to make only one of the orders, namely:
On any day that Chester City AFC play at a regulated football match at the Deva Stadium during the period commencing three hours prior to kick off and ending six hours after kick-off, enter any area inside the shaded boundary as defined in the attached map.

We amend the ASBO made in respect of Bruce by quashing the other orders and confirming this part only of the original order. In so far as Schofield is concerned, he will be living and working within the exclusion zone, so the order made is inappropriate. In his case the order will read:
On any day that Chester City AFC play at a regulated football match at the Deva Stadium during the period commencing three hours prior to kick off and ending six hours after kick-off, enter any area which is within 100 yards of the main entrance to Chester Station except for the purposes of his work with the Royal Mail.
As the trouble that arose in this case did so on a day when Wrexham AFC was playing away and the club's supporters were returning home via Chester railway station there will be in the case of both Bruce and Schofield an additional term in the ASBO as follows.
In the case of Bruce:
On any day that Wrexham Town AFC play a regulated football match away from their home stadium during the period commencing three hours prior to kick off and ending six hours after kicking off, enter any area inside the shaded boundary as defined in the attached map.
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In the cases of Schofield:
On any day that Wrexham Town AFC play a regulated football match away from their home stadium during the period commencing three hours prior to kick off and ending six hours after kick-off, enter any area which is within 100 yards of the main entrance to Chester railway station except for the purposes of his work with the Royal Mail,
The period of 10 years for which the judge ordered the ASBOs to run is manifestly excessive. In the case of each appellant the order will last for four years from January 7, 2005, the date when they were sentenced.
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Status: S Law in Force © Amendment(s) Pending
Criminal Justice and Public Order Act 1994 c. 33 Part V PUBLIC ORDER: COLLECTIVE TRESPASS OR NUISANCE ON LAND
Powers in relation to raves
This version in force from: **January 1, 2006** to **present** (version 4 of 5)
The text of this provision varies depending on jurisdiction or other application, see parallel texts relating to:
England and Wales | Scotland
England and Wales
63.— Powers to remove persons attending or preparing for a rave.
1. This section applies to a gathering on land in the **open air** of 20 or more persons (whether or not trespassers) at which amplified music is played during the night (with or without intermissions) and is such as, by reason of its loudness and duration and the time at which it is played, is likely to cause serious distress to the inhabitants of the locality; and for this purpose—
A. such a gathering continues during intermissions in the music and, where the gathering extends over several days, throughout the period during which amplified music is played at night (with or without intermissions); and

B. "music includes sounds wholly or predominantly characterised by the emission of a succession of repetitive beats.
(1 A) This section also applies to a gathering if-
a. it is a gathering on land of 20 or more persons who are trespassing on the land; and
b. it would be a gathering of a kind mentioned in subsection (1} above if it took place on land in the open air.
2. If, as respects any land, a police officer of at least the rank of superintendent reasonably believes that—
(a) two or more persons are making preparations for the holding there of a gathering to
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which this section applies,
(b) ten or more persons are waiting for such a gathering to begin there, or
(c) ten or more persons are attending such a gathering which is in progress,
he may give a direction that those persons and any other persons who come to prepare or wait for or to attend the gathering are to leave the land and remove any vehicles or other property which they have with them on the land.
3. A direction under subsection (2) above, if not communicated to the persons referred to in subsection (2) by the police officer giving the direction, may be communicated to them by any constable at the scene.
4. Persons shall be treated as having had a direction under subsection (2) above communicated to them if reasonable steps have been taken to bring it to their attention.
5. A direction under subsection (2) above does not apply to an exempt person.
6. If a person knowing that a direction has been given which applies to him—
a. fails to leave the land as soon as reasonably practicable, or
b. having left again enters the land within the period of 7 days beginning with the day on which the direction was given, he commits an offence and is liable on summary conviction to imprisonment for a term not exceeding three months or a fine not exceeding level 4 on the standard scale, or both.
7. In proceedings for an offence under subsection (6) above it is a defence for the accused to show that he had a reasonable excuse for failing to leave the land as soon as reasonably practicable or, as the case may be, for again entering the land.
(7 A) A person commits an offence if-
a. he knows that a direction under subsection (2) above has been given which applies to him, and
b. he prepares for or attends a gathering to which this section applies within the period of 24 hours starting when the direction was given.
(7B) A person guilty of an offence under subsection (7A) above is liable on summary conviction to imprisonment for a term not exceeding three months or a fine not exceeding level 4 on the standard scale, or both.
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(9) This section does not apply—

(a) in England and Wales, to a gathering in relation to a licensable activity within section 1(1 Vet of the Licensing Act 2003 (provision of certain forms of entertainment) carried on under and in accordance with an authorisation within the meaning of section 136 of that Act.
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(b) in Scotland, to a gathering in premises which, by virtue of section 41 of the Civic Government (Scotland) Act 1982, are licensed to be used as a place of public entertainment.
(10) In this section—
"exempt person", in relation to land (or any gathering on land), means the occupier, any member of his family and any employee or agent of his and any person whose home is situated on the land.
***"land in the open* air" includes a place partly open to the air.**
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"occupier"
"trespasser"
and ***"vehicle*** 'have the same meaning as in section 61.
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Scotland
63.— Powers to remove persons attending or preparing for a rave.
This section applies to a gathering on land in the open air of 100 or more persons (whether or not trespassers) at which amplified music is played during the night (with or without intermissions) and is such as, by reason of its loudness and duration and the time at
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which it is played, is likely to cause serious distress to the inhabitants of the locality, and for this purpose—
(a) such a gathering continues during intermissions in the music and, where the gathering extends over several days, throughout the period during which amplified music is played at night (with or without intermissions); and
(b) "music" includes sounds wholly or predominantly characterised by the emission of a succession of repetitive beats.
- If, as respects any land
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a police officer of at least the rank of superintendent reasonably believes that—
(a) two or more persons are making preparations for the holding there of a gathering to which this section applies,
(b) ten or more persons are waiting for such a gathering to begin there, or
(c) ten or more persons are attending such a gathering which is in progress,
he may give a direction that those persons and any other persons who come to prepare or wait for or to attend the gathering are to leave the land and remove any vehicles or other property which they have with them on the land.
(3) A direction under subsection (2) above, if not communicated to the persons referred to in subsection (2) by the police officer giving the direction, may be communicated to them by any constable at the scene.
(4) Persons shall be treated as having had a direction under subsection (2) above communicated to them if reasonable steps have been taken to bring it to their attention,
(5) A direction under subsection (2) above does not apply to an exempt person.
(6) if a person knowing that a direction has been given which applies to him—
(a) fails to leave the land as soon as reasonably practicable, or

(b) having left again enters the land within the period of 7 days beginning with the day on which the direction was given,

he commits an offence and is liable on summary conviction to imprisonment for a term not exceeding three months or a fine not exceeding level 4 on the standard scale, or both.

(7) In proceedings for an offence under this section it is a defence for the accused to show that he had a reasonable excuse for failing to leave the land as soon as reasonably practicable or, as the case may be, for again entering the land.

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(8) A constable in uniform who reasonably suspects that a person is committing an offence under this section may arrest him without a warrant.

(9) This section does not apply—

(a) in England and Wales, to a gathering in relation to a licensable activity within section 1(1fc) of the Licensing Act 2003 (provision of certain forms of entertainment) carried on under and in accordance with an authorisation within the meaning of section 136 of that Act.

(b) in Scotland, to a gathering in premises which, by virtue of section 41 of the Civic Government (Scotland^ Act 1982. are licensed to be used as a place of public entertainment.

(10) In this section—

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"exempt person", in relation to land (or any gathering on land), means the occupier, any member of his family and any employee or agent of his and any person whose home is situated on the land.

"land in the open air includes a place partly open to the air.

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"occupier"

"trespasser"

and ***"vehicle***' have the same meaning as in section 61.

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Notes

Words repealed by Anti-social Behaviour Act 2003 c. 38 Sc.h.3 oara.1 (January 20, 2004 as Si 2003/3300)

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Substituted by Licensing Act 2003 c. 17 Sch.6 oara.111 (November 24. 2005)

(a) Definition repealed by Licensing Act 2003 c. 1. Sch.7 oara.1 (November 24, 2005 as SI 2005/3056)

(4) Repealed by Licensing Act 2003 c, 17 Sch.7 para.1 (November 24, 2005 as SI 2005/3056)

(5) Amended by Anti-social Behaviour Act 2003 c. 38 PI 7 s.58 (January 20, 2004)

(6) Repealed subject to transitory provisions specified in SI 2005/3495 art.2(2) by Serious Organised Crime and Police Act 2005 c. 15 Sch.17f2t para.1 (January 1,2006: repeal has effect subject to transitory provisions specified in SI 2005/3495 art.2(2))

(7) Note not available

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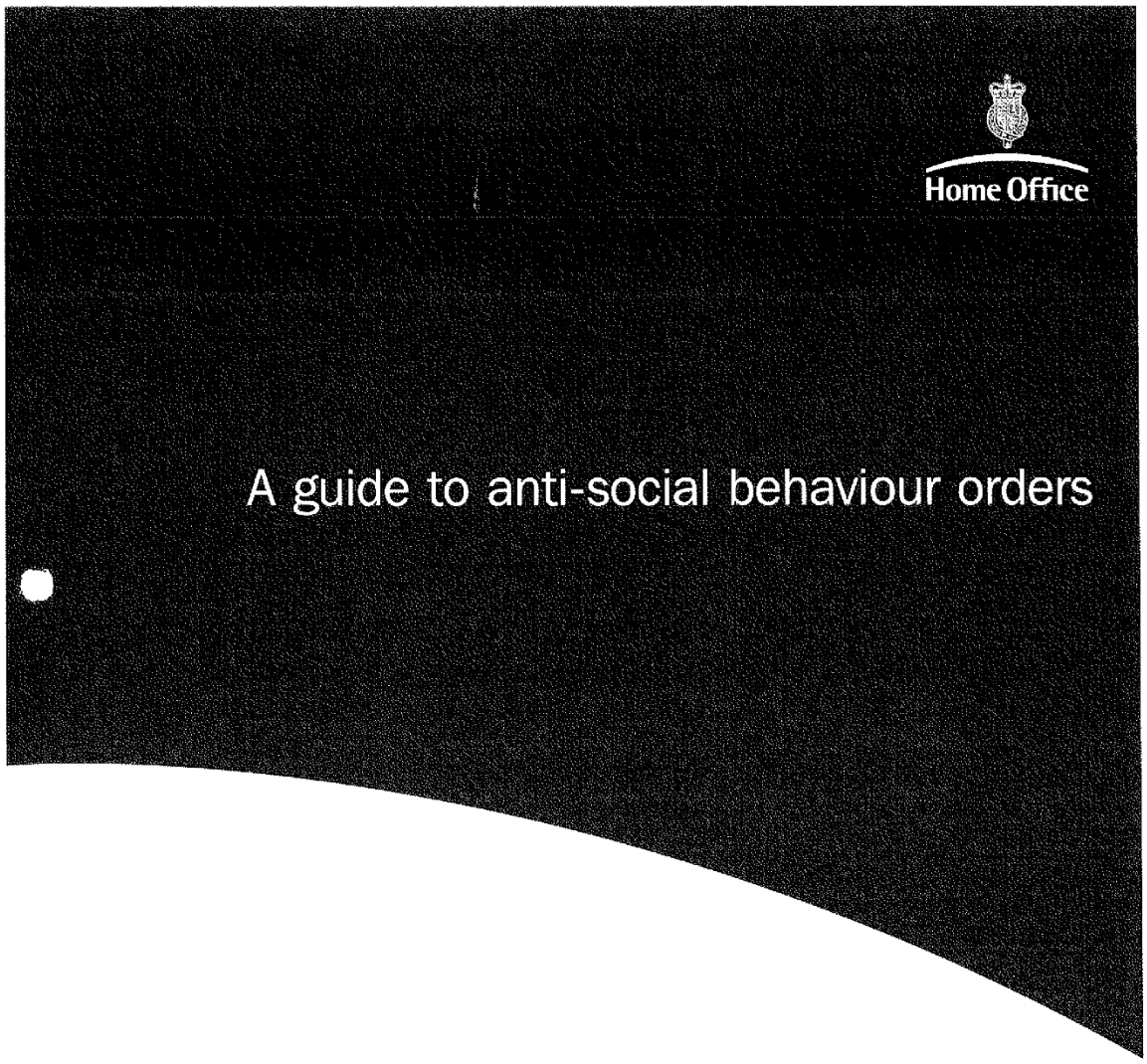

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IN THE WOOD GREEN CROWN COURT
Case No A2Q150064
IN THE MATTER OF AN APPEAL AGAINST AN ANTI-SOCIAL BEHAVIOUR ORDER
B E T W E E N :
SIMON CORDELL -and-
Appellant
THE COMMISSIONER OF POLICE OF THE METROPOLIS
Respondent
SKELETON ARGUMENT FOR THE RESPONDENT

References to page numbers are in [square brackets], [AX] being the Appellant's bundle and [RX] being
the Respondent's bundle
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Listing; For appeal hearing, 22-24.02,16 for 3 days
Issues: (I) whether the Appellant has acted in an anti-social manner
(ii) **whether an ASBO** necessary Recommended
pre-reading: For an Application for the ASBO [Rl-3]
The ASBO made on 04.08.15 [R13]
The statements of DC Elsmore, the OIC [R14-35]
Statements of R's witnesses [R36-66]
A's statements [A1-X5]
Statements of A's witnesses [A16-30, A258-272]
INTRODUCTION
(1) The Appellant is appealing against a decision made by the district judge at Highbury Corner Magistrates' Court on 4 August 2015 pursuant to S.1 of the Crime and Disorder Act 1998 ("the 1998 Act") to make him subject to an anti-social behaviour order (ASBO) to last for 5 years.
(2) The facts relied upon by the Respondent are set out in the bundle of evidence placed before the court and, in particular, the witness statements of the Respondent's officers **[R.14-35].** The Appellant has also provided a bundle for this appeal hearing **[A],**
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(3) The Respondent's case is that the Appellant has been integrally involved in the organisation of raves in London, particularly Enfield, and/or the supply of sound equipment to those raves. The Respondent relies on each incident set out in the application notice to support his case [Rl-3]. 'The Respondent submits that it is necessary for an ASBO to be in place to protect the public from further anti-social acts, specifically the organisation of raves, done by the Appellant.
(4) A chronology of events is appended to this Skeleton Argument.
(5) LEGAL FRAMEWORK
(6) Whilst the relevant provisions of the 1998 Act were repealed by the Anti-social Behaviour, Crime and Policing Act 2014, s.21 of that Act provides that these proceedings are unaffected except that, on 23 March 2020, the Appellant's ASBO will automatically become an Injunction under as if made under S.1 of that Act.

(7) Section 4 of the 1998 Act provides that an appeal against the making of an ASBO lies to the Crown Court.
(8) Section 79(3) of the Senior Courts Act 1981 provides that an appeal to the Crown Court is by way of a re-hearing. The relevant test, therefore, is that set out in S.1 of the Act.

(1) Pursuant to S.1 (4) of the 1998 Act, the court may exercise it discretion and make an ASBO if the two-part test se**t:** out in S.1(l) is satisfied. Section 1(1) states:

a. An application for an order under this section may be made by a relevant: authority if i**t:** appears to the authority that the following conditions are fulfilled with respect to any person aged ID or over, namely—that the person has acted, since the commencement date, in an and-social manner, that is to say, in a manner that caused or was likely to cause harassment: alarm or distress to one or more persons not of the same household as himself; and

b. that such an order is necessary to protect relevant persons from further antisocial acts by him.

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(9) It is for the Respondent to satisfy the court to the criminal standard that the Appellant has acted in a manner that caused or was likely to cause harassment, alarm, or distress to one or more persons not of the same household as himself. However, the second limb of the test "does not involve a standard of proof: it is an exercise of judgment or evaluation" (R ***(McCann) v Manchester Crown Court*** [2003] l A.C. 787 at [371).

(10) In R ***v Dean lioness*** [2006] 1 Cr. App. II. (S.) 120, the Court of Appeal provided general guidance as to the creation of prohibitions forming an ASBO. the court held tha**t:**

3. prohibitions should be individually tailored to the individual and that each individual prohibition must be necessary [28].

(ti) an ASBO can include prohibitions not to undertake minor criminal activity that may be covered under separate legislation [30-1]. However, an ASBO should seek to prevent a person from being able to commit that offence, rather than further penalise him when he does commit it [35]; and

(iii) the terms of the ASBO must be proportionate so as to be commensurate with the risk identified [37],

SUBMISSIONS

The first limb of the test under S. 1 (l)(a) of the 1998 Act

(11) The organisation of large-scale raves, whether or not they fall within the parameters of s.63 of the Criminal justice and Public Order Act 1994 and whether on private property or common land, fall within the definition of anti-social behaviour. 1 he Home Office Guidanc**e:** ***'A Guide to antisocial beamer orders'*** specifies noise nuisance, particularly when late at night, as an example of anti-social behaviour.

24.11.1 It is submitted that, a person who helps organise or supplies equipment for a rave, where there is loud music late at night (except where there is a licence to do so and/or the music is played on licensed premises), has ***prana jade*** done an act in contravention of S.1(l)(a) of the 1998 Act.

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(12) The Respondent relies on the evidence provided in die witness statements provided by various officers as well as supporting intelligence reports, the page references for this

evidence are set out in the appended chronology. The court is invited to take particular note of the evidence supporting the conclusion that the Appellant was integrally involved in the organization of raves and/or the supply of equipment:

4. The Appellant was identified by gate security as the organizer of a rave of about 300 people on 7/8 June 2014 (see evidence of Insp. Hamill **JR38] and** supporting evidence of PS Miles **[R36]).**

5. The Appellant admitted to Insp. Skinner that he was the organiser of the rave on 7/8 June 2014 **[R41].**

6. The Appellant admitted to Insp. Skinner that he was the organiser of the rave organised and prevented on 19 July 2014 **[R39, R41].**

7. The Appellant admitted to PC Edgoose that he lent his sound equipment for use at raves and that he could get a significant number of people to turn out for a rave **[R48, R88];** and

8. The Appellant was the organiser of the rave on 9 August 2014 and provided the sound equipment as well as laughing gas **[R42, R44-5, R47].** When a crowd turned up and tried to force entry, the Appellant encouraged them to break the police line **[R43, R45-6].**

(13) The Respondent further relies on the information set out in the intelligence reports and the documents provided to the court in the Respondent's bundle. The evidences show the Appellant has witnessed by many different police officers supplying equipment for or helping to organise a rave.

(14) The court will be invited to reject the Appellant's account as **t:**o his activities on the relevant, days as not credible.

The second limb of the test under section 1 of the Act

(15) It is first submitted that an ASBO is, in general terms, necessary.

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(16) There is a significant body of evidence showing the impact of raves on people who live near where they occur **[R51-66, R155-298].** The level of distress that these individuals suffered as a result of the raves organised by the Appellant was high. 'There is a need to prevent these events occurring in the future.

(17) The ASBO (and interim ASBO beforehand) have been effective. The only time where the. Appellant's behaviour has improved is when these proceedings were commenced, and it was made clear to the Appellant that his actions could not be tolerated.

(18) "The Appellant has denied the acts alleged by the Respondent. He has shown no acknowledgment or desire to change his ways that might make an ASBO unnecessary.

(19) As to the particular prohibitions on the ASBO, significant effort was made by the Respondent and by the court to ensure that any legitimate business activities that the Appellant wished to undertake would in no way be inhibited by this order. Tor the Appellant to provide recorded music to a gathering of people he would either need to have a licence for that event or to provide the music on a licensed premises for fewer than 500 people with, a general licence to play recorded music (see s. 1 and Sch.l of the Licensing Act 2003). This order specifically does not preclude him from providing regulated entertainment under the auspices of a valid licence.

(20) The only amendment that the Respondent would seek is that the words "or s.63(l. A)" be added after the words "s.63(l)" in prohibitions a, b, and c of the ASBO.

(21) It is submitted that the terms of the ASBO as drafted are necessary and proportionate in that they should have minimal impact on the Appellant's life and legitimate business activities.

ROBERT TALALAY

Chambers of 1 'torus Barton OC 5 ***Essex Court "I'rnrpk***
January 2016
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Case No A20150064

IN THE WOOD GREEN CROWN COURT
IN THE MATTER OF AN APPEAL AGAINST AN ANTI-SOCIAL BEHAVIOUR ORDER
BETWEEN:
SIMON CORDELL
Appellant
-and-
THE COMMISSIONER OF POLICE OF THE METROPOLIS
Respondent
SKELETON ARGUMENT FOR THE RESPONDENT

1C Essex Court
Hugh Giles (Director)
Metropolitan Police Service
Directorate of Legal Services
New Scotland Yard
Broadway
London
SW1H OBG

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IN THE WOOD GREEN CROWN COURT Case No A2Q15P064
IN THE MATTER OF AN APPEAL AGAINST AN ANTI-SOCIAL BEHAVIOUR ORDER
B E T W E E N :
SIMON CORDELL
Appellant
-and-
THE COMMISSIONER OF POLICE OF THE METROPOLIS
Respondent

CHRONOLOGY
12/01/13
Information pertaining to this date entered by PC Purcell that a vehicle belonging to the Appellant (Ford hocus Silver MA57LDY) was supplying equipment for a rave in Canary Wharf **[R152-4].** Appellant accepts attendance but. denies any organisational/supply role for a rave **[A3]**
24/05/13
Information pertaining to this date entered by PC- Jackson that the Appellant was seen with another individual who told PC- Jackson that they were looking for a place to set. up a rave over the ban holiday **[R118- 120].** Appellant's account at **[A4]**
25/05/14
Information pertaining to this date entered by PC Hoodless concerning a

report that there were trespassers on private premises. The Appellant was spoken to and had a set of large speakers in his van (White Ford I transit CX52JPZ) **[R112-4]**. Appellant accepts attendance but denies any organisational/supply role for a rave **[A4]**

6-8/06/14

Police attended and broke up a rave at Progress Way, Enfield. Evidence of the Appellant's alleged organisational involvement **[R36-41, 110];** impact statements **[R51-66];** CAD reports **[R155-298].** Appellant denies attendance on 6 or 8 June 2014 and admits attendance on 7 June 2014 but denies any organisational/supply role for a rave **[A5]**

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20/06/14

Rave in Neasden closed down. White Fold Transit CX52JRZ removed from the site **[R102].** Appellant's account is that he provided sound equipment for a gentleman's birthday party and was informed the following day that his equipment had been seized **[A5, A253-6]**

19/07/14

Police attended and closed down a putative rave on Great Cambridge
Road, Enfield. Evidence of the Appellant's alleged organisational involvement **[R39-41, R91].** Appellant's account is that stopped his car to help a homeless person from being arrested when he was arrested for a breach of the peace; he denies any organisational/supply role for a rave

[A6]

24/07/14

Conversation reported by PC Edgoose in which the Appellant is alleged
to have bragged about organising raves **[R48, R88].** I he Appellants account is at **[A6-7]**

27/07/14

Information pertaining to this date entered by PC Chandler that the Appellant driving a White herd transit CX52JRZ was present at powering speakers at a rave on Millmarsh Lane, Enfield **[R83-6J.** Appellant, accepts attendance at a birthday party but denies any organisational/supply role for a rave **[A7]**

09-10/08/14

Police attended and broke up a rave on Millmarsh Lane, Pm field.
Evidence of the Appellant's alleged organisational involvement **[R42-7, R80-1].** Appellant accepts attendance at a birthday dinner but denies any organisational/supply role for a rave

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[R (McCann) v Manchester Crown Ct (HL(E))

House of Lords

Regina (McCann and others) v Crown Court at Manchester and another

Clingham v Kensington and Chelsea Royal London Borough fi Council

[2002.] UKHL 39

2002 May 27,28; Lord Steyn, Lord Hope of Craighead, Lord Hutton,
Oct 17 Lord Hobhouse of Woodborough and
Lord Scott of Foscote

Crime — Crime and disorder — Antisocial behaviour order — Applications for antisocial behaviour orders relying on hearsay evidence — Whether proceedings civil or criminal — Whether hearsay evidence admissible — Whether criminal standard of proof to be satisfied — Crime and Disorder Act 1998 (c 37J, s r — Human Rights Act 1998 (042), Sch 1, Ft 1, act

In the first case the Chief Constable applied to the magistrates' court for anti- social behaviour orders to be made against each of the defendants, three brothers aged 16, 15 and 13, pursuant to section 1 of the Crime and Disorder Act 1998'. The stipendiary magistrate made the orders, which, inter alia, prohibited the defendants from entering a particular area of the city in which they lived. On the defendants' appeal to the Crown Court, the judge held chat the proceedings for the making of an order were civil rather than criminal and that, therefore, they were not subject to the rules of evidence which applied in criminal prosecutions or to the protection of article 6(2) of the Convention for the Protection of Human Rights and Fundamental Freedoms, as scheduled to the Human Rights Act 1.998c However, the court applied the standard of proof of being "satisfied so that it was sure" that the orders should be made and, having done so, dismissed the appeals.
The defendants brought judicial review proceedings seeking an order of certiorari to quash the judge's decision.
The Divisional Court dismissed the application and the Court of Appeal upheld that decision.
The defendants appealed.
In the second case the local authority applied to the magistrates' court for an antisocial behaviour order to be made against the defendant. The application was based primarily on hearsay evidence including evidence from anonymous complainants and evidence from complainants whose identities were not disclosed. A hearsay notice under the Magistrates' Courts (Hearsay Evidence in Civil Proceedings) Rules 1999 was served on the defendant, who challenged its validity. Following a pre-trial review, the district judge stated a case for the Divisional Court raising questions about the admissibility of hearsay evidence in the proceedings. The Divisional Court, in reliance on the decision of the Divisional Court in the first case, ruled that the proceedings were civil and that the hearsay evidence could be admitted. The defendant appealed pursuant to a certificate granted under section 1 of the Administration of Justice Act 1960.

On the appeals—

Held, dismissing the appeal in the first case and declaring that the house had no jurisdiction to hear the appeal in the second case, that since applications for antisocial behaviour orders under section 1 of the Crime and Disorder Act 1 998 were initiated by the civil process of complaint and did not charge the defendant with any

Crime and Disorder Act 1998, s r: see post, para 6.

Human Rights Act 1998, Sell 1, Pt., art 6: see post, para 7.

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(2003] 1 AC

crime or involve the Crown Prosecution Service, and since the making of such an order, the purpose of which was preventive not punitive, was not a conviction, did not appear on the defendant's criminal record and resulted in no penalty, the proceedings were civil under domestic law; that, since the proceedings did not involve the determination of a criminal charge and could not result in the imposition of an immediate penalty on the defendant, they therefore could not be classified as criminal for the purposes of article 6 of the Convention; that, in so far as the proceedings involved a determination of the defendants' civil rights and thereby engaged the right to a fair trial under article 6(r),

the use of hearsay evidence admissible under the Civil Evidence Act 1995 in such proceedings was not unfair and involved no violation of that right; that hearsay evidence under the 1995 Act and the 1999 Rules was therefore admissible on an application for an anti-social behaviour order under section 1 of the 1998 Act; but that, given the seriousness of

the matter involved, the court should be satisfied to the criminal standard of proof that a defendant had acted in an anti-social manner before making such an order; and that, accordingly, in rile first case the appropriate standard of proof had been applied, and since the second case was not a "criminal cause or matter" the House had no jurisdiction to hear the appeal under section 1 of the 1960 Act (post, paras 22, 2627, 30, 33-35, 36, 37, 39-40, 5H 55-5h, 64, 67, 68, 74, 76-77, 81-84, 94-98, 102103, 105-106, 108, 111, 112, 11 3-117).

(22) Dicta of Lord Atkin in ***Proprietary Articles Trade Association v Attorney General for Canada*** [1.931] AC 310, 324,

(23) ***PC, of Lord Bingham of Cornhili CJ in Customs and Excise Comrs v City of London Magistrates' Court*** [2000] 1 WLR 2020, 2025,

(24) ***DC, B 1 > Chief Constable of Avon and Somerset Constabulary*** [2001] 1 WLR 340, DC, S v Miller 2001 SC 977 and

(25) ***Gough v Chief Constable of Derbyshire Constabulary*** [2002] QB 1213, CA applied.

Decision of the Court of Appeal [2001] EWCA Civ 281; [2001] 1. WLR 1084; [2001] 4 All ER 264 affirmed.

The following cases are referred to in the opinions of their Lordships.

Adolf v Austria (1982) 4 EHRR 313

Albert and Le Compte v Belgium (1983)5 EHRR 533 ^

Amand v Home Secretary 1943 | AC 147; [1942] 2 All ER 381, HL(E)

B v Chief Constable of Avon and Somerset Constabulary [200 t] I WLR 340; [2001] 1 All ER 562, DC

B endenoun v France (19 9 4) 18 EHRR 5 4

Bcnham v United Kingdom (1996) 22 EHRR 293

Brown v Stott (2003] t AC 68 r; [1001] 2 WLR 817; [2001] 2 All ER 97,

PC Cons tanda v M 19 9 7 S C 217

Customs and Excise Comrs v City of London Magistrates' Court [2000] 1 WLR Z020; 120001 4 All ER 763,

DC Deweer u Belgium (1980) 2 EHRR 439

Dumbo Beheer BV v The Netherlands (1993) 18 EHRR 213

Doorson v The Netherlands (1996)22 EHRR 3 30 Engel t/

The Netherlands (No 1) (1976) > EHRR 647

Garyfallou AEBE v Greece (1997) 28 EHRR 344

Gough v Chief Constable of the Derbyshire Constabulary [2001 j EWITC Admin 554; [2002] QB 459; [2001] 3 WLR T392; [2001] 4 All ER 289, DC; [2002] EWCA Civ 351; 12002] QB tzr 3; (2002] 3 WLR 289; [2002] 2 All ER 985,

CA Guzzardi v Italy (1980) 3 EHRR 3 3 3

H (Minors) (Sexual Abuse: Standard of Proof), hi re [1996] AC 563; (1996] 2 WLR 8; [1996] 1 All ER 1, HI. (E)

Han v Customs and Excise Comrs {200:] EWCA Civ 1040; [2001] 1 WLR 2253; [2001] 4 All ER 687, CA

Kostovskt v The Netherlands (5989) 12 EHRR 434

Lauko v Slovakia (1998) 33 EHRR 994

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Lutz v Germany (1987) Ro EHRR 181

M v Italy (1991) 70 DR 59

McFeeley v United Kingdom (1980) 3 EHRR 161

M'Gregor v D 1977 SC 3 30
Official Receiver v Stern \2.000] 1 WLR 22.30; [2001] 1 All ER633, CA ***Qztiirk v Germany*** (1984) 6 EHRR 409 ^
Percy v Director of Public Prosecutions [r995l 1 WLR 1381; l.t.995] 3 All ER 124, DC
Proprietary Articles Trade Association v Attorney General for Canada [1931] AC 310, PC
R v Kansa! (No z) [2001] UKHL 62; [2002] 2 AC 69; [2001] 3 WLR 1.562; [2002] **All ER 257, HL{E)**
R v Secretary of State for Trade and Industry, Ex p McCormick [1998] BCC 379
Raimondo v Italy (1994) 18 EJHRR 137 ***Ravnsborg v Sweden*** (1994) r 8 EHRR 3 8
S (Minors) (Care Order: Implementation of Care Plan), In re [2001] UKHL 10. 12002] 2 AC 291; [2002] zWLR 720; [2002] 2 All ER 5:92, HL(E)
S v Miller 200 s SC 977
Saidi v France {1993} 17 EHRR 251
Sporrong and Ldnnrotb v Sweden (1981) j EHRR 35
Steel v United Kingdom (1998) 28 EHRR 603
Unterpertinger v Austria (1986) 13 EHRR 175
Woodball (Alice), Ex p **(**1888) 20 QBD 83 2, CA
The following additional cases were cited in argumen**t:**
Bonalmm v Secretary of State for the Home Department [1985] QB 675; [1985] WLR 712; 11.985] 1. AUER797, CA ^
Botross v Hammersmith and Fulham London Borough Council (1994} 93 LGR 268, DC , .
Carr v Atkins [1987] QB 963; [1987] 3 WLR 529; [1987] 3 All LR 684, CA ***Ihhotson v United Kingdom*** (1998) 27 EHRR CD 332
Krone-Verilog GmbH v Austria (Application No 28977/95) (unreported) 21 May 1997, E Com HR
Nottingham City Council v Zain (A Manor) I2001j EWCA Civ 1248; [2002] 1 WLR 607, CA
Pelle v France (1986) 50 DR 263
R v Board of Visitors of Hull Prison, Ex p St Germain [1.979] QB 42S; 119791 1 WLR 42; [1979] 1 AUER 701, CA
R (McCann) v Crown Court at Manchester APPEAL from the Court of Appeal
This was an appeal, with leave of the House (Lord Slynn of Hadley, Lord Steyn and Lord Rodger of Earls ferry) granted on 25 April 2002, by the defendants, Sean McCann, Michael McCann and Joseph McCann, against a decision of the Court of Appeal (Lord Phillips of Worth Matravers MR, Kennedy and Dyson LJj) dated 1 March 2001 dismissing their appeals from a decision of the Divisional Court of the Queen's Bench Division (Lord Woolf CJ and Rafferty j) on 22 November 2000 to refuse the defendants' application, by their mother and litigation friend Margaret McCann, for judicial review by way of an order of certiorari to quash the decision of Judge Rhys Davies QC, the Recorder of Manchester, and justices sitting in the Crown Court at Manchester on 16 May 2000 to uphold a decision of a stipendiary magistrate to make anti-social behaviour orders against the defendants on the application of the Chief Constable of Greater Manchester.
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R (McCann) v Manchester Crown Ct (HL(E)
[2003] 1 AC
The facts are stated in the opinion of Lord Hope of Craighead.

