

# #04

# Criminal Behaviour Orders

---

**s1**  
Overview of the  
CBO regime

---

**s2**  
Applications for a CBO

---

**s3**  
Key principles

---

**s4**  
Evidential matters

---

**s5**  
Terms of the order

---

**s6**  
Reporting restrictions  
and publicising CBOs

---

**s7**  
Review, variation  
and discharge

---

**s8**  
Appeals

---

**s9**  
Breach of a CBO

---

**s10**  
Case study - A

**This guide is to assist lawyers representing children who are subject to an application for a Criminal Behaviour Order (CBO).**

The CBO regime was introduced by s22 of the Anti-social Behaviour, Crime and Policing Act (AS-BCPA) 2014, as a replacement for the Anti-social Behaviour Order (ASBO) regime.

# Overview of the CBO regime

The table below sets out the CBO regime in overview.

Alternatives	Consider alternatives to a CBO including early and informal intervention. <sup>1</sup>
Level of consultation	Consultation with YOT is mandatory <sup>2</sup> and consultation with other statutory agencies (for example, schools and colleges of further education, providers of probation services, social services, mental health services, housing providers or others) is encouraged. <sup>3</sup>
Power to make a CBO	A CBO may be granted by a criminal court, <sup>4</sup> following a child's conviction and sentence <sup>5</sup> for any criminal offence. <sup>6</sup>
Applicant	The prosecution (usually the Crown Prosecution Service (CPS)) either of its own initiative or following a request from the police or a local authority – the court cannot make a CBO of its own volition. <sup>7</sup>
Subject	Any child convicted of a criminal offence. <sup>8</sup>
Purpose	Tackling the most serious and persistent offenders where their behaviour has brought them before a criminal court. <sup>9</sup> To prevent a child from engaging in behaviour likely to cause harassment, alarm or distress. <sup>10</sup>
Two-limbed legal test	Limb 1 – 'Behaviour test': <sup>11</sup> The offender has engaged in behaviour that caused, or was likely to cause, harassment, alarm or distress to any person.  Limb 2 - 'Helpfulness test': <sup>12</sup> The order will help in preventing the offender from engaging in such behaviour.  <b>BOTH LIMBS MUST BE MET</b> <sup>13</sup>
Standard of proof	Beyond reasonable doubt. <sup>14</sup>
Available terms	Prohibitions and positive requirements. <sup>15</sup>
Length of order	For a child, not less than 1 year and not more than 3 years. <sup>16</sup>

- 1 This guide, on page 3, addresses the alternatives available
- 2 s22(8) ASBCPA 2014 & 'Anti-social Behaviour, Crime and Policing Act 2014: Anti-social behaviour powers; Statutory guidance for frontline professionals' January 2021, p37
- 3 'YOT Practitioner's Guide: civil injunctions and the Criminal Behaviour Order', Youth Justice Board, 2015, p15, <http://bit.ly/2Ly7fB6>
- 4 s22(2) ASBCPA 2014
- 5 A CBO cannot be combined with an absolute discharge: s22(6) ASBCPA 2014
- 6 s22(1) ASBCPA 2014
- 7 s22(7) ASBCPA 2014
- 8 s22(7) ASBCPA 2014
- 9 'Anti-social Behaviour, Crime and Policing Act 2014: Anti-social behaviour powers; Statutory guidance for frontline professionals', Home Office, January 2021, p36, <https://bit.ly/3nIrZ63>
- 10 s22(3) ASBCPA 2014
- 11 s22(3) ASBCPA 2014
- 12 s22(4) ASBCPA 2014
- 13 s22(2) ASBCPA 2014
- 14 s22(3) ASBCPA 2014
- 15 s22(5)(a)-(b) ASBCPA 2014
- 16 s25(4)(a)-(b) ASBCPA 2014

# Alternatives

Alternatives to the making of a CBO can be explored and are recommended.

Statutory guidance recommends early and informal intervention.<sup>17</sup> It is also recommended that local authorities should develop a 'tiered' approach to anti-social behaviour, in which the following approaches are recommended as alternatives:

- diversion from the justice system
- restorative justice, or
- evidence-based voluntary support.<sup>18</sup>

Other examples of alternatives include: a verbal or written warning, community resolution, mediation, Acceptable Behaviour Contracts/Agreements, parenting contracts, support and counselling.

It is suggested that, at the very least, the possibility of alternatives should be given consideration by:

1. YOT, when they are formulating their views as to the making of a CBO,<sup>19</sup> and
2. any court considering the proportionality of a CBO application.

## Practical advice

In resisting an application for a CBO, consider advancing submissions about whether alternatives were explored. This is a matter relevant to the court's assessment of proportionality.

