

JUSTICES' CLERKS' SOCIETY
Good Practice Guide

Anti-Social Behaviour Orders:
A Guide to Law and Procedure in the
Magistrates' Court

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Justices' Clerks' Society

England and Wales

INTRODUCTION

This guide has been produced by the Justices' Clerks' Society in order to assist legal advisers, courts and parties to 'ASBO' proceedings. This update takes account of the changes in law introduced by legislation (including the Criminal Justice Act 2003 and the Serious Organised Crime and Police Act 2005) and reflects recent case law.

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1. **Anti-Social Behaviour Orders**

An Anti-Social Behaviour Order (“ASBO”) can be made against any person aged 10 or over. It can be either

- (a) a free standing order i.e. one made after a formal application under Section 1 Crime and Disorder Act 1998 by “a relevant authority” (defined at 2.1 below). The Court also has power to make an interim order pending determination of the application itself; or
- (b) an order under Section 1C made in addition to a sentence or conditional discharge imposed for any offence committed on or after the 2nd December 2002. The court has power to make an interim order if it is necessary to adjourn the proceedings.

These orders are the same in purpose and effect

N.B. All statutory references unless otherwise stated are to the Crime and Disorder Act 1998.

2. **ASBO under Section 1 Crime and Disorder Act 1998**

2.1 Who can apply?

Only “a relevant authority” which is defined as follows can apply (Section 1(1A)):-

- (a) The council for a “local government area”, defined by Section 1(12) as:-
 - i) in England, a District or London Borough, the city of London, the Isle of Wight and the Isles of Scilly;
 - ii) in Wales, a county or county borough
- (b) The Chief Officer of Police of any police force maintained for a police area
- (c) The Chief Constable of the British Transport Police
- (d) Any person registered under Section 1 Housing Act 1996 as a social landlord who provides or manages any houses or hostel in a local government area.
- (e) Housing Action Trusts
- (f) County Councils in England

Note 1 Under s.1A(2) the definition of “relevant authority” may be extended by order of the Secretary of State.

Note 2 Before a local authority applies for an order in respect of a child in its care it should have regard to its duty of care to the child.

2.2 Consultation Requirements (Section 1E)

- (a) If the Council intends to apply it must first consult the Chief Officer of Police for the area
- (b) If the Chief Officer of Police intends to apply he must first consult the Council for the area in which the proposed defendant resides or appears to reside
- (c) Any other relevant authority that intends to apply must first consult both the Council for the area in which the proposed defendant resides or appears to reside and the Chief Officer of Police for the area. County Councils must consult the local district council where one exists

Agreement between agencies is not required.

2.3 Which Court? (Section 1(3))

- (a) The application should be made by complaint to the Court whose commission area includes the local government area or police area concerned. The Chief Constable himself does not have to be the complainant.
- (b) The application is heard in the adult Court even if the Order is sought against a youth. Where the person against whom the order is sought is a person under the age of 18 the Justices (or District Judge (MC)) constituting the court should normally be qualified to sit in Youth Courts. The proceedings are classed as civil proceedings.

A Practice Direction was issued by the President of the Queen's Bench Division on 24th February 2006 which reads as follows:-

"1 Where there is an application to a magistrates' court for an anti-social behaviour order under section 1 of the Crime and Disorder Act 1998 (the Act), or an application to a magistrates' court for an anti-social behaviour order 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.

2 Applications for interim orders under section 1D of the Act, including those made without notice, may be listed before justices who are not so qualified.

3 If it is not practicable to constitute a bench in accordance with paragraph 1, in particular where to do so would result in a delayed hearing, this direction does not apply".

Note:- Deputy District Judges will not be so qualified.

2.4 Criteria for making an ASBO. (Section 1(1))

The Court must be satisfied that the following conditions are both fulfilled: -

- 1(1)(a) That the person against whom the order is sought (“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 and
- 1(1)(b) That such an order is necessary to protect “relevant persons” (defined in sub-paragraph 2.6 below) from further anti-social acts by him

2.5 Evidential Requirements

- (a) The standard of proof required to satisfy the first limb (Section 1(1)(a)) is the equivalent of the criminal standard of beyond reasonable doubt even though the proceedings are civil (so the justices have to be sure that the defendant has acted in an anti-social manner).
- (b) “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”. (per Lord Steyn in R v Manchester Crown Court ex parte McCann).
- (c) Hearsay evidence is admissible in accordance with the Civil Evidence Act 1995; The Court must carefully decide what weight to attach to it since it cannot be tested by cross-examination.
- (d) A special measures direction may be made in proceedings under s.1 or s1C (below).
- (e) The Court must disregard any act of the defendant which he shows, on the balance of probabilities, was reasonable in the circumstances (Section 1(5))
- (f) If both conditions are fulfilled the Court may make an ASBO. which prohibits the defendant from doing anything described in the Order (Section 1(4)).
- (g) Applicants may adduce evidence of behaviour which occurred more than 6 months prior to the making of the application. (See Chief Constable of West Mercia –v- Boorman, The Times 17th November 2005).