Clingham v Kensington and Chelsea Royal London Borough Council
APPEAL from the Divisional Court of the Queen's Bench Division
This was an appeal, with leave of the House granted on 23 October 2001, by the defendant, Andrew George Clingham, against a decision of the Divisional Court (Schiemann LJ and Poole J) dated 11 January 2001 dismissing his appeal by way of case stated against a decision on the admissibility of evidence by District Judge David Kennett Brown, sitting as a magistrate at Marylebone Magistrates' Court on **14 September 2000** at a pre-trial review of an application by Kensington and Chelsea Royal London I3orough Council for an anti-social behaviour order against the defendant.
In refusing leave to appeal the Divisional Court certified, under section 1(2) ***c*** of the Administration of justice Act i960, that the following point of law of general public importance was involved in its decision: "Whether hearsay evidence is admissible in proceedings to secure the making of an anti-social behaviour order under the Crime and Disorder Act 1998?"
The facts are stated in the opinion of Lord Steyn.
Stephen Salley QC and ***Alan Fraser*** for Clingham. Seen as a whole, the scheme provided for by the Crime and Disorder Act 1998 for the making of and enforcement of anti-social behaviour orders is punitive, rather than preventative, and therefore truly criminal. The sanctions for breach of such an order, which include imprisonment for a maximum of five years, are clearly penal in nature. The proper application of the relevant criteria leads to the conclusion that it is properly categorised as criminal even in respect of ^ the initial imposition of the order looked at alone. Consequently, the usual, criminal procedures apply and the Civil Evidence Act 1995 and the Magistrates' Courts (Hearsay Evidence in Civil Proceedings) Rules 1999 (SI 1999/681) do not.
The absence of any real restriction on the possible ambit of anti-social behaviour orders also presents the risk of ad hoc, novel and ill-defined "criminal offences" (founded on the terms of any such order), that is a matter of concern and possible injustice in that it is effectively creating "offences" attracting substantial penalties without the direct involvement of Parliament and in circumstances lacking the sort of certainty that should characterise any prohibition carrying such penal sanctions. The fact that the conduct originally complained of is inevitably reflected in the formulation of the "offence", it is an integral and inextricable part of a single process with punitive sanction.
Geographical exclusion from a particular area is also properly regarded as punitive. It encroaches on freedom of movement and may in some circumstances amount to an infringement of the right to respect for private and family life (contrary to article 8 of the Convention) and/or freedom of association (contrary to article 11). Although each of these rights is subject to restriction for reasons including the "prevention of crime and disorder" and the "protection of rights of others" that reinforces the argument that such, a sanction is a punitive order.
Even if it is held that the proceedings are properly characterised as "civil", defendants are entitled to a "fair" hearing in accordance with article ***6*** **(R)** "in
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[2003] 1 AC R (McCann) v Manchester Crown Ct (HL(E)
A determination of his civil] rights and obligations". In determining what is "fair" in this context an almost (or "quasi") criminal approach should be adopted not only in relation to the standard of proof but in interpretation of wider procedural issues. In the circumstances that would include having particular regard to the minimum requirements that would attach to criminal proceedings under article 6(3), even if those did not directly apply g by virtue of

criminal status. In particular this should include the right to examine witnesses pursuant to article <5(3){d).
The application of the criminal standard of proof as being "likely to be appropriate" in the majority of applications for an anti-social behaviour order was accepted by the Court of Appeal in ***McCann.*** That is an unsatisfactory approach in relation to the appropriate standard of proof. It would lead to a lack of clarity and certainty, which in turn is likely to cause ***C*** injustice, actual or perceived. The proper interpretation is that the appropriate standard of proof to be applied in relation to the making of any anti-social behaviour order is the criminal standard. It is unrealistic to suggest some sort of sliding scale between the criminal and civil standard of proof. Application of the criminal standard of proof would go a long way to achieving a fair trial.
In ***Clingham*** the allegations involve serious criminal conduct including burglary, dealing in drugs and assaults. One of the consequences of this is that a person may find himself having to attempt to answer an allegation founded on multiple hearsay to resist an application for an order, only to later have to answer a formal criminal charge founded on the same "facts" which were only proved to the civil standard. Anything said in the course of the first proceedings could be used against hint in respect of the later criminal charge. This also has the potential of effectively depriving the person of his right to silence under article 6(2) in any such subsequent proceedings. If he is to seek to preserve this right by not exposing himself to such risk, by not seeking to challenge the basis on which the anti-social behaviour order is sought, he would be compelled to constrain himself in the initial proceedings such that his general right to a "fair" hearing under article 6(1) in determination of his "civil rights and obligations" regardless of any minimum guaranteed rights afforded in respect of a "criminal charge" under article 6(3}, would be compromised. Anonymity of witnesses probably will not be achievable in these circumstances. The problem of fearful witnesses can be dealt with improving the role of the CPS and police rather than reducing the threshold required for an order to be made.
The jurisdiction to accept ***Clingham*** is properly exercised. The definition ^ of "criminal cause or matter in section r(I)(a) of the Administration of Justice Act 1.960, for the purpose of appeal to the higher courts, is wider than the phrase "criminal proceedings": see ***Exp Alice Woodhall*** (1888} 20 QBD 832; ***Amand v Home Secretary*** [1943] AC 1:47; ***Bonalwni v Secretary of State for the Home Department*** [1985] QB 675; ***Carr v Atkins*** f 1 987] r. QB 963; ***Customs and Excise Comrs v City of London Magistrates' Court H*** [2000] 1 WLR 2020. Applying that approach the making of an anti-social behaviour order would clearly be a criminal cause or matter, as is everything that flows from it.
Adrian Eulford QC and ***fames Stark*** for the Mc Cans. Anti-social behaviour orders require proof of conduct that is criminal in nature, closely

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akin to offences under sections 4A and 5 of the Public Order Act 1986 and section 1 of the Protection from Harassment Act 1997 and may lead to restrictions on liberty that constitute a punishment. Although the wording of sections 4A and 5 Public of the 1986' Act is not identical to section 1 of the Crime and Disorder Act .1998, the conduct involved all falls within section 1. Furthermore, there is no limitation placed on the definition of harassment in section 7(2) of the Protection from Harassment Act 1997.
English law contains a number of strict liability offences. The lack of a requirement of intent cannot render the proceedings civil. Furthermore, men's rea in both section 5 of the Public Order Act 1986 and section 2. of the Protection from Harassment Act 1997 offences is

knowledge based i.e. knew or ought to have known. Most tellingly of all section 1(10) of the Crime and Disorder Act 1998 itself creates an offence without the requirement of intent- It is subject only to a reasonable excuse defence.
Whether a prohibited act leads to criminal proceedings depends upon the consequences arising from the act not the form of the statute within which it is described or the procedure by which proceedings are commenced. The procedure must be looked at in its totality from the beginning to the end. Although proceedings are started by complaint that is not conclusive. An anti-social behaviour order makes those against whom they are made subject to the risk of criminal sanctions in respect of conduct that would not otherwise be criminal. Conduct which is criminal in character may well take place only at the stage of breach of an order. Prohibitions against committing criminal offences or defined types of anti-social behaviour can be made, breach of which may expose the individual to far more serious penalties than the offence itself. Although it may have been Parliament's intention to create civil rather than criminal proceedings, one has to look at what has been created not what it was intended to create. The fact that there are different stages to the proceedings does not prevent both stages being criminal causes or matters: see ***Amand v Home Secretary*** [r 943] AC 147; ***R v Board of Visitors of Hull Prison, Ex p St Germain*** [1979] QB 425- Consequently, applications for anti-social behaviour orders are the initial step in a criminal cause or matter.
The second limb of section 1(1) of the Crime and Disorder Act 1998, the requirement of it being "necessary" to make an order is not at odds with the character of the proceedings being criminal Those elements come into play in other criminal proceedings. The first limb constitutes the "offence' the second limb the need for a "penalty".
The fact that a penalty, which may have severe consequences, is described as being imposed to protect the public in the future, and not as a punishment for a crime already committed does not prevent the proceedings being criminal proceedings when the correct test is applied: see ***Proprietary Articles Trade Association v Attorney General for Canada*** [1.931! AC 310; ***Customs and Excise Comrs v City of London Magistrates' Courts*** [2000] 1: WLR 2020.
The object of a penalty by way of sentence is that it seeks to "protect" as well as to "punish" e.g. removing an offender from society by custody to prevent further offending. In sentencing protective
considerations, rather than society's need to punish the individual, often play the major role in deciding what penalty to impose. Thus, to define an anti-social behaviour order as protective does not in any way diminish its punitive effect.

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The conditions that may be attached to an anti-social behaviour order are unlimited. Curfews and orders banning people from certain areas are now expressly recognised as criminal penalties under sections 37 and 40A of the Powers of the Criminal Court (Sentencing) Act 2000. Restrictions upon liberty have also included a limit upon the number of visitors a person can have to their home or the number of persons with whom they may congregate. The injunction analogy is a false one. Injunctions seek to prevent the interference by one person with another's civil rights whether in contract, tort, or equity or to ensure that civil obligations are carried out as in the case of a mandatory injunction. They are not aimed at preserving public order or containing anti-social behaviour. Committal is in consequence of disobedience to the court not as a punishment or penalty for the actual conduct involved. Furthermore, a contempt can be purged but an anti-social behaviour order last for two years.

There are fundamental differences between an anti-social behaviour order and a sex offender order under section 2 of the Crime and Disorder Act 1998. Section 1 requires proof. Section 2 only requires "reasonable cause to believe". Thus, the court does not, under section 2, apply a simple objective test of whether acts took place as in section 1 but has a further subjective element to apply that is not consistent with a criminal offence. Furthermore, the sex offender has already had his fair trial to the criminal standard of proof on the conduct which gave rise to the jurisdiction to make an order. The sex offender order is a mechanism to control the further conduct of those already convicted of criminal offences. The essential prerequisite for the order does not need to be proved in proceedings for making the order. In the context of European jurisprudence a sex offender order is made against a very limited class of persons, those already convicted of sex offences while the anti-social behaviour order is of general application. That is a significant factor: see ***Benbam v United Kingdom*** (1996) 22 EHRR 293 The relevant criteria for the consideration of whether proceedings are criminal for the purpose of article 6 of the Convention rights a**re:** (a) the domestic classification; (b) The nature of the proceedings; (c) The nature and severity of the punishmen**t:** see ***Engel v The Netherlands (No 1)*** (1976) I EHRR 647. Those criteria are not cumulative. Any one of the three may render the proceedings as being in respect of criminal charg**e:** see ***Garyfallou AEBE v Greece*** (1997) 28 EHRR 344; ***Lauko v Slovakia*** (1998) 33 EHRR 994. There does not have to be tile formal constituent elements of an offence as recognised in domestic law: see ***Deiveer v Belgium*** (1980) 2 EHRR 439. There is a broad similarity between proceedings for anti-social behaviour orders and breach of the peace. In both cases what is effectively sought is an order prohibiting a certain kind of behaviour. The intention was almost certainly to create a civil procedure, but it did not actually achieve that: see ***Steel v United Kingdom*** (1998) 28 EHRR 603. A penalty is still a penalty even when it takes a novel form. See also ***Han v Customs and Excise GAMUTS*** [2001 j 1 WFR 2253 for a review of the European jurisprudence.

The original anti-social behaviour is the most significant element of the criminal conduct leading to a criminal sanction under section 1(10). Thus the crucial conduct of a criminal nature that lies at the heart of the order and to which it is most important for the procedural safeguards of article 6(2) and (3) to be applied occurs at the first stage on the application for an order. It is

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thus impossible, when applying the autonomous test from the Convention as A to the genera! nature of the proceedings, to escape the conclusion that they are in respect of a criminal charge. Thus, the orders made in the instant proceedings on the basis that they were civil proceedings not subject to such safeguards should be quashed.

Having a shifting or varying burden of proof may impose on justices an almost impossible task and could lead to the wholly undesirable practice of g justices being asked about the approach they are going to adopt.

A professional judge could mould proceedings to meet the particular dictates of the case more easily: see ***Official Receiver v Stern*** I2000] I WLR 2230, 2257-2258. Other issues also arise: the protections under the Police and Criminal Evidence Act 1984 would not apply and there could be profound problems regarding the weight to be given to identification evidence.

Brodie Thompson QC for Liberty. There are fundamental implications in the development of criminal law involved in the use of anti-social behaviour orders. It is important that all the full protections of criminal procedure are maintained when people are in effect accused of

criminal conduct. Under section I(I){a) of the Crime and Disorder Act 1998 a person with no previous convictions can be accused of conduct which could equally well have been prosecuted under section 5 of the Public Order Act 1986. An individual can thus be brought before the court for the first time under section 1 (I)(a). The penalties that can be imposed are in reality much more severe than those under section 5 or under the procedure of binding over the keep the peace, which is a criminal matter under the convention: see ***Steel v United Kingdom*** 28 EHRR 603. The protections under criminal law are designed to protect the liberties of persons accused of such conduct. It is £ important that such protections exist and are changed only by the express will of Parliament. The analogies with sex offenders etc concern people who have already been convicted. It is quite different to impose a similar regime on someone who has no convictions. There is no objection to simple procedures to deal with public order disturbances. There is a long history of such powers see summary in: ***Percy v Director of Public Prosecutions*** [19 9 5 3 1 WLR 1382. The proper approach to anti-social behaviour is for principled changes in die criminal law to be made by Parliament. The alternative of regarding the matter as civil but reading in criminal protections on an "ad hoc" basis is conceivable hut less desirable in that it left to the Courts to define the protections traditionally provided by the criminal law.

Section 3 of the Human Rights Act 1998 imposes on the courts a broad general duty to construe primary, as well as secondary, legislation to accord ***c*** with Convention rights. In that respect the strong interpretive obligation imposed by section 3 necessarily subordinates the narrow intention of Parliament in the adoption of particular measures to its broader intention to avoid any implied inconsistency with protection of the Convention rights, even in primary legislation. Thus, section 3 introduces a degree of circularity into the position under domestic law, requiring the position under the Convention to be considered even in respect of the proper classification of anti-social behaviour orders in. the Crime and Disorder Act 1998 under domestic law principles. Such orders should be construed as criminal if a civil classification would fail to provide all the protections required by the Convention under a criminal classification.

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John Bowers QC and ***Richard Banwell*** for Kensington and Chelsea Royal London Borough Council. Anti-social behaviour orders were specifically introduced in section x of the Crime and Disorder Act 1998, as a novel method for the police and local authorities to deter anti-social behaviour and prevent its escalation, without recourse to criminal sanctions. They are a reaction to a widely perceived social problem of crime and disorder. They were not intended to replace or modify existing criminal offences; rather they are primarily preventative in nature.

A useful contrast may be made between anti-social behaviour orders and:
curfew orders under sections 12 and 13 of the Criminal Justice Act 1991 which are available to the court upon conviction of an offence; and (b) the terms of the Protection from Harassment Act 1997 which specifically creates a criminal offence.

An anti-social behaviour order may be properly characterised in effect as, or by analogy, to a quick time injunctive order made in civil proceedings, used to restrain further behaviour which may cause harassment, alarm or distress to the relevant persons in the local government area concerned. Section 1(4) of the 1998 Act thus provides that an order may prohibit the defendant from doing anything described in the order in the future. An order is in terms restricted to the prohibition(s) necessary to protect persons in a defined area from anti-

social behaviour (section 1(6)) and is manifestly an order designed to protect in the future, not to punish past misconduct. An analogy to the anti-social behaviour order is the banning order, which may be made by a magistrates' court under section 14B of the Football Spectators Act 1989. Such an order is civil in natu**re:** see ***Gough u Chief Constable of the Derbyshire Constabulary*** [2002] QB 459. A similar comparison can be made with disqualification orders under the Company Directors Disqualification Act 198***6*** which are also not criminal: see ***R v Secretary of State for Trade and Industry, Ex p McCormick*** [1998] BCC 379.

The making of an anti-social behaviour order does not involve a trial and punishment of the individual concerned. Indeed, section I{r){a) of the 1998 Act does not require that a person has caused harassment, alarm, or distress, only that the same may be likely to be caused. The contrast between the provisions of an anti-social behaviour orders and section 5 of the Public Order Act 1986 is also instructive. Section 5 expressly provides that a person using threatening, abusive, or insulting words or behaviour within the hearing of a person likely to be caused harassment, alarm and distress is guilty of an offence. There is no attribution of an offence to an anti-social behaviour order.

There is no "overall scheme" to section r. to which the application for an anti-social behaviour order can be seen as a "preliminary" (non-criminal proceeding) stage, Instead anti-social behaviour orders, like an injunction may be a possible precursor to separate penal proceedings to enforce them as a distinct second stage, but they do not constitute penal proceedings in themselves. Subsequent enforcement proceedings under the 1998 Act for breach are quite separate from the initial application and order. There is no immediate danger of an individual losing his liberty merely because an order is made.

There are other features of the application for an anti-social behaviour order which tend towards it being a civil procedure: (a) Under Section 1(3) of the 1998 Act proceedings are initiated by complaint, the appropriate

procedure for commencing civil proceedings in the magistrates' court.

The requirement to consult each other "relevant authority" and adjoining authorities where an order specifies neighbouring areas, demonstrates that it is not contemplated that penal sanctions be imposed.

Criminal sanctions are found in Part I of the 1998 Act under the heading "Crime and Disorder: general" which covers prohibitions on sex offenders (section z) and "Crime and disorder strategies" (section 5) thus emphasizing the preventative nature of the provisions; (d) Prosecutions are not conducted by the Crown Prosecution Service.

The categorization for what constitutes a criminal offence formulated in ***Customs and Excise Comrs v City of London Magistrates' Court.*** [2000]
· WLR 2,020 should be adopted. On that basis applications for anti-social behaviour orders involve none of the hallmarks of a criminal matter; there is no formal accusation, made on behalf of the state or by any private prosecutor, that a defendant has committed a breach of the criminal law.

There is no relevant or viable concept of "quasi-criminal" in respect of hearsay evidence, although there may be varying standards of the civil standard of proof. That is a wholly different matter to a "quasi-criminal" approach to matters of admissibility of evidence.

If applications under the 1.998 Act for an anti-social behaviour order are civil in nature, the decision of the High Court in ***Clingham*** is final and no right of appeal lies to the House of

Lords, as section I(I){a) of the Administration of Justice Act i960 only permits an appeal from a decision of the High Court "in any criminal cause or matter".
Charles Garside QC and ***Peter Cadwallader*** for the Chief Constable of Greater Manchester. Applications for anti-social behaviour orders are civil proceedings. Any proceedings for the breach of an order are criminal proceedings. It was the intention of Parliament that applications for antisocial behaviour orders should be civil proceedings. That result was affected by section 1 of the 1998 Act,
Criminal proceedings are begun by arrest, charge, and production at court or by laying an information followed by summons or warrant. Applications for anti-social behaviour orders are begun by complaint. That is the method for commencing civil proceedings in magistrates' courts: see Part 2 and sections 51 and 52 of the Magistrates' Courts Act 1980. ***Botross v Hammersmith and Fulham London Borough Council*** (1994) 93 LGR 268 was a case with special facts. It concerned section 82(1) of the Environmental Protection Act 1990. The Act and that section had a long legislative history going back to 1.875. ^ ^la<^ been decided in many cases that the nature of such proceedings was criminal, in part, because the sanctions available included a fine. The court concluded that when Parliament enacted the r.990 Act it had made a mistake in legislating for such proceedings to be begun by complaint and had never intended to change the nature of such proceedings.
The procedure for applications for anti-social behaviour orders (section 1(2) of the 1.998 Act) and sex offender orders (section 2(2) of the Act) are identical. Applications for sex offenders' orders are civil proceedings: see ***B t/ Chief Constable of Avon and Somerset Constabulary*** 1200r j r WLR 340.

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Applying the three criteria laid down in ***Engel v The Netherlands (No I) I*** EHRR 647 to determine whether the proceedings are "criminal" for the purposes of article 6: first, the proceedings for anti-social behaviour orders are classified as civil in domestic law and, second, the defendants are not charged with any offence. As to the third criterion, section 1 of the Act is directed not to the detection, apprehension, trial and punishment of those who have committed crimes, but the restraint of those who have committed anti-social behaviour (which may also amount to a crime) and whose conduct is such that a measure of restraint is necessary to protect members of the public from further anti-social behaviour. The purpose of the proceedings is of importance within the European Jurisprudenc**e:** see ***Raitnondo v Italy*** (1994) 18 EHRR ***2.37', Guzzardi v Italy*** (1980) 3 EHRR 333. The powers available in those case was at least as restrictive as chose given to the court under section 1 of the Crime and Disorder Act 1998.
Jonathan Crow for the Secretary of State for the Horne Department. In determining whether, as a matter of domestic classification, a particular statutory provision forms part of the criminal law, there are two elements: (T) a "prohibited act" and (ii) "penal consequences": see ***Proprietary Articles Trade Association v Attorney General for Canada*** [19313! AC 310, 314. In relation to the first limb, the Act itself does not itself "prohibit" the conduct defined in any anti-social behaviour order. In relation to the second limb, it is important to consider the nature of an anti-social behaviour order independently from the possible consequences of any breach. Given that the only act that can logically be said to have been "prohibited" by section 1 is the act which triggers the making of the order, it is only permissible to consider the immediate consequences of that act—not the possible consequences of some other acts in breach of the anti-social behaviour order, that may or may not occur in the future. When

properly analysed ***Amand v Home Secretary*** [1943] AC 147 and ***R v Board of Visitors of Hull Prison, Ex p St Germain*** [1979] QB 42,5 support that approach. They decide that a cause or matter would be classified as criminal if, carried to its conclusion, it might result in a conviction and sentence. That analysis demonstrates that the criminal sanction for a breach of an anti-social behaviour order cannot affect the proper classification of the proceedings that are brought for the imposition of ail anti-social behaviour order. It is also entirely consistent with the analysis adopted in many other areas of the law, for example, interim injunctions, sex offenders' orders and orders under the Company Directors Disqualification Act 1986.
The question whether any act is "prohibited" by section r. of the 1998 Act is not answered by reference to the question whether the preconditions for making an anti-social behaviour order are exactly co-extensive with some other substantive criminal offence— e.g. under the Public Order Act 1986 or the Prevention from Harassment Act 1997. The correct question is whether section 1 itself prohibits any act. It does not. In any event there are substantial differences between, on the one hand, section 4A of the Public Order Act 1986 and section 1 of the Protection from Harassment Act and, on the other, section 1: of the 1:998 Act.
Tor the purposes of article 6 there are several reasons why the preconditions to making an anti-social behaviour order take it outside the criminal realm. The order seeks to deal with anti-social behaviour, not with

crime, and it seeks to do so by preventing future crimes rather than by punishing past ones. If a sanction is imposed for the purposes of deterrence or punishment, then it is likely to be regarded as a criminal penalty: see ***Oztiirk v Germany*** (1984) ***6*** EHRR 409; ***Han v Customs and Excise Comrs*** [2.001] 1 WLR 2253. By contrast, a sanction that is imposed for preventive reasons is not so regarded (even if it involves a restriction on liberty, and/or an interference with property rights, and/or it is imposed in the context of criminal proceedings: see ***Raimondo v Italy*** (1994) £HRR 237; ***M v Italy*** (1990) 70 DR 59. A decision whether to impose an anti-social behaviour order does not involve the determination of a criminal charge simply because the matters on which reliance is placed might also happen to constitute the necessary elements of a criminal offenc**e:** see ***Pelle v France*** (1986) 50 DR 263; ***McFeeley v United Kingdom*** (1980) 3 EHRR 161. Finally, the existence of past misconduct cannot of itself trigger an antisocial behaviour order: there must also be a need for protection for the future under section r(I)(b).
An anti-social behaviour order is clearly not a criminal penalty. Section 1(4) precludes any order being made other than as a prohibition. The court can neither fine nor imprison a person. There is a very significant difference in the European jurisprudence between imposing a restriction on a person's liberty (which will not be a criminal penalty) and depriving a person of his liberty (which will be a criminal penalty): see ***Guzzardi v Italy*** 3 LEIRR 333; ***Raimondo v Italy*** 18 EHRR 237. The court cannot deprive a person of his liberty under the cloak of an anti-social behaviour order, and the fact that an order might interfere with his freedom of movement (e g by excluding him from designated areas) does not convert it into a criminal penalty.
The fact that a person may be imprisoned for acting in breach of an antisocial behaviour order doc not mean that the imposition of the order itself involves any criminal penalty: see by analogy ***Ibhotson v United Kingdom*** (1998) 27 EHRR CD 332. The reason why a different conclusion was reached in ***Steel u United Kingdom*** 28 EHRR 603 was that the penalty was available to he imposed at the outset by the sentencing court in order to enforce compliance

with the order. The difference in ***Ibbotson*** was that in that case separate proceedings would have to be brought for a breach of the statutory obligation before any criminal sanction could be imposed. The same is true under section 1 of the 1998 Act. ^
Steel v United Kingdom 28 EHRR 603, ***Garyfallou AEBE v Greece*** 28 EHRR 344 and ***Lauko v Slovakia*** 33 EHRR 994 merely illustrate the application in very different factual situations of the three criteria in ***Engel v The Netherlands (No 1) 1*** EHRR 647 without adding any points of principle. ___
Applying the criminal standard of proof is wrong in three respects. First, it undermines one of the purposes of section 1 of the 1998 Act, namely, to render it easier to obtain an anti-social behaviour order than it would be to obtain a conviction for a comparable offence. Second, it conflates the two elements in section 1 of the 1998 Act. There is no reason why the criminal standard should be applied in relation to the question whether section I.(1)(b) is satisfied: that is a matter of evaluation as to future risk, and simply does not lend itself to being tested by reference to the criminal standard of proof. Third, in relation to the issues generally under section 1, the Court of

Appeal's approach subverts the proper classification of an anti- social behaviour order as involving civil proceedings.
The civil standard of proof should be regarded as a single fixed standard. However, the more serious the allegation the more cogent the evidence will need to be see ***in re H (Minors) (Sexual Abuse: Standard of Proof)*** [1996] AC 563.
Solley QC in reply. ***Kostovski v Netherlands*** (1989) 12 EHRR. 434 and ***Saidi v France*** (1993) 17 EHRR 251 involved a lack opportunity to examine witnesses.
The criminal standard of proof would not lie comfortably with the hearing of hearsay evidence under the Civil Evidence Act 1995. There should be a declaration of incompatibility under section 4 of the Human Rights Act 1998.
Fulford QC in reply. ***Raimondo v Italy*** 18 EHRR 237 and ***Guzzardi v Italy*** 3 EHRR 333 involved very different proceedings from an anti-social behaviour order. See also ***Krone-Verlog GmbH v Austria*** (Application No 28977/95) (unreported) 21 May 1997 and ***Nottingham City Council v Zain (A Minor)*** [2002] 1 WLR 607.
Their Lordships took time for consideration.
17 October. LORD STEYN
My Lords, section 1. of the Crime and Disorder Act 1998 ("the Act") provides for the making of anti-social behaviour orders against any person aged ten years or over. It came into force on 1 April 1999. Between 1 April 1999 and 31. December 2001. magistrates in England and Wales made 588 such orders and refused 19. It is important social legislation designed to remedy a problem which the existing law failed to deal with satisfactorily. This is the first occasion on which the House has had to examine the implications of section 1.
There are two appeals before the House. They are unrelated but raise overlapping issues. Both cases involve the power of the magistrates' court under section 1 of the Act, upon being satisfied of statutory requirements, to make an anti-social behaviour order prohibiting a defendant from doing prescribed things. Breach of such an order may give rise to criminal liability. That stage has, however, not been reached in either case. In the case of ***Clingbam*** no order has been made. In the case of the ***McCann*** breathers antisocial behaviour orders have been made against all three. The appeals are therefore concerned only with the first stage of

the procedure under the Act, namely, the application for such an order, and the making of it, and not with the second stage, namely proceedings taken upon an alleged breach of such an order.

Clingham the district judge gave a preliminary ruling on 14 September 2000. In the ***McCann*** case the recorder gave judgment on an appeal from a stipendiary magistrate on 16 May 2000. E11 both cases the Human Rights Act 1998 is not directly applicable: **R *v Kansal (No 2)*** I2002] 2 AC 69. The House has, however, been invited by all counsel to deal with the appeals as if the Human Rights Act 1998 is applicable. My understanding is that your Lordships are willing to do so.

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The principal issues ^

It is common ground that proceedings taken for breach of an antisocial behaviour order are criminal in character under domestic law and fall within the autonomous concept "a criminal charge" under **article 6** of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as scheduled to the Human Rights Act 1998. The principal general and common questions are:

(a) whether as a matter of domestic classification proceedings leading to the making of an anti-social behaviour order are criminal in nature; and

(b) whether under article 6 of the European Convention such proceedings involve "a criminal charge". Underlying these questions are two specific issues, namely:

(c) whether under section 1 of the Act hearsay evidence is admissible in proceedings seeking such an order.

24.11.2 what the standard of proof is in such proceedings. The evidential c question arises primarily in the ***Clingham*** case and the question as to standard of proof arises mainly in the ***McCann*** case. On the other hand, counsel for the defendants to a considerable extent adopted each other's submissions.