You may also wish to argue that the ability of a statutory agency to seek a civil remedy – an Anti-social Behaviour Injunction (ASBI)<sup>20</sup> and/or Anti-Gang Injunction<sup>21</sup> – gives a 'back-up' if a young person's behaviour remains unaffected after criminal proceedings have concluded, should the court decline to make a CBO.

17 'Anti-social Behaviour, Crime and Policing Act 2014: Anti-social behaviour powers; Statutory guidance for frontline professionals', Home Office, January 2021, p23

18 'SCYJ guide to the new anti-social behaviour powers', Standing Committee for Youth Justice, February 2015, p12, <https://bit.ly/3snZRc6> & 'Anti-social Behaviour, Crime and Policing Act 2014: Anti-social behaviour powers; Statutory guidance for frontline professionals', Home Office, August 2019, p29, <https://bit.ly/3nIrZ63> pp17–19,

19 s22(1) ASBCPA 2014

20 Part 1 ASBCPA 2014 sets out the relevant statutory provisions relating to ASBIs

21 Part 4 Policing & Crime Act (PCA) 2009 sets out the statutory provisions relating to Anti-Gang Injunctions

# Applications for a CBO

An application for a CBO is usually made by the CPS, on the advice of a local police force or local authority.

A Crown prosecutor should review an application for a CBO to establish that the criteria for a CBO are made out and that it is in the public interest to pursue it.<sup>22</sup>

There must be evidence to support the request for a CBO and to justify the proposed terms. This would usually include:<sup>23</sup>

- a statement from the officer in charge (or equivalent) which summarises the defendant's offending history
- up-to-date Police National Computer (PNC) printout
- Victim Personal Statements
- Community Harm Statement, and
- if an exclusion zone is proposed, a clear map of the suggested area. If the defendant lives near the proposed exclusion zone, their home address should be marked.

## Practical advice

The CPS Legal Guidance for Crown Prosecutors on CBOs provides a number of useful resources, including but not limited to:<sup>24</sup>

**Annex A** – Procedure by which the police request the CPS to apply for a Criminal Behaviour Order (CBO)

**Annex B** – Procedure by which the local authority requests the CPS to apply for a Criminal Behaviour Order (CBO)

**Annex D** – Guide for the local authority about preparing applications

**Annex F** – Notice of Intention to apply for a Criminal Behaviour Order (CBO)

**Annex G** – Principles supporting prohibitions on Anti-Social Behaviour Orders (ASBOs)

**Annex H** – Guide to Anti-Social Behaviour Orders (ASBOs) prohibitions in reported cases

**Annex I** – Template for the Application for the variation of a Criminal Behaviour Order (CBO)

**Annex K** – List of relevant considerations when considering imposing or removing reporting restrictions

**Annex L** – Template and Process for obtaining the views of the youth offender team (YOT)

**Annex M** – Criminal Behaviour Orders (CBO) Aide Memoire

## Consultation with statutory and other agencies

### The Youth Offending Service

The CPS is required to consult with the YOT before making an application for a CBO.<sup>25</sup>

The CPS must seek YOT views on:

- the making of the order, and
- the proposed terms.

### Practical note

Most YOTs are now referred to as 'Youth Justice Services', to reflect the wider remit they have around Out of Court Disposals (OOCs) and early intervention when the child hasn't been convicted of a criminal offence. This definition is better able to reflect the 'child first'<sup>26</sup> principle.

<sup>22</sup> 'Criminal Behaviour Orders', CPS Legal Guidance for Crown Prosecutors, updated 13 May 2020, 'File review', <http://bit.ly/2LOHIZN>

<sup>23</sup> 'Criminal Behaviour Orders', CPS Legal Guidance for Crown Prosecutors, updated 13 May 2020, 'File review'

<sup>24</sup> 'Criminal Behaviour Orders', CPS Legal Guidance for Crown Prosecutors, updated 13 May 2020

<sup>25</sup> s22(8) ABCPA 2014

<sup>26</sup> See, for example, 'Standards for children in the youth justice system 2019', Youth Justice Board, 2019, p2, <http://bit.ly/38Kjzak>

YOT views must be recorded and included in the file of evidence provided to the prosecution. If the local YOT views are not present in the CBO file, the CPS must ensure that YOT views are ascertained.<sup>27</sup>

Additionally, the views of YOT will be sought during proceedings. Any pre-application objections raised by YOT, but which do not result in an application being abandoned, can be renewed in court.<sup>28</sup>

## Practical advice

Where it is anticipated that a CBO application is to be made by the prosecution, consider discussing the potential application with YOT.

Every practitioner will need to use their own judgment to decide whether this is appropriate in the individual circumstances of a case.