2.6 “Relevant persons” (Section 1(1B))

- (a) If the Council is the applicant they are persons within the Local Government Area of that Council
- (b) If the Chief Officer of Police is the applicant they are persons within the police area

- (c) If the Chief Constable of the British Transport Police is the applicant they are: -
- EITHER persons who are on or likely to be on “policed premises” in a Local Government area. “Policed premises” are, broadly speaking any railway land building structure or rolling stock (Section 1(12))
 - OR persons who are in the vicinity of or likely to be in the vicinity of “policed premises”
- (d) If a social landlord or housing action trust is the applicant they are: -
- EITHER persons who are residing in or who are otherwise on or likely to be on premises provided or managed by the applicant
 - OR persons who are in the vicinity of or likely to be in the vicinity of such premises.
- (e) If a County Council is the applicant, persons within that county.

Note. The definition “relevant person” may be extended by order of the Secretary of State. S.1A(2) of the Act.

2.7 Prohibitions that may be imposed

- (a) Those necessary for the purpose of protecting persons (whether “relevant persons” or persons elsewhere in England and Wales) from further anti-social acts by the defendant (Section 1(6)). The prohibitions principally must be aimed at preventing the scope for the conduct about which complaint was made eg:- by prohibiting entry to a particular area or the carrying of tins of spray paint.
- (b) Although the Court has to be satisfied that an ASBO. is necessary to protect relevant persons, the prohibitions imposed need not be limited to those necessary for their protection but can include those necessary for the protection of persons elsewhere in England and Wales
- (c) In deciding what prohibitions to include the court should take into account prohibitions which already exist in the criminal law. It will not normally be necessary to include an existing criminal offence as a prohibition in an ASBO other than in respect of relatively minor offence when it is found necessary to remind the defendant of his obligation. (Per Lord Justice Hooper in R –v- Boness [2005] EWCA Crim 2395).
- (d) Deciding what prohibitions are necessary involves the exercise of judicial discretion and judgement and, in view of the Human Rights Act the Court must act fairly and proportionately.
- (e) Although an ASBO must be at least 2 years duration it is not a requirement that every prohibition in the order is applicable throughout the full duration of the order.

2.8 Duration of ASBO. (Section 1(7))

The Order will be for a fixed period (but not less than 2 years). The duration may be extended or shortened by further order.

2.9 Variation or Discharge of ASBO. (Section 1(8) and (9))

Either the applicant or the defendant may apply by complaint to the Court that made the order for its variation or discharge BUT it cannot be discharged within 2 years of its service on the defendant unless both parties consent. If such an application relates to an order made in respect of a person under the age of 18 the proceedings should be dealt with by Justices (or a District Judge(MC)) qualified to sit in Youth Courts.

2.10 Individual Support Orders and Parenting Order

When the court makes an order following a civil application for an ASBO in respect of a person under the age of 18, the court must consider making an Individual Support Order for up to 6 months (s1AA of the Act) and make a parenting order (see s.8 of the Act). The Individual Support order must be made if the statutory condition for making the order are met, namely:-

- That such an order would be desirable in preventing the behaviour that led to the making of an ASBO;
- That the defendant is not already subject to an ISO and
- That the court has been informed that an ISO is available in the area.

A report is required from the relevant Youth Offending Team. If the court finds the conditions are not met the court must announce its reasons for not making an order.

Note:-

- 1 This order is intended to support stand-alone ASBOs. It is not intended to be available when orders are made under s.1C where requirements similar to those which might be included in an ISO can be brought into effect through the sentence of the court.
- 2 It should further be noted that the power to make an ISO arises on the occasion of making an ASBO. There appears to be no power to make an ASBO and adjourn separately the issue of whether the conditions are satisfied for making an ISO.

3.0 Interim ASBO. (Section 1D)

An Interim Order is an Order that prohibits the defendant from doing anything described in the Order (Section 1D(3)).

3.1 Criteria for making Interim Order

If, before determining the application for the ASBO, or an order under s.1C (below), the Court considers it just to do so, it may make an Interim Order (Section 1D(2)).