Jurisdiction

If under domestic law an application for an anti-social behaviour order under section r of the Act properly fails to be classified as civil proceedings, the House may not have jurisdiction in the ***Clingham*** case. The House has, however, jurisdiction to inquire into its own jurisdiction and to deal with all relevant matters pertinent to that inquiry. Moreover, the jurisdictional issue causes no real problem since the points which arise in the ***Clingham*** case arguably could arise in the ***McCann*** case. All parties wish the House to deal with the genera! and specific issues outlined which could arise in many proceedings under section 1. In these circumstances the jurisdictional question can be considered briefly at the very end of this judgment.

HI Section 1. of the Act and article 6 of the European Convention

In order to render the proceedings and issues intelligible it is necessary to set out section 1. of the Act. It appears in Part I of the Act under the heading "Prevention of Crime and Disorder". The material parts of section 1 read as follows:

"(1) An application for an order under this section may be made by a c relevant authority if it appears to the authority that the following conditions are fulfilled with respect to any person aged ten or over, namely—(a) that the person has acted, since the commencement date, in an anti-social manner, that is to say, in a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself; and (b) that

such an order is necessary to protect persons in the local government area in which the harassment, alarm or distress was caused or was likely to be caused from further antisocial acts by him; and in this section 'relevant authority' means the council for the local government area or any chief office: of police any part of whose police area lies within that area.

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A relevant authority shall not make such an application without
consulting each other relevant authority.

Such an application shall be made by complaint to the magistrates' court. . .

@ (4) If, on such an application, it is proved that the conditions mentioned in subsection (1) above are fulfilled, the magistrates' court g may make an order under this section (an 'anti-social behaviour order') which prohibits the defendant from doing anything described in the order.

"(5) For the purpose of determining whether the condition mentioned in subsection (I)(a) above is fulfilled, the court shall disregard any act of the defendant which he shows was reasonable in the circumstances.

"(6) The prohibitions that may be imposed by anti-social behaviour order are those necessary for the purpose of protecting from further antisocial acts by the defendant—(a) persons in the local government area; and (b) persons in any adjoining local government area specified in the application for the order. . .

"(7) An anti-social behaviour order shall have effect for a period (not less than two years) specified in the order or until further order.

"(8) Subject to subsection (9) below, the applicant or the defendant
may apply by complaint to the court which made an anti-social behaviour order for it to be varied or discharged by a further order.

"(9) Except with the consent of both parties, no anti-social behaviour order shall be discharged before the end of the period of two years beginning with the date of service of the order.

"(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.

"(11) Where a person is convicted of an offence under subsection (to) above, it shall not be open to the court by or before which he is so convicted to make an order under subsection (t)(b) (conditional discharge) of section 1A of the Powers of Criminal Courts Act 1973 ('the 1973 Act') in respect of the offence."

The section falls into two distinct parts. Subsection (r) deals with the making of the application, the requirements for the making of an order, ***C*** the making of an order, and consequential matters. Subsections (10) and (T 1) deal with the consequences of a breach of the order.

Article 6 of the European Convention provides as follows:

"(12) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced

publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion

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of the court in special circumstances where publicity would prejudice the interests of justice. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; (b) to have adequate time and facilities for the preparation of his defence; (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

While the guarantee of a fair trial under article 6(1) applies to both criminal and civil proceedings article 6 prescribes in paragraphs 2 and 3 additional protections applicable only to criminal proceedings. It is also well established in European jurisprudence that "the contracting states have greater latitude when dealing with civil cases concerning civil rights and obligations than they have when dealing with criminal cases": ***Dombo Beheer B v The Netherlands*** (1993) 18 EHRR 213, 2.2.9, Para 32

IV The C Mangham case

In late February 2000, the Kensington and Chelsea Royal London Borough Council received a report by a housing trust about the behaviour of the defendant, then aged 16, who lived on an estate within the borough. After detailed investigations the borough resolved to apply to the magistrates' court for an anti-social behaviour order. The complaint was supported by witness statements containing some first-hand evidence of the defendant's behaviour. The application was, however, primarily based on hearsay evidence contained in records of complaints received by the trust and in crime reports compiled by the police. The latter contained information relating to a wide range of behaviour, from allegations of verbal abuse to serious criminal activities including assault, burglary, criminal damage, and drug dealing dating from April 1998 to December 2000. The allegations revealed a high level of serious and persistent anti-social behaviour. The material from the records of the trust and the police fell into three categories: (I) anonymous complaints where the source was never known; (ii) complaints where the source was known but was not disclosed; (iii) computerised reports made by police officers in the course of their duties, where the source of the complaint was either unknown or not disclosed. The borough served its supporting material on the defendant. In substance the material in its cumulative effect was, subject to any answer by the defendant, logically probative of the statutory requirements under section r, The statements and exhibits were not, however, accompanied by a hearsay notice under the Magistrates' Courts (Hearsay Evidence in Civil Proceedings) Rules 1999 (SI 1999/681).

Pursuant to an order by the judge a hearsay notice was served on the defendant. The defendant challenged the validity of the hearsay notice on

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the ground that it did not identify the makers of the hearsay statements. At a pre-trial review the district judge ruled that on reflection, the 1999 Rules did not apply as the borough's supporting material involved no hearsay. The judge stated a case for the decision of the Divisional Court which raised questions about the admissibility of hearsay evidence in the proceedings under section 1(1) of the Act.

In the Divisional Court [2001] EWHC Admin 582 the view of the district judge as to what amounted to hearsay evidence was rejected. In an unreported judgment Schiemann. I., J observed that "If the policeman could only say that he had been told by such persons [who had seen the behaviour in question] that Mr Clingham had behaved in an anti-social manner that would be hearsay evidence of the behaviour": para 15. Relying on the then unreported decisions of the Divisional Court in ***R (McCann) v Crown Court at Manchester*** [2001] 1 WI. R 358 and ***B v Chief Constable of Avon and Somerset Constabulary*** [2001] 1 WLR 340 the Divisional Court ruled that the proceedings were not criminal proceedings under domestic law and did not involve a criminal charge under article 6. In these circumstances Schiemann LJ concluded, in paras 19-20:

"The |hearsay] evidence can be admitted. If its weight is slight or it is not probative the judge can say so. If he comes to an unlawful conclusion his decision can be appealed ... In the light of this judgment, it is unnecessary for us to make any order. The matter will remain to be dealt with by the magistrates' court. That court will consider the evidence on the basis that it is hearsay evidence and therefore subject to the criticisms which can be made of hearsay evidence. The court will have to consider what weight to give to the evidence in the light of those criticisms. I do not consider it appropriate for this court to express any views as to weight."

Poole [took the same view, at paras 21 and 22.

The McCann cases

I gratefully refer to the account given by my noble and learned friend Lord Hope of Craighead of the background to these cases. I can therefore deal with the matter briefly. Between May and September 1999 die Chief Constable of Greater Manchester collected evidence with a view to seeking anti-social behaviour orders against the three McCann brothers who were then respectively aged 13, 15 and 16. They had been accused by various members of the public of criminal activity and other anti-social behaviour including burglary, theft, threatening and abusive behaviour, and criminal damage in the Beswick area of Manchester. Complaints were duly lodged by the Chief Constable against them. The applications sought various prohibitions against them including orders excluding them from Beswick. The seriousness and persistence of their alleged anti-social behaviour is dearly described by Lord Hope of Craighead, (he evidences against them consisted of oral evidence of eye witnesses, as well as hearsay evidence consisting of a number of witness statements, and police evidence of what had been reported to them by complainants.

A stipendiary magistrate found the requirements of section 1(1) satisfied and made anti-social behaviour orders against all three McCann brothers on 15 December 1999. Each order provided as follows:

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"[The defendant] is prohibited from entering the Beswick area as defined, edged in red, on the map attached- [The defendant] is prohibited from using or engaging in any abusive, insulting, offensive, threatening or intimidating language or behaviour in any public place in the City of Manchester. [The defendant] is prohibited from threatening or engaging in violence or damage against any person or property within the City of Manchester. [The defendant] is prohibited from encouraging any other person to engage in any of the acts described in paragraphs a and 3 within the City of Manchester."
The defendants appealed to the Crown Court.
Sir Rhys Davies QC, the Recorder of Manchester, sat with two magistrates. After a review of the domestic and European case law he concluded that the proceedings under section 1(1) are correctly to be classified as civil under domestic law and for the purposes of article ***6.*** The recorder then turned to the argument that, despite this classification, the criminal standard should apply under section 1(1). He cited an observation in ***B v Chief Constable of Avon and Somerset Constabulary*** [2.00:1) 1 WLR 340, 354, para 31, where Lord Bingham of Cornhill CJ described, in the context of section z of the Act, which deals with orders against sex offenders, the heightened civil standard of proof as "for all practical purposes . . . indistinguishable from the criminal standard". I the recorder stated:
"Having considered this authority and the arguments, we are satisfied that the standard to be applied is the civil standard, but how are we to give effect to the guidance of the Lord Chief Justice, that is to apply the civil standard with the strictness appropriate to the seriousness of the matters to be proved and the implications of proving them. This is not an easy task and we have brought to bear the judicial experience of all three of us which, it is has to be said, is considerable, and we have concluded that in reality it is difficult to establish reliable gradations between a heightened civil standard commensurate with [the] seriousness and implications of proving the requirements, and the criminal standard. And we have concluded chat for the purposes of this particular case, and we do not intend to lay down any form of precedent, so I emphasise that for the purposes of this particular case, we will apply the standard of being satisfied so that we are sure that the conditions are fulfilled before we would consider the making of an order in the case of each [defendant] severally, because, of course, each case must be considered separately."
This is an important observation, by a highly experienced judge, to which I must in due course return.
The defendants appealed to the Divisional Court. Lord Woolf CJ (with the agreement of Rafferty **J)** ruled that the proceedings under section 1(1) were properly to be classified under domestic law and under article 6 of the European Convention as civil proceedings and not criminal proceedings. The court dismissed the appeal: R (***McCann) v Croum Court at Manchester*** [2.001] 1 WLR 3 58,
The defendants then appealed to the Court of Appeal (Civil Division). The leading judgment was given by Lord Phillips of Worth Matravers MR; Kennedy and Dyson IJJ agreed: ***R (McCann) 1/ Crown***

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A Court at Manchester [2001] t WLR 1084. In a detailed judgment Lord Phillips MR concluded that both under domestic law and under article 6 the correct categorisation of proceedings under section 1 of the Act is civil. He then turned to the issue whether the standard of proof should nevertheless be the criminal one. He referred to the observation of Lord Bingham of Cornhill CJ in ***B v Chief Constable of Avon and Somerset Constabulary*** that the heightened civil standard is for all practical purposes indistinguishable from the criminal standard: p 1101, para 65. He quoted the passage from the judgment of the recorder about the difficulty of establishing "reliable gradations between a heightened civil standard commensurate with the seriousness and implications of proving the requirements, and the criminal standard" and pointed out that the Crown Court decided to apply the criminal standard. Lord Phillips MR observed, at p 1102, para 67:

"I believe that the course followed by the Crown Court in this case is
likely to be appropriate in the majority of cases where an anti-social behaviour order is sought, and I would commend it."

At present therefore the position is that in proceedings under section I.(T) magistrates have to decide, on a case-by-case basis, what standard of proof to 0 apply. The Secretary of State has challenged this ruling of the Court of Appeal. Counsel submitted on his behalf that it is preferable to apply a single fixed standard of a balance of probabilities.

V! The social problem

Before the issues can be directly addressed it is necessary to sketch the social problem which led to the enactment of section T{I) and the

E technique which underlies the first part of section 1. It is well known that in some urban areas, notably urban housing estates and deprived inner-city areas, young persons, and groups of young persons, cause fear, distress, and misery to law-abiding and innocent people by outrageous anti-social behaviour. It takes many forms. It includes behaviour which is criminal such as assaults and threats, particularly against old people and children, F criminal damage to individual property and amenities of the community, burglary, theft, and so forth. Sometimes the conduct falls short of cognisable criminal offences. The culprits are mostly, but not exclusively, male. Usually they are relatively young, ranging particularly from about 1.0 to T,8 years of age. Often people in the neighbourhood are in fear of such young culprits. In many cases, and probably in most, people will only report _ matters to the police anonymously or on the strict understanding that they will not directly or indirectly be identified. In recent years this phenomenon became a serious social problem. There appeared to be a gap in the law. The criminal law offered insufficient protection to communities. Public confidence in the rule of law was undermined by a not unreasonable view in some communities that the law failed them. Ibis was the social problem which section 1 was designed to address.

· ***The legislative technique***

The aim of the criminal law is not punishment for its own sake but to permit everyone to go about their daily lives without fear of harm to person or property. Unfortunately, by intimidating people the culprits, usually

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small in number, sometimes effectively silenced communities, bear of the consequences of complaining to the police dominated the thoughts of people: reporting incidents to the police entailed a serious risk of reprisals.
The criminal law by itself offered inadequate protection to them. There was a model available for remedial legislation. Before 1998 Parliament had, on a number of occasions, already used the technique of prohibiting by statutory injunction conduct deemed to be unacceptable and making a breach of the g injunction punishable by penalties. It may be that the Company Directors Disqualification Act 1986 was the precedent for subsequent use of the technique. The civil remedy of disqualification enabled the court to prohibit a person from acting as a director: section 1(1) of the 1986 Act**: *R v Secretary of State for Trade and Industry, Ex p McCormick*** [1998] BCC 379, 395C-F; ***Official Receiver v Stern*** [2.000] 1 WLR 2.2.30. Breach of the order made available criminal penalties: sections 13 and 14 of the 1986 Act. In 1994 ***c*** Parliament created the power to prohibit trespassory assemblies which could result in serious disruption affecting communities, movements, and so forth: see section 70 of the Criminal Justice and Public Order Act 1994 which amended Part II of the Public Order Act 1986 by inserting section 14A. Section 14B which was introduced by the 1994 Act, created criminal offences in respect of breaches. In the field of family law, statute created the power to make residence orders, requiring a defendant to leave a dwelling house; or non-molestation orders, requiring a defendant to abstain from threatening an associated person: sections 3 3 (3)(4) and 42 of the Family Law Act 1996. The penalty for breach is punishment for contempt of court. The Housing Act 1996 created the power to grant injunctions against anti-social behaviour: section 152; section 153 (breach). This was, however, a power ^ severely restricted in respect of locality. A broadly similar technique was adopted in the Protection from Harassment Act 1997: section 3; section 3(6) (breach). Post-dating the Crime and Disorder Act 1998, which is the subject matter of the present appeals, Parliament adopted a similar model in sections 14A and 14J (breach) of the Football Spectators Act T989, inserted by section 1(1) of and Schedule ***1*** to the Football (Disorder) Act 2000: ***Gough v Chief Constable of the Derbyshire Constabulary*** [2002J QB 459. In all these cases the requirements for the granting of the statutory injunction depend on the criteria specified in the particular statute. The unifying clement is, however, the use of the civil remedy of an injunction to prohibit conduct considered to be utterly unacceptable, with a remedy of criminal penalties in the event of disobedience.
There is no doubt that Parliament intended to adopt the model of a civil remedy of an injunction, hacked up by criminal penalties, when its enacted section 1 of the Crime and Disorder Act 1998. The view was taken that the proceedings for an anti-social behaviour order would be civil and would not attract the rigour of the inflexible and sometimes absurdly technical hearsay rule which applies in criminal cases. If this supposition was wrong, in the sense that Parliament did not objectively achieve its aim, it would inevitably follow that the procedure for obtaining anti-social behaviour orders is completely or virtually unworkable and useless. If that is what the law decrees, so be it. My starting point is, however, an initial scepticism of an outcome which would deprive communities of their fundamental rights: sec ***Brown v Stott*** I2003] 1: AC 681, per Lord

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Bingham of Cornhill, at p 704E-F; per Lord Hope of Craighead, at pp 718G, 719B-C; my judgment, at p 707G-H.

The classification under domestic law

• It is necessary to consider whether under domestic law proceedings under the first part of **section 1** should be classified as criminal or civil fi proceedings. In law it is always essential to ask for what purpose a classification is to be made or a definition is to be attempted. It is necessary in order to decide whether the provisions of the Civil Evidence Act 1995, which permits the admission of hearsay evidence in civil proceedings, and the Magistrates' Courts (Hearsay Evidence in Civil Proceedings) Rules 1999, are available to establish the requirements of section 1(1). It is also relevant to the appropriate standard of proof to be adopted.

2.0 In a classic passage in ***Proprietary Articles Trade Association v Attorney General for Canada*** [1:931] AC 310, 314 Lord Atkin observed:

"Criminal law connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the state. The criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but on**e:** Is the act ^ prohibited with penal consequences?"

In ***Customs and Excise Conns v City of London Magistrates' Court*** [2000] 1 WLR 2,02,0, 2025 Lord Bingham of Cornhill C.1, expressed himself in similar vein:

"It is in my judgment the general understanding that criminal proceedings involve a formal accusation made on behalf of the state or by a private prosecutor that a defendant has committed a breach of the criminal law, and the state or the private prosecutor has instituted proceedings which may culminate in the conviction and condemnation of the defendant."

24.11.3 Absent any special statutory definition, in the relevant contexts, this general understanding must be controlling. Counsel for Gingham invited the House CO approach the question from the point of view of the meaning given in decided cases to the words "criminal cause or matter" which appear in section I(r)(a) of the Administration of justice Act 1.960 and section 1 8(I)(a) of the Supreme Court Act 198 1. The decided cases on both sides of the line are helpfully summarised in ***Taylor On Appeals*** (2000), pp 51:6—518, paras 14-020-14-021. The cases were decided in the context of regulating and determining the appropriate appeal route. Often pragmatic considerations played a role. These cases do not help the true inquiry before the House and distract attention from the ordinary meaning of civil proceedings which must prevail Similarly, the fact that proceedings under the first part of section r of the Act are classified as criminal in order to ensure the availability to defendants of legal assistance is in my view entirely W neutral: see section 12(2) of the Access to Justice Act 1.999 and paragraph T(I) of the Access to justice Act 1999 (Commencement No 3, Transitional Provisions and Savings) Order 2000 (SI 2000/774). I would approach rite matter by applying the tests enunciated by Lord Atkin and Lord Bingham of Cornhill CJ.

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Counsel for the defendants accepted that the purpose of Parliament A was to cast proceedings under the first part of section I, as opposed to proceedings for breach, in a civil mould. However, counsel submitted that objectively considered the objective was not achieved. They argued that in reality and in substance such proceedings are criminal in character. This is an important argument which must be carefully examined. The starting point is that in proceedings under the first part of section I the Crown Prosecution Service is not involved at all. At that stage there is no formal accusation of a breach of criminal law. The proceedings are initiated by the civil process of a complaint. Under section x(I}(a) all that has to be

established is that the person has acted "in an anti-social manner, that is to say, in a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself'. This is an objective inquiry: men's rea as an ingredient of particular offences need is not proved. It is unnecessary to establish criminal liability. The true purpose of the proceedings is preventative. This appears from the heading of Part I. It is also clearly brought out by the requirement of section I(I)(b}:
"that such an order is necessary to protect persons in the local government area in which the harassment, alarm or distress was caused or was likely to be caused from further anti-social acts by him. It follows that the making of an anti-social behaviour order is not a conviction or condemnation that the person is guilty of an offence. It results in no penalty whatever. It cannot be entered on a defendant's record as a conviction. It is also not a recordable offence for the purpose of taking fingerprints: see section 27 of the Police and Criminal Evidence Act 1:984.
Counsel for the defendants sought to avoid the consequences of this analysis by various arguments. First, they argued that the procedure leading to the making of an order under section 1(4) must be considered together with the proceedings for breach under section 1(1.0), the latter being undoubtedly criminal in character. I do not agree. These are separate and independent procedures. The making of the order will presumably sometimes serve its purpose and there will be no proceedings for breach. It is
in principle necessary to consider the two stages separately.
Counsel next made a comparison between the requirements of section 1 and the ingredients of an offence under section 4A of the Public Order Act 1986. They submitted that there was a striking similarity. This proposition was not made good. It is sufficient to point out that section 4A of the 1986 Act requires proof of men's rea whereas section 1(1) does not. In any event, this is a barren exercise. It elides the critical point that section 1 itself does not prohibit any act. An anti-social behaviour order under ***C*** section 1(4) does prohibit conduct specified in the order but ***by itself*** does not amount to a condemnation of guilt, ft results in no penal sanction.
Counsel for the defendants also emphasised the consequences which an anti-social behaviour order may have for a defendant. This is an important factor. Section 1 is not meant to be used in cases of minor unacceptable behaviour but in cases which satisfy the threshold of persistent and serious anti-social behaviour. Given the threshold requirements of section 1 (1) it can readily be accepted that the making of such an order against a person inevitably reflects seriously on his character. In response to this argument Lord Phillips of Worth Matravers MR observed 1200 t] 1: W I R 1084,1094-1095, para 39:

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"Many injunctions in civil proceedings operate severely upon those against whom they are ordered. In matrimonial proceedings a husband may be ordered to leave his home and not to have contact with his children. Such an order may be made as a consequence of violence which amounted to criminal conduct. But such an order is imposed not for the purpose of punishment but for protection of the family. This demonstrates that, when considering whether an order imposes a penalty or punishment, it is necessary to look beyond its consequence and to consider its purpose."
Similarly, ***Mareva*** injunctions, which are notified to a defendant's bank, may have serious consequences. An ***Anton Filler*** order operates in some ways like a civil search warrant and

may be particularly intrusive in its operation. Breach of such orders may result in penalties. Nevertheless, the injunctions are unquestionably civil.
The view that proceedings for an anti-social behaviour order under section 1 are civil in character is further supported by two important decisions. In ***B v Chief Constable of Avon and Somerset Constabulary*** [2001] 1 WLR 340 the question arose whether proceedings for a sex offender order under section 2 of the Act are civil. Section 2 is different in conception from section 1 in as much as an order can only be made in respect of a person who has already been convicted as a sex offender. On the other hand, its purpose is preventative "to protect the public from serious harm from him". Lord Bingham of Cornhill CJ held, at p 3 52, para 25:
"The rationale of section 2 was, by means of an injunctive order, to seek to avoid the contingency of any further suffering by any further victim. It would also of course be to the advantage of a defendant if he were to be saved from further offending. As in the case of a civil injunction, a breach of the court's order may attract a sanction. But, also as in the case of a civil injunction, the order, although restraining the defendant from doing that which is prohibited, imposes no penalty or disability upon him. I am accordingly satisfied that, as a matter of English domestic law, the application is a civil proceeding, as Parliament undoubtedly intended it to be."
To the same effect was the detailed reasoning in ***Gough v Chief Constable of the Derbyshire Constabulary*** [2002] QB 459; an^ 0,1 appeal [2002] QB 121.3. h was held that a football banning order under sections 14A and 1.4B of the Football Spectators Act 1989 do not involve criminal penalties and are therefore civil character.
conclude that proceedings to obtain an anti-social behaviour order are civil proceedings under domestic law.
· ***The classification under article 6***
The question now arises whether, despite its domestic classification, an anti-social behaviour order nevertheless has a criminal character in accordance with the autonomous concepts of **article 6.** The fair trial guarantee under article 6(1) applies to both "the determination of a (person's) civil rights" and "the determination of any criminal charge". On the other hand, only the latter attract the additional protections under article 6(2} and 6(3). In so far as the latter provisions apply to "everyone charged with a criminal offence" it is well established in the jurisprudence of

the European Court of Human Rights that this concept is co-extensive with ***A*** the concept of the determination of any criminal charg**e:** ***Lutz v Germany*** {1987) 10 EHRR i8z. Germane to the present case is the minimum right under article 6'(3)(d) of everyone charged with a criminal, offence to examine or have examined witnesses against him or to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. If the proceedings under section ***1*** of the Act are fi criminal within the meaning of article 6, this provision is applicable. If it is civil, article 6(3){d) is inapplicable.
Before I examine directly in the light of European jurisprudence the question whether proceedings involve a criminal charge, it is necessary to make clear that this is not one of those cases where the proceedings may fall outside article 6 altogether. Examples of such cases are given by ***Emmerson***

& Ashworth, Human Rights and Criminal Justice (2001), pp 152—166. In C the cases before the House the two principal respondents accept that the proceedings are civil in character and that they attract the fair trial guarantee under article 6(1). Counsel for the Secretary of State in the ***McCann*** case reserved his position. For my part, in the light of the particular use of the civil remedy of an injunction, as well as the defendant's right under article 8 to respect for his private and family life, it is dear that a defendant Q has the benefit of the guarantee applicable to civil proceedings under article 6(1). Moreover, under domestic English law they undoubtedly have a constitutional right to a fair hearing in respect of such proceedings.

In ***Engel v The Netherlands (No 1)*** (1976) 1 EHRR 647, 678-679, para 82, the European Court established three criteria for determining whether proceedings are "criminal" within the meaning of the Convention, namely (a) the domestic classification, (b) the nature of the offence, and (c) the severity of the potential penalty which the defendant risks incurring. The character and attributes of the proceedings for an anti-social behaviour order have been outlined. Domestically, they are properly classified as civil.

That is, however, only a starting point. Turning to factor (b), the position is that the order under the first part of section 1 does not constitute a finding that an offence has been committed: contrast the community charge decision

in ***Benhatn v United Kingdom*** (1996) 22 EHRR 293. It is right, however, to observe that the third factor is the most important. Here the position is that the order itself involves no penalty. The established criteria suggest that the proceedings were not in respect of a criminal charge.

The House has been taken on a tour d'horizon of the leading decisions of the European Court: see the judgment of Potter LJ in ***Han v Customs and Excise Comrs*** [2001] 1 WLR 2253, 2269-2273, paras 55-64 C for a recent review of the European case law. It will serve no purpose to review again decisions far removed from the present case. What does emerge, however, is that there is, as Lord Bingham of Cornhill CJ pointed out in ***B v Chief Constable of Avon and Somerset Constabulary*** [2001]

1 WLR 340, no case in which the European Court has held proceedings to be criminal even though an adverse outcome for the defendant cannot result in ^ any penalty. It could be said, of course, that there is scope for the law to be developed in this direction. On the other hand, an extensive interpretation of what is a criminal charge under article 6(r) would, by rendering the injunctive process ineffectual, prejudice the freedom of liberal democracies to maintain the rule of law by the use of civil injunctions.

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A 32 The closest case in support of the defendants' submission is ***Steel v United Kingdom*** (1998) 28 EHRR 603, 635-636, paras 48-49, which is authority for the proposition that proceedings whereby in England and Wales a person may be bound over to keep the peace involve the determination of a criminal charge for the purposes of article 6. This power goes back many centuries: see ***Percy v Director of Public Prosecutions*** [1995] 1 WLR 1382, 138911-139011. It is in a very real sense a judicial power sui generis. The European Court found a punitive element in the fact that the magistrates may commit to prison any person who refuses to be bound over not to breach the peace where there is evidence beyond reasonable doubt that his or her conduct caused or was likely to cause a breach of the peace and that he would otherwise cause a breach of the peace: para 48. There was an immediate

and obvious penal consequence. Properly analysed this case does not assist the defendant's argument.
The conclusion I have reached is reinforced by a cogently reasoned judgment on the interpretation of article 6 by the Lord President (Lord Rodger of Earls ferry) in ***S v Miller*** 2001 SC 977. Section 52(2) of the Children (Scotland) Act 1995 provides that a child may have to be subjected to compulsory measures of supervision when he "has committed an offence". The question arose whether in such proceedings article 6 is applicable. The Lord President observed, at pp 989-990: at the stage when S was arrested and charged by the police on 31 October, he was indeed 'charged with a criminal offence' in terms of article 6, since he was liable to be brought before a criminal court in proceedings which could have resulted in the imposition of a penalty. He remained 'charged with a criminal offence' in terms of **article 6** until the procurator fiscal decided the following day—in the language of section 43(5) of the Criminal Procedure Act— 'not to proceed with the charge'. At that point the criminal proceedings came to an end and the reporter initiated the procedures under the 1995 Act by arranging a hearing in terms of section 63(1), In my view, once the procurator fiscal has decided not to proceed with the charge against a child and so there is no longer any possibility of proceedings resulting in a penalty, any subsequent proceedings under the 1995 Act are not criminal for the purposes of article 6. Although the reporter does indeed intend to show that the child concerned committed an offence, this is not for the purpose of punishing him but in order to establish a basis for taking appropriate measures for his welfare. That being so, the child who is notified of grounds for referral setting out the offence in question is not thereby 'charged with a criminal offence' in terms of article 6.
"24, It is not now disputed, of course, that the children's hearing proceedings involve the determination of civil rights and obligations. Article 6 therefore applies. But, since the proceedings are not criminal, the specific guarantees in article 6(2) and (3) do not apply."
I am in complete agreement with this reasoning as correctly reflecting the purpose of article 6. And it applies a fortiori to proceedings under section 1. After all, section 1(1) does not require proof of a criminal offence.
In my view an application for an anti-social behaviour order does not involve the determination of a criminal charge.

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The admission of hearsay evidence

• Having concluded that the proceedings in question are civil under domestic law and article 6, it follows that the machinery of the Civil Evidence Act 1995 and the Magistrates' Courts (Hearsay Evidence in Civil Proceedings) Rules 1999 allow the introduction of such evidence under the first part of section 1. The weight of such evidence might be limited. On the other hand, in its cumulative effect it could be cogent. It all depends on the particular facts. In my view the ruling of the Divisional Court, set out in paragraph Ro above, was correct.
• It is submitted that, even if the relevant proceedings are civil, words must be implied into the Civil Evidence Act 1995 which give the court a wider power to exclude hearsay evidence. As the Divisional Court judgment makes clear this is unnecessary and unwarranted. Counsel in the C***lingham*** case then argued that, even if the proceedings are civil, nevertheless the introduction of hearsay evidence infringes a defendant's right to a fair trial under article 6(1) "in the determination of his civil rights and obligations". This is a misconceived argument. The case has not been heard. Such a challenge is premature. Upon a due consideration of the

evidence, direct or hearsay it may turn out that the defendant has no answer to the case **under section 1** (1). For the sake of completeness, I need only add that the use of the Civil Evidence Act 1:995 unless in cases under the first part of section 1 are not in any way incompatible with the Human Rights Act 1998.

The standard of proof

· Having concluded that the relevant proceedings arc civil, in principle it follows that the standard of proof ordinarily applicable in civil £ proceedings, namely the balance of probabilities, should apply. However,

I agree that, given the seriousness of matters involved, at least some reference to the heightened civil standard would usually be necessary: ***In re H (Minors) (Sexual Abuse: Standard of Proof)*** [1996] AC 563, 586D-H, per Lord Nicholls of Birkenhead. For essentially practical reasons, the Recorder of Manchester decided to apply the criminal standard. The Court of Appeal said that would usually be the right course to adopt. Lord Bingham of Cornhill has observed that the heightened civil standard and the criminal standard are virtually indistinguishable. I do not disagree with any of these views. But in my view pragmatism dictates that the task of magistrates should be made more straightforward by ruling that they must in all cases under section 1 apply the criminal standard. If the House takes this view it will be sufficient for the magistrates, when applying section T (I){a) ***to be sure c*** that the defendant has acted in an anti-social manner, that is to say, in a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself. The inquiry under section I(I)(b), namely that such an order is necessary to protect Persians from further anti-social acts by him, does not involve a standard of proof: it is an exercise of judgment or evaluation. Ibis approach should facilitate correct decision-making and should ensure consistency and predictability in this corner of the law. In coming to this conclusion, I bear in mind that the use of hearsay evidence will often be of crucial importance.