There may be issues affecting a child that YOT are unaware of and which would have a bearing on whether they endorse a CBO application. For instance, a child may not have been offered any informal support in addressing alleged anti-social behaviour or the underlying causes and you may feel that YOT should be notified of this (and of the need for alternatives to be explored) before YOT's views are formally canvassed by the prosecution.

## Consultation with other agencies

Statutory guidance<sup>29</sup> recommends that the agency requesting the CBO consults with local organisations that have come into contact with a child before a decision to seek an order is made.<sup>30</sup>

Furthermore, it is highly likely that YOT will formulate their views as to the application for a

CBO in consultation with any statutory and other agencies involved in a child's care, including Children's Services.

Youth Justice Board guidance<sup>31</sup> recommends the following consultative process:

### STAGE 1<sup>32</sup>

Police/local authority notifies the YOT Anti-social-Behaviour (ASB) Lead and CPS of intention to request the prosecution apply for a CBO against a young person.

### STAGE 2

YOT ASB lead adds the application to the agenda for the next 'prevention' panel (which may need to sit at short notice or take place 'remotely' if timescales are tight, and should include representatives from the police, housing, YOT, education and children's services and others as depending on local structures)

### STAGE 3

Panel discussions focus on:

- The likely impact of a CBO application. Have all pre-court/voluntary options been fully explored? If not, this should be fed back to the CPS.
- Prohibitions and positive requirements. If the YOT already provide the requirements, they will need to prepare evidence on how they are suitable and enforceable, and make the necessary arrangements for notification of non-compliance.
- The publicising of orders made against under-18s (see page 30 of Home Office statutory guidance).

### STAGE 4

CPS informed of outcome of discussions.

27 'Criminal Behaviour Orders', CPS Legal Guidance for Crown Prosecutors, updated 13 May 2020; 'Criminal Behaviour Order – process to find out the view of the local youth offending team', CPS Legal Guidance for Crown Prosecutors <http://bit.ly/2YetYoG>

28 'Criminal Behaviour Orders', CPS Legal Guidance for Crown Prosecutors, updated 13 May 2020; 'Criminal Behaviour Order – process to find out the view of the local youth offending team', CPS Legal Guidance for Crown Prosecutors

29 'Anti-social Behaviour, Crime and Policing Act 2014: Anti-social behaviour powers; Statutory guidance for frontline professionals', Home Office, January 2021, p37

30 Examples given include: schools and colleges of further education; providers of probation services; social services; mental health services; housing providers or others

31 'YOT Practitioner's Guide: civil injunctions and the Criminal Behaviour Order', Youth Justice Board, 2015, p15

32 This table is extracted from the statutory guidance, see 'YOT Practitioner's Guide: civil injunctions and the Criminal Behaviour Order', Youth Justice Board, 2015, p15

# Key principles

Statutory and Court of Appeal guidance emphasises that the power to make a CBO should not be lightly exercised and any order granted must be tailored to the specific facts of the person on whom the order is imposed.

The following principles will apply to the court's consideration of a CBO application:

- (a) the granting of a CBO is not a box-ticking exercise<sup>33</sup>
- (b) the court should proceed with caution and circumspection<sup>34</sup>
- (c) assessments of proportionality will be 'intensively fact sensitive'<sup>35</sup>
- (d) a CBO is intended to tackle the most serious and persistent offenders where their behaviour has brought them before a criminal court<sup>36</sup>
- (e) the CBO regime should respond to anti-social behaviour without adversely impacting on behaviour that is neither unlawful nor anti-social,<sup>37</sup> and
- (f) the court should not prohibit conduct that is already criminal.<sup>38</sup>

## Power to make a CBO

A CBO can be made on a child's conviction, for any criminal offence, by any criminal court, on an application by the prosecution.<sup>39</sup>

The two-limbed statutory test must be satisfied:

1. 'Behaviour test': The court must be satisfied, beyond reasonable doubt, that the offender has engaged in behaviour that has caused or was likely to cause harassment, alarm or distress to any person.<sup>40</sup>
2. 'Helpfulness test': The court considers that the making of the order will help in preventing the offender from engaging in such behaviour.<sup>41</sup>

## Procedural formalities

The relevant procedural rules can be found in Criminal Procedure Rules (CrimPR) Part 31.

Legal aid for responding to an application for a CBO is provided through the CRM14 that covers ordinary criminal proceedings.