3.2 Prohibitions that may be imposed

The prohibitions that may be imposed are those that may be included in a final ASBO. (Section 1D(5)). (See also 2.7 above)

3.3 Duration of Interim Order

An Interim Order must be for a fixed period but can be renewed (Section 1D(4)(a) and (b)).

3.4 Variation and Discharge of Interim Order

An Interim Order can be varied or discharged on the complaint of either the applicant or the defendant but shall, in any event, come to an end when the full application is determined (Section 1D(4)(b) and (c)).

3.5 Ex-parte Interim Order

(a) The Clerk to the Justices can authorise an application for an Interim Order to be made without notice being given to the defendant. (Rule 5 Magistrates' Courts (Anti Social Behaviour Order) Rules 2002)

(b) Given the nature of prohibitions attaching to an ASBO, and the consequences of breach, the clerk must be satisfied that it is necessary for the application to be made without notice to the defendant. The clerk should have regard to 7 factors:-

- Whether witnesses or complainants would be prejudiced by the defendant's response to notice.
- The gravity of the conduct.
- The urgency of the need for an order.
- The defendant's right to know of the proceedings.
- The fact that the order is of no effect until served.
- The limited duration of the order; and
- The right of the defendant to seek variation or discharge of the order.

This is not an exhaustive list and other factors may be relevant to the decision.

Ex parte orders are appropriate where the court is satisfied that factors exist which are sufficiently serious to show that immediate protection to persons or property is required. This must be balanced against the impact of the order on the rights of the individual. In respect of defendants under 18 the interests of the child or young person are a primary consideration.

(c) Ex-parte Orders are served on the defendant at the same time as the application for the ASBO itself and do not take effect until served. If not served within 7 days they cease to have effect.

(d) Ex-parte Interim Orders should be given as early a return date as practicable to allow the defendant an opportunity to be heard quickly.

3.6 Procedure and Considerations

- (a) By their nature, Interim Order applications are likely to be dealt with at a hearing of limited duration. An applicant may rely upon the testimony of one 'professional'
- (b) The defendant may choose to give evidence if the application is made on notice.
- (c) Both parties must be afforded the opportunity to make representations.
- (d) The only criterion is that the Court must consider that it is just to make an Interim Order. What is just involves the exercise of judicial discretion and judgement.
- (e) The effect of the Human Rights Act on the proceedings and the possible consequences of a breach of the Interim Order (as with a final order, imprisonment for up to 5 years) must be borne in mind.
- (f) **The Court should thus: -**
 - (i) Look at all the circumstances of the case.
 - (ii) Consider the nature, seriousness and frequency of the anti-social acts alleged against the defendant.
 - (iii) Ascertain what persons require protection from him.
 - (iv) In the light of the evidence, consider whether it is probable that these persons will suffer from anti-social acts perpetrated by the defendant, and, if so, whether the need to protect them is so immediate that an interim order is justified.
 - (v) If granting an order, impose only the prohibitions necessary to protect those whom it has identified as being in need of immediate protection.

4.0 Orders on Conviction (Section 1C)

The Court has power to make an order where a person ("the offender") is convicted of any offence committed on or after the 2nd December 2002 (Section 1C(1) and (10)). If he is convicted in the Youth Court that Court will make the order. An order can be made if the prosecutor asks it to do so or if the court thinks it is appropriate to do so. (See 4.4 below).

4.1 Nature of Order on Conviction (Section 1C(4))

Whether initiated by the prosecution or made of the court's own motion the order is a civil order which is ancillary to sentence. See R (W) –v- Acton Magistrates' Court [2005] EWHC 954 (Admin). Accordingly the civil evidence rules apply.

4.2 Criteria for making an order on conviction (Section 1C(2))

The Court must be satisfied: -

- (a) That the offender 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; and
- (b) That an order is necessary to protect persons in any place in England and Wales from further anti-social acts by him.

4.3 Prohibitions that may be imposed (Section 1C(2))

The offender may be prohibited from doing anything described in the Order. Again, as with 'free standing' orders, any order needs to be proportionate in its terms. (See comments above regarding the terms of prohibition in para 2.7).

4.4 General considerations regarding orders on conviction

- a) The Anti Social Behaviour Act 2003 provides that the prosecution may request an order on conviction, or the court can make an order of its own motion if it considers it appropriate to do so. Proceedings may be adjourned even after sentence has been passed in the criminal proceedings.

Note:- If the defendant does not appear at the adjourned hearing the proceedings may be further adjourned and a warrant may be issued subject to proof of service of the adjournment notice on the defendant.