For my part, hearsay evidence depending on its logical proactiveness is quite capable of satisfying the requirements of section 1.

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A XII The submissions of Liberty

The House gave permission to Liberty to intervene in the ***McCann*** case in writing and orally. The contribution of Liberty has helped to sharpen the focus of the debate on issues under the Human Rights Act 1998. It is, however, unnecessary to deal separately with the submissions of Liberty. The reasons I have given are also dispositive of the issues and arguments
g raised by Liberty.

· ***Jurisdiction***

Section x(x)(a) of the Administration of Justice Act i960 only permits an appeal from a decision of the High Court "in any criminal cause or matter". In my view the proceedings under the first part of **section 1** do not satisfy this criterion. It follows that in the ***Clingman*** case the House did not have jurisdiction to entertain the appeal.

· ***Disposal***

For these reasons as well as the reasons given by Lord Hope of Craighead I would dismiss the appeals in the ***McCann*** case and formally declare that there was no jurisdiction to hear the C***lingham*** case.

LORD HOPE OF CRAIGHEAD

My Lords, in a democratic society the protection of public order lies at the heart of good government. This fundamental principle has a prominent place in the European Convention for the Protection of Human Rights and Fundamental Freedoms. Among the grounds on which a public
authority may interfere with the rights described in articles 8 to T 1: of the Convention, are public safety, the protection of public order and the protection of the rights and freedoms of others. It is only in article 10(1) that one finds an express declaration that the exercise of freedoms carries with its duties and responsibilities. But it is a theme which runs right through the Convention. Respect for the rights of others is the price that we must all pay for the rights and freedoms that it guarantees.
On the whole we live in a law-abiding community. Most people respect the rights of others, most of the time. People usually refrain from acts which are likely to cause injury to others or to their property. On the occasions when they do not, the sanctions provided by the criminal law are available. But it is a sad fact that there are some individuals for whom respect for the law and for the rights of others has no meaning. Taken one by one, their criminal or sub-criminal acts may seem to be, and indeed often are, relatively trivial. But, taken together, the frequency and scale of their destructive and offensive conduct presents a quite different picture. So does the aggression and intimidation with which their acts are perpetrated. 1 he social disruption which their behaviour creates is unacceptable. So too is the apparent inability of the criminal law to restrain their activities. This provides the background to the enactment of section 1 of the Crime and Disorder Act 1998 with which your Lordships are concerned in these appeals.
The main question which they raise is the familiar one of classification. If proceedings under section 1 of the Crime and Disorder Act 1998 are to be classified as criminal proceedings for the purposes of

article 6 of the Convention, all the normal rules of evidence which apply to a criminal prosecution in domestic law must be applied to them. This is of crucial importance to the use which may be made in these proceedings of hearsay evidence. In domestic terms, hearsay evidence under the Civil Evidence Act 1995 would be inadmissible in these proceedings if they are too, he classified as criminal. In Convention terms, the persons against whom anti-social behaviour orders were sought would be entitled to the protection g of article 6(3){d) if it applies to them. Under that paragraph every person charged with a criminal offence has the right to examine or have examined the witnesses against him. But much of the benefit which the legislation was designed to achieve would be lost if this is how these proceedings have to be classified. It would greatly disturb the balance which **section 1** of the Crime and Disorder Act 1998 seeks to strike between the interests of the individual and those of society.
The reason for this is not hard to find. So often those who are directly affected by this conduct lack both the inclination and the resources to do anything about it. Above all, they have been intimidated and they are afraid. They know that they risk becoming targets for further anti-social behaviour if they turn to the law for their protection. It is unrealistic to expect them to seek the protection of an injunction under the civil law. Reports to the police about criminal conduct are likely to result in their having to give evidence. In this situation

the opportunity which civil proceedings provide for the use of hearsay evidence is a valuable safeguard.
It greatly increases the prospect of persuading those who are likely to be exposed to further anti-social behaviour to co-operate with the authorities in protecting them from such conduct.
The facts
The facts of the ***Clingham*** case have been described by my noble and learned friend Lord Steyn, and I gracefully adopt his account. As he has pointed out, it is a striking feature of that case that two of the statements relied on were anonymous and two of them were by persons who were in fear of reprisals if they were to be called on to give evidence. I should like to ^ deal in my speech with the facts in the case of ***McCann***, which has similar characteristics.
The defendants in the case of ***McCann*** are three brothers who all live
in the Ardwick area of Manchester. They were aged 16, 15 and 1.3 011 1:7 May 2000 when anti-social behaviour orders were made against them by Judge Rhys Davies QC, the Recorder of Manchester, sitting in the Crown Court with lay magistrates.
The Chief Constable of Greater Manchester had been collecting evidence against the defendants for a period of about five months between May and September 1999. They had been accused by various members of the public in the Beswick area of Manchester of threatening and abusive behaviour, causing criminal damage, theft, and burglary. On 28 September 1999 the Chief Constable consulted with Manchester City Council, the council for the relevant local government area, as required by section 1 of
the Crime and Disorder Act 1998. I hey agreed that an application for antisocial behaviour orders should be made. 1 the Chief Constable laid complaints against the defendants at Manchester Magistrates' Court on 22 October 1999, and summonses were served on them on 1 November
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19951. On 15 December 1999 Mr Alan Berg, a stipendiary magistrate, made anti-social behaviour orders against each of them, which they then appealed. Their appeal was heard in the form of a rehearing by the Crown Court.
The stipendiary magistrate held that the defendants had acted in a manner which caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as themselves by offensive, abusive, insulting, threatening and intimidating words and behaviour as well as violent behaviour towards people in the local authority area of Manchester. He also held that an anti-social behaviour order was necessary to protect persons in that area and he made prohibitions against each of them. Dismissing their appeals, the Crown Court made identical orders to those made by the magistrate which prohibited each of them: (x) from entering the Beswick area as defined, edged in red on the map attached; (2) from using or engaging in any abusive, insulting, offensive, threatening or intimidating language or behaviour in any public place in the City of Manchester; (3) from threatening or engaging in violence or damage against any person or property within the City of Manchester; (4) from encouraging any other person to engage in any of the acts described in paragraphs 2 and 3 within the City of Manchester.
- The evidence against the defendants consisted in part of direct
evidence and in part of hearsay evidence. Four members of the public gave evidence of various acts of anti-social behaviour. One said that he had been abused on one occasion by two of the defendants and that he had been threatened and assaulted on another occasion by the third. The second said that he had been abused on one occasion by one of the defendants, who on the same occasion also assaulted an unknown youth. the third was an employee of a

local supermarket who said that on a number of occasions between April and November 1999 she had been abused, threatened, harassed, and alarmed by all three defendants. The fourth said that he and his customers had been abused by all three defendants between April and September 1999 and that the defendants had sought to intimidate them. Three police officers also gave evidence. One said that on one occasion the oldest defendant caused alarm and physical danger to others by driving a vehicle recklessly. Another said that, on another occasion the same defendant was party to the theft of a bag from a car. A third gave direct evidence of threats and abuse by two of the defendants of a householder by banging on the door and interfering with the electrics of the property. This incident was also the subject of anonymous hearsay evidence. Anonymous hearsay evidence was also given by the police of four other incidents. One was burglary of domestic premises by two of the defendants. The second was damage to a motor vehicle by the same two defendants. The third was the throwing of items into the street from scaffolding which they had climbed. The fourth was the abuse by one of them of market stall holders. There was also a hearsay witness statement of the abuse by two of the defendants of firefighters. _
The overall picture which was painted by the evidence was of a prolonged course of behaviour which caused or was likely to cause harassment, alarm, or distress to many people in the local government area during this six-month period. The contribution which was made to the picture by the hearsay evidence, while not perhaps crucial, was certainly significant.

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Classification in domestic law

I agree with Lord Steyn, for all the reasons that he has given, that proceedings leading to the imposition of an anti-social behaviour order under section r of the Crime and Disorder Act 199^ are civil proceedings in domestic law. I should like to add only a few observations to what he has
said. .
Section 19 of the Crime and Disorder Act 1998 provides tor the g imposition of anti-social behaviour orders in Scotland. There are some differences of detail in the scheme which this section lays down from that which section 1 lays down for use in England and Wales. But the broad aim
is the same. It is designed to deal with persons who have acted in an antisocial manner or have pursued a course of anti-social conduct that caused or was likely to cause alarm or distress. A conviction for breach of an antisocial behaviour order in Scotland carries with it the same penalties under section 22(1) as those prescribed for England and Wales by section r(io)- The important point for present purposes lies in the choice which Parliament has made as to the proceedings which are to be used for making these applications in Scotland. Section 19(2) provides that an application for an anti-social behaviour order shall be made by summary application to the sheriff within whose sheriffdom the alarm or distress was alleged to have been caused or was likely to have been caused.
3 The question whether a summary application to a sheriff a civil proceeding in Scots domestic law is quite straightforward in comparison with the equivalent and more complex question under English law. This is because the Scottish system has always maintained a firm distinction at levels between criminal and civil procedure. The civil nature of the _ procedure for the imposition of anti-social behaviour order is indicated at the outset by the fact that section 19(1) of the Crime and Disorder Act 1998 provides that an application for an anti-

social behaviour order is to be made by the local authority. Criminal proceedings cannot be brought by a local authority in Scotland. They can be brought only by or on the authority of the Lord Advocate. Then there is the nature of the procedure that is prescribed by section 19(2). A summary application to the sheriff is defined by section 3 (p) of the Sheriff Courts (Scotland) Act 1907 as including all applications, whether by appeal or otherwise, brought under any Act of Parliament which provides, or, according to any practice in the sheriff court, which allows that the same shall be disposed of in a summary manner, but which does not more particularly define in what form it is too he heard, tried or determined. The long title of the 1907 Act states that it is an Act to regulate and amend the laws and practice relating to the civil procedure in sheriff courts in Scotland. An appeal against the judgment of the sheriff on a summary application lies to the sheriff principal and to the Court of Session, cither direct or from the sheriff principal, under sections 27 and 28 of the 1907 Act. The fact that appeals do not He to the High Court of Justiciary, which has exclusive jurisdiction for the hearing of appeals in criminal cases, is a further sign, if more were needed, that in domestic terms this is a civil proceeding.

It is worth noting that in ***S v Miller*** 2001 SC 977, 988, para 19 Lord President Rodger said that children's hearings under section 52 of the Children (Scotland) Act 1995, a«<J- the related proceedings before the sheriff, have always been regarded as being civil in character, even where they

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contain a ground for referral under section 5i(I){I) which is chat the child has committed an offence. In ***McGregor v D*** 1977 SC 330, 336 Lord President Emslie said, with reference to the provisions of Part III of the Social Work (Scotland) Act 1968 which have now been re-enacted with amendments in Part II of the Children (Scotland) Act T.995, that in no sense were these proceedings criminal proceedings. As he put it, they are on the contrary civil proceeding's sui generis. Where the ground of referral is that the child has committed an offence and the sheriff is asked to consider whether this ground has been established under section 68 of the 1995 Act, the standard of proof which must be applied is that which is required in criminal procedure: section 68(3)(b). The Civil Evidence (Scotland) Act 1988 provides for the abolition of corroboration and the admission of hearsay evidence in civil proceedings. But section 9 of that Act excepts from the definition of "civil proceedings" for the purposes of chat Act any hearing by a sheriff of an application under what is now Part II of the Children (Scotland) Act 1995 where the ground of referral was that the child has committed an offence. Nevertheless, the proceedings which Parliament has laid down for the determination of these applications by the sheriff is civil procedure. The reason for this, as the Lord President said in ***S v Miller*** 2001 SC 977, 988, para 20, is that, even though the proceedings may involve establishing that the child has committed an offence, there is no possibility of the child being punished for the offence under them by the imposition of a penalty. This approach is consistent with the principle which was referred to by Lord Wright in ***Amand v Home Secretary*** [1943] AC 147, r6T where he said that a criminal cause or matter was one which, if carried to its conclusion, might result in the conviction of the person charged and in a sentence of some punishment.

I think that two important points can be derived from these provisions relating to Scotland in support of the proposition that proceedings which are brought in England and Wales under section 1 of the Crime and Disorder Act 1998 are civil proceedings. The first is that the fact that Parliament chose to provide for the use of civil proceedings in applications for anti-social

behaviour orders in Scotland strongly suggests that its intention was that applications for these orders which were made in England and Wales should be made by way of civil proceedings also. The grounds on which these applications may be made in both jurisdictions are similar, and the consequences of the making of an anti-social behaviour order are the same. In neither jurisdiction does an anti-social behaviour order have them. character of a punishment for an offence such as a fine or imprisonment. The fact that an anti-social behaviour order has been made against him does not appear on the person's criminal record. On the contrary, the order is described in both section 1(4) and section 1:9(3) as a prohibition. In this respect it has the character of a civil injunction or, in Scotland, a civil interim interdict. A criminal sanction is available in both jurisdictions if the person is convicted of having breached the order: see section 1 (Ro) for England and Wales and section 1 for Scotland. But the proceedings which must be brought in the event of a breach are separate proceedings. Overall, the scheme is so similar in both jurisdictions that the intention of Parliament as to the nature of the proceedings under which the application was to be made can be taken, in the absence of any contrary indication, to have been the same.

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The second point is that it would not be inconsistent with a finding that the proceedings under section I(I) of the Crime and Disorder Act 1998 were civil proceedings for your Lordships to hold that the standard of proof to be applied was that which is required in criminal proceedings. In ***Constanda v M*** r 997 SC 217 the ground on which the child had been referred to a children's hearing was that he was exposed to moral danger in terms of section 3 2. (2.) (b) of the Social Work (Scotland) Act 1968. The Court of Session held that, as the whole substratum of the ground of referral was that the child had performed certain acts which constituted criminal offences, the commission of these offences had to be proved to the criminal standard. This was despite the fact that the proceedings before the sheriff were civil proceedings, and in the absence of any rule laid down by the Act which required the criminal standard to be applied in any case other than where the child had been referred under section 32(2) ^) on the ground that he had committed an offence.

Classification under the Convention

The fact that the proceedings are classified in our domestic law as civil proceedings is not conclusive of the question whether they are of that character for the purposes of article 6 of the Convention. It provides no more than a starting point, as the question has to be examined in the light of the common denominator of the legislation of the contracting states: ***Engel v The Netherlands (No 1)*** 1 EHRR 647, 678, para 82.

The examination must begin with the wording of article 6 itself, and in particular with the opening sentence of article 6(1). It provides:

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

Then there are the opening words of article 6(3) which provides chat everyone "charged with a criminal offence" is to have the minimum rights which are set out in that article.

There are two aspects of the wording of article 6 that I think are worth noting before I turn to the authorities. The first is that, for article 6 to apply at all, the proceedings must be capable of being classified either as proceedings for the determination of the person's "civil rights and obligations" or as proceedings for the determination of a "criminal charge" against him. Rut

it would be wrong to approach the article on the assumption that all that is in issue is the question as to which of these two descriptions better fits the nature of the proceedings. It is not a straight choice between one description and the other. It is possible that the proceedings which are in. issue in a given case will fit neither description. In ***Albert and Le Compte v Belgium*** (1983) 5 EHRR 533, 539, para 25 the court observed that there are some cases which are not comprised within either of these categories and which thus fall outside the ambit of article 6(1). For example, in ***Ravnsborg v Sweden*** (1994) r8 EHRR 38 the court held that article 6 did not apply to proceedings where the applicant had been fined for making improper statements in written observations before the Swedish courts. The proceedings were regarded as being outside the ambit of article 6 because they were disciplinary in character: p 51, para 34. In

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A Raimondo v Italy (1994) 18 EHRR 237 the court held that article 6 did not apply to the proceedings which led to the applicant being placed under special police supervision.

The second aspect of the wording that is worth noting is that those parts of article 6 which refer to criminal proceedings make it clear that the essential feature of proceedings that have that character for the purposes of

g the Convention is that the person is "charged with a criminal offence". This expression is to be interpreted as having an autonomous meaning in the context of the Convention: ***Adolf v Austria*** (1982) 4 EHRR 313, 322, para 30. So careful attention must be paid to the meaning which has been attached to these words by the Strasbourg court. As is by now very well known, the case law has established that there are three criteria to be considered. They are not always stated in precisely the same language, but they are usually said to be (1) the classification of the proceedings under national law, (2) the nature of the offence and (3) the nature and degree of severity of the penalty: ***Engel u The Netherlands (No 1) 1*** EHRR 647, 678-679, paras 82-83; ***Benham v United Kingdom*** 22 EHRR 293, 323, para 56.

The words "criminal charge" themselves suggest that the proceedings which they have in mind are not just proceedings where a

"charge" is made. The question is whether they are proceedings which may result in the imposition of a penalty. This point emerges clearly from the French text of article 6(r), as Lord President Rodger pointed out in ***S v Miller z001 SC*** 977, 988, para 21. It states that the matter which is to be determined must be either a dispute "sur ses droits et obligations de £ caractere civil" or an "accusation en matiere penale". The words "en matiere penale" indicate it is envisaged that there will be a penal element. The court seems to have had this point in mind when, in ***Engel v The Netherlands (No 1),*** at p 678, para 82, it asked itself when it was setting out the first criterion "whether the provision(s) defining the offence charged belong, according to the legal system of the respondent state, to criminal law, disciplinary law or both concurrently." In other words, proceedings ^ involving a charge which is merely disciplinary in character will not fall within the ambit of article 6.

In ***Oztiirk v Germany*** (1984) 6 EHRR 409, 421, para 50 the court said that the first matter to be ascertained was "whether or not the text defining the offence in issue belongs, according to the legal system of the respondent state, to criminal law". In the continental systems the texts in question are likely to be found in a code, and there is often a separate criminal code which can readily be identified. As the Lord President observed in ***S v Miller*** 2001 SC 977, 988-989, para 21:

"the very titles of such codes of criminal law will often reveal that they are indeed concerned essentially with 'matiere penale'. For instance, in France there is a 'code penaie', in Italy a codice penale1, in Spain a codigo penal' and in Germany a 'Strafgesetzbuch'. It follows that when, in such cases as ***Ozturk,*** the court investgiates whether the text defining the offence belongs to criminal law, it is investigating whether the text belongs to an area of the law where proceedings can result in a penalty being imposed."=

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Ministerial foreword

It is now seven years since anti-social behaviour orders (ASBOs) were introduced following the Crime and Disorder Act 1998. Since then, over 7,300 ASBOs have been issued. We often hear from residents up and down the country about how useful they are in bringing respite to communities suffering anti-social behaviour, the drive to tackle anti-social behaviour has been pioneered by anti-social behaviour practitioners and other interested parties all over England and Wales.

During this time much has happened:

For our part we have adjusted policy and response to changing demands prompted by practitioners to ensure that the tool continues to be effective.

The Together Action Line, website and Academy events have provided an excellent source of advice and ensured spread of good practice.

Practitioners have developed protocols and helpful leaflets to improve communication between themselves.

A number of organisations have also organised seminars and conferences to bring practitioners together, debate problem areas and resolve issues between them.

The courts have responded and played their part and we particularly welcome Lord Justice Thomas's guidance, which has been referred to substantially for the revision of this guidance, and which provides the latest case law for practitioners in a very clear and methodical manner.

The fundamental ethos of ASBOs remains that they combine the twin-track approach of enforcement and support.

However, there have also been some developments and policy adjustments as the courts have interpreted ASBO legislation as more and more cases come before them.

After ASBOs were first introduced, orders on conviction were introduced to improve access and timing; and interim orders for extreme cases where communities needed protecting urgently. Since May 2004 courts have been able to issue individual support orders to juveniles issued with ASBOs on application. This is a positive measure, attaching positive

conditions to ensure that young people get all the support they need to change their behaviour. I urge agencies to make the greatest possible use of them.
We are also extending the power to apply for orders to the Environment Agency and Transport for London.
We continue to listen to the views of practitioners and stakeholders and to adjust policy and legislation accordingly. One illustration of this has been the development of the one-year review of ASBOs issued to young people, which is explained in this guidance. Although it is not yet enshrined in legislation, we feel that this formalises existing good practice to ensure that young people are provided with the right support throughout the duration of their ASBO. We also hope to introduce later this year measures to empower the courts to apply rigorous case management in ASBO proceedings.
This guidance is also issued in the context of the Respect programme which builds on the Government's anti-social behaviour strategy. Under the Respect drive, we will maintain and build on the strong enforcement action that has helped us make so much progress, but extend this further through a comprehensive strategy to deliver:
a new approach to tackling problem families.
a wide-ranging programme to address poor parenting.
measures to improve behaviour and attendance in schools.
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initiatives to provide constructive activities for young people; and
a drive to strengthen communities through more responsive public services.
I am delighted to introduce this new guidance which I am sure everyone working in the field of anti-social behaviour will find to be a source of reference that is both useful and informative.
TONY Mc NULTY
August 2006
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Introduction
This guidance on ASBOs draws on the experience of the police service, local authorities, youth offending teams, the courts and other organisations, it is intended for use by practitioners - people with a professional responsibility for tackling anti-social behaviour, whether they represent local authorities, the police, youth offending teams, registered social landlords, prosecutors, the courts, or any other agency which seeks to tackle the problem of anti-social behaviour.
The crime and disorder reduction partnership lies at the heart of the Government's approach to the reduction of both crime and anti-social behaviour (much of which is of course criminal in nature). All crime and disorder reduction partnerships have an antisocial behaviour co-ordinator and access to them is published on the Together website (www.together.gov.uk).All partnerships, too, are required to draw up strategies for the reduction of anti-social behaviour in their areas, and the anti-social behaviour co-ordinators are in the best position to ensure that those strategies genuinely reflect the needs of the community served by the partnerships.
Anti-social behaviour is given a wide meaning by the legislation - to paraphrase the (Time and Disorder Act 1998, it is behaviour that causes or is likely to cause harassment, alarm or

distress to one or more people who are not in the same household as the perpetrator. Among the forms it can take are.
graffiti - which can on its own make even the tidiest urban spaces look squalid and can act as a magnet for further anti-social behaviour and crime.
abusive and intimidating language too often directed at minority groups.
excessive noise, particularly late at night.
fouling the street with litter.
drunken behaviour in the streets, and the mess it can result in; and
dealing drugs, with all the problems to which it gives rise.
There has been considerable criticism of the current wording being too wide. However, the House of Commons Select Committee looked at this in its report on anti-social behaviour and concluded that it would be a mistake to make it more specific because:
the definitions work well from an enforcement point of view and no significant practical problems appear to have been encountered.
exhaustive lists of the kind of behaviour considered anti-social by central government would be unworkable and anomalous; and
anti-social behaviour is inherently a local problem and may be of a different nature in different localities.
This flexibility is therefore a major strength of the current statutory description of antisocial behaviour.
Anti-social behaviour is an issue that concerns everyone in the community. Incidents that cause harassment, alarm and distress cannot be written off as generational issues - they impact on the quality of life of young and old alike. And they require a response that puts partnership into action.
Just as the problems of anti-social behaviour are wide-ranging, the solutions too must operate equally effectively on many levels. While an energetic and constructive police response is essential, it must be supplemented by engagement from a wide variety of partners. To take only the most obvious, schools need to have effective policies in place against truancy and bullying, and the police need to work closely with licensing authorities in order to tackle alcohol-related problems. Local authorities and registered social landlords need to take responsibility for acting against anti-social behaviour by them
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1 House or Commons Select Committee, ***Anti-Social Behaviour: 5th Report of Session 2004 -05,*** recommendation 7.

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Introduction

tenants and against their tenants. Social services need to ensure that they are taking the welfare of the whole community fully into account when making decisions, as well as taking care of the perpetrators. And, just as important, all of these bodies need to be sharing information with each other to the fullest possible extent in order to act fairly and decisively against the problems of antisocial behaviour.
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Anti-social behaviour orders: the basics

What are anti-social behaviour orders?
Anti-social behaviour orders (ASBOs) were introduced by section 1 of the Crime and Disorder Act 1998 in England and Wales and have been available since April 1999.The

powers to deal with anti-social behaviour were strengthened and extended by the Police Reform Act 2002, which introduced the power to make similar orders on conviction in criminal proceedings, and in county court proceedings, and the power to make interim orders. Orders can now also extend across any defined part of England and Wales. The provisions relating to orders on conviction under section 1C and interim orders under section ID in the magistrates' courts were inserted in the 1998 Act by the Police Reform Act 2002 and came into force on 2 December 2002.

The provisions relating to orders in county court proceedings (section 1B) were also inserted in the 1998 Act by the Police Reform Act 2002 and came into force on 1 April 2003.

ASBOs are civil orders to protect the public from behaviour that causes or is likely to cause harassment, alarm or distress. An order contains conditions prohibiting the offender from carrying out specific anti-social acts or from entering defined areas and is effective for a minimum of two years. The orders are not criminal sanctions and are not intended to punish the offender.

Applications for ASBOs are made to the magistrates' court by 'relevant authorities' which include local authorities, chief officers of police, registered social landlords, housing action trusts or any other person or body specified by the order of the Secretary of State (as previously mentioned, it is intended that the Environment Agency and Transport for London be specified for this purpose).

A similar order can be applied for during
related proceedings in the county court and can be requested on conviction of certain offences in the criminal courts. It remains a civil order irrespective of the issuing court.

ASBOs are community-based orders that involve local people not only in the collection of evidence to support an application but also for the purpose of helping to enforce breaches. By their nature they encourage local communities to become actively involved in reporting crime and disorder and to contribute actively to building and protecting the community. The civil status of ASBOs has implications for the nature of the proceedings at which applications are heard. For example, hearsay and professional witness evidence can be heard. This is an extremely important feature of ASBOs that can help protect victims and witnesses of anti-social behaviour.

What sort of behaviour can be tackled by ASBOs?

Anti-social behaviour that can be tackled by ASBOs includes:

1. harassment of residents or passers-by.
2. verbal abuse.
3. criminal damage.
4. vandalism.
5. noise nuisance.
6. writing graffiti.
7. engaging in threatening behaviour in large groups.
8. racial abuse.
9. smoking or drinking alcohol while underage.
10. substance misuse.
11. joyriding.
12. begging.
13. prostitution.
14. kerb-crawling.
15. throwing missiles.
16. assault; and
17. vehicle vandalism.

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Anti-soda! behaviour orders' the basics

The terms of each order should be tailored to the circumstances of the individual case.

Tackling prostitution and drug-related anti-social behaviour at Kings Cross

Issue

Kings Cross was one of the most infamous drug and vice hotspots in the country. For years the authorities had struggled to improve the area.

Approach

'flic anti-social behaviour partners meet to discuss individual cases and offer appropriate help, including housing and rehabilitation services. If the perpetrators of the anti-social behaviour fail either to engage or to change their behaviour, acceptable behaviour agreements (ABAs) are often used to bring to the offenders' attention the impact of their behaviour on the community.

Outcomes

This worked very well with only 4 out of 32 ABAs progressing to ASBO applications. But where the ASBO was deemed necessary by the partners, Camden police officers put together bundles of evidence, with Camden Council's legal team making the ASBO application. Impact statements were taken from local community activists and councillors to prove the need for the orders. Since then, having issued 45 ASBOs with prohibitions within the area, Kings Cross is completely unrecognisable from its previous image. The partners have also been successful in working with perpetrators to facilitate a significant sustainable change in behaviour. One crack cocaine addict recently wrote to the local paper apologising to the people of Kings Cross for his behaviour. Another went on to be a drugs worker in Brixton while a third is now working in the Home Counties and has had her ASBO discharged with the consent of the authorities.

Contact

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Legal definition of anti-social behaviour for the purpose of obtaining an order

Under section 1 of the Crime and Disorder Act 1998, the agency applying for an ASBO must show that:

the defendant behaved in an anti-social manner; and an order is necessary for the protection of people from further anti-social behaviour by the defendant.

This is sometimes referred to as the 'two-stage test'.

Section 1(1) of the Act describes acting in an 'anti-social manner' as acting in 'a manner which causes or is likely to cause harassment, alarm or distress to one or more persons not of the same household as the perpetrator.

The wording is intentionally wide-ranging to allow for the orders to be used in a variety of circumstances.

The expression likely to cause' has the effect that someone other than a victim of the anti-social behaviour can give evidence of the likelihood of its occurring. This is intended specifically to enable the use of professionals as witnesses where those targeted by the behaviour feel unable to come forward, for example for fear of reprisals or intimidation.

Standard of proof

In the case of ***McCann (R v Crown Court at Manchester ex parte McCann (FC) and Others (FC***)), the House of Lords, while confirming that ASBOs were civil orders, set out the law on the standard of proof as follows:

'they [magistrates] must in all cases under section 1 apply the criminal standard... it will be sufficient for the magistrates, when applying section 1(1)(a) to be sure that the defendant has

acted in an anti-social manner, that is to say in a manner which caused or was likely to cause harassment, alarm, or distress to one or more persons not of the same household as himself.' (Lord Steyn, paragraph 37)
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This means that the criminal standard of proof applies to acts of anti-social behaviour alleged against the defendant.
However, Lord Steyn went on to explain:
'The inquiry under section 1(1)(b), namely that such an order is necessary to protect persons from further anti-social acts by him, does not involve a standard of proof: it is an exercise of judgement or evaluation.'
It should be noted that it is the effect or likely effect of the behaviour on other people that determines whether the behaviour is antisocial. The agency applying for the order does not have to prove an intention on the part of the defendant to cause harassment, alarm or distress. Under section 1(5) of the 1998 Act, the Court will, however, disregard any behaviour shown to be reasonable in the circumstances.
The most common behaviour tackled by ASBOs is general loutish and unruly conduct such as verbal abuse, harassment, assault, graffiti and excessive noise. ASBOs have also been used to combat racial harassment, drunk and disorderly behaviour, throwing fireworks, vehicle vandalism and prostitution. Many other problems, for instance the misuse of air guns, could also lend themselves to this approach.
The wide range of anti-social behaviour that can be tackled by ASBOs and the ability to tailor the terms of the order to each specific case illustrates their flexibility. There have been cases where the chief executive of a company has been issued with an ASBO for anti-social behaviour committed by the company. This is because ASBOs must be issued against individuals and not against organisations. ASBOs may also be used, for example in the misuse of mini motors, where warnings and other measures have failed.
Against whom can an order be made?
An order can be made against anyone aged 10 years or over who has acted in an anti-social manner, or is likely so to act, and where an order is needed to protect people and the wider community from further anti-social acts. A list of interventions available for children under 10 is at Appendix A. the orders are tenure-neutral and can be used against perpetrators living in any type of housing (not just social housing). Because the order is specific to the person, if someone moves to a new house, it still remains in force, ASBOs can be used to combat anti-social behaviour in a wide range of situations and settings.
They are highly relevant to misconduct in public spaces such as parks, shopping centres and transport hubs, but they are by no means confined to such areas.
Where groups of people are engaged in anti-social behaviour, a case needs to be made against each individual against whom an order is sought. However, the cases can be heard together by the court. Agencies have found that targeting ringleaders with orders is an effective deterrent to other members of the group.
When investigating complaints about antisocial behaviour, it is vital that agencies satisfy themselves that complaints are well founded. In particular, they should consider the possibility that complaints may have been motivated by discrimination, perhaps on racist grounds, or to further a pre-existing grudge. However, failing to act against instances of anti-social behaviour can lead to an escalation of the problem by increasing fear of crime or leading those subjected to the anti-social behaviour to retaliate. Nipping unacceptable behaviour in the bud is therefore the best option.