- 33 R v Khan [2018] EWCA Crim 1472 para 20
- 34 R v Khan [2018] EWCA Crim 1472 para 20
- 35 R v Khan [2018] EWCA Crim 1472 para 20
- 36 R v Khan [2018] EWCA Crim 1472 para 18, referring to 'Anti-social Behaviour, Crime and Policing Act 2014: Anti-social behaviour powers; Statutory guidance for frontline professionals', Home Office, January 2021, p36
- 37 'Anti-social Behaviour, Crime and Policing Act 2014: Anti-social behaviour powers; Statutory guidance for frontline professionals', Home Office, January 2021, p4
- 38 R (W) v DPP 169 JP 435 DC
- 39 s22(7) ASBCPA 2014
- 40 s22(3) ASBCPA 2014
- 41 s22(4) ASBCPA 2014
- 42 CrimPR 31.3(3)
- 43 CrimPR 31.3(4)
- 44 CrimPR 31.8
- 45 CrimPR 31.7
- 46 CrimPR 31.3(4) & 31.6

## Notice of intention to apply for a CBO

Notice of intention to apply for a CBO must be served by the prosecution, by the time a conviction is returned.

This notice must:<sup>42</sup>

- summarise the relevant facts
- provide the evidence relied on
- attach any statements not already served during the course of criminal proceedings
- attach a hearsay notice, if hearsay evidence is to be relied on
- specify the proposed terms.

## Defence response

The defence must:

- serve their reply to the notice as soon as practicable, setting out the defence position<sup>43</sup>
- within 5 working days of service of a hearsay notice, indicate whether they seek to challenge the credibility and consistency<sup>44</sup> of the maker of a hearsay statement and/or cross-examine<sup>45</sup> the maker of a statement
- serve any evidence relied on and a hearsay notice if applicable.<sup>46</sup>

## Practical advice

In advance of the CBO application hearing, and in addition to the above, you may wish to consider serving a defence skeleton argument clearly setting out the grounds of opposition to the application.

### Application timing

The application must:

- be made before the sentencing hearing has concluded
- may be adjourned, even after a child has been sentenced,<sup>47</sup> but should be dealt with expeditiously.<sup>48</sup>
- If an adjournment of a CBO application is granted, an interim order may be made.<sup>49</sup>

### Interim CBO

An interim CBO may be granted where the court adjourns an application for a CBO, until the final hearing of the application or until further order, where it is just to do so.<sup>50</sup>

There is no requirement for the prosecution to have made an application or ascertained the views of YOT.<sup>51</sup>

### Failure to attend an adjourned hearing

If a child does not appear at an adjourned hearing for a CBO, the court may:<sup>52</sup>

- (a) further adjourn the proceedings, or
- (b) issue a warrant for the child's arrest, or
- (c) hear the proceedings in the child's absence.

The court may not issue a warrant for the defendant's arrest, or hear the case in a child's absence, unless it is satisfied that sufficient notice has been given of the time and place of the hearing and the child has been advised that the court has the power to deal with the application in their absence.<sup>53</sup>

### Failure to comply with the Procedural Rules

It is important that all parties observe the CrimPR.<sup>54</sup> However, a failure to comply may not cause a CBO to be invalid. The key issue is whether any unfairness has been caused.<sup>55</sup>

In the case of Lima<sup>56</sup> the Court of Appeal quashed a CBO in circumstances where the ap-

pellant had not been given an opportunity to rebut the evidence of a police officer, in consequence of a failure by the prosecution to observe the procedural rules relating to the introduction of hearsay evidence.

47 s23(3) ASBCPA 2014 & provided the notice of application was served in accordance with CrimPr 31.2

48 R v Khan [2018] EWCA Crim 1472

49 s26 ASBCPA 2014

50 s26(2) ASBCPA 2014

51 s26(3) ASBCPA 2014

52 s23(4) ASBCPA 2014

53 s23(5) & (6) ASBCPA 2014

54 M v DPP [2007] EWHC 1032 (Admin); R v Khan [2018] EWCA Crim 1472, para 13

55 R v Asfi [2016] EWCA Crim 1236

56 R v Lima [2010] EWCA Crim 284

## Practical advice

You should always take the step of ensuring that the prosecution have complied with the rules set out in CrimPR Part 31. A failure by the prosecution to comply may result in an easy strategy for defeating a CBO application.

# Evidential matters

The following rules of evidence apply:

1. CBO applications are civil proceedings and, generally, adopt civil rules of evidence,<sup>57</sup> with the exception that the evidence adduced by the Crown to establish the first limb of the statutory test must be proved to the criminal standard.
2. Typically, the prosecution will seek to introduce evidence by hearsay notice. If there is an objection to the introduction of evidence in this way, for instance because the defence seek to challenge it by cross-examination, the hearsay notice must be responded to by the defence within 5 working days.<sup>58</sup>
3. The evidence does not need to have been admissible in the original proceedings in which the defendant was convicted.<sup>59</sup>
4. The court may take account of conduct dating back one year before the commencement of the CBO provisions (20 October 2014).<sup>60</sup>
5. The application can rely on evidence of behaviour that has not resulted in criminal convictions. If the facts of the behaviour are not accepted by the defence, they must be proved by the prosecution, to the criminal standard.
6. Where previous convictions are relevant to obtaining a CBO, they will be admissible.
7. The Rehabilitation of Offenders Act 1974 applies to an application for an order on conviction so that no reference should be made to convictions that are 'spent' in the CBO proceedings without the consent of the court.
8. Special measures are available.