- b) In any given case, the decision to make an order must be based on the evidence presented to the court. Consideration should be given to what prohibitions may be necessary to protect people from further acts of anti-social behaviour. It is open to the court to make an interim order before finally determining the application if it is just to do so.
- c) Reliance may be placed upon the current conviction(s) (or more properly the facts giving rise to it/them) without more. An offence may be so serious and inherently anti-social that the court will consider imposing prohibitions on activities associated with the crime. An example of an offence in this category might be one stemming from criminal damage or assault.
- d) The primary consideration is whether an order is necessary to protect persons from further anti-social acts. For this it may require a *pattern of anti-social behaviour* to be established, and evidence beyond that associated with the current offence may be required. This may consist of evidence disclosed through previous convictions (in which case further and better particulars of the previous convictions will normally be required), or other evidence properly adduced. The 2003 Act provides that it is immaterial whether such evidence would have been admissible in the proceedings for which the offender was convicted.

- e) A “pattern of anti-social behaviour” could be established, for example, from evidence that the offender has targeted a particular family, harassed members of the community, or targeted their behaviour in a particular area.
- f) The legislation does not require a ‘nexus’ between the evidence to be adduced in support of an order on conviction and the current offence(s). However, there may be circumstances where an application under section 1C is less appropriate, for example where there is no nexus to either the current conviction, previous convictions (and the facts giving rise to them) and no link to a wider pattern of anti-social behaviour. In such circumstances it might be more appropriate for an application to be made by complaint under s.1.
- g) Where a defendant pleads guilty to an offence, but disputes the facts as presented by the prosecution, then if those facts would, if established in evidence, form the basis for a post-conviction order, a ‘Newton’ hearing may be held to establish the facts. Note the power to sentence the offence and adjourn consideration of the making of an order under s.1C.
- h) The court should be cautious when considering applications that relate to offenders with defined medical/mental problems that give rise to the anti-social behaviour in issue.

4.5 Procedure to be followed by the Court

- a) A Court that is invited to make an order on conviction should adopt the following procedure.
 - (i) Whilst a ‘relevant authority’ (e.g. the police) may have prompted the application, the Anti-social Behaviour Act 2003 explicitly provides for the prosecutor to request an order on conviction and for the prosecution and defence to present evidence to the court. The prosecutor may call a relevant authority to give evidence in support of the order. It is immaterial whether that evidence would have been admissible in the proceedings for which the offender was convicted.
 - (ii) The prosecution should give as much advance notice as possible of its intention to apply for a post-conviction order and, where possible, include in such notice the grounds for and terms of the order sought. Notwithstanding that Section 10(3) MCA 1980 permits adjournment after conviction and before sentence any failure by the prosecution to give notice which gives rise to a sustainable application for an adjournment could lead to the court refusing to hear the application.
 - (iii) The ‘two-limb’ test in Section 1C(2) applies to the making of a post-conviction order.
 - (iv) A copy of the order should be served on the offender before he leaves the Court, and a copy provided to the prosecution and any ‘relevant authority’ as may be appropriate.
- b) The following procedure should be adopted by the Court if it is minded to make an order on conviction of its own motion: -
 - (i) Inform the parties that the Court is minded to make an order on conviction and outline the prohibitions proposed.

- (ii) If necessary give the defence sufficient time (a short 'stand down' should normally be adequate) to consider the issues involved.
- (iii) Allow the parties an opportunity to make representations.
- (iv) Only if satisfied that the Section 1C(2) criteria are made out, and that an order is necessary, should the Court make an order.
- (v) Ensure that a copy of the order is served on the offender before he leaves the Court, and a copy provided to the prosecution and any 'relevant authority' as might be appropriate.

Note:- the Police must be supplied with a copy of the order in all cases so that the order may be put on the Police National Computer. This mirrors the provision under Rule 7 (2) of the Magistrates' Courts (ASBO) Rules 2002.

4.6 Duration of order on conviction (Section 1C(5) and (9))

- (a) The Order takes effect on the day that it is made but, if the offender is in custody, all or any of the terms of the order can be suspended until his release.
- (b) The Order can be made for a fixed period (but not less than 2 years). The term of the order may be extended or reduced by further order.

4.7 Variation and Discharge of an order on conviction (Section 1C(6) and (8))

- (a) The offender may apply to the Court that made the Order for its variation or discharge but it cannot be discharged within 2 years of the date when it was made.
- (b) The Director of Public Prosecutions may apply for variation or discharge of the order. No order may be discharged earlier than 2 years after the making of the order unless all parties consent.
- (c) A relevant authority may apply for variation of the order if the protection of relevant persons would be more appropriately effected by a variation of the order. A relevant authority may apply for discharge if the protection provided by the order is no longer necessary.