Who can apply for an order?
Agencies able to apply for orders are referred to as 'relevant authorities' in the legislation (section 1(1 A) of the Crime and Disorder Act 1998). These are:
local authorities - by virtue of sections 1(A) and 1(12) of the 1998 Act, a local authority is, in England, the council of a county, district or London Borough, the Isle of Wight or the Isles of Scilly, or, in Wales, the council of a county or county borough; police forces, including the British Transport Police (BTP);
registered social landlords (RSLs), that is a body registered as a social landlord under section 1 of the Housing Act 1996; and Housing Action Trusts (I-IATs).
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The Environment Agency and Transport for London are to be designated as relevant authorities in due course.
Local authorities and the police may apply for an order where they consider it necessary to protect persons in their area ('relevant persons') from further anti-social behaviour irrespective of where the original anti-social behaviour took place. An order can be sought which provides protection not just to the relevant persons but also, where necessary, to any persons in England and Wales.
The BTP, RSLs and HATs are empowered to apply for orders by virtue of changes introduced under the Police Reform Act 2002, which enable these agencies to deal with their particular problems of anti-social behaviour in a more effective and timely manner. RSLs and HATs may apply for orders against non-residents as well as residents and should consider doing so where the antisocial behaviour of non-residents is affecting the quality of life for residents.
Applications from the BTP, RSLs or HATs must concern anti-social behaviour related to the premises for which they are responsible by persons who are on or in the vicinity of such premises or likely to be either on or in the vicinity of such premises.
The BTP, RSLs and HATs are required to consult both the local authority and local police force when applying for an order. The agencies are not compelled to use the power. The police or local authority may still apply for ASBOs on their behalf.
Under section 17 of the 1998 Act, the police and local authorities have a joint responsibility to develop and implement strategies for tackling anti-social behaviour and disorder in the local area. This responsibility is not changed in any way by allowing the BTP, RSLs and HATs to apply for orders.
Which courts can make ASBOs?
ASBOs can be made by:
* magistrates' courts (acting in their civil capacity).
county courts (where the relevant authority or the person against whom the order is sought is a party to the proceedings and the non-party is joined to these proceedings);
magistrates' courts (on conviction in criminal proceedings).
the Crown Court (on conviction in criminal proceedings).
youth courts (on conviction in criminal proceedings); and
at the time this guidance was being revised, 11 county courts, which were trialling hearings for ASBO cases for children and young people. These are as follows:

- **Bristol**
- **Central London**
- **Clerkenwell**
- **Dewsbury**

- **Huddersfield**
- **Leicester**
- **Manchester**
- **Oxford**
- **Tameside**
- **Wigan**
- **Wrexham**

The pilot will be evaluated in autumn 2006.
The table overleaf sets out what each type of court can do.
Length of orders
Orders are issued for a minimum of two years and can be issued for an indefinite period pending a further order. They can also be varied or discharged on application by either party, although they cannot be discharged in the first two years without the consent of both parties. In the ease of young people, ASBOs should be reviewed each year as explained on page 45.
Anti-social behaviour response courts
Within Her Majesty's Courts Service there is now a network of specialist anti-social behaviour response courts across the country - existing courts that are better able to respond to the issue of Anti-social behaviour. They ensure that magistrates and court staff are specially trained and follow a framework - including specialist sessions, witness care, local community engagement and appropriate media strategies. This ensures courts are able to respond properly to anti-social behaviour cases in a visible and consistent way.
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Magistrates' court - acting in their…				
…Civil capacity	**...Criminal capacity**	**County court**	**Youth court**	
Which ASBO?	No restrictions	Only on conviction in criminal proceedings	Pilots taking place for children and young people until September 2006	Only on conviction in criminal proceedings as it has no civil jurisdiction
Disposals available if ASBO breached - under-18s	n/a	n/a	n/a	Sections 90 and 91 cases - Powers of Criminal Courts (Sentencing) Act 2000, detention and training order, action plan order, referral order, attendance centre order, supervision order, reparation order, parenting order, fine, community punishment and rehabilitation order (16-17-year olds), absolute discharge All sentences to the community are open to the following orders: curfew order, parenting

				order, drug testing and treatment order
Disposals available if ASBO breached - adult	Maximum five years' imprisonment. community order, absolute discharge, fine, compensation order, deferred sentence	Maximum five years' imprisonment; community order, absolute discharge, fine compensation order, deferred sentence	Maximum five years' imprisonment; community order, absolute discharge, fine, compensation order, deferred sentence	n/a

Untouchable gang's reign of terror on a anti-social behaviour response courts Issue
A gang of 10 youths who believed they were beyond the reach of the law were regularly terrorising vulnerable residents on a street in Thornton, Merseyside. The youths had been smashing windows, breaking into and throwing missiles at vehicles, and verbally abusing people, Victims included the young, elderly and vulnerable and the gang's behaviour created such fear locally that residents would not go out after dark or leave their properties unattended. Many of them installed CCTV Only the most serious incidents were repented at the time they occurred but victims would not press charges for fear of being singled out and targeted by the gang.
Merseyside street ends in the Approach
The neighbourhood police officer carried out a detailed investigation of the problem to bring a case for arresting the perpetrators and bringing them before the courts.
Previous police logs and reports were scrutinised, and impact statements taken from the majority of witnesses in anonymity to use as hearsay evidence. One family, which had been singled out by the perpetrators, was given support by the police with daily contact and visits. The victims installed CCTV and kept a diary of all the incidents which was exhibited as evidence.
The police and Crown Prosecution Service (CPS) worked closely together to prepare the case and the police gathered strong evidence. Interviews with perpetrators were carefully planned so that when faced with

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Antisocial behaviour orders: The busies

the evidence against them all 10 perpetrators admitted their responsibility.
In advance of the case, the CPS specialist prosecutor for the area worked to set up a special anti-social behaviour response court. Advance disclosure of evidence to the judge and other parties prior to the court hearing meant that the case was dealt with quickly once in court.

At the hearing, nine perpetrators were charged on criminal offences ranging from disorderly behaviour to attempted arson. Three of the gang were given ASBOs and six of the gang signed acceptable behaviour agreements.
Conditions attached to the ASBOs were designed to protect the community from any recurrence of the behaviour. The perpetrators were restricted to sleeping at their nominated address and were not allowed out between 6.00pm and 6.00am unless accompanied by a parent or appropriate adult. They were clearly instructed not to approach or interfere with any prosecution witnesses. They were also prohibited from being verbally abusive and from throwing missiles at any residential property or from
carrying anything which they could use to launch a missile.
The CPS advised the local media of the antisocial behaviour response court and the press reported this operation on the front pages of the local papers. This is part of a strategy to publicise successful action of the police, CPS and judiciary working in partnership to tackle anti-social behaviour. Its aim is to encourage the community to report anti-social behaviour, knowing that it will be dealt with effectively.
Outcome
The operation provided much needed relief for the residents in the area. A parent of one of the gang members has since become proactive in a local community action group which is working to increase diversionary activities for young people in the area.
For the professionals involved in the case, the operation has underlined the importance of taking impact statements as a matter of course when victims fail to press charges due to fear of reprisals. The multiagency partnership approach works best if one officer who is aware of all the facts of the case co-ordinates the case.
Orders made in county court proceedings (section IB of the Crime and Disorder Act 1998)
For an application to be made in the county court, both the applicant and the person against whom the application is made must be parties to the 'principal proceedings'
(such as an eviction). Where the relevant authority is not a party to the principal proceedings, an application to be had a party and the application for an order should be made as soon as possible after the authority becomes aware of the principal proceedings. Where the person alleged to have committed the anti-social behaviour is not a party but the relevant authority thinks that his anti-social acts are material to the principal proceedings, the authority can apply to have him joined in the proceedings and apply for an order. The county court will be able to grant orders where the principal proceedings involve evidence of anti-social behaviour.
Enabling the county courts to make orders may remove the need for a separate legal process in the magistrates' court and make it possible for the public to be protected from anti-social behaviour more quickly and more efficiently.
An order made in county court proceedings might, for example, be useful to prevent an individual, evicted from his accommodation for harassing his neighbours and/or others in the area, from returning to the same area to continue the abusive behaviour.
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Taking a strategic approach
Orders can only work properly when they are based on partnership in action. They are powerful instruments, and they will be at their most effective when all the agencies confronted by an individual's anti-social behaviour collaborate to make the best possible use of them.
Orders made on conviction in criminal proceedings

Criminal courts - the magistrates' court, the Crown Court and the youth court - can make-orders against an individual who has been convicted of a criminal offence, and this is known as an 'order on conviction' (sometimes also called a 'CRASBO'). Some county courts are currently trialling stand-alone ASBO cases for children and young people until the end of September 2006.These are not proceedings on conviction.
The order on conviction is considered at a civil hearing after the verdict. It is not part of the sentence the offender receives for the criminal offence.
The order will be granted on the basis of the evidence presented to the court during the criminal proceedings and any additional evidence provided to the court after the verdict, although it is possible for the order to be granted on the basis of the criminal proceedings alone. There is a statutory requirement for a conviction to be for an offence committed after the date on which the insertion of the relevant provisions by the Police Reform Act took effect.
The court may make an order on conviction either on its own initiative or following an application by the prosecutor (see section 1 C (3) of the Crime and Disorder Act 1998). Alternatively, the order can be requested by the police or local authority, who may make representations to the court in support of the request. Orders on
conviction cannot be made if there is a deferred sentence for the relevant offence.
The court may adjourn the proceedings following conviction to allow an application for an order on conviction to be made.
By virtue of section l D (l)(b) of the 1998 Act (inserted by the Serious Organised Crime and Police Act 2005), the court may also make an interim order.
The order on conviction is a civil order and has the same effect as an ASBO made on application - ft contains prohibitions rather than penalties and is made in civil proceedings. It is similar to the football banning order on conviction in that it is a civil order made following a criminal procedure,2 3
If the offender is detained in custody, the court may make provision for requirements of the order on conviction to become effective on their release. For this period the order takes effect immediately, but its terms are suspended until release.
Where is an ASBO valid?
Before the changes introduced by the Police Reform Act 2002, the conditions an order could impose extended only to the applicant's area and adjoining areas. An order can now extend across any defined area within England and Wales. '
The power to make an order over a wide area is for use where there is reason to believe that the person concerned may move or has already moved. It goes some way to addressing the problem of offenders moving to other areas and continuing the behaviour.
An order covering a wider area could address problems such as ticket touting at different train stations or anti-social behaviour on trains, and could help deal with the minority
Section 10(21 of the Crime and Disorder Act 1998 states that the court may make an order which prohibits the offender from doing anything described in the order. Section 14A of the Football Spectators Act 1989 places a duty on the court to impose a football banning order if a person is convicted of a relevant offence or to state in open court why such an order has not been made.
The geographical area which an order may cover is indicated by section 1(6) for ASBOs and orders made in county court proceedings; and by section l C (2)(b) for orders made on conviction in criminal proceedings.
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Taking a strategic approach

of the travelling community who persistently engage in anti-social behaviour around the country, Careful thought needs to be given to the consequences of extending the exclusion area so that it does not simply result in displacing the behaviour into a neighbouring area. Any evidence of the itinerant nature of the defendant's lifestyle, of the likelihood of the individual moving to another area, or of wide geographical spread of offending behaviour should be submitted with the application file, The applicant does not have to prove that anti-social behaviour will occur elsewhere, just show that it is likely to.
The more serious the behaviour, the greater the likelihood that the court will grant a geographically wide order. Orders that seek to operate in the whole of England and Wales will not be granted without evidence that that is the actual or potential geographical extent of the problem. Further detail about effective prohibitions is given in Chapter 7.
Can interim orders be made?
Interim orders are available under section ID of the Crime and Disorder Act 1998 (as amended by section 65 of the Police Reform Act 2002 and the Serious Organised Crime and Police Act (SOCPA) 2005) in both the magistrates' court and the county court. This is an order made at an initial court hearing held in advance of the full hearing. This temporary order can impose the same prohibitions and has the same penalties for breach as a full order. The interim order can, with leave of the justices' clerk, be made without notice of proceedings being given to the defendant.
A without notice interim order has no effect until it has been served on the defendant. If it is not served within seven days, it will cease and will not have effect. The benefit of the interim order is that it enables the courts to order an immediate stop to anti-social behaviour and thereby to protect the public more quickly. It reduces the scope for witness intimidation by making it unlawful for the offender to continue the behaviour while the ASBO application is being processed. It also removes any delay in the proceedings.
Section 139 of SOCPA 2005 gives the court the power to grant an interim order pending an adjourned hearing for an order on conviction.
The interim order will send a clear message to the community that swift action against anti-social behaviour is possible.
The order can be made at the outset of proceedings for an ASBO application if the court considers that it is just to make such an order. The applicant authority should, if possible, request an interim order at the same time as submitting an application for a full order.
When considering whether to make an interim order, the court will be aware that it may not be possible at the time of the interim order application to compile all the evidence which would prove that a full ASBO is necessary. Rather the court will determine the application for the interim order on the question of whether the application for the full order has been properly made and where there is sufficient evidence of an urgent need to protect the community
Applications for interim orders will be appropriate, for example, in cases where the applicant feels that persons need to be protected from the threat of further antisocial acts which might occur before the main application can be determined. Where an interim order is granted without notice of proceedings to the defendant, it is expected that the court will usually arrange an early return date.
An individual who is subject to an interim order will have the opportunity to respond to the case at the hearing for the full order. The defendant is also able to apply to the court for the interim order to be varied or discharged. In this instance the matter will be dealt with at a hearing dealing specifically with the interim order.
The interim order:
will be for a fixed period.
can be varied or discharged on application by the defendant.

will cease to have effect if the application for the ASBO or county court order is withdrawn or refused.
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Taking a strategic approach
may extend over any defined area of England and Wales; and
18. has the same breach penalties as for a full order.
The court procedures and forms to be used when applying for or making an interim order are set out in the Magistrates' Courts (Anti-Social Behaviour Orders) Rules 2002 (available at www.opsi.gov.uk/si/si2002/ 20022784.htm).
Interim orders made in the county courts
A relevant authority may apply for an interim order in the county court once it is party to the 'principal proceedings. The application for an interim order should be made early in the proceedings.
The procedure for making applications for orders in the county court is set out in the Practice Direction of the updated Cavil Procedure Rules 65.24 to 26 (Appendix B).
Orders against children and young people
Under the Crime and Disorder Act 1998, applications for ASBOs against young people aged 10 to 17, and in certain circumstances 18-year-olds, can be heard in the magistrates' court. As a result of the recent practice direction (the Magistrates' Courts (Anti-Social Behaviour Orders) Composition of Benches practice direction, February 2006), the justices constituting the court should normally be qualified to sit in the youth court unless to do so would result in a delayed hearing. Applications for orders are not heard in the youth court as a matter of course because of the civil status of the orders, although youth courts may make orders where appropriate on conviction.
Practitioners familiar with dealing with young people's cases will be aware of the restrictions on reporting that apply under the Children and Young Persons Act 1933- However, automatic reporting restrictions do not apply to stand-alone ASBOs as they are civil orders.
In orders on conviction cases, the court does have discretion under section 39 of the Children and Young Persons Act 1933 to impose reporting restrictions. Reporting
restrictions will always apply to the criminal proceedings on which the order on conviction is based but in till other cases, the presumption is that publicity will be allowed. See page 52 for detailed guidance on promoting awareness of orders.
A court making an ASBO does have the power to impose restrictions to protect the identity of a person under 18. But the imposition of reporting restrictions may restrict the effectiveness of the order if the effectiveness of the ASBO will largely depend on the wider community knowing the details. Please see the separate sections on publicity and on children and young people.
Breach of an order
Breach of an order is a criminal offence; criminal procedures and penalties apply.
The standard of proof required is the criminal standard. Guilt must be established beyond reasonable doubt. Breach proceedings are heard in the magistrates' court and may be committed to the Crown Court. Such proceedings are the same irrespective of whether the order is a full or interim order made on application to the magistrates' court or the county court, or an order on conviction in criminal proceedings.
Expert prosecutors
A team of 14 anti-social behaviour expert prosecutors has been set up with funding from the Together campaign to support all Crown Prosecution Service (CPS) prosecutors dealing with

anti-social behaviour-related cases. The team drives improvements in performance across the country.

The team:

19. promotes better partnership working between local prosecutors, the police, focal authorities, registered social landlords and others involved in taking action against anti-social behaviour.

20. delivers training to prosecutors on the new powers to obtain orders on conviction provides advice to prosecutors on the full range of enforcement measures and key issues such as prosecution of ASBO breach; and

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• works with court clerks and magistrates in improving their response to anti-social behaviour.

In addition to the 14 specialist prosecutors, anti-social behaviour co-ordinators have now been appointed CPS-wide to ensure that there is a focus on anti-social behaviour issues in every CPS area. Their role is to drive this work forward. Further information can be obtained from Sarah Johnston at sarah.johnston@cps.gsi.gov.uk.

Standard ASBO form

A copy of the order form used by the magistrates' courts can be found at Appendix C.

Disposals

The maximum penalty for breach of an order is five years' imprisonment tor an adult offender. A conditional discharge is not available for breach of an ASBO.

The full range of disposals of the youth court is available, and custody should only be considered as a last resort in cases of serious and persistent breach (if appropriate, breach may be dealt with by way of a final warning). Where custody is deemed by the court to be necessary, the maximum sentence for breach by children and young people is a detention and training order (DTO), which has a maximum term of 24 months - 12 months of which is custodial and 12 months is in the community. The DTO is available for 12 to 17-year-olds (although 12 to 14-year-olds must be persistent (criminal) offenders to be given a DTO). A 10 to 11 -year-old can be given a community order for breach of an ASBO. The sentence given should be proportionate and reflect the impact of the anti-social behaviour. It must relate to all the relevant circumstances, such as the number of breaches and how the breach relates to the finding of anti-social behaviour. Proceedings should be swift and not fractured by unnecessary adjournments either during the proceedings or before sentencing. Information on how to handle breaches of ASBOs by young people is contained in page 26 of the anti-social behaviour guidance issued by the Youth Justice Board, Home Office and Association of Chief Police Officers.

The leading precedent for the approach on sentencing on this point is ***R v Lamb*** \ 20051 EWCA Crim 2487. In this judgment the court drew the distinction between a breach that represents further anti-social behaviour and those that are merely breaches of the terms of an order, for instance, as in that case, not to enter a particular metro system. Differing from earlier decisions - in particular from the case of ***R v Morrison*** [2005] EWCA Crim 2237 - the court held that the orders are properly designed to protect the public from frequent and distressing repeated misbehaviour.

In the case of ***Morrison,*** it was determined that if the breach amounted to a specific criminal offence that carried a particular penalty, the sentence for breach of the ASBO could not be greater than that.

As the court in ***Lamb*** pointed out, this would merely encourage people to commit criminal offences rather than breach their ASBOs in other ways. The court has therefore laid down a series of steps for consideration prior to the imposition of a sentence.
Where a breach does not involve harassment, alarm or distress, a community order may be considered to assist the defendant to learn to live with the terms of the ASBO. This is entirely consistent with the guideline on breach proceedings issued by the Sentencing Guidelines Council, where it is pointed out that custody should be used as a last resort, and the primary purpose of breach proceedings should be to ensure that the order itself is observed.
However, ***Lamb*** confirmed that where there is a persistent breach without harassment, alarm or distress, it may become necessary to impose custody to preserve the authority of the court. In those circumstances, the sentence should be as short as possible, and in ***Lamb*** the individual sentences were reduced to two months in custody. However, where the new breach amounts to further harassment, alarm or distress, then the court thought orders of eight months, on a guilty plea, were appropriate, applying ***R v Braxton*** [2005] 1 CRAPP R (S) 36,7? ***v Tripp*** [20051
Youth Justice Board, Home Office and Association of Chief Police Officers (2006) Anti-***social Behaviour: A guide to the role of Youth Offending*** Teams ***in dealing with antisocial behaviour.*** This can be downloaded at www.youth-justice-board.gov.uk/Putilications/Scr!pts/prodView.asp?id[)roduct=212&ep-
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EWCA Grim 2253 and ***R v Dickinson***
[2005] 2 CR APP R (S) 488.
When the offender has been found guilty of breaching an order, and before sentencing, the court may take reports from the local authority or police and any applicant agency. The court should also consider the original reasons for the making of the order.
A copy of the court order (ASRO) as granted (including any maps and details of any prohibitions) can be put before the court during breach proceedings as evidence that an order has been made without the need for a statement formally proving that an order was made. This provision was introduced by SO CPA 2005 on 1 July 2005.
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Managing the application process

This section focuses on the main issues involved in applying for an order. For an ASBO to be effective, the process of evidence gathering and applying to the courts should be as swift as possible.
Groups of organisations and partnerships such as crime and disorder reduction partnerships (CDRPs) may wish to consider buying specialist legal advice in blocks or pooling expertise and experience. This is likely to be more cost effective than buying in legal advice on a case-by-case basis.

Partnership working

A fully co-ordinated approach is essential if anti-social behaviour is to be tackled. Effective defence of communities depends on all agencies - including housing organisations, social services, education authorities and youth services - accepting that the promotion of safe anti orderly neighbourhoods is a priority and working together to agree a response to

unacceptable behaviour. The consultation arrangements are important but should be organised so that they do not cause delays in dealing with cases.
Agencies and communities join to tackle anti-social behaviour in Slade Green
Issue
Slade Green in Bexley was once described as 'a cluster of low-rise estates centred on a precinct of shops and Slade Green railway station, where vandalism, burglary and drugs blight the lives of residents'. Slade Green has experienced high levels of crime and social deprivation and features among the top 1.6% of the most deprived wards in England. Bexley Police identified Slade Green as a hot spot for residential and non-residential burglary, auto crime, disorder, domestic violence and race crime. Residents, local housing providers and the leader of the Slade Green Community Safety Forum were alarmed at the escalation of anti-social behaviour in the area. Residents regularly experienced threats and actual violence, making them afraid of giving evidence to the police.
Approach
A meeting between resklents and the local partnership team produced an outline action plan. Community meetings, local press coverage and 'Have A Say' days led to key witnesses being willing to give evidence.
The partnership team applied for ASBOs against the six men identified as the most prolific perpetrators. In total, 30 witnesses gave evidence, most in the form of hearsay, with nine giving evidence in person at the court hearing. The policing team involved in the case supported witnesses by being at court to provide additional reassurance. Victim Support's witness support service also helped. Strong witness evidence and a compelling case prepared by the police and the council legal department convinced the court to agree to all six applications.
Outcome
The impact of these ASBOs on crime and fear of crime in the area was significant. For the period 2003/04, robbery incidents fell by 53%, burglary by 21%) and auto crime by 40%. Of the original six to receive an ASBO, one person has been prosecuted for breach of the ASBO condition relating to criminal damage to a car, for which he received a custodial sentence.
A community safety action zone (CSAZ) was established in Slade Green with the aim of reducing crime and disorder in the area.
A multi-agency operations group was formed
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Managing the application process
to find the grass roots issues leading to these problems. The addition of environmental and security improvements has enhanced the appearance of the area and have made it a safer and more secure place to live. These improvements have included improved street lighting, removal of graffiti, removal of fly-tipping, removal of abandoned and unlicensed cars and improvements to play areas.
A survey was carried out before the start of the CSAZ which found that 22% of residents in Slade Green who responded felt safe at night in their area. After the CSAZ had been set up, 93% of residents surveyed in Slade Green felt safe at night in their area.
Contact
Charlotte Shrimpton **Telephone:** 020 8284 5503
Taking ownership
It is vital that a specified individual within the lead agency takes on a lead role with responsibility for the ownership, director, and management of the case. 1'his will help ensure

that there is no confusion about who is expected to make sure that the necessary actions are taken on the right timescale.
The lead individual should manage and co-ordinate the involvement of other agencies so that they add value by contributing their own specialist knowledge and expertise.
A multi-agency approach should be adopted so that all agencies that could hold information on the individual in question are involved in the process at an early stage.
Such agencies include the Probation Service, social services, health services, the youth offending team (YOT) and voluntary organisations, all of which may have come into contact with the individual or members of their family.
GDRPs should consider adopting the antisocial behaviour action group (ASBAG) approach developed by Watford Borough Council.
Watford's partnership approach involves all relevant statutory and voluntary agencies and engages the local community in taking a stand against the perpetrators of anti-social behaviour.
They have developed a problem-solving approach to issues and apply the SARA model:
Sean for all available intelligence in relation to the anti-social behaviour issue.
Analyse the intelligence, looking for the root cause of the problem.
Respond with a clear action plan designed to address the behaviour.
Assess the progress/success of the action plan on a monthly basis.
Delivery is through the monthly multi-agency ASBAG, which includes cross-boundary working as required.
Watford's anti-social behaviour strategy allows for a range of diversionary activities and intervention as alternatives to enforcement, if the ASBAG agrees they are appropriate to effectively tackle an individual and their anti-social behaviour, such as:
verbal warnings
written warnings.
acceptable behaviour contracts (ABGs);
mentoring programmes.
intervention programmes.
educational programmes.
supporting youths and their parents; and
restorative justice (when and where appropriate for victims and localities).
Information is exchanged between stakeholders and members of the CDRP at each monthly ASBAG meeting.
This strategy works in parallel with the prolific and priority offender strategy and a representative from the prolific offender unit is represented on the ASBAG to avoid duplication of work.
If the level of anti-social behaviour is such that the risk of further behaviour or escalation of behaviour is imminent, the Watford anti-social behaviour co-ordinator may convene an immediate action plan meeting with the police anti-social behaviour officer and a legal representative from Watford Borough Council acting on the ASBAG's

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MuiUtkins' the application process

behalf in the interests of managing the risk to public safety without delay.
Watford CDRP works to the principles of the National Intelligence Model for tasking and co-ordination.
Each action plan is performance-managed by the ASBAG and is subject to monitoring and scrutiny by quarterly feedback to the Watford responsible authority group by the Watford

Borough Council anti-social behaviour co-ordinator. The ASBAG performs a full self-evaluation and review every 12 months.

Contact

Matt Leng

Anti-social Behaviour Coordinator Watford Borough Council Matt.Leng@watford.gov.uk

Other considerations

Local authorities have a duty under the NHS and Community Care Act 1990 to assess any person who may be in need of community care services. If there is any evidence to suggest that the person against whom the order is being sought may be suffering from drug, alcohol or mental health problems or an autistic spectrum disorder, the necessary support should be provided by social services or other support agencies. Such support should run parallel with the collection of evidence and application for an order, where an application for an order is deemed necessary. This ensures that the court can balance the needs of the community with the needs of any alleged perpetrator.

From December 2006, provisions in the Disability Discrimination Act 2005 will come into force which make unlawful discrimination by a public authority in the exercise of public functions. There are some exemptions for listed persons and certain acts including (in broad terms) legislation, prosecution and judicial acts. However, the new prohibition of discrimination covers functions carried out, for example, by local authorities and the police. The definition of discrimination includes, in some circumstances, not making a reasonable-adjustment to the way a function is carried out. Chapter 11 of the guidance, which the Disability Rights Commission will issue shortly (entitled ***Code of Practice - Rights of Access: services to the public, public authority functions, private clubs and premises***) includes advice on how the Act now impacts on those carrying out public authority functions. It will be available on the Commission's website (www.drc.org.uk).

Statutory consultation requirements

Section IE of the Crime and Disorder Act 1998 (as amended by section 66 of the Police Reform Act 2002) sets out the consultation requirements for agencies applying for orders. These are that:

the police and local authorities must consult each other; and

the British Transport Police (BTP), registered social landlords, housing action trusts and any other person or body designated by the Secretary of State as a relevant authority must consult both the local authority and the police force for the area.

Consultation takes place with the authority or force whose area includes the address where the subject of the order resides or appears to reside. Each district or borough council and police division/basic command unit should have a nominated contact. Care should be taken (where the local authority is the applicant) that if the subject is under local authority care there is no conflict of interest. They must ensure that the social worker involved in the ease is consulted. Where a young person is the alleged perpetrator, the YOT should be consulted.

Consultation is required to inform the appropriate agency or agencies of the intended application for the order and to check whether they have any relevant information. The agencies must take into consideration at the earliest possible opportunity the relevant information necessary to apply for an individual support order or a parenting order. Information on these is contained in a separate section on children and young people.

Where the partnership working arrangements recommended in earlier paragraphs are in force, they will normally satisfy (and exceed) the statutory requirement for consultation,

The statutory requirement for consultation does not mean that the agencies must agree

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to an application being made but rather that they should be told of the intended application and given the opportunity to comment. This should ensure at the very minimum that actions taken by each agency regarding the same individual do not conflict.
While no agency has a veto over another agency's application for an order, the expectation is that any reservations or alternative proposals should be discussed carefully against the background of the overriding need to bring the anti-social behaviour to a speedy end. Again, the case conference procedure is designed to ensure that this happens.
A signed document of consultation is all that is required by the court. This should not indicate whether the party consulted was or was not in agreement. This is not required by the legislation. Supporting statements or reports from partner agencies should be provided separately.
The changes introduced by the Police Reform Act 2002 reduce bureaucracy by removing the need for applying agencies to consult with every local authority and police service whose areas are included in the order.
In addition to the consultation requirements set out above, it may be helpful for police forces to contact the BTP, which may hold information on the anti-social behaviour of the subject. The availability of this information may assist the evidence-gathering process for an order. The BTP holds a national database of offenders committing summary offences (these include railway-specific summary offences as well as those included in Home Office counting rules). Police forces can request a search on a particular offender, in writing, from the Force Crime Registrar, British Transport Police, Force Headquarters, 15 Tavistock Place, London WC1H 9SJ.
Collection of evidence
When applying for an order, the lead agency will be required to gather evidence to prove its ease beyond reasonable doubt. This evidence can include hearsay evidence. Further advice on hearsay evidence is provided later in the guidance.
The evidence in support of an application for an order should prove:
that the defendant acted in a specific way on specific dates and at specific places; and
that these acts caused or were likely to cause harassment, alarm, or distress to one or more persons not in the same household as the defendant.
The court then needs to evaluate whether an order is necessary to protect persons from further anti-social acts by the defendant. This is not a test to which a standard of proof will be applied. Instead, it is an assessment of future risk. The applicant can present evidence or argument to assist the court in making this evaluation. Witness evidence need not prove that they were alarmed or distressed themselves, but only that the behaviour they witnessed was likely to produce such an effect on others. As hearsay evidence is allowed, it may be given by 'professional witnesses' - officers of public agencies whose job it is to prevent anti-social behaviour. Since civil rules apply to these orders, it is unnecessary to disclose the names of the witnesses,
Experience has shown that elaborate court files are not normally required or advantageous. Where the anti-social behaviour has been persistent, agencies should for us on a few well-documented cases. A large volume of evidence and/or a large number of witnesses creates its own problems. There is more material for the defence to contest and timetabling issues may increase delays in the process.
Agencies applying for orders should strike a balance and focus on what is most relevant and necessary to provide sufficient evidence for the court to arrive at a clear understanding of the matter.
Evidence may include:

breach of an A B C;
witness statements of officers who attended incidents.
witness statements of people affected by the behaviour.
evidence of complaints recorded by the police, housing providers or other agencies.