57 R (W) v Acton Youth Court [2005] EWHC 954 (Admin)

58 CrimPR 31.7

59 s23(2) ASBCPA 2014

60 s33(5) ASBCPA 2014



# Terms of the order

## The terms of a CBO

- 1 The terms may include prohibitions and positive requirements.<sup>61</sup>
- 2 The terms must be designed for the purpose of preventing the defendant from engaging in harassment, alarm or distress.<sup>62</sup>
- 3 The terms must avoid interfering with the times at which a child normally works or attends school or any other educational establishment.<sup>63</sup>
- 4 The terms must not conflict with the requirements of any other court order or injunction to which the child may be subject.<sup>64</sup>
- 5 It is recommended that account is taken of any caring responsibilities a child may have and, in the event that they have a disability or specific learning need, whether the child is capable of complying with the proposed prohibitions or requirements.<sup>65</sup>
- 6 The court must consider:
  - the child's welfare and best interests
  - whether the proposed terms are a necessary, proportionate or reasonable interference with a child's human rights, primarily Article 8 of the European Convention on Human Rights (right to respect for private and family life, home and correspondence).<sup>66</sup>
- 7 The terms must be drafted in accordance with the guidance of the Court of Appeal in the case of Boness:<sup>67</sup>
  - (a) the terms must be precise and capable of being understood by the defendant
  - (b) the findings of fact giving rise to the making of the order must be recorded
  - (c) the order must be explained to the defendant
  - (d) the exact terms of the order must be pronounced in open court and the written order accurately reflect the order as pronounced.

61 s22(5)(a)–(b) ASBCPA 2014

62 s22(4) & (5) ASBCPA 2014

63 s22(9) ASBCPA 2014

64 s22(9) ASBCPA 2014

65 'YOT Practitioner's Guide: civil injunctions and the Criminal Behaviour Order', Youth Justice Board, 2015, pp9–10

66 DPP v Bulmer [2015] EWHC 2323 (Admin), para 46; R v Janes [2016] EWCA 676, para 18; also: R v Boness [2005] EWCA Crim 2395, para 38

67 R v Boness [2005] EWCA 2395, paras 19–23; also R v Khan [2018] EWCA Crim 1472, para 14

68 See: R v Simsek [2015] EWCA Crim 1268, para 18; & 'Anti-social Behaviour, Crime and Policing Act 2014: Anti-social behaviour powers; Statutory guidance for frontline professionals', Home Office, January 2021, p4

69 DPP v Bulmer [2015] EWHC 2323 (Admin), para 23

70 DPP v Bulmer [2015] EWHC 2323 (Admin), para 23

71 s24(2) ASBCPA 2014

## Requirements

### Prohibitions:

- Should not be too widely drafted, so as to cause a defendant to breach the order for behaviour that is neither unlawful nor anti-social.<sup>68</sup>

### Positive requirements:

- Are not obligatory.<sup>69</sup>
- If imposed, should be designed to support a child in addressing the underlying causes of the anti-social behaviour.<sup>70</sup>
- Must be based on the court hearing evidence about the suitability and enforceability of the term proposed by the person/organisation responsible for supervising the order.<sup>71</sup>

The court must specify the person/organisation responsible for supervising any positive requirements. The specified person/organisation is responsible for and has a duty to:<sup>72</sup>

(a) make the necessary arrangements for the requirement(s)

(b) promote compliance

(c) inform the prosecution/police as to a child's compliance (positive or negative) with the requirement(s).

## Practical advice: resisting the making of CBO

It is possible to argue that the sentence imposed for the criminal conviction will be sufficient to prevent further anti-social behaviour. Consideration should be given to contesting the order in its entirety so that the young person can demonstrate the positive effect of the sentence passed on them.

You may wish to obtain evidence relating to the impact of the proposed terms of a CBO on a child's social development from individuals/organisations involved with a child's care.

In any CBO application there is the potential for overlap between behaviour that is said to be anti-social (for instance, association with particular friendship groups and participation in activities such as in drill music; all of which could be presented as bad character evidence) and the legitimate features of a child's social life. As a result, there is a high risk that prohibitions sought by the prosecution would have an adverse impact on a child's personal growth and development and could result in their ostracization from forms of support, such as friendship circles.