5.0 Breach of ASBO.s ("Freestanding", Interim or Orders on Conviction) (Section 1(10) and (11))

- (a) Breach proceedings are criminal proceedings and, in the case of a youth, will be heard in the youth court
- (b) In breach proceedings a certified copy of the order is admissible as evidence of its making and its content.
- (c) The offence is triable either way and in the case of an adult, the maximum penalty in the Crown Court is 5 years imprisonment. The

youth court's maximum sentence will thus be a Detention and Training Order for 2 years

- (d) It is not open to the Court to impose a conditional discharge for the breach of an ASBO.
- (e) Courts should refer to the Magistrates' Courts Sentencing Guidelines implemented on 1 January 2004. Reference can also be made to the independent guide circulated by Lord Justice Thomas in October 2005 which contains reference to many cases on the approach to sentence for breach of an ASBO. Guidance to magistrates' courts from the Judicial Studies Board indicates that "breach of an order is a criminal offence and is itself a serious matter. A court should be wary of treating the breach of an ASBO as just another minor offence. It should be remembered that the order itself would normally have been a culmination of a course of persistent anti-social behaviour. An ASBO will only be seen to be effective if breaches are taken seriously. Further breaches of a court order should be treated more seriously and may need to be committed to the Crown Court for sentence. The sentence should be both proportionate to the seriousness of the breach and, importantly, reflect the impact of the anti-social behaviour".

6.0 Publicity in cases involving youths

The following paragraphs draw upon the relevant section of the Judicial Studies Board's guidance on "Publications Reporting Restrictions in the Magistrates' Court" and have been amended to reflect decisions of the Appeal Courts and changes in legislation.

6.1 For orders made on complaint in the magistrates' court:

- a) The Court would have to have good reason, aside from age alone, to impose any discretionary order under section 39 of the Children and Young Persons Act 1933 to prevent the identification of any child or young person concerned in the proceedings.
- b) Although any request for reporting restrictions to be imposed is for the court to decide, the applicant may resist a call from the defendant's representatives for such restrictions if the effectiveness of the ASBO will largely depend on a wider community knowing the details.
- c) It is in the community interest that any order will be enforced in order to protect the community. Unless the nuisance is extremely localised, enforcement of the order will normally depend upon the general public being aware of the order and of the identity of the person against whom it is made.
- d) Effective enforcement may require the publication of photographs of the subjects, as well as their names and addresses. The steps taken by the relevant authority to publicise the making of an order should be necessary and proportionate and should have regard to the impact on the rights of the person named in the order.

- e) The magistrates dealing with a youth in ASBO proceedings may be called upon to balance the interests of the community against the welfare of the young person against whom the order has been made.
- f) Whilst reporting of orders is generally desirable to enable the order to operate and to be enforced effectively, the court should exercise care before refusing to impose reporting restrictions on youths when making an Interim Order.
- g) There would have to be good reason to impose any restrictions to prevent media reports' identification of any under 18 year old involved in the proceedings under section 39 of the Children and Young Persons Act 1933.

6.2 For orders made on conviction in the youth court:

- a) The Anti-Social Behaviour Act 2003 removes automatic reporting restrictions under section 49 Children and Young Person's Act 1933 for the order stage of proceedings.
- b) The court retains the discretion to impose reporting restrictions under section 39 of the 1933 Act where it considers this to be appropriate. Details of the criminal offence for which the individual is in court remain subject to automatic reporting restrictions.

6.3) If the defendant is under 18 and is the subject of criminal proceedings before the Youth Court for the alleged breach of an ASBO, automatic restrictions upon public, but not press, access to the proceedings will apply. The press will have the right to attend the proceedings under section 47 of the Children and Young Persons Act 1933 and the right to report the proceedings. The normal restrictions on press reporting of proceedings involving children or young persons under s.49 of the Act do not apply in respect of the child or young person against whom the proceedings are brought. Note:- When s.45 of the Youth Justice and Criminal Evidence Act 1999 comes into force the court will have a discretion to impose reporting restrictions provided that it gives reasons for doing so. Until that time the same discretion can be exercised under s.39 of the 1933 Act subject to the same requirements for reasons to be given.

7 The Order

- 7.1 When drawing up the ASBO, Interim Order or order under s.1C it is good practice to include details of the anti-social behaviour that led to the order being made.
- 7.2 The court should ensure that a copy of the order is given/sent to all parties and relevant authorities in the case. A copy of the order must be supplied to the Police immediately after the hearing.
- 7.3 The court should ensure that full details of all orders and breaches thereof are recorded to enable compliance with data collection requirements of the relevant government departments.

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