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Managing the application process

statements from professional witnesses, for example council officials, health visitors or truancy officers.
video or CCTV evidence (effective where resolution is high and high-quality still images can be used);
supporting statements or reports from other agencies, for example probation reports.
previous successful civil proceedings that are relevant, such as an eviction order lor similar behaviour.
previous relevant convictions.
copies of custody records of previous arrests relevant to the application; and
information from witness diaries.
Together campaign fact sheet
The Together campaign has produced a fact sheet giving step-by-step guidance on evidence collection which is available on the website www. together.gov.uk
Southampton shopping area blighted by anti-social behaviour

Issue

Lordshill centre was suffering from a large amount of anti-social behaviour, especially around the local supermarket. There was a substantial amount of shoplifting, criminal damage and harassment of visitors and shoppers. At the other end of the centre was a large bingo hall frequented by older patrons who were becoming increasingly afraid to go after 6pm.The supermarket was also shutting earlier in response to these incidents.

Approach

The local anti-social behaviour team's senior investigator met with the manager of the supermarket, together with the local police, and discussed possible ways of working more closely to deal with the issues, they were provided with a log book to record all incidents and this was checked weekly by the anti-social behaviour investigator and the police. This information was then put into a schedule to identify times and dates of the issues and also the perpetrators. Logbooks were provided to the local library and the bingo hall, as well as the supermarket, in an attempt to collate a large amount of evidence. It's Your Call' posters were put up in all shops in the area and premises were visited regularly by a member of the multi-agency team.

Outcome

Because of the joint working and shared support, the stores felt able to tackle those causing the problem. As a result of information provided by the shops, an ASBO was obtained against the main perpetrator, with an exclusion from the whole shopping area.
There was also a Crime Reduction and Environment Week in the area, and a youth project has been funded by the supermarket, which has also provided paint to repaint the subway. This has prevented graffiti reappearing. There is also a dispersal order in place now to complement the ASBO and the perpetrator has not returned to the area. Residents and visitors can now shop in peace and the supermarket is looking to invest more money in the area.
Contact
Jane Mieinicezek Anti-social Behaviour Manager Telephone: 023 8083 3988
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Time limits

Magistrates' courts (acting in their civil capacity)

Under section 127 of the Magistrates Court Act 1980, a complaint must be made within six months of the time when the matter of the complaint (the behaviour) arose. One incidence of serious anti-social behaviour may be sufficient for an order to be made. Earlier incidents may be used as background information to support a case and show a pattern of behaviour. As long as the complaint is made within the six-month timeframe, a summons may be served outside this time period, although delay is not encouraged.

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Use of hearsay and professional witness evidence

Hearsay and professional witness evidence allow for the identities of those too fearful to give evidence to be protected. This is especially vita! as cases often involve anti-social behaviour in residential areas by local people and those targeted by the behaviour feel unable to come forward for fear of reprisals. Hearsay evidence cannot be excluded (at the request of defence lawyers) simply on the grounds that it is hearsay.

Hearsay evidence

Evidence of anti-social behaviour which occurs at any time after the commencement of section H may be considered when the court considers whether or not to grant an order on conviction under section 1C.

The House of Lords judgment in the McCann case confirmed that hearsay evidence is admissible. Lord Steyn stated tha**t:**'1

'Having concluded that the proceedings in question are civil under domestic law and article 6, it follows that the machinery of the Civil Evidence Act 1995 and the Magistrates' Courts (Hearsay Evidence in Cavil Proceedings) Rules 1999 allow the introduction of such evidence under the first part of section 1.

'... use of the Civil Evidence Act 1995 and the Rules in eases under the first part of section 1 are not in any way incompatible with the Human Rights Act 1998,

'... hearsay evidence will often be of crucial importance. For my part, hearsay evidence depending on its logical proactiveness is quite capable of satisfying the requirements of section 1(1).'

It is a matter for the judge or magistrate to decide what weight they attach to hearsay evidence. 5 6

Hearsay allows a police officer to provide a statement on behalf of a witness or witnesses who remain anonymous. Hearsay evidence must be relevant to the matters to be proved. It could include details such as dates, places, times, specific descriptions of actions, who was present and who said what.

Hearsay can include evidence from the person taking the statement. The person giving the hearsay evidence may attest to the observable conditions of the witness, for example that the witness appeared upset, and may give evidence based on their own judgement of the situation.

Where an applicant intends to rely on hearsay evidence in the county court, they must act in accordance with part 33 of the Civil Procedure Rules. Written notice must be given at least 21 days before the hearing to the other party and to the court.

Professional witnesses

Professional witnesses can be called to give their opinions as to matters within their expertise and can give evidence about their assessments of the respondent or his/her behaviour. Examples of witnesses who may be called as professional witnesses include council officials, health visitors, railway staff, teachers, doctors and police officers.
Care should be taken to ensure that a professional witness does not inadvertently enable vulnerable or intimidated witnesses to be identified, for example from their home address.
Vulnerable and intimidated witnesses
Witnesses who are willing to testify in court provide the best form of evidence and, where possible, should be encouraged to come forward. The new provisions introduced in Section ***1*** of the Crime and Disorder Act 1998 came into force on 1 April 1999, Taken from paragraphs 35. 36 and 37 of ***Clingham (formerly C (a minor)) v Royal Borough of Kensington and Chelsea (on Appeal from*** a ***Divisional Court of the Queen's Bench Division); R v Crown Court at Manchester*** ex ***parte McCann (FC) and Others (FC),***
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Use of hearsay and professional witness evidence
the Serious Organised Crime and Police Act 2005 make it easier for victims of anti-social behaviour to attend court and give evidence in person. The Act permits the 'special measures' that were formerly reserved for criminal hearings to be used in anti-social behaviour cases. This will enable witnesses who wish to give direct evidence to do so in private, from behind a screen or by video link.
Vulnerable witnesses are all witnesses aged under 17 years or whose quality of evidence is likely to be diminished because they have a mental disorder or learning disability or have a physical disability or physical disorder.
Intimidated witnesses are witnessing whose quality of evidence is likely to be diminished because they are in fear or distress about testifying. It is for the court to decide whether the quality of a witness's evidence is likely to be diminished.
Witness development and support
The principal purpose of an order is to protect those who directly experience antisocial behaviour. The protection provided should include, where necessary, those who are personally targeted by perpetrators, other witnesses who see this happen and the wider local community. It follows that engaging, developing, and supporting these individuals and groups of people must be a primary concern for any agency managing a case and seeking to use these orders. Without the initial complaint of the witness, the agency will have no detailed knowledge of the problem. Without their continuing engagement, there will be no evidence on which to build a case.
Local strategies to promote the use of orders should have the interests of the witnesses and the community at their centre. The welfare and safety of residents whose complaints form the basis of any action must at every stage of the process be the first consideration. The use of hearsay evidence and professional witnesses is one way of achieving this (see section on hearsay evidence above).
While professional witnesses may have a duty to engage, lay witnesses can only be expected to do so if they can see a point in doing it; if the agency is credible and authoritative;
if the case work is visibly focused on the interests of the witnesses; if the order protects them and stops the anti-social behaviour quickly and effectively; and if the case manager offers them well-informed, practical personal support throughout the period of evidence collection, court proceedings and afterwards, as necessary.

The experience of witnesses must be given value and significance by case managers. The status and importance of witnesses in case development must be made clear. They should be provided, as appropriate, with:
a simple method of capturing information - diaries, video/audio recording facilities and translation services.
information on services and procedures - about the way witness support services work, service access points, telephone numbers and the name of the case manager working on the case.
an active and respected role in developing the case - the case strategy should reflect their needs, particularly for reassurance about their safety, and they should have control over any information they provide, including agreeing the form in which it will be provided to the defence;
protection for themselves and their family - security for door and window access, emergency contact equipment, panic alarms and mobile phones may all be appropriate in particularly serious cases.
regular contact from the case manager, including telephone contact as agreed with the witness (daily, weekly, etc).
support for any court appearance - a briefing on court procedures and what they should expect, the presence with them in court of the case manager, transport to and from court (if necessary) and a secure space separate from perpetrators in which they can wait to be called; and
support after a court appearance - speedy delivery of information, copies of any orders which have been made and an explanation of the implications of the court decision.
Each key witness should also be engaged in a face-to-face meeting with the agencies, including those who do not wish to give a statement or attend court.

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Use of hearsay anti professional v Unless evidence

Agencies should publicise positive results - one way this can be done is through leaflet drops (these can be cost effective when targeted appropriately).
Witness support is an area where the benefits of partnership working can be clearly seen local authorities and the police have different skills and resources and can combine them to give well-rounded support.
Methods of supporting witnesses currently being used by agencies also include:
enclosing a letter with the summons advising the respondent to stay away from witnesses.
a higher police presence in the vicinity.
giving witnesses the personal mobile telephone number of a named police officer who can be called if they are threatened.
visits from neighbourhood wardens at pre-arranged times (sometimes daily); and
phone calls from the local authority at pre-arranged times.
The interim order enables witnesses to be protected from the outset of the court process.
Sections 48 and 49 of the Criminal Justice and Police Act 2001 make it an offence to intimidate witnesses in civil proceedings such as those for ASBOs.
Improving protection of witnesses in court
Manchester City Council protects witnesses

Issue

Witnesses felt anxious about giving evidence. Their concerns included the prospect of appearing in court, coming face to face with defendants and being threatened by defendants at the court building, as well as uncertainties about waiting room and refreshment facilities.

Approach
Manchester City Council negotiated the following arrangements with local courts for anti-social behaviour cases:
access to a quiet room for witnesses.
a video link for perpetrators in prison where it would be expensive to bring them back for an ASBO or injunction hearing (this also has the benefit of being less stressful for the witnesses).
a video link for children and young people; and
police presence, where appropriate.
In addition, the council provides practical information and support to witnesses.
They are made aware of what to expect, including the court layout, where they and the defendant(s) will be sitting and how people will be dressed. Practical support also includes transport to and from the court, being met by a council officer on arrival and information about refreshment and bathroom facilities.
Outcome
The result has been reassurance and physical security for witnesses. This has led to a reduction in the anxiety about the prospect of appearing in court or accidentally meeting a defendant. Witnesses are better able to focus on the ease. The ease manager is also able to keep witnesses informed of progress and to manage the case more effectively.
Contact
Nuisance Strategy Group Telephone: 0161 234 46l 1
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Information sharing
Section 115 of the Crime and Disorder Act 1998 empowers any person to disclose information, where necessary or expedient for the purposes of the Act, to a 'relevant authority', namely a chief officer of police, police force, local authority, probation service or health authority, or to a person acting on their behalf. Where the agency requesting the information clearly needs it for the purposes of reducing anti-social behaviour, the presumption should normally be that it will be supplied.
As a result of the findings of the Crime and Disorder Act review, the Police and Justice Bill before Parliament seeks to strengthen section 115 of the Crime and Disorder Act further. For example, the power to disclose personal information has not changed but it places a duty on relevant authorities to share depersonalised data which is relevant lor community safety purposes and already held in a depersonalised format.
Information sharing and registered social landlords
A 'relevant authority' (as defined by section 115 of the Crime and Disorder Act 1998) may disclose information to a registered social landlord where the landlord is acting on behalf of the relevant authority for the purposes of the provisions of the Act.
In order to be 'acting on behalf of the relevant authority, the person or body so acting must have authority and must have consented to do so. Such authority may be given in writing or orally. Authority may also be implied from the conduct of the parties or from the nature of employment. Authority may be confined to a particular act or be general in its character. If authority is general, then it will that be confined to acts that the relevant authority itself has power to do.
Information sharing protocols
It may be useful for partners to negotiate information sharing protocols, examples of which can be obtained from the Home Office Information Sharing Team at informationsharing@homeoffice.gsi.gov.uk

www.crimereduction.gov.uk/ information sharing
If possible, the protocol should be published, so that the public can see that information is being shared in an appropriate way.
The model protocol can be accessed at www.crimereduction.gov.uk/infosharing.htm
Information sharing issues can also be discussed with the Information Commissioner's Office, whose website (www.ico.gov.uk) gives further details.
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The terms of the order (the prohibitions)
The role of the agencies
Although it is for the court to decide what prohibitions are to be imposed by the order, the applicant agency should propose conditions (including duration) to the court.
A full order should be drawn up using the form in the court rules. The courts find it helpful if applicants can ensure that they are equipped to amend and print off the final version of the order at the end of the hearing. This improves efficiency and helps ensure that the defendant leaves the court with a clear understanding of the prohibitions.
In the county court, the proposed order should accompany the application. The process for the county court is set out in the Practice Direction at Appendix B.
Where the order is made on conviction in criminal proceedings, an agency concerned in the case, such as the police, may propose prohibitions or the court may draw them up of its own volition. It should be noted that the order may not impose positive requirements, only prohibitions.
Careful thought needs to be given to the formulation of the conditions so they cannot be easily circumvented and can be easily understood by the perpetrator.
The prohibitions
The prohibitions:
should cover the range of anti-social acts committed by the defendant.
should be necessary for protecting person(s) within a defined area from the anti-social acts of the defendant (but, as a result of the recent changes, that defined area may be as wide as necessary and could in appropriate cases include the whole of England and Wales);
should be reasonable and proportionate.
should be realistic and practical.
should be clear, concise, and easy to understand.
should be specific when referring to matters of time if, for example, prohibiting the offender from being outside or in particular areas at certain times.
should be specific when referring to exclusion from an area, including street names and clear boundaries such as the side of the street included in the order (a map with identifiable street names should also be provided).
should be in terms that make it easy to determine and prosecute a breach.
should contain a prohibition against
inciting/encouraging others to engage in anti-social behaviour.
should protect all people who are in the area covered by the order from the behaviour (as well as protecting specific individuals).
may cover acts that are anti-social in themselves and those that are precursors to a criminal act, for example a prohibition on entering a shopping centre rather than on shoplifting.
may include a general condition prohibiting behaviour which is likely to cause harassment, alarm and distress, but where this is done there must be further clarification of what type of behaviour is prohibited; and

may include a prohibition from approaching or harassing any witnesses named in the court proceedings.
Examples of AS BO prohibitions can be found on the Crime Reduction website at www.crimereduction.gov.uk
The courts
The absence of a precise definition of antisocial behaviour within the legislation means that orders can be used to tackle a wide range of behaviour. In recent years, courts have imposed orders to prevent behaviour such as joyriding, verbal abuse, vandalism, begging,
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The terms of the order (the prohibitions)
drinking underage and assault. While the proceedings and the making of the order itself can curb behaviour, the extent to which the order succeeds also depends on the prohibitions imposed, which in turn require effective wording.
ft is good practice for the applicant to provide a draft of the prohibitions sought, but the final wording of the order will be a matter for the court. Problems have arisen when prohibitions have been drafted too widely or in such ways that enforcement is made difficult, if not impossible. Guidance and genera! principles on drafting prohibitions have come from legislation, case law and shared best practice. The following section draws together these principles and provides suggestions and comments for consideration.
There is now a requirement for the court to set out its findings of fact in relation to antisocial behaviour on the face of the order, following the cases of Wadmore and Foreman.
Effective prohibitions
If the conditions for making an order are met, the court may make an order which prohibits the defendant from doing anything described in the order (section 1(4) Crime and Disorder Act 1998 (CDA)). The facts leading to the order should be recorded and the court should provide its reasons for making the order ***(C v Sunderland Youth Court*** [2003 J EWHC 2385).
The effect of the order should be explained to the defendant and the exact terms pronounced in open court. Most courts now have a practice of serving the defendant with a copy of the court order before he or she leaves court and may also require his or her acknowledgement. The order should set out in full the anti-social behaviour in relation to which the order was made (7? ***v Shane Tony P***
EWCA Grim 287).
Once the court has decided that the order is necessary to protect persons from further anti-social acts by the defendant, the court must then consider what prohibitions arc appropriate to include. Each order and therefore prohibition will need to be targeted to the individual and the type of anti-social behaviour it is to prevent.
The prohibitions that may be imposed are those necessary to protect persons from further anti-social behaviour by the defendant (section 1 (6) CDA) and must not impose positive obligations. Therefore, each prohibition must be:
negative in nature.
precise and target the specific behaviour that has been committed by the defendant.
proportionate to the legitimate aim pursued and commensurate with the risk to be guarded against, which is particularly important where an order may interfere with an ECHR right (7? v lioness [2005] EWCA 2395); and expressed in simple terms and easily understood.
Identification of some of the best practice used within the courts suggests that the following issues should be borne in mint! when formulating prohibitions:

A court should ask itself before making an order are the terms of this order clear so that the offender will know precisely what it is, he or she is prohibited from doing?' (R v lioness |2005| EWCA 2395).
Less common phrases such as 'curtilage', 'paraphernalia' or 'environs' should be avoided as they may cause confusion.
Can it be enforced? Those who will enforce the order must be able to identify and prove a breach.
Are any excluded areas clearly delineated? Most courts require a map to be included and it may be necessary to delineate which side of the road forms the boundary. If a line is drawn down the middle of a road, there may be arguments as to which side of the road the defendant was standing.
Does the prohibition clearly identify those whom the defendant must not contact or associate with?
Where the defendant is a foreign national, some courts consider it good practice for the order to be translated into the native tongue.
testing the prohibition by considering ways in which it could be breached may highlight its limitations (7? v McGrath EWCA Crim 353).
There is no requirement that the acts prohibited by an order should by themselves give rise to harassment, alarm, or distress (7? v McGrath [20051 EWCA Crim 353).

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* Curfews are substantially prohibitive and, while also a sentence of the court, there is nothing legally objectionable to a curlew as a prohibition if the necessary protection of the public justifies its inclusion (7? ***(Lonergan) v Lewes Crown Court*** [2005] EWHC 457 (Admin)).
A prohibition can prohibit behaviour that is in any event unlawful, although previously the courts have encouraged inclusion of comparatively minor offences only (***R v Shane Tony P*** [2004] EWCA Crim 287). However, recently the Court of Appeal has indicated that prohibiting behaviour that is in any event a crime does not necessarily address the aim of an order, which is to prevent anti-social behaviour. Prohibitions should enable agencies to act before the anti-social behaviour takes place rather than waiting for a crime to be committed ***(R v Bones*** [2005] EWCA 2395). Therefore, bail conditions provide a useful analogy when considering what prohibitions to impose.

The Court of Appeal provided some hypothetical examples by way of guidance.

If faced with a defendant who causes criminal damage by spraying graffiti, then the order should be aimed at facilitating action to be taken to prevent graffiti spraying by him before it takes place. For example, the prohibition could prevent the offender from being in possession of a can of spray paint in a public place, giving an opportunity to take action in advance of the actual spraying. This makes it clear to the defendant that he has lost the right to carry such a can for the duration of the order.
If a court wished to make an order prohibiting a group of youngsters from racing cars or motor bikes on an estate or driving at excessive speed (anti-social behaviour for those living on the estate), then the order should not (normally) prohibit driving while disqualified. It should prohibit, for example, the offender while on the estate from taking part in, or encouraging, racing, or driving at excessive speed. It might also prevent the group from congregating with named others in a particular area of the estate. Such an order gives those responsible for enforcing the order on the estate the opportunity to take action to prevent the anti-social conduct before it takes place. Neighbours can alert the police, who will not have to wait for the commission of a particular criminal offence.

The order will be breached not just by the offender driving but by his giving encouragement by being a passenger or a spectator.
The court also seemed to leave open the door for the continued use of a prohibition to prevent conduct that also amounts to an existing offence which carries only a monetary penalty, for example loitering for the purpose of prostitution. The court should not impose such a prohibition merely to increase the sentence for the offence but must go through all the steps to make sure that an order is necessary.
Further details can be found on the Together website at www.together.gov.uk
Length of prohibitions
In ***R (lonergan) v Lewes Crown Court*** [2005] EWHC 457 (Admin), Maurice Kay LJ referred to the duration of prohibitions, saying:
A curfew for two years in the life of a teenager is a very considerable restriction of freedom. It may be necessary, but in many cases I consider it likely that either the period of curfew could properly be set at less than the full life of the order or that, in the light of behavioural progress, an application to vary the curfew under section 1(8) might well succeed.'
Consequently, just because an order must run for a minimum of two years, it does not follow that each and every prohibition within the order must endure for the life of the order. This approach was endorsed by the Court of Appeal in ***R v Bones*** [2005] EWCA 2395 which considered that it might be necessary to amend or remove a prohibition after a period of time, for example if the defendant started work.
ASBOs on juveniles should be reviewed yearly, and further details are given on page 45.
Targeting specific behaviour
As noted above, prohibitions must target the defendant's specific anti-social behaviour.
But assuming the prohibitions are negative, specific and enforceable, the appropriateness of
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The ter nix of the order (the prohibitions)
the prohibitions imposed can be judged only on the facts of each case. Therefore, a number of common scenarios are included below for consideration, these are based on orders made by the courts, although facts and prohibitions have been altered to highlight specific issues.
While these types of behaviour have been made the subject of orders, this should not imply that such behaviour will automatically be held to be subject to orders in the future.
Further examples of prohibitions can be found on the Crime Reduction website at www.crimereduction.gov.uk
The following are examples of prohibitions that were drawn up but were found to be too wide or poorly drafted:
Not to be a passenger in or on any vehicle, while any other person is jsic] committing a criminal offence in England or Wales.
(A breach could be occasioned by travelling in a bus, the driver of which, unknown to the subject of the order, was driving without a licence ***(R (W) v Acton Magistrates' Court*** [2005] EWHC 954 (Admin)).
Not to associate with any person or persons while such a person or persons is engaged in attempting or conspiring to commit any criminal offence in England or Wales. (A similar result to the above, in that he could be associating with someone who, unknown to him, was conspiring to commit an offence.)
Entering any other car park, whether on payment or otherwise, within the counties of |...].
(This was considered to be too draconian as it would prevent the defendant from entering, even as a passenger, any car park in a supermarket ***(R v McGrath*** [2005] EWCA Crim 353).)

Trespassing on any land belonging to any person, whether legal or natural, within those counties. (As above, in that any wrong turn onto someone else's property would risk custody.)
Having in his possession in any public place any window hammer, screwdriver, torch or any tool or implement that could be used for the purpose of breaking into motor vehicles. (Unacceptably wide, as the meaning of any tool or implement' is impossible to ascertain.)
° Entering any land or building on the land that forms a part of educational premises, except as an enrolled pupil with the
agreement of the head of the establishment or in the course of lawful employment.
(It was held that the term 'educational premises' lacked clarity, for example it could have included teaching hospitals or premises where night classes were held. Also, there was a danger that the defendant might unwittingly breach the order if he played on playing fields associated with educational premises ***(R v lioness*** [2005] EWCA 2395).)
In any public place, wearing, or having with you, anything that covers, or could be used to cover, the face or part of the face this will include hooded clothing, balaclavas, masks or anything else that could be used to hide identity. (This was found to be too wide and a breach could occur by wearing a scarf or carrying a newspaper.)
Doing anything that may cause damage.
(Far too wide, as it may include the defendant scuffing his shoes.)
Committing any criminal offence. (Taken with other prohibitions, the divisional court commented that this was very plainly too wide ***(R (on application of W) v DPP*** [2005] EWHC 1333 (Admin).)
Further examples and consideration of prohibitions made for football-related violence may be found in the ease of ***(R v lioness*** [2005] EWCA 2395).
Duration of an order
The minimum duration of an order is two years, which was set in order to give respite to communities from anti-social behaviour. There is no maximum period and an order may be made for an indefinite period. It is for the court to decide the duration of an order, but the applicant agency should propose a time period as part of its application.
The duration applied for should take into account the age of the recipient, any special conditions that might affect their behaviour, the severity of his or her anti-social behaviour, the length of time it has gone on for and the recipient's response to any previous measures to deal with the behaviour. A longer order will generally be appropriate in the case of more serious or persistent anti-social behaviour. Orders issued to children and young people should be reviewed annually and careful consideration must be given to the case for applying for such orders to last beyond two years.

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Summons's procedure
Magistrates' court (acting in its civil capacity)
The lead individual in charge of the case should arrange for an application form and three copies of the summons form to be completed and served upon the court. Once these proceedings have been issued, the applicant should serve the defendant with the following:
1. the summons.
2. a copy of the completed application form.
3. documentary evidence of statutory consultation.
4. guidance on how the defendant can obtain legal advice and representation.
5. notice of any hearsay evidence.

6. details of evidence in support of the application as agreed with the applicant agency's solicitor; and
7. a warning to the defendant that it is an offence to pervert the course of justice, and that witness intimidation is liable to lead to prosecution.
Wherever possible, the lead officer in charge will ensure that service of the summons is made on the defendant in person. If personal service is not possible, the summons should be served by post as soon as possible to the last known address.
Where a child or a young person is concerned, a person with parental responsibility must also receive a copy of the summons. This could be a local authority social worker in the case of a looked-after child as well as, or instead of, the parent. ('Parent' has the same meaning as under section 1 of the Family Law Reform Act 1987, and 'guardian' is defined in section 107 of the Children and Young Persons Act 1933.)
The summons forms are set out within the Magistrates' Courts (Anti-Social Behaviour Orders) Rules 2002. See Appendix D.

County court

The process for the county court is set out in the Practice Direction of the updated Civil Procedure Rules at 65.21 -65.26.

Disclosure

Before evidence is disclosed, the applicant should consult the police and other agencies to ensure that all reasonable steps have been taken to support witnesses and minimise any potential for witness intimidation. Evidence should not be disclosed without the express permission of the witness. However, evidence that is not disclosed cannot be relied on.
The applicant should seek to maintain witness anonymity and ensure that it does not identify them by default (for example through details of location, race, personal characteristics or age).

Court procedures

It is important that those hearing the case are fully briefed on the purpose of an order. There should be no confusion as to the purpose of the order, which is to protect the community. Where the case concerns a child, the welfare of the child is, of course, to be considered, and indeed the making of the order should contribute to this by setting standards of expected behaviour. But the welfare of the child is not the principal purpose of the order hearing.
Whether or not the subject of the application is present, the court should be asked to make the order. Adjournments should be avoided unless absolutely necessary.
Magistrates' court (acting in its civil capacity)
An application for an order in the magistrates' court is made by complaint. This means that the court will act in its civil capacity. The provisions governing civil applications for
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orders in magistrates' courts are set out in the Magistrates' Courts Act 1980.
The application, under section 1(3) of the Crime and Disorder Act 1998, should be made to the magistrates' court whose area includes the local government area or police area where people need to be protected from the anti-social behaviour.
The lead officer in charge of the case should ensure that all the evidence and witnesses are available at the hearing, including evidence in support of any need for the court to make an immediate order.
Under section 98 of the Magistrates' Courts Act 1980, evidence will be given on oath. Any magistrate or judge may hear the case.

Where a defendant fails to attend a hearing, the applicant may, after substantiating the complaint on oath, apply to the court to issue a warrant for the defendant's arrest. Various provisions for adjournment, non-attendance at court and the issue of a warrant for arrest are contained in sections 54 to 57 of the Magistrates' Courts Act 1980.
County court
An application for an order in the county court must be made in accordance with the procedure set out in the Practice Direction at Appendix B.
Where the applicant is the claimant in the principal proceedings, the application for the order should be included in the claim form. Where the applicant is the defendant in the principal proceedings, the application should be made by way of an application notice,
How to prepare a court tile for an application
A file to support the application for an order should be prepared by the lead agency or the solicitor acting on their behalf.
A minimum of eight identical court bundles will be required as follows.
three for the magistrates.
one for the legal adviser.
one for the applicant's solicitor.
one for the defence solicitor.
one for the defendant; and
one for the witness box.
The files are in loose-leaf format (in an A4 ring binder) and should be indexed and paginated.
The index and contents should include, as appropriate:
the summons for the order, together with proof of service.
the application for the order (in the format provided by the Magistrates' Court (Anti-Social Behaviour Orders) Rules 2002);
the defendant's details.
the defendant's previous convictions.
the defendant's acceptable behaviour contract (ABC) agreements.
a summary of the incidents being relied upon by the applicant.
1. a map and description of the exclusion area.
2. an association chart (showing relationships and connections where the alleged anti-social behaviour is by a group of people).
3. documentation of statutory consultations.
4. supporting statements from any multiagency consultation.
5. a statement from the officer in the case.
6. any other statements obtained.
7. hearsay notices.
8. a draft order for approval by the court; and
9. a home circumstances report where the subject of the order is a child or young person (if necessary and completed).
The bundle should be prepared and served on the solicitor for the defendant as soon as the summons is served. The applicant's solicitor should attempt to have the contents of the bundle agreed prior to any pre-trial review. Disclosure should be transparent and complete.
Contact
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Telephone: 01772 412919
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which should accompany the defence. If the applicant is not a party to the principal proceedings, an application to be had a party and for the order must be made to the court in the same application notice.

Orders made on conviction in criminal proceedings

After a defendant has been convicted of an offence, the prosecutor may make an application for an order. Alternatively, the court may make an order of its own volition.

Orders on conviction can be made by the magistrates' court, the youth court or the Crown court. The form of these orders is set out in the Magistrates' Court Rules and the Crown Court Rules. An order may be made only if the court sentences or conditionally discharges the offender for a relevant offence.

The Crown Prosecution Service usually requests the court to make an order on conviction, as there is no formal application process for this order. The court has to consider that:

- the offender has acted in an anti-social manner, that is in a manner that caused or was likely to cause harassment, alarm, or distress to one or more persons not of the same household as the offender; and
- an order is necessary to protect any persons in any place in England and Wales from further anti-social acts by him.
- Evidence
- Evidence should explain to the court the context of the anti-social behaviour and its effect on other people. It can include:
- direct witness statements.

The head of a noisy household gets an ASBO for ignoring repeated official warnings and threatening complaining neighbours and council officers

Issue

In March 2004, neighbours of a house in Lowestoft were subjected to frequent and persistent loud music, resulting in 17 complaints over the course of a month. The perpetrator, who was a housing association tenant, had intimidated, threatened, and verbally abused her neighbours, council officers and visitors.

Approach

A noise abatement notice was served on the perpetrator by environmental health officers under section 80 of the Environmental Protection Act 1990. Audio equipment was confiscated following breach of the noise abatement notice. During the confiscation, the perpetrator verbally abused the council officers.

After seven warning letters, two abatement notices and the confiscation of more than £1,000 of musical equipment, the council was still receiving complaints.

Failure to comply with an abatement notice without reasonable excuse is an offence, and the noisy neighbour was taken to court. The council consulted Suffolk Police and the housing association and proposed terms for an order on conviction that achieved much more than the original abatement notice was capable of.

The magistrates granted the council's application for an order on conviction with the following prohibitions:

- not to play loud music that could be heard outside her dwelling; and
- not to verbally (or otherwise) **abuse:** employees or agents of the council; neighbours; or visitors to the neighbourhood.