## Practical advice

Examples of frequently used prohibitions include:

- Non-association with named people. Frequently the names of people listed in a non-association condition are children who attend the same school or Youth Offending Service, and the condition should be worded to acknowledge this
- Exclusion zones
- Curfews
- Possession of unregistered mobile phones and SIM cards. A person under the age of 18 cannot register a mobile phone or SIM card in their name, so the prohibition should state the names of the people in whose name the devices can be registered
- Prohibiting contributions to websites
- Attendance at an anger management course where an offender finds it difficult to respond without violence
- Youth mentoring
- A substance misuse awareness session where a child's anti-social behaviour occurs when they have been drinking or using drugs
- A job readiness course to help a child move into employment

# Reporting restrictions and publicising CBOs

The reporting restrictions that automatically apply in the youth court do not apply to a CBO application or breach proceedings.<sup>73</sup>

The court<sup>74</sup> retains a discretionary power to restrict the reporting of a CBO application.<sup>75</sup> Consideration should always be given to granting an order to preserve a child's anonymity.<sup>76</sup>

Where reporting restrictions are not imposed, the police and/or local authority may publicise the making of a CBO. Matters that must be taken into account in any decision include:<sup>77</sup>

- whether it is necessary and proportionate to interfere with a child's right to privacy
- the likely impact on a child's behaviour
- the need to provide reassurance to victims and the wider community and provide the information necessary to enable reporting of breaches.

## Practical advice

You should always ensure that the court is invited to retain a child's anonymity. Anecdotal experience from YOT suggests that the loss of the right to anonymity comes at a significant cost to a child.

You should liaise with the local YOT when preparing objections to the loss of anonymity as YOT is likely to be in a position to provide you with examples (anonymised) of the impact of anonymity being waived.

73 s30(5) ASBCPA 2014. Note that reporting restrictions continue to apply to the offence the child has been convicted of

74 Youth court, magistrates' court & Crown Court

75 s39 Children and Young Persons Act 1933

76 R (T) v St Albans Crown Court [2002] EWHC 1129 (Admin)

77 'Anti-social Behaviour, Crime and Policing Act 2014: Anti-social behaviour powers; Statutory guidance for frontline professionals', Home Office, January 2021, p40

# Review, variation and discharge

A child's CBO must be reviewed annually by the police. Other parties may be invited to participate in the review, including YOT.<sup>78</sup> Statutory guidance

provides an overview of the procedure that should be adopted.<sup>79</sup>

## Practical advice

You may wish to consider ensuring that YOT are aware of this review requirement. Anecdotal evidence suggests that YOT are not, but for reasons that will be obvious may be in a position to make a meaningful and positive contribution to the review process.

A CBO may be varied or discharged by a defendant or the prosecution.<sup>80</sup> The power to vary includes a power to: (a) add an additional prohibition or requirement; and/or (b) extend the period for which a term has effect.<sup>81</sup>

Either the defendant or the prosecution can make an application but if this is dismissed by the court, neither party can make another application

without the consent of either the court or the other party.

The court has a discretion to vary an order in the absence of the defendant, but would have to consider carefully whether there was a genuine reason for the absence and whether the application should properly be adjourned in order to hear fully from both parties.

## Practical advice

A defendant may wish to vary the order in the light of a change of circumstances or passage of time.

Relevant circumstances are likely to include: a child remaining out of trouble after a CBO has been made, leaving the area, getting employment or any other circumstances that suggest it would be appropriate for an order/prohibition to be lifted.<sup>82</sup>

The procedure to follow when seeking to vary or discharge a CBO is set out in CrimPR 31.5. The application is generally made by letter, setting out the variation sought and enclosing the evidence relied upon.

78 'Anti-social Behaviour, Crime and Policing Act 2014: Anti-social behaviour powers; Statutory guidance for frontline professionals', January 2021, p40

79 'Anti-social Behaviour, Crime and Policing Act 2014: Anti-social behaviour powers; Statutory guidance for frontline professionals', Home Office, January 2021

80 s27(1) ASBCPA 2014

81 s27(4) ASBCPA 2014

82 These circumstances would be analogous to the circumstances for variation or discharge of an ASBO under the old regime, when the court could consider 'that he has mended his ways, left the area, got a proper job or any other considerations which may lead the magistrate to think that the prohibition on him can now be lifted'. See: 'Criminal Behaviour Orders', CPS Legal Guidance for Crown Prosecutors, updated 13 May 2020, 'Variation or discharge of an order (s27)'

# Appeals

A child defendant may seek to appeal the making of the CBO on the basis that the order should not have been made and/or the terms imposed were too severe.

