

CRIMINAL BEHAVIOUR ORDERS

SENTENCING EXPLAINED

The Criminal Behaviour Order (CBO) was introduced by the Anti-social Behaviour, Crime and Policing Act 2014 and came into force on 20 October 2014. The CBO replaced the Anti-social Behaviour Order (ASBO) in England and Wales as the primary tool aimed specifically at tackling underlying ‘anti-social behaviour’. The CBO generally targets low-level but persistent offenders and is a form of ‘ancillary order’ (also sometimes referred to as a ‘secondary order’; see our explainer on Ancillary Orders here [INSERT LINK]). As ‘ancillary’ orders, CBOs operate in a supplementary capacity at sentencing. CBOs are only available on conviction for an offence – but the conviction can be for any criminal offence in any criminal court, including youth courts. However, they are not available where the offender has been sentenced to an absolute discharge.

It is a criminal offence to fail to do something required by a CBO, or to do something prohibited by a CBO. A CBO can, therefore, criminalise behaviour which would not otherwise be criminal.¹ A CBO should be reserved for persistent anti-social offenders and aim to prevent them from further offending.²

When can a CBO be imposed?

A CBO can only be imposed on the application of the prosecution.³ In the majority of cases, an application is likely to be made by the Crown Prosecution Service, either on its own initiative or at the request of the police.⁴ It is possible, however, that an application may also be made where proceedings are conducted by a prosecutor other than the Crown Prosecution Service, such as a local authority.

¹ As an example, a man who has been convicted for the theft of bikes from train stations has been made subject to a CBO that prohibits him from entering a railway station except for the purpose of travelling. Therefore, if this man enters a train station without the purpose of travelling – something which is, of course, not ordinarily criminal – he will have committed an offence: he will have breached the CBO that prohibits him from doing so.

² Due to both the high level of interference on an individual’s autonomy that results from the imposition of a CBO, and the serious consequences of any breach, the courts have accepted that, as a matter of principle, CBOs are not to be ‘lightly’ imposed (*Director of Public Prosecutions v Bulmer* [2015] EWHC 2323 (Admin)).

³ Section 331(1) of the Sentencing Act 2020.

⁴ Before an application is made for a CBO in respect of a young person who was convicted, the prosecution is required to contact the local Youth Offending Team (YOT) and establish their views in respect of the appropriateness of the proposed CBO.

For the court to impose a CBO, two conditions must be met. Firstly, the court must be ‘satisfied that the offender has engaged in behaviour that caused or was likely to cause harassment, alarm or distress to any person’.⁵ Secondly, the court must additionally consider that ‘making the order will help in preventing the offender from engaging in such behaviour’.⁶

The first condition must be proved by the prosecution to the criminal standard (i.e. ‘beyond reasonable doubt’). In determining whether this condition has been met, the court may take into account any conduct of the offender (whether or not related to the current offence) occurring up to one year before the commencement day of the proposed CBO.

If the ‘harassment, alarm or distress’ condition is not satisfied, then that is the end of the matter, and a CBO cannot be imposed. If, however, the court finds that this first condition is satisfied, it will then consider whether the second condition is also met.

In considering whether making a CBO will help in preventing the offender from engaging in anti-social behaviour, the court is able to take a flexible and holistic approach. The court need not be convinced that such an order is necessary for the prevention of anti-social behaviour, nor that it will have the effect of preventing it. The court only need to be convinced that it will ‘help in preventing’ such behaviour. Unlike the first condition, the second condition does not expressly impose any burden of proof upon the prosecution; instead, it is primarily the exercise of the court’s judgement.

What can a CBO contain?

An offender will be provided with a written copy of a CBO containing the requirements of the order. By imposing a CBO, the court can require an offender to both do positive acts (a ‘requirement’)⁷ and refrain from certain acts (a ‘prohibition’).⁸

In instances where a CBO includes a requirement, the court must specify who is to be responsible for supervising the offender’s compliance with that requirement (this may be an individual or an organisation)⁹ and hear evidence from this proposed supervisor regarding both the suitability and enforceability of the proposed requirement.¹⁰

Any requirements or prohibitions contained in a CBO must be proportionate, reasonable, precise, and capable of being understood by the offender. The court must also specify the duration of the CBO. If the person is under the age of 18 at the time of the imposition of the CBO, the order must be of a fixed period of not less than one year and not more than three years. Where the person is 18 or over, the order period must either be a fixed period of not less than two years or be for an indefinite period (so that the order has effect until further order).¹¹

⁵ Section 331(2)(a) of the Sentencing Act 2020.

⁶ Section 331(2)(b) of the Sentencing Act 2020.

⁷ For example, where it is considered that the anti-social behaviour is connected to substance misuse, the CBO may require attendance at a substance misuse course.

⁸ For example, prohibiting the offender from entering a certain geographical area that is linked to their anti-social behaviour.

⁹ Section 333(1) of the Sentencing Act 2020.

¹⁰ Section 333(2) of the Sentencing Act 2020.

¹¹ Section 334 of the Sentencing Act 2020.

Insofar as is practicable, the conditions of a CBO should avoid (a) any interference with the times during which a person works or attends an educational establishment; and (b) any conflict with the requirements of other court orders or injunctions to which the person is subject.¹²

The convicted person can appeal against the imposition of a CBO if they believe that the order should not have been made or that the contents of the order, such as any requirements or prohibitions, are wrong. A CBO imposed by a magistrates' court may be appealed to the Crown Court, and a CBO imposed by the Crown Court may be appealed to the Court of Appeal (Criminal Division).

A CBO may also be varied or discharged by the court which made the original order. An application to vary or discharge a CBO may be made where, for example, the offender seeks to argue that circumstances have changed since its imposition. An application can be made by either the offender or the prosecution, but if this is dismissed by the court, they cannot make a further application without the consent of either the court or the other party.¹³

How often are CBOs imposed and what are the consequences of breaching the terms of a CBO?

Serious consequences can follow the breach of a CBO. In 2018, 904 CBOs were imposed by courts in England and Wales.¹⁴ As CBOs may be breached on multiple occasions, the annual number of proceedings against individuals for breaching CBOs is higher than the number of CBOs imposed each year. In 2018, there were 3,386 proceedings against individuals for the offence of breaching a CBO, and the individual was found guilty in 3,034 of these cases.¹⁵ Of these, 1,067 received an immediate custodial sentence, with the average custodial sentence length being 2.7 months.¹⁶ The next most common sentencing outcome was a fine (663 cases), followed by a community sentence (536 cases), then a suspended sentence (345 cases).¹⁷

¹² Section 331(4) of the Sentencing Act 2020.

¹³ Section 336 of the Sentencing Act 2020.

¹⁴ Ministry of Justice (2019), Freedom of Information Act Request, Reference: 190926025. There were 707 CBOs imposed in 2015, 952 in 2016, and 909 in 2017.

¹⁵ Ministry of Justice (2020), *Criminal justice system statistics quarterly: December 2019*, Outcomes by offence data tool. In order for an individual to be liable for the breach of a CBO, the prosecution must prove the existence of an order, the terms of that order, and that what the defendant did or did not do was in breach of that order (i.e. that they failed to do what they were required to do, or that they did what they were prohibited from doing by the order). There is no requirement for any intention on behalf of the defendant to breach the order to be proven.

¹⁶ 22 offenders were sentenced to 12 months or longer (with one individual sentenced to more than three but less than four years).

¹⁷ The maximum sentence for this offence on summary conviction is six months; the maximum sentence on indictment is five years (section 339(2) of the Sentencing Act 2020).