Outcome

The order on conviction had several advantages over the noise abatement notice as an enforcement tool. It was easier to enforce as the evidence of experts such as environmental health officers to prove statutory noise nuisance would not be required. The order on conviction reduced the test of compliance to a simple (nonexpert) factual observation of

audibility' beyond the confines of the defendant's dwelling - a simple matter of observable fact that, say, a police officer could witness.
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The second prohibition to deal with the tenant's threatening and abusive behaviour was beyond the scope of the original abatement notice. It was granted as the council was able to produce evidence of the tenant's behaviour to justify the restriction gained from early consultations with Suffolk Police and the housing association, which proved it was a reasonable restriction to impose on the defendant.
The resulting order on conviction did not cost any more than the noise prosecution would have cost on its own. Obtaining these restrictions in this way avoided the need for a stand-alone ASBO application in respect of the other aspects of the defendant's behaviour, saving money, avoiding several weeks' delay, and achieving faster and more readily enforceable relief for the wider community.
Valuable lessons were learnt by environmental health and other enforcement authorities in this action.
In particular, early consultation with relevant agencies in the process of investigation and enforcement are important to an ASBO's success. And if the applicant for an order offers the other relevant agencies the opportunity to assist in drafting appropriate prohibitions, a successful outcome, which offers relief for the community 'on all fronts', is more likely.
Contact
Andrew Reynolds, Principal Environmental Health Officer, Waveney District Council
Telephone: 01502 562111
professional witness statements.
hearsay evidence.
CCTV footage.
letters of complaint (including anonymous complaints) to the police, the council or a landlord.
articles in the local press.
the number and nature of the charges against the defendant.
the defendant's character and conduct as revealed by the evidence.
the content of the victim's personal statement.
other offences that have been taken into consideration (TICs);
details of final warnings or previous convictions.
the risk assessment in any pre-sentence report.
records of any non-compliance with other interventions, e.g., ABCs or warnings; and
the community impact statement (CIS).
A CIS can be written by a caseworker (such as a housing officer or community safety officer) and/or by the local police. The purpose of a CIS is to outline the effect the anti-social behaviour is having on the wider community in a way that is clear and concise for the judge's consideration. In certain circumstances, some elements of evidence, such as hearsay, CCTV footage and letters of complaint, can be put in a (Vis.
Adjournments
Section 1.0(3) of the Magistrates' Courts Act 1980 permits adjournments to be made after conviction and before sentence to enable enquiries to be made or, in this context, to determine the most suitable way of dealing with an application for an order under section 1C of the Crime and Disorder Act 1998.Where the court adjourns and delays sentencing to consider the order, it can impose bail conditions in the normal manner.

Section 139 of (he Serious Organised Crime and Police Act 2005 has amended section 1C of the Crime and Disorder Act 1998 to allow lor adjournments after sentencing the offender for the purpose of considering an order. Powers are also available to compel a defendant to return to court after sentencing to attend the adjourned hearing.
interim orders on conviction
An interim order on conviction can be sought to protect vulnerable witnesses and communities from threats of violence, intimidation and further anti-social behaviour by the defendant pending the hearing of an application for a full order. This change to the Crime and Disorder Act 1998 was also introduced by section 139 of the Serious Organised Crime and Police Act 2005. For more information on interim orders, see the
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article 'What are interim anti-social behaviour orders?' on the Together website at www. together, gov.uk
Step-by-step guide
A step-by-step guide to the process can be found at Appendix E.
Public funding for defendants
A guide to public funding for defendants can be found at Appendix F.
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- **Children and young people**

The Home Office, Youth Justice Board and Association of Chief Police Officers have issued separate guidance on the role of the youth offending team (YOT) in dealing with anti-social behaviour.7 There is also separate guidance on the interventions available for children under 10 at Appendix B.
This section sets out the procedures for applying for ASBOs and similar orders in respect of children and young people, and the procedures for managing the case afterwards.
Who can apply for an order?
Agencies able to apply for orders are the same as those for adults, and the consultation requirements are the same.
The role of the YOT needs to be clearly set out in terms of what it can offer in the prevention of anti-social behaviour, and in the ASBO process. All other agencies should involve the YOT in any consideration of an order at an early stage as it is likely to have much information to share about that young person. The YOT has a responsibility to prevent crime and anti-social behaviour by young people, and should help partners to obtain an order to stop the behaviour continuing where it is deemed appropriate.
If there are any doubts about the option of obtaining an order, these should be explored at an early stage with the YOT and other partners, rather than in court. The YOT can also have a role in explaining the conditions of an order to the young person and their parents, explaining the impact of that person's behaviour on the community, and making it dear that the order is the consequence of that behaviour. In addition, the YOT and other partners should offer support in order to aid compliance.
In cases of a breach of an order, the pre-sentence report (PSR) provided to the court by the YOT should outline the impact title behaviour has had on the community.
The YOT can also use the PSR in criminal proceedings to recommend an order on conviction where that course of action has been agreed and deemed appropriate.
The PSR should also address the issue of parenting and further support to the young person. Courts can make a parenting order with an ASBO or similar order, if a voluntary approach

has failed and it will help improve behaviour, together with an individual support order (ISO). The YOT has a key role in both of these interventions. Details on these are set out below,

Applications to the magistrates' court acting in its civil capacity

Since the youth court has no civil jurisdiction, applications for orders against under-18s will be heard by the magistrates' court (except where the youth court is asked to impose an order on conviction). A pilot to allow children and young people to be joined to proceedings in the county court, for the purpose of obtaining an ASBO where the anti-social behaviour is material to the principal proceedings, is currently under way in 11 county courts and is due to run until September 2006.

The officer in charge of the application should contact the justices' clerk in advance of the hearing to ensure that it will be conducted in a way that is suitable for the child or young person.

Where there is an application to a magistrates' court lor an ASBO under section 1 of the Crime and Disorder Act 1998, or an application to a magistrates' court for an ASBO to be varied or discharged under section 1(8) of the Act, and the person against whom the order is sought is under 18, the justices constituting the court should normally be qualified to sit in the youth court.

Unlike a youth court, which is closed to the general public, the magistrates' court is Youth Justice Board, Home Office and Association of Chief Police Officers (2006), ***Antisocial Behaviour: A guide*** to ***the role of*** Youth ***Offending Teams in dealing with antisocial behaviour.*** This can be downloaded at www.youthjuslice board.gov.uk/Publication's/Scnpts/pro(IView.asp?icfproduct=212&ep = **165,**

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Children and young people

Dealing effectively with persistent young perpetrators in Norfolk

Issue

Improved partnership working between the police and the YOT was key to effectively tackling anti-social behaviour by young people.

Approach

Regular liaison meetings of YOT and youth inclusion and support panel (YISP) staff were held at the Safer Communities Unit. Community reparation projects were planned which impacted on sensitive communities or resonated with vulnerable members of the community. Police officers forged contact with youth groups and educational centres. Part of the action plan required YISP workers to attend a police tasking and co-ordination meeting.

Outcomes

The YOT discussed, and was helpful to and supportive of, community reparation projects that added to increased public reassurance. Work commissioned included graffiti clearance in priority areas, and the cleaning of home Watch' street signs that were covered in algae, and where householders were elderly and not able to carry out that work. Two respected local officers maintained their links with a local community youth project through a weekly radio broadcast. On the Beat1, on the first community radio station in Norfolk. The Safer Communities inspector became a member of the steering group of that project. Community team officers enjoyed good relations with the Excellence Centre, a unit for excluded or disengaged children of school age, as evidenced by the support of the centre manager for the Constabulary's recent 'Chartermark' award.

Contact

Inspector Peter Walsh

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open to the general public and has no automatic restrictions to prevent public and press access or to prevent reporting of the proceedings or to protect the identity of a child or young person (or adult) who is the subject of an application.
The court should have a good reason, aside from age alone, to impose a discretionary order under section 39 of the Children and Young Persons Act 1933 to prevent the identification of a child or young person concerned in the proceedings.
The applicant may resist a call from the defendant's representatives for such restrictions if the effectiveness of the ASBO will largely depend on the wider community knowing the details.
The applicant should note the following.
Under section 98 of the Magistrates' Courts Act 1980, evidence will be given on oath, except the evidence of a child under 14 years of age, which is given unsworn.
Section 34A of the Children and Young Persons Act 1933 requires the attendance of a parent or legal guardian at court for any person under 16 years of age. Every effort should be made before a hearing to ensure that this takes place to avoid unnecessary adjournments.
The court will require information about the child's or young person's background, home surroundings and family circumstances. Such information should be available to avoid the need for an adjournment.
Assessment of needs
When applying for an order against a young person aged between 10 and 17, the YOT should make an assessment of their circumstances and needs. This will enable the local authority to ensure that the appropriate services are provided for the young person concerned and for the court to have the necessary information about them.
It is vital that any assessment does not delay the application for an order. The lead agency should therefore liaise closely with the local social services department or YOT from the start of the process so that, where a new assessment is required, it can be begun quickly. In some cases an up-to-date assessment may already be available.
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Councils with social services responsibilities have a duty, arising from section 17 of the Children Act 1989, to safeguard and promote the welfare of children within their areas who may be in need the assessment of the needs of such children is expected to be carried out in accordance with the ***Framework for the assessment of children in need and their families?***
The guidance sets out the content and timescales of the initial assessment (seven working days) and the core assessment (35 working days). A core assessment is required when an initial assessment has determined that the child is in need. The assessment will cover the child's needs, the capacities of their parents and wider family, and environmental factors. This enables councils to determine whether the child is a 'child in need' and what services may be necessary in order to address the assessed needs.
The assessment of the child's needs should run in parallel with evidence gathering and the application process. Statutory agencies, such as social services, the local education authority or the health authority, have a statutory obligation to provide services to under-18s.They should do so irrespective of whether an ASBO application is to be made and the timing of that application. The ASBO application does not prevent such support and can proceed in parallel, or indeed prior to, that support.
Parenting orders
This section should be read in conjunction with Government guidance on parenting contracts and parenting orders. 'There is also information on the Together website (www.together.gov.uk).The applicant for parenting orders is the YOT. (Provisions in the

Police and Justice Bill currently before Parliament aim to extend to registered social landlords and local authorities the power to apply lor parenting orders.)

Parenting orders are available alongside other court action where:

an ASBO or a sex offender order has been made in respect of a child or young person; or a child or young person has been convicted of a criminal offence.

Parenting orders can be made for children aged between 10 and 17 provided that the conditions in section 8 of the Crime and Disorder Act 1998 are not. This section stipulates that a parenting order is desirable only if it is made 'in the interest of preventing repetition of the behaviour which led to the order being made.'

The court can decide to make the order; it is not necessary to obtain the consent of the parent or guardian.

It is essential that parents and guardians take responsibility for the behaviour of their children. If an ASBO or an order on conviction is made against a child or young person, the court must also consider making a parenting order in respect of the parents or guardians of the child or young person. Where the parent or child has a disability, a practitioner with specialist knowledge should be involved in the assessment process to help establish whether the behaviour is a result of disability and whether it could or should be addressed.

Parenting orders are civil orders that help to engage parents8 9 10 11 to address their child's offending or anti-social behaviour, and to establish discipline and build a relationship with their child. This may help the conditions of the ASBO to be met and thereby reduce the chances of the young person breaching the order.

The parenting order requires the parent or guardian to comply, for a period of not more than 12 months, with such requirements as are specified in the order, being those which the court considers desirable in the interests of preventing any repetition of the anti-social behaviour (for example ensuring that the Department of Health (2000) ***Framework for the*** assessment ***of children in need end their families.***

Home Office, Youth Justice Board, Department for Constitutional Affairs. ***Parenting Contracts and Orders Guidance,*** February 2004.

Provision for parenting orders is set out in sections 8, 9 and 10 of the Crime and Disorder Act 1998.The orders can be made in proceedings where a child safety order, an ASBO or sex offender order has been made; a child or young person is convicted of an offenc**e:** or a person is convicted of an offence under sections 443 or 444 of the Education Act 1996.

1.1. For the purposes of the 1998 Act, the term 'parent' has the same meaning as that contained within section 1 of the Family Law Reform Act 1987, that is either of the child's or young person's natural parents whether or not married to each other at the time of their birth. 'Guardian' is defined in section 117 of the 1998 Act with reference to section 107 of the Children and Young Persons Act 1933, and includes any person who, in the opinion of the court, has for the time being the care of the child or young person. This may include people who may not have parental responsibility for the child or young person as defined in the Children Act 1989, such as stepparents.

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Children and young people

child attends school regularly, avoids certain places, or is home by a certain time at night). The parent or guardian is required to attend a counselling or guidance programme for up to three months. This element is compulsory and must be imposed in all cases when an order is made (except where the parent or guardian has previously received a parenting order - section 8(5)). Programmes can cover setting and enforcing consistent standards of behaviour and responding more effectively to unreasonable adolescent demands.

The court needs to consider an oral or written report before making a parenting order, unless the child or young person has reached the age of 16.T0 avoid unnecessary adjournments, such a report should be available early in the court process.
A 'responsible officer', who will generally be from the local YOT, social services, probation service or local education authority, supervises delivery of the parenting order.
The officer will have responsibility for, among other things, arranging the provision of counselling or guidance sessions and ensuring that the parent complies with any other requirements which the court may impose.
If the parent does not comply with the order, the responsible officer can refer the matter to the police for investigation. Such action is generally expected only where noncompliance is sufficiently serious to warrant possible prosecution - the responsible officer is expected to work with the parent to improve compliance. But if prosecuted and convicted for non-compliance, the parent can be fined up to Jo 1,000 (level 3 on the standard scale).

Individual support orders

Section 1AA of the Crime and Disorder Act 1998, which was inserted by section 322 of the Criminal Justice Act 2003, provides for the making of ISOs, which have been available since May 2004.They are civil orders and can be attached to ASBOs made against young people aged between 10 and 17 years old. They impose positive requirements on the young person and are designed to tackle the underlying causes of their anti-social behaviour.
ISOs are available for stand-alone ASBOs made in the magistrates' courts only. Where a magistrates' court makes an ASBO against a young person, it must also make an ISO if it considers that an ISO would help to prevent further anti-social behaviour. ISOs are not available for orders on conviction, where it is expected that sentencing will address the underlying causes of the offence.
ISOs can last up to six months and require a young person to comply with such requirements as may be specified in the order and any directions given by the responsible officer to that end. Such requirements must be those which the court considers desirable in the interests of preventing repetition of the anti-social behaviour and may include requirements to participate in certain activities, to report to a specified person at specified times or to comply with educational arrangements, but in no case should they require attendance on more than two days a week. An example would be support sessions tailored to the individual's needs and designed to address the causes of the behaviour that led to the ASBO being made, such as counselling for substance misuse or an anger management programme. The ISO may name specific activities the individual must participate in and can also specify dates and places where attendance is required.

ISO application process

There is no need for a specific application for an ISO, although it might be helpful to raise the issue with the court. Where a magistrates' court is making an ASBO (stand-alone only) against a person under 18 years old, it is obliged to make an ISO at the same time if the following conditions are met:
the ISO would be desirable in the interests of preventing any repetition of the antisocial behaviour which led to the ASBO being made.
the young person is not already subject to an ISO; and
the Secretary of State has notified the court that arrangements for implementing the ISO are available (this was done in April 2004 in Home Office Circular 025/2004).
The court should ensure the requirements of the ISO and the consequences of breach are explained to the defendant. If an ISO is not made, then the court must state why it
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considers that the conditions for making the order arc not met. ISOs are not available for orders on conviction.
Role of the youth offending team
The YOT advises the magistrates' court on whether an ISO is necessary and the conditions an ISO should contain. This information is based on a need's assessment of the young person. The YOT is responsible for co-ordinating delivery of the ISO and also has a role in ensuring that the terms and conditions of both the ASBO and ISO are understood by the defendant. The conditions within the ISO are overseen by a responsible officer who is usually a member of the YOT, social services or local education authority.

Variation and discharge

An application to vary or discharge the ISO may be made by either the young person subject to the ISO or the responsible officer. The need to very an ISO may arise where support proves to be inappropriate or the individual moves out of the area. Equally if the ASBO linked to the ISO is varied by a court, the court may also vary or discharge the ISO at the same time.
If the ASBO comes to an end or is discharged, the ISO also ceases to have effect.

Breach

Breach of an ISO is an offence and criminal penalties apply, for ISOs to be credible, breaches must be dealt with.
The responsible officer is responsible for ensuring compliance with an ISO. It will usually be appropriate for the responsible officer to encourage compliance using warning tetters before instigating proceedings for a criminal prosecution.
The breach is taken forward by the Crown Prosecution Service and breach proceedings are heard in the youth court. If a court finds that the subject of the order has failed to comply with any requirement of the order, they are guilty of an offence. Breach is a summary offence and the court can impose a fine of up to:
£1,000, if defendant aged 14 or over; or
A.250, if defendant aged under 14.
Where the defendant is under 16, the parent will usually be responsible for payment of the fine. The court also has the discretion to order the parent to pay if the defendant is aged between 16 and 18 (as set out in section 137 of the Powers of Criminal Court (Sentencing) Act 2000.

A referral order is not available for breach of an ISO.

Balcony games for the boys creates corridor of hell for neighbours: ASBOs, ISOs and a house move bring relief for all

Issue

Sons of two neighbouring families were responsible for persistent noise nuisance which caused neighbours great distress for over a year. The children of families X and Y, aged between 10 and 15, lived in first- floor council flats where they played rowdy games outside their flats. Family X had a secure tenancy while family Y had a short-term tenancy. Residents frequently complained to the housing office or to the local police community support officers (PCSOs).

Approach

Police and the housing office worked closely together on the case and discovered a pattern of nuisance. PCSOs and the estate manager mediated between families X and Y and their neighbours. When mediation failed, joint visits were made to warn the families of the consequences of their continued antisocial behaviour. Formal warnings followed, outlining the consequences of the boys' actions in terms of potential ASBOs and possible loss of their

parents' tenancy. When all warnings had failed, a multi-agency team obtained an interim ASBO on the five boys to put an immediate stop to the nuisance.
Evidence provided by PCSOs and the estate manager was used at the hearing, and interim orders were granted.
Minor breaches over the Christmas period were reported to the police by witnesses between the interim and full hearing, and
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Children and young people
these strengthened the ease for the ASBOs at the full hearing.
Witnesses who were previously fearful of giving evidence were willing to do so at the full hearing where the ASBOs were granted, and an ISO was attached to each ASBO to tackle some of the underlying causes of the behaviour.
The conditions of the ASBOs on the five boys ordered them:
not to cause nuisance within the vicinity of their dwellings.
to stop knocking on doors and windows; and
not to play games on the balcony. Outcome
The main benefit of the ASBOs was the relief that they brought to the neighbours, who felt they had been supported through the process by police and the housing office.
The ISO, devised and facilitated by Norfolk Youth Offending Team, consisted of four hour-long sessions aimed at helping the boys develop an understanding of how their anti-social behaviour, their constant shouting and banging, impacted on themselves as a group, on their immediate family, and on their neighbours.
The first session defined the ground rules for the group, including showing respect, listening with only one person talking at a time, no shouting, and with each member
being allowed to voice an opinion. The second session got the boys listening to what people were saying around them. The third session introduced elements from a social skills game that focused on the boys' finding different ways of asking each other something without resorting to shouting. In the fourth session, a worker from Positive Futures helped the boys think about what leisure activities were available as alternatives to playing on the balcony. The youth worker kept the boys' parents up to date on what was happening in the sessions. Family X, who were relocated away from family Y, kept their tenancy and no further problems were reported. Similarly, family Y succeeded in stopping their anti-social behaviour.
The ISO gave the boys an opportunity to understand the effect of their rowdy behaviour on themselves and others. As a result of the order and the interventions of the youth worker, the boys took up recreational activities and found constructive ways of spending their time. Overall, the intervention package was a great success for the community, and for the families themselves.
Contact
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In a debate in the House of Commons on 28 June, Vernon Coaker MP, a Home Office Minister, said:
"ISOs are playing their part in the wider battle to combat anti-social behaviour and promote positive behaviour. They have proven potential to help young people to turn around their lives and move away from anti-social behaviour and offending.

I share the enthusiasm for ISOs of my hon. Friend the Member for Stockport, and 1 hope that she and the other hon. Members will encourage local agencies to make more use of such a highly effective intervention tool."
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Immediate post-order procedure (adults and young people)
Where an ASBO or similar order is granted, it is preferable for a copy of the order to be served on the defendant in person prior to his or her departure from court. It is essential to ascertain that the defendant understands the nature of the prohibitions and the order.
Good practice - managing procedures and timescales
Practitioners handling such orders have taken a range of measures to minimise paperwork and delays, including:
breaking down the process into clear, manageable stages that are easy to follow for those unfamiliar with the process.
setting timeframes for each stage of the application to keep the process focused, including a commitment to arrange problem-solving meetings at short notice.
releasing key staff so that they can concentrate on the application process - this should result in evidence gathering being conducted quickly and efficiently.
using other agencies, such as neighbourhood wardens and station staff, to collect additional evidence where required (evidence gathering and attending incidents are tasks that local authorities, registered social landlords (R l. s) and the police are already involved in and therefore involve no additional cost);
adopting strategies to overcome challenges to witness evidence such as ensuring that witness statements corroborate.
minimising court delays by forewarning the courts of application and using pre-trial reviews.
sharing costs between partner agencies and utilising the expertise from each agency; and
not engaging in non-essential problem solving meetings in more serious cases in order to get to court more quickly.
Where an individual has not been personally served with the order at the court, the court should be asked to arrange for personal service as soon as possible thereafter.
In without notice proceedings, proof of service of an ASBO is important, since any criminal proceedings for breach may fail if service is challenged by the defence and cannot be proved by the prosecution. While all other orders do not need proof of service in order to prove breach of an order, lack of knowledge of existence of an order will contribute to a reasonable excuse for the defence. In the case of a child or young person, the order should also be served on the parent, guardian or an appropriate adult, and such service should be recorded.
An order comes into effect on the day it is made. But the two-year period during which no order shall be discharged except with the consent of both parties starts from the date of service.
The lead agency, if not the police, should ensure that a copy of the order is forwarded immediately to the police. The agency should also give copies of the order to the anti-social behaviour co-ordinator of the local crime and disorder reduction partnership, the other partner agencies and the main targets and witnesses of the anti-social behaviour, so that breaches can be reported and acted upon. The Justices' Clerks' Society guidance states that it is the responsibility of the court to inform the police of the making of an order."
The police should notify the appropriate- police area command on the same working day so that details of the defendant and the conditions of the order can be recorded.

A copy of the order should be provided to the lead agency's legal representative on the same day as the court hearing, and in the case of a child or young person, the court will provide a further copy for the youth
Campbell, S. (2002) ***Implementing Antisocial! Behaviour Orders: messages for practitioners.*** Home Office Findings 160, Sections 1(9), 18(6) and 1C of the Crime and Disorder Act 1998, as amended. justices' Clerks' Society. Good practice guide ***Anti-Social Behaviour Orders. A Guide to Law and Procedure in the Magistrates' Court,*** 4.5(V).
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Immediate post-order procedure (adults and your people)
offending team (YOT). The YOT should arrange for action to be taken by an appropriate agency (for example social services) to ensure that the young person understands the seriousness of the order.
It should also consider the provision of appropriate support programmes to help avoid a breach of the order by diverting the offender from the behaviour that led to it, although such programmes cannot, as the law currently stands, be a condition of the order.
Enforcing the order
The obtaining of the order is not the end of the process. The order must be monitored and enforced properly.
Partnership working after the order is made should include information exchange to ensure early warning of problems and clarification of who should do what to safeguard witnesses, as well as what other action should be taken to challenge the perpetrator in such cases.
Agencies need to be alert to the prospect that this should become a statutory requirement in the near future. Adopting this as best practice now will enable them to achieve compliance more readily.
Police National Computer (PNC)
Recording of orders on the PNC will enable police forces to enforce breaches effectively. Local arrangements should be made for orders to be placed on the PNC so that police officers are in a position to access usable data to identify those who are subject to an order. Conditions of the order should be appended clearly along with the identity of the case officer so that the necessary action can be taken in ease of a breach (which is an arrestable offence). It is essential that breaches of an order, appeals against the sentence and any other actions relating to the management of the case are reported to the agency responsible for the management of the case.
One-year review of juveniles' ASBOs
Orders issued to young people should be reviewed each year, given young people's continually changing circumstances, to help ensure that they are receiving the support they need in order to prevent breach. The review should be administrative rather than judicial and should be undertaken by the team that decided upon the initial application. Where practicable, the YOT should provide the group with an assessment of the young person. Depending upon progress towards improved behaviour, possible outcomes will include an application to discharge the order or a strengthening of the prohibitions. Applications to vary or discharge the order will have to be made to the court in the usual way. The overriding considerations remain the safety and needs of the community, and the review would have to incorporate the community's views on the order's effectiveness.
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Appeals

Magistrates' court (acting in its civil capacity) and orders on conviction in criminal proceedings

Section 4 of the Crime and Disorder Act 1998 provides the offender with the right of appeal against the making of a stand-alone ASBO. Section 108 of the Magistrates' Courts Act 1980 provides a right of appeal against an on- conviction order. An appeal in both cases is to the Crown Court. Rules 74 and 75 of the Magistrates Courts Rules 1981 and 6 to 11 of the Crown Court Rules 1982 apply to appeals against orders. Both parties may provide additional evidence. By virtue of section 79(3) of the Supreme Court Act 1981, an appeal is by way of a re-hearing of the case. In determining an appeal, the Crown Court should have before it a copy of the original application lor an order (if applicable), the full order and the notice of appeal. The lead agency should ensure that copies are sent to the court.

Notice of appeal must be given in writing to the designated officer of the court and the applicant body within 21 days of the order (Crown Court Rules 1982, rule 7). But the Crown Court has the discretion to give leave to appeal out of time (rule 7(5)). The agency that brought the initial application should take charge of defending any appeal against the order. It should also lead in action to guard against witness intimidation.

The Crown Court may vary the order or make a new order. Any order made by the Crown Court on appeal shall be treated for the purpose of any later application for variation or discharge as if it were the original magistrates' court order, unless it is an order directing that the application be re-heard by the magistrates' court.

Although on hearing an appeal it is open to the Crown Court to make any incidental order, for example to suspend the operation of a prohibition pending the outcome of the appeal where this appears to the Crown Court to be just, there is no provision for automatic stay of an order pending appeal.

The order remains in force pending the outcome of the appeal, and breach is a criminal offence even if the appeal subsequently succeeds.

An appeal against the ruling of the Crown Court is to the High Court by way of case stated under section 28 of the Supreme Court Act 1981, or by application for judicial review by virtue of section 29(3) of that Act. It is also open to the applying authority to seek to challenge a magistrates' decision to refuse to grant an order by way of case stated (judicial review of the decision to the divisional court) by virtue of section 111 of the Magistrates' Courts Act 1980.

County court

Any appeal against an order made in the county court must be made in accordance with part 52 of the Civil Procedure Rules. Appeals against orders made by district judges will be to a circuit judge and against orders made by circuit judges to the High Court.

Appeals to the High Court by case stated

Any person who was party to any proceedings or is aggrieved by the conviction, order, determination, or other proceedings of the court may question the proceedings on the grounds that it is wrong in law or in excess of jurisdiction.

The court can then be asked to state a case for the opinion of the High Court.

The case stated is heard by at least two High Court judges, and more often three judges sit, including the Lord Chief Justice. No evidence

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Appeals

is considered, so the hearing consists entirely of legal argument by counsel.

Having heard and determined the question(s) of law, the High Court may reverse, affirm or amend the original determination in respect of which the case has been stated, or remit the

matter to the justices with the opinion of the court, or make such an order in relation to the matter as the court may see fit.
Appeals before the Crown Court
The hearing at the Crown Court is an entirely fresh one and, by virtue of section 79(3) of the Supreme Court Act 1981, is a full re-hearing of the case. The judgment in the ease of ***R v Lamb*** [2005] EWCA Crim 2487 recommended that circuit judges and above should be dealing with these cases.

Rectification of mistakes

Section 142 of the Magistrates' Courts Act 1980 gives the court power to vary or rescind a sentence or other order imposed or made by it when dealing with an offender, if it appears to the court to be in the interests of justice to do so. However, this section is intended to rectify mistakes and applies only to orders made when dealing with an offender in criminal proceedings. Therefore, this power would only be applicable to orders made on conviction, rather than on a stand-alone application.

Application for judicial review

judicial review looks at the lawfulness of actions and decisions. An application can be made for the High Court to consider whether the magistrates' court has failed to exercise its jurisdiction properly or whether it has made an error of law, which appears on the face of the record.
The High Court has the power to quash the order or make a mandatory prohibiting order. An application must be made promptly, and in any event within three months of the date on which the grounds for the application arose.

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Breaches

Breaches by adults
Breach of an order is a criminal offence, which is arrestable and recordable. Prosecutions for breaches of orders can be brought by the Crown Prosecution Service (CPS), although a local authority may also do so by virtue of section 1(1 OA) of the Crime and Disorder Act 1998 (as inserted by section 85(4) of the Anti-social Behaviour Act 2003), which states that prosecutions can also be brought by:
1. a council which is a relevant authority.
2. the council for the local government area in which a person in respect of whom an order has been made resides or appears to reside.
The lead officer managing the case should keep the other partner agencies informed of the progress and outcome of any breach investigation. A particular consideration will be the need to protect witnesses. The standard of proof for prosecution of a breach of an order is the criminal standard - 'beyond reasonable doubt'. Provision is made in section 1(10) of the Crime and Disorder Act 1998 for a defence of reasonable excuse.
The maximum penalty on conviction in the magistrates' court is six months in prison or a fine not exceeding £5,000 or both; at the Crown Court the maximum penalty is five years in prison or a fine or both. Community penalties are available, but a conditional discharge is not. Agencies and courts should not treat the breach of an order as just another minor offence. (It should be remembered that the order itself would normally have been the culmination of a course of persistent antisocial behaviour.) An order will only be seen to be effective if breaches are taken seriously.
Information on breaches can be received from any source, including the local authority housing department and other local authority officers, neighbours and other members of the public. Any information received by a partner agency should be passed immediately to the police and lead officer, who should inform the other agencies involved. Breach penalties are

the same for all orders, including the interim order. Court proceedings should be swift and not fractured by unnecessary adjournments either during the proceedings or before sentencing.
Where the offender is found guilty of the breach, the court may take reports from the local authority or police and any applicant agency before sentencing. The court should also consider the original reasons for making the order. A copy of the original order as granted (including any maps and details of any prohibitions) can be put before the court as evidence that an order has been made without the need for a statement formally proving that an order was made (section 139 of the Serious Organised Crime and Police Act 2005).
The sentence given should be proportionate and reflect the impact of the behaviour complained of.