CBO in youth court or adult magistrates' court  
→ automatic right of appeal to Crown Court

CBO in Crown Court  
→ avenue of appeal would be to the Court of Appeal

Slip rule amendment is not available in the youth or adult magistrates' court, but is available in the Crown Court.<sup>83</sup>

<sup>83</sup> s142 Magistrates' Courts Act 1980 cannot be used to correct errors in CBOs, as it is only available to criminal proceedings. In the Crown Court, any errors can be corrected via the 'slip rules' as long as this happens within 56 days of the error and parties are put on notice

# Breach of a CBO

It is a criminal offence for a child to fail to comply with the prohibitions and/or requirements in the CBO, without reasonable excuse.<sup>84</sup>

Breaches should be dealt with in the youth court, even if the order was originally made by the Crown Court.<sup>85</sup> The defence of 'reasonable

excuse' is available and must be disproved by the prosecution to the criminal standard.<sup>86</sup>

In some cases, a youth caution may be an appropriate disposal for a CBO breach, therefore the CPS should review any decision to prosecute a breach.

## CPS Legal Guidance for Crown Prosecutors<sup>87</sup>

'Where a youth breaches a CBO, a youth caution may be appropriate. The CPS legal guidance on Youth Offenders states that youth cautions are intended to provide a proportionate and effective response to offending behaviour and can be used for any offence providing the statutory criteria are satisfied. Offence seriousness is determined by reference to the ACPO Gravity Matrix, which sets out the most prevalent offences, and provides them with a score of 1, 2, 3 or 4. The score may be raised or lowered by one level according to aggravating and mitigating factors which are set out in the Matrix.

The Gravity Matrix score for breach of a CBO without any aggravating factors is 3 provided the breach was not a flagrant one. Where the breach was flagrant, then the expectation would be to charge, unless there were some very unusual circumstances. In the case of breaches of a CBO imposed following a conviction, the public interest will usually require a prosecution.'

If a child is prosecuted, they will be sentenced in line with the Sentencing Council's guideline for breach of CBO, taking into account the principles

in the guideline for the sentencing of children and young people. The maximum penalty is a 24-month Detention and Training Order (DTO).

## Practical advice

If a defendant is charged with breach of a CBO but has lodged an appeal against the making of the order, the breach is still a criminal offence. In these circumstances, there may be merit in making an application to adjourn the breach proceedings until the appeal has been dealt with.

84 s30(1) ASBCPA 2014

85 The ordinary allocation rules for the youth court apply, with a presumption of trial in the youth court. See, for instance, 'Criminal Behaviour Orders', CPS Legal Guidance for Crown Prosecutors, updated 13 May 2020, 'Youths: breaches of CBOs'

86 R v Charles (2009) EWCA Crim 1570

87 'Criminal Behaviour Orders', CPS Legal Guidance for Crown Prosecutors, updated 13 May 2020, 'Youths: breaches of CBOs'.

# Case study – A

On 14 March 2019 a 15 year old was sentenced for the offence of possession of a bladed article (a second offence) to a Youth Rehabilitation Order of 12 months with the following requirements: supervision; 30 hours' reparation; Violence Reduction Programme; and an electronically monitored curfew for 2 months between 8pm and 7am.

A had previously been sentenced to a Referral Order of 9 months for one offence of possession of a bladed article and one offence of the possession of Class A drugs on 12th November 2018.

At A's sentence hearing the prosecution indicated that they wished to apply for a CBO. The defence confirmed the application would be contested. The YOT, who were supervising A's sentence, did not support the application.

The application proposed 5 conditions: a combination of prohibitions and positive requirements.

Prohibitions – not to:

1. Remain in the immediate presence of any of the following persons in any Public Place in England and Wales: [named persons]
2. Carry any knife or bladed article in any public place, even if the blade is less than three (3) inches.
3. Be in possession of more than ONE (1) Mobile Phone handset in a public place.
4. Be in possession of more than ONE (1) SIM card in a Public Place.

Positive requirement:

5. A must remain inside an address agreed by Youth Offending Service and Court and present himself in person to any Police Officer in attendance between the hours of 1900 and 0600 for a period of NINETY (90) days.

The application relied on evidence from two police officers.

A defence skeleton argument was served in advance of the hearing, outlining the grounds of opposition to the application.

In summary, it was argued that the first limb of the test was not satisfied as there was no evidence that A had engaged in anti-social behaviour and any material that did exist was incapable of satisfying the court, to the criminal standard, that A had engaged in such behaviour.

1. The prosecution evidence on which the prosecution sought to rely was not specific to A. The evidence given in the witness statements of the officers did not appear to contain any personal knowledge of A or any particulars of the incidents reported.

One statement merely presented generic information collated from police records and the second made only general reference to the effect of knife crime.

For instance, one officer stated that A lived in an area frequented by a 'gang' engaged in drill music. There was no evidence of A being involved in this.