Breaches by children and young people

Breach proceedings for children and young people will be dealt with in the youth court. Breach proceedings in the youth court are not subject to automatic reporting restrictions. The Serious Organised Crime and Police Act 2005 removed automatic reporting restrictions for children and young people convicted of a breach of an ASBO (section 341), and thus details about the perpetrator can be made public. The court may still impose reporting restrictions, particularly if they were put in place when the order was initially imposed in a civil court.
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Hreacbes

Under section 98 of the Magistrates' Courts Act 1980, evidence will be given on oath, except the evidence of a child under 14, which is given unsworn. Section 34 of the Children and Young Persons Act 1933 requires the attendance of a parent or legal guardian at court for any person under 16 years of age. The court will require information about the young person's background, home surroundings and family circumstances prior to sentence. This should be provided by the youth offending team or social services.
As with adults, community penalties are available, but a conditional discharge is not. In addition, the youth court should consider whether to make a parenting order, or whether the individual support order should be amended.
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- **Variation and discharge of an order**

Variation or discharge of an order, including an interim order, may be made on application to the court that originally made it. An application to vary or discharge an order made on conviction in criminal proceedings may be made to any magistrates' court within the same petty sessions areas as the court that made the order. The application can be made either by the original applicant in the case or the defendant. An order cannot be discharged within two years of its service without the consent of both parties. An order made on conviction cannot be discharged before the end of two years. Prohibitions, however, can be varied, removed or added within that initial two-year period.
The procedure for variation or discharge is set out in the Magistrates' Courts (Anti-Social behaviour Orders) Rules 2002, the Crown Court (Amendment) Rules 2002 and the Civil Procedure Rules. These are published separately from this guidance and are available on the crime reduction website at www.crimereduetion.gov.uk
If the individual who is subject to the order asks for its variation or discharge, the agency that obtained the order needs to ensure that a considered response is given to the court. If it is

decided that the lead agency should contest the application for variation or discharge, it should give the court its reasons, supported as appropriate by evidence gathered in the course of monitoring the effectiveness of the order. The magistrates' legal adviser will send details of the variation or discharge of any order to the local police force and local authority. The police should record any discharge or variation of the order on their computer system and arrange for any changes to be reflected in the Police National Computer record.
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- **Monitoring and recording**

Local agencies should agree common procedures for recording and monitoring both their successful and unsuccessful applications. Details of orders granted should be sent to the local crime and disorder reduction partnership (CDRP) anti-social behaviour co-ordinator and the local authority or police as appropriate, as well as to other agencies involved with the offender (including the local youth offending team if the offender is under 3 8 years old).
As a minimum there should be a record of:
the original application (or details of the prosecution and hearing of any request for the order in the case of an order on conviction), including the name, address, date of birth, gender and ethnicity of the defendant.
the order itself, including, where applicable, the map showing any exclusion area.
the date and details of any variation or discharge of the order; and
the action taken for any breach.
The following information could also be recorded:
name, address, age, gender and ethnicity of any victim - or a statement that the case involved no identified victim.
details of any person or persons who complained of the behaviour.
details of any contributory issues, for example drugs, alcohol and substance misuse and/or mental health problems.
details of any aggravating factors, for example racial motivation; and
assessment of outcome in terms of whether or not the anti-social behaviour ceased,
satisfy themselves and the public that their anti-social behaviour policies do not discriminate.
The Act also imposes a duty to promote race equality. As part of this duty, local authorities and the police should therefore ensure that they monitor the impact of their anti-social behaviour policy on the promotion of race equality. Systems to monitor the ethnicity of both defendants and victims will therefore need to be in place.
This information should, where possible, be collected on the basis of self-definition by the defendant.
From December 2006, the new general duty under the Disability Discrimination Act requires a public authority to pay due regard when carrying out its functions to: the need to eliminate unlawful discrimination against disabled people; the need to eliminate disability-related harassment of disabled people; the need to promote equality of opportunity for disabled people; anti the need to take account of disabled persons' disabilities even where that involves more favourable treatment. Advice on the general duty can also be obtained from the leaflet issued by the Office for Disability Issues (ODI) entitled ***Disability equality: a priority for all***. The Disability Rights Commission website at www.dre.org.uk contains information under the section on publications entitled. Do the Duty'.
Consistency of information will help to assess the effectiveness of orders and inform future local audits and crime reduction strategies.
Local authorities and other agencies, including the police, have a duty under the Race Relations (Amendment) Act 2000 to

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- **Promoting awareness of orders**

The purpose of the orders is to protect local communities from the harassment, alarm or distress that can be caused by anti-social behaviour. An effective media strategy by the CDRP is therefore essential if local residents and businesses are to be aware of orders and their implications. Using the local press to ensure the community knows the subject and conditions of the order is often a cost-effective strategy. At the same time, the staff of the partner agencies need to understand how and when orders can be used, and how they relate to the other tools to combat anti-social behaviour available to the partnership.

Local agencies and CDRPs should, within the context of their overall strategies for combating anti-social behaviour, devise a strategy for promoting awareness of orders. A designated officer should have responsibility for its delivery. This might most naturally be the CDRP anti-social behaviour co-ordinator. Disclosure of information should be necessary and proportionate to the objective it seeks to achieve.

Suggested aims of the strategy

The aims of an effective local publicity strategy are to:

increase community confidence in reporting anti-social behaviour and expectations that it can be reduced. deter potential offenders from anti-social behaviour.

ensure that the local population is aware of orders; the powers of the local authority, registered social landlords, Housing Action Trusts, the Environment Agency and the police (including the British Transport Police) to apply for them; and whom to approach if they believe that an order may be appropriate;

ensure that agency staff have confidence in using orders where they are deemed appropriate; and ensure that potential witnesses are aware of the support available to them.

Publicity

This part of the guidance reflects the judgment of Lord justice Kennedy, presiding judge in the case of ***R (on application of Stanley, Marshall and Kelly) v Commissioner of Police for the Metropolis and Chief Executive of London Borough of Brent*** 12004] EWHC 2229 (Admin), commonly referred to as ***Stanley v Brent.***

Principles

1. There is no 'naming and shaming1 - ASBOs are not intended to punish or embarrass individuals but to protect communities.

2. Publicity is essential if local communities are to support agencies in tackling antisocial behaviour. There is an implied power in the Crime and Disorder Act 1998 and tire Local Government Act 2000 to publicise an order so that it can be effectively enforced.

3. Orders protect local communities.

4. Obtaining the order is only part of the process; its effectiveness will normally depend on people knowing about the order.

5. Information about orders obtained should be publicised to let the community know that action has been taken in their area.

6. A case-by-case approach should be adopted, and each individual case should be judged on its merits as to whether or not to publicise the details of an individual who is subject to an order. Publicity should be expected in most cases.

7. It is necessary to balance the human rights of individuals who are subject to orders against those of the community as a whole when considering publicising orders.

8. Publicity should be the norm, not the exception. An individual who is subject to an order should understand that the community is likely to learn about it.

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Promoting contourites of orders

Benefits of publicity

The benefits of publicity include the following:

Enforcement –

Local people have the information they need to identify and report breaches.

Public reassurance about safety –

Victims and witnesses know that action has been taken to protect them and their human rights in relation to safety and/or quiet enjoyment of their property. Making local people aware of an order that is made for their own protection can make a real difference to the way in which they live their lives, especially when they have suffered from anti-social behaviour themselves or lived in fear of it.

Public confidence in local services –

Local people are reassured that if they report anti-social behaviour, action will be taken by local authorities, the police
or other agencies.

Deterrent to the subject of the order –

The perpetrator is aware that breaches are more likely to be reported because details of the order are in the public domain.

Deterrent to other perpetrators –

Publicity spreads the message that orders are being used and is a warning to others who are causing a nuisance in the community.

The decision to publish

Each individual case should be judged on its merits as to whether or not to publicise the details of an individual who is subject to an order. There should be a correlation between the purpose of publicity and the necessity tes**t:** that is, what is the least possible interference with privacy in order to promote the purpose identified.

Decision-makers should ensure that the decisions to publicise orders are recorded. However, this should not be seen as an onerous, lengthy task, but merely a way of recording the process they go through to arrive at publication. To ensure it is achieved, it is good practice to identify an individual, such as the anti-social behaviour co-ordinator, to be in charge of the process.

The decision-making process should aim to consider and record several key factors:
the need for publicity.
a consideration of the human rights of the public.
a consideration of the human rights of those against whom orders are made; and
what the publicity should look like and whether it is proportionate to the aims of the publicity.

The decision-making process should be carried out early on so as to avoid any delay in publicity following the granting of the order.

The decision-making process

Publicity must be necessary to achieve an identified aim - this will involve a necessity test. The identified aim for publicising could be (1) to notify the public that an order has been obtained, to reassure the public that action has been taken; (2) to notify the public of a specific order so that they can help in its enforcement; or (3) to act as a deterrent to others involved in anti-social behaviour, hi some cases two or even all three aims will be relevant.

Disclosure of information should always be necessary and proportionate to achieving the desired aim(s). When identifying the aim(s), decision-makers should acknowledge, in those cases where it is relevant, the 'social pressing need' for effective enforcement of an order that prohibits anti-social behaviour to protect the community. In effect, this is a consideration of the human rights of the wider community, including past and potential victims. The decision-maker should recognise and acknowledge that for publicity to achieve its aim, it might engage the human rights of the individual who is subject to the order and potentially those of his or her family. Publicity should be proportionate to ensure that any interference is kept to a minimum. For example, if the legitimate aim is enforcement of the order then personal information, such as the terms of the order, the identity of the individual (including a photograph) and how to report any breach of the terms should normally be included. Usually the consideration of the effect of publicity on family members should not deter decision-makers from the stated aim of publicising the order. However, consideration of the impact of publicity on vulnerable family members should be made and recorded. The defendant and his or her

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Promoting a wariness of orders

family should be warned of the intention to publish details.

What publicity should look like; are the contents proportionate?

The contents of the publicity should also be considered and decisions about them recorded. Disclosure of information should always be proportionate to achieving the desired aim. The contents of publicity should include factual and accurate material.

The content and tone of the publicity should be considered carefully. Information must be based on facts, and appropriate language used: for example, the order itself does not mean that an individual has been found guilty of a criminal offence, Words such as 'criminal' and 'crime' to describe the individual and their behaviour must be used with care and only when appropriate. If the anti-social behaviour was, as a matter of fact, also criminal, then it is permissible to describe it as criminal. Breach of an order is an offence and should be described as such. Publicity should be consistent with the character of the order itsel**f:** that is, a civil prohibition (rather than a criminal order) restricting anti-social behaviour (which may be criminal but need not be).

It would be prudent to rehearse the facts of the case and agree on appropriate language to use. Some consideration should be given to the personal circumstances of individuals named on the order when deciding whether to include them in any publicity leaflet, particularly if they are under 18. However, any arguments for not including their names must be balanced with the need to enable those who receive the leaflet to be able to identify a breach.

Details of conditions of non-association named on the order, particularly where those named are also subject to orders or have a recent history of anti-social behaviour, can be included in publicity. Even in cases where the named individuals with whom association is prohibited are not subject to an ASBO it will usually be appropriate to name them once some consideration has been given to their personal circumstances.

Type of information to include in publicity

The type of personal information that might be included in any publicity would be:

the name of the individual; and/or

a description; and/or

the age; and/or

a photograph; and/or

his/her address.

a summary of the individual's anti-social behaviour; and/or
a summary of, or extracts from, the findings of the judge when making the ASBO; and/or
a summary of, or extracts from, the terms of the ASBO.
the identification of any relevant exclusion zone (as illustrated on a map).
details of conditions of non-associations named on the order, particularly where those named are also subject to ASBOs or have a recent history of anti-social behaviour.
the expiry date of the order.
the manner in which the public can report breaches (for example names, telephone numbers, addresses, possibility of anonymous reporting, etc); and/or
the names of local agencies responsible for obtaining the ASBO.
local contact numbers, such as those for Victim Support, local police and housing services, with reassurance that reports will be treated in confidence.
date of publication.
the identity of the group to be targeted by the publicity (for example businesses or residents in the vicinity); and/or
those who are suspected to have been subject to anti-social behaviour by the individual; and/or
those individuals or businesses within and immediately adjacent to an area identified in the ASBO; and
details of the publication area, for example within the area of any exclusion zone and the area immediately adjacent to the exclusion zone, within the borough.
Age consideration
The age of the person against whom the order was obtained should be a consideration when deciding whether or how to inform people about the order. Factual information should be obtained about whether an individual is particularly vulnerable. 'Phis should be done as early as possible, to avoid
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Promoting awareness of orders
delays in informing the public once an order has been obtained. The fact that someone is under the age of 18 does not mean that their anti-social behaviour is any less distressing or frightening than that of an adult.
An order made against a child or young person under 18 is usually made in open court and is not usually subject to reporting restrictions. The information is in the public domain and newspapers are entitled to publish details. But if reporting restrictions have been imposed, they must be scrupulously adhered to. In applications involving children and young people where evidence has consisted of details of their past convictions, and reporting restrictions were not lifted for the proceedings leading to those convictions, the publicity should not refer to those convictions. Similarly, where an order on conviction has been imposed on a child or young person in the youth court, unless reporting restrictions are lifted, details of the offences or behaviour alluded to in that hearing cannot be reported. However, details of the behaviour outlined in the order on conviction hearing can be used, unless the court orders otherwise.
Where the court making the order does impose reporting restrictions under section 39 of the Children and Young Persons Act 1933, the press must scrupulously observe these.
A court must have a good reason to make a section 39 order. Age alone is insufficient to justify reporting restrictions being imposed. Section 141 of the Serious Organised Crime and Police Act 2005 reverses the presumption in relation to reporting restrictions in the youth

court in cases for breach of ASBOs. Automatic reporting restrictions will not apply but the court retains the discretion to impose them. The prosecutor can make an application to the court for this. While it is the case that from 1 July 2005 no automatic reporting restrictions have applied in cases for breach of ASBOs relating to children and young people, when dealing with the case the court will consider whether reporting restrictions were imposed when the original order was granted. As ASBOs are civil orders, reporting restrictions will not have applied (unless imposed by the court).
If reporting restrictions were imposed at the original ASBO hearing, then unless there has been a significant change in the intervening period, it is likely that the court will impose reporting restrictions at the hearing for the breach. If no reporting restrictions were imposed at the original ASBO hearing, it is still open to the court to impose reporting restrictions at the hearing of the breach case. If reporting restrictions are not imposed, publicity can be considered, considering all the matters that are relevant when considering publicising the ASBO itself.

Photographs

A photograph of the subject of the ASBO will usually be required so that they can be identified. This is particularly necessary for older people or housebound witnesses who may not know the names of those causing a nuisance in the area. The photograph should be as recent as possible.

Distribution of publicity

This should be primarily within the area(s) that suffered from the anti-social behaviour and that are covered by the terms of the order, including exclusion zones. People who have suffered from anti-social behaviour, for example residents, local businesses, shop staff, staff of local public services, particular groups or households should be the intended audience.
All orders should be recorded on the Police National Computer to assist enforcement.
This is particularly relevant where the order extends across England and Wales. It may be appropriate to extend publicity beyond the area where the anti-social behaviour was focused if there is a general term prohibiting harassment, alarm or distress in a wider area.
It may also be appropriate if there is a danger of displacement of the anti-social behaviour to distribute it just beyond the area covered by the order.
The timescale over which publicity is anticipated to occur should also be given due consideration and decisions recorded. It is important that publicity does not become out of date or irrelevant. Special attention needs to be paid to posters that are distributed to other organisations, as posters should not be left up when the need for them has expired.
It will usually be appropriate to issue publicity when a full order is made, rather than an interim order. However, exceptions can be made, for example where the antisocial behaviour is severe, where there has been extreme intimidation or where there is
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Promoting awareness of orders

a delay between the making of the interim order and the outcome of the final hearing.
In the case of ***Keating v Knowsley Metropolitan Borough Council*** [2004] EWHC 1933 (Admin), the judge held that publicity could be used for interim orders. In these circumstances it should be stated in the publicity that the order is temporary and that a hearing for a 'full' order will follow, and distribution should be extremely localised.

Consideration of human rights

Consideration of the human rights of the individual who is subject to the order and of the human rights of the public, including the victim(s) and potential victims, should be carried out. Appropriate and proportionate publicity is compliant with the human rights of the

individual who is subject to the order. The ***Stanley v Brent*** case accepted that publicity was needed for effective enforcement of the order. Individuals do not welcome publicity and may view the effect of publicity as a punishment. However, a subjective assessment by the individual of the effect of publicity is irrelevant in determining the purpose of the publicity. Consideration of the human rights implications of publicity should be recorded.

Consideration of data protection

Publicity is not contrary to the Data Protection Act 1998 as long as authorities are operating in accordance with the Act. There is an exemption in section 29 of the Act let the processing of personal data for the purposes of prevention or detection of crime. This means that personal data can be processed with a view to compliance with a statutory function, where the data has been obtained from a person who possessed it for the purposes of the prevention or detection of crime. This will be the case when considering publicising an ASBO.

Type of publicity

No one directly involved in the case (witnesses and victims) should wait unnecessarily for information about an order. They should be informed immediately when an order is made. This is in addition to keeping them informed of progress throughout the court process and can be done by visits, letters and community meetings or by phone. Victims and witnesses may also be given a copy of the order. It is
recommended that publicity be distributed to targeted households immediately after the order has been granted and by at least a week after the court date. Local people should be informed when variation or discharge of an order relevant to them is made.

The method of publicity can include the following:

- local print and television media.
- local leaflet drop; and
- local newsletter.

Practitioners need to apply the proportionality test when deciding which method is appropriate.

Leaflets and other printed materials, such as posters or residents' newsletters, allow local agencies to target particular neighbourhoods, streets or households with information.

The public can be informed about an ASBO at any time - publicity can be issued and re-issued according to the circumstances. However, publicity needs to be timely to ensure that people are able to enforce the order as soon as it has been granted and to reassure the public that something is being done.

Working with the media

It is usual for local statutory agencies to have working relationships with local and regional media, including press, television and radio. This is particularly relevant to issues such as anti-social behaviour and where the media are keen to report how local agencies are tackling these issues through the deployment of dispersal orders, ASBOs crack house' closures, etc. It is important to work with local media and to make them understand that it is not the purpose of any publicity to punish the individual. Media coverage has the potential to go to a wider audience than leaflets or posters. It is good practice to identify newspapers that report on city, borough and neighbourhood issues, free local press and local radio and television and to develop working relationships with them. This could include being aware of their publication deadlines, giving them exclusives and making sure that the complainant's (victim's) point of view is put across. However, it is important to

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Promoting a wariness of orders

keep close control of the material. Witnesses should not be put at risk by disclosing dates of hearings, and your relationships with the courts should not be jeopardised. Those subject to an ASBO who are considered vulnerable should also not be put at risk.
Issuing a press release is a way of retaining control of the material. There should be an agreed process for authorisation of the press releases. The press release should contain information that meets the identified aim of the publicity. For example, if the aim is to help enforce the order, the information in the press release will be more detailed than the information needed for publicity whose aim is to reassure the community that something is being done. It is good practice to identify a spokesperson to liaise with the press.
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Appendix A

Early intervention and tackling offending behaviour by under-10s
Interventions available

Acceptable behaviour contract (ABC)

An ABC (also known as an acceptable behaviour agreement) is an intervention designed to engage an individual in acknowledging his or her anti-social behaviour and its effect on others, with the aim of stopping that behaviour. An ABC is a written agreement made between a person who has been involved in anti-social behaviour and their local authority, youth inclusion support panel (YISP), landlord or the police. ABCs are not set out in law, which is why they are sometimes called agreements. Any agency is able to use and adapt the model. An ABC or acceptable behaviour agreement is completely flexible and can be adapted for the particular local need. It can include conditions that the parties agree to keep. It may also contain the agreed consequences of a breach of the agreement.

Parenting contracts (section 25 of the Anti-Social Behaviour Act 2003)

Parenting contracts are voluntary written agreements between youth offending teams (YOF's) and the parent/guardian of a child/young person involved, or likely to be involved, in anti-social behaviour or criminal conduct. They are a two-sided arrangement where both the parents and the agency will play a part in improving the young person's behaviour. The contract contains a statement by the parent(s) agreeing to comply with the requirements for the period specified and a statement by the YOT agreeing to provide support to the parent(s) for the purpose of complying with those requirements. It is important that there is a clear agreement about the consequences if the terms of the parenting contract are not adhered to. If the contract is broken, the YOT may apply to the court for a parenting order (see below), which would include compulsory requirements.
Child safety order (sections 11-13 of the Crime and Disorder Act 1998 as amended by section 60 of the Children Act 2004)
A child safety order (CSO) allows compulsory intervention with a child under 10 years of age who has committed an act which, had they been aged 10 or over, would have constituted an offence. It is designed to prevent anti-social behaviour when it is not possible to engage on a voluntary basis with a child under 10. A CSO is made in family proceedings in the magistrates' court on application by a local authority. The order places the child under the supervision of a responsible officer, who may be a local authority social worker or a member of a youth offending team and can include requirements designed to improve the child's behaviour and address underlying problems.
If the order is not complied with, the parent can be made the subject of a parenting order if that would be in the interests of preventing repetition of the behaviour that led to the CSO being made.

Parenting order

A parenting order can be made in respect of a parent of a child under 10 years of age. It can require parents to attend a parenting programme (lasting up to three months) and specify requirements for the parent regarding supervision of the child (lasting up to 12 months). Failure to comply with a parenting order is a criminal offence punishable by a fine of up to £1,000 and/or a community sentence.
Under section 8 of the Crime and Disorder Act 1998 as amended by the Children Act 2004, a parenting order can be imposed on a parent of a child who is subject to a CSO or when a CSO has been breached.
Section 26 of the Anti-social Behaviour Act 2003 enables YOTs to apply to the magistrates' court for a 'free-standing' parenting order. The court must be satisfied that the child or young person has engaged
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clearly intervention and Stickling offending behaviour by under
in anti-social behaviour or criminal conduct and that the order would be desirable in preventing further occurrences of such behaviour.
There is provision in the current Police and Justice Bill to extend the power to apply for parenting orders to local authorities and registered social landlords.
For further information on parenting orders, refer to the guidance on parenting contracts and orders at www.homeoffice.gov.uk/documents/ parenting-orders- guidance
Local child curfew schemes (section 14 of the Crime and Disorder Act 1998 as amended by Criminal Justice and Police Act 2001)
These are designed for children and young people 15 years old and below, to help local authorities to deal with the problem of unsupervised children or young people involved in late-night, anti-social behaviour on the streets. Under a local child curlew scheme, a local authority or local police force can ban children under 16 from being in a public place during specified hours (between 9pm and 6am), unless they are under the control of a responsible adult. With children under 10, contravening a ban imposed by a curfew notice (for instance being found outside their homes after the curfew) is one of the conditions under which a family court could make the child subject to a CSO. A local child curfew can last for up to 90 days.
Junior youth inclusion projects
Junior youth inclusion projects are based on high-crime, high-deprivation neighbourhoods across England and Wales and work with the 8-13 age range. Projects aim to prevent youth crime in those neighbourhoods by targeting the 50 most at-risk children and young people in the area, assessing their needs and providing meaningful interventions aimed at addressing those risk factors. Young people typically are either on the cusp of offending or are already involved in low-level offending. Ill order to engage with the 50 most at-risk young people, projects work with around another 100 peers and siblings of core group members.
Youth inclusion support panels
Youth inclusion support panels (YISPs) are multi-agency planning groups that serve to identify those young people in the 8-13 age range who are most at risk of offending and engaging in anti-social behaviour. They offer an early intervention based on assessed risk and need. Parenting support in the form of contracts and programmes is offered as part of a range of tailored interventions.
The suggested criteria for a young person referred to the YISP is as follows:
The child is aged between 8 and 13 years inclusive (up to 17 in some areas).

The behaviour of the child is of concern to two or more of the partner agencies and/or their parents/carers, and they consider that it requires a multi-agency response.
The parent/carer and child are willing to take part, give consent to the referral and the child is willing to co-operate with an integrated support plan.
The child is exposed to four or more risk factors.
There is known offending behaviour up to and including a police reprimand or ASBO, or there is concern over potential involvement in criminal or anti-social behaviour.
The panel is made up of representatives from a variety of agencies which can include YOTs; police; social services; housing, probation, and education services; Connexions; voluntary sector organisations; anti-social behaviour units; and the fire service. (This list is not exhaustive and can be tailored to local circumstances.) The panel will meet on a regular basis and consider referrals made to it in order to devise an integrated support plan. The YISP must ensure that a mechanism is in place for the sharing of information. The method, criteria and considerations for this can be found by referring to the Association of Chief Police Officers/Youth Justice Board guidance.
16 Association of Chief Police Officers/Youth Justice Boat's (2005) ***Sharing Personal and Sensitive information in Respect of Children and Young People*** a! ***Risk of Offending.*** London: Youth Justice Board,
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Appendix B

County court Practice Direction according to the Civil Procedure Rules
Anti-social behaviour orders under the Crime and Disorder Act 1998
Scope of this Section and interpretation

65.21	**(1)**	This Section applies to applications in proceedings in a county court under sub-sections (2), (3) or (3B) of section IB of the Crime and Disorder Act 1998 by a relevant authority, and to applications for interim orders under section ID of that Act.
	(2}	**In this Section -**
	(a)	'the 1998 Act' means the Crime and Disorder Act 1998:
	(b)	'relevant authority' has the same meaning as in section 1(1A) of the 1998 Act: and
	(0	'the principal proceedings' means any proceedings in a county court.

Application where the relevant authority is a party in principal proceedings

65.22	**(1)**	Subject to paragraph (2) -
	(a) where the relevant authority is the claimant in the principal proceedings, an application under section 1B (2) of the 1998 Act for an order under section 1B (4) of the 1998 Act must be made in the claim form; and	
	(b) where the relevant authority is a defendant in the principal proceedings, an application for an order must be made by application notice which must be filed with the defence.	
	(2)	Where the relevant authority becomes aware of the circumstances that led it to apply for an order after its claim is issued or its defence fiied, the application must be made by application notice as soon as possible thereafter.
	(3)	Where the application is made by application notice, it should normally be made on notice to the person against whom the order is sought,

Application by a relevant authority to join a person to the principal proceedings

65.23	(1)	An application under section 1B(3S) of the 1998 Act by a relevant authority which is a party to the principal proceedings to join a person to the principal proceedings must be made -	
		(a)	in accordance with Section 1 of Part 19;
		(b)	in the same application notice as the application for an order under section 1B (4) of the 1998 Act against the person; and
		(c)	as soon as possible after the relevant authority considers that the criteria in section 1B(3A) of the 1998 Act are met.
	(2)	The application notice must contain -	
		(a)	the relevant authority's reasons for claiming that the person's anti-social acts are material in relation to the principal proceedings; and
		(b)	details of the anti-social acts alleged.
	(3)	The application should normally be made on notice to the person against whom the order is sought.	

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County court Practice Direction according to the Civil Procedure Rules

Application where the relevant authority is not party in principal proceedings

65.24	(1)	Where the relevant authority is not a party to the principal proceedings -	
		(a)	an application under section 18(3} of the 1998 Act to be made a party must be made in accordance with Section I of Part 19; and
		(b)	the application to be made a party and the application for an order under section 16(4} of the 1998 Act must be made in the same application notice.
	(2)	The applications -	
		(a)	must be made as soon as possible after the authority becomes aware of the principal proceedings; and
		<b)	should normally be made on notice to the person against whom the order Is sought.

Evidence

65.25

An application for an order under section 1B (4) of the 1998 Act must be accompanied by written evidence, which must include evidence that section IE of the 1998 Act has been complied with.

Application for an interim order

65.26	(1)	An application for an interim order under section ID of the 1998 Act must be made in accordance with Part 25.
	(2)	The application should normally be made
	(a) in the claim form or application notice seeking the order; and	
	(b) on notice to the person against whom the order is sought.	

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Appendix C

Order form

FORM
Anti-social behaviour order (Crime and Disorder Act 1998, si)
Magistrates' Court (Code)
Date:
Defendant:
Address:
On the complaint of Complainant:
Applicant Authority:
Address of Applicant Authority:
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Order form
The court found that:
the defendant acted in the following anti-social manner, which caused or was likely to cause harassment, alarm, or distress to one or more persons not of the same household as himself:
And
this order is necessary to protect persons from further anti-social acts by him. And it is ordered that the defendant
[NAME]
is prohibited from
Until [further order]
Justice of the Peace
[By order of the clerk of the court]
NOTE: If, without reasonable excuse, the defendant does anything which he is prohibited from doing by this order, he shall be liable on conviction to a term of imprisonment not exceeding five years or to a fine or to both.
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Appendix D
Summons's form
Rule 4(2)
SCHEDULE 2 FORM
Summons on application for anti-social behaviour order (Crime and Disorder Act 1998, si)
Magistrates' Court (Code)
Date:
To the defendant: [name]
Address:
You are hereby summoned to appear on [date] at before the magistrates' court at
to answer an application for an anti-social behaviour order, which application is attached to this summons.
By or Justice of the Peace
order of the clerk of the court)
NOTE: Where the court is satisfied that this summons was served on you within what appears to the court to be a reasonable time before the hearing or adjourned hearing, it may issue a warrant for your arrest or proceed in your absence.
If an anti-social behaviour order is made against you and if, without reasonable excuse, you do anything you are prohibited from doing by such an order, you shall be liable on conviction to imprisonment for a term not exceeding five years or to a fine, or to both.
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Appendix E

Step-by-step process for anti-social behaviour orders and orders on conviction
Process for anti-social behaviour orders

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Step-by-step process fur anti-social behaviour orders and orders on conviction

Process for an order made on conviction in criminal proceedings (in the magistrates' court or the Crown Court)

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Step-by-step process for anti-social behaviour orders (nut orders on conviction

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Appendix F

Public funding for defendants

Criminal public funding is available for any proceedings under sections 1 and 4 of the Crime and Disorder Act (CDA) 1998 relating to ASBOs, including interim orders, where they are made in the magistrates' court or where an appeal is made in the Crown Court,

Advocacy assistance is available for an ASBO, an interim order under section ID of the CDA, variation or discharge of an ASBO, or an appeal against the making of an ASBO under section 4 of the CDA, in accordance with the Criminal Defence Service General Criminal Contract, Solicitors can self-grant advocacy assistance for these matters, There are no financial criteria for the grant of advocacy assistance. Advocacy assistance may not be provided where it appears unreasonable that approval should be granted in the particular circumstances of the case, or where the interests of justice test, set out in Schedule 3 of the Access to Justice Act 1999, is not met.

In applying this test, there is an additional factor of whether there is a real risk of imprisonment if an ASBO is made and subsequently breached.

A representation order may be sought on application to the Legal Services Commission in respect of these proceedings. Provision for representation is made under Regulation 3(2) (criminal proceedings for the purposes of section 12(2)(g) of the Access to Justice Act 1999) of the Criminal Defence Service (General)(No.2) Regulations 2001, and Regulation 6(3) of the same regulations.

An application to the Commission must be made on form CDS3.An application will be determined in accordance with the interests of justice criteria. The availability of advocacy assistance will be a relevant factor which the Legal Services Commission will take into account when considering the grant of rep rese n ration.

Where an application for a representation order is refused, the Legal Services Commission shall provide written reasons for the refusal and details of the appeal process. The applicant may make a renewed application in writing to the Funding Review Committee, which may grant or refuse the application.

Advocacy assistance is available for proceedings in the Crown Court, where an appeal is made under section 4 of the CDA. The merits test is slightly different from that on application for an interim or a full ASBO.

It is based only on the general reasonableness test. Advocacy assistance may not be granted if it appears unreasonable that approval should be granted in the particular circumstances of the case. The prospects and merits of an appeal should be taken into account as well as whether the individual has reasonable grounds for taking the proceedings. Representation is also

available for an appeal against an order under section 4 of the CDA. An application should be made to the Legal Services Commission which will consider grant against the availability of advocacy assistance.
Any challenge against the ruling of the Crown Court to the High Court by way of case stated or by application for judicial review falls outside the scope of criminal funding. Legal representation would have to be applied for in accordance with the Funding Code procedures to the Legal Services Commission. This work is funded through the Community Legal Service although it falls within the scope of the General Criminal Contract.
Advocacy assistance is available for a breach of an interim order or full ASBO.
Representation is also available for breach proceedings on application to the Commission as above.

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Further reading
Anti-social Behaviour: A guide to the role of Youth Offending Teams in dealing with anti-social behaviour published by the Youth Justice Board, the Home Office and the Association of Chief Police Officers, which can be downloaded at
www.youth-justiceboard.gov.uk/Publications/Scripts/prodView.asp?idproduct= 212&eP-
The Guidance for the Courts by Lord Justice Thomas can be found at:
www.youth-justice-board.gov.uk/NR/ rdonlyres/398987C5-E79A-491E-B912-DF3D4D762293/0/ASBOGuidanceforjudiciaryHMCS.june052.pdf
Websites
www.together.gov.uk
www.respect.gov.uk
www.crimereduction.gov.uk
www.youth-justice-board.gov.uk