2. A's antecedent record did not establish either that A had been committing crimes in public or that members of the public were in any way exposed to them, such as to be caused harassment, alarm or distress.

For instance, in relation to A's conviction for possession of a bladed article in November 2018 there was no evidence that A had been engaged in anti-social behaviour at the time he was stopped and searched. The knife that formed the basis of the charge was found in a hedge. It was not being brandished, it was not suggested that there were any civilian witnesses and members of the public were not present.

In relation to the second limb of the test, it was argued that the conditions failed to satisfy the helpfulness test and were neither tailored nor proportionate.

1. Condition 1 referred to a list of people, several of whom attended the same educational establishment and YOT as A. They were not people with whom A had committed offences.
2. Condition 2 prevented A from being able to use cutlery in a public place such as an educational establishment or restaurant. This had implications for his right to private life under Article 8 of the European Convention on Human Rights.
3. A prohibition on A having only one SIM card and one mobile phone did not satisfy the helpfulness test, as A did not have any convictions for criminal conduct connected with the use of multiple SIM cards and phones, such as possession with intent to supply (PWITS).
4. The proposal that A be subject to an electronically monitored curfew failed the helpfulness test. The sentencing court had already imposed an electronically monitored curfew designed to address the cause of A's offending, following a recommendation by YOT, who were best placed to judge what conditions would be appropriate. In these circumstances the imposition of a more onerous curfew was clearly disproportionate.

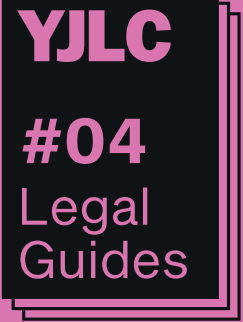
Throughout, the defence reminded the court of its obligation to treat A's welfare as paramount.

The application was refused.

#04

## Criminal Behaviour Orders

Written by Mel Stooks (GT Stewart Solicitors) in collaboration with Claire Mawer, Katya Moran and Laura Cooper at the Youth Justice Legal Centre. With thanks to Joel Bennathan QC (Doughty Street Chambers).



#01  
Turning 18

#02  
Intermediaries for  
child defendants

#03  
Child Criminal  
Exploitation

#04  
Criminal  
Behaviour Orders

#05  
Trauma Informed  
Lawyering

#06  
Criminal Practice  
Directions

#07  
Effective  
Participation

#08  
Instructing  
an Expert

#09  
Bail &  
Remand

#10  
Diversion

#11  
S.38 Beds

#12  
Anonymity

### Youth Justice Legal Centre [yjlc.uk](http://yjlc.uk)

The Youth Justice Legal Centre (YJLC) has been set up by the charity Just for Kids Law to provide legally accurate information, guidance and training on youth justice law. YJLC is a centre of excellence on youth justice law, providing:

- Guidance and expertise on youth justice law to safeguard children's rights in the youth justice system;
- A dedicated website with comprehensive information, legal resources and best practice guides for lawyers, judges, magistrates, youth offending teams, professionals, children and families;
- Training on youth justice issues for lawyers and non legal professionals working with children;
- Free specialist legal advice for children, their families, youth offending teams, the judiciary and lawyers.

### Doughty Street Chambers [doughtystreet.co.uk](http://doughtystreet.co.uk)

Doughty Street Chambers offers extensive expertise across numerous child rights-related areas and has wide-ranging experience in bringing ground-breaking litigation for and concerning children in public law, extradition, immigration, mental health, community care, prison law, trafficking, education, criminal justice, clinical negligence and inquests. Many of our members specialise in complex and developing areas concerning the rights of children, including female genital cutting (FGC) and children, abortion rights for vulnerable teenagers, unaccompanied minors' rights, the education rights of children in custody, inclusive education for disabled children, children's effective participation in criminal trials, and the rights of LGBTQI children.

### Just for Kids Law [justforkidslaw.org](http://justforkidslaw.org)

Just for Kids Law is a UK charity that works with and for children and young people to hold those with power to account and fight for wider reform by providing legal representation and advice, direct advocacy and support, and campaigning to ensure children and young people in the UK have their legal rights and entitlements respected and promoted and their voices heard and valued.

### Paul Hastings [paulhastings.com](http://paulhastings.com)

At Paul Hastings, corporate social responsibility isn't just the right thing to do. It's smart business. We undertake challenging pro bono matters with the same intense focus we bring to all our work, while engaging and empowering our employees to advance change. We believe in supporting purposeful programs that have a meaningful impact on our communities around the world, including our commitment to the Youth Justice Legal Centre at Just for Kids Law, who we have partnered with for a number of years, to assist with their mission of providing much-needed legal guidance and training on youth justice law.