

Criminal Justice Alliance response to the Home Office consultation on 'More Effective Responses to Anti-Social Behaviour'

About the Criminal Justice Alliance

The Criminal Justice Alliance (CJA) is a coalition of 55 organisations - including campaigning charities, voluntary sector service providers, research institutions, staff associations and trade unions - involved in policy and practice across the criminal justice system. The CJA's current member organisations are: Action for Prisoners' Families; Adullam Homes Housing Association; the Apex Charitable Trust; the Association of Black Probation Officers; the Association of Members of Independent Monitoring Boards; Birth Companions; Carers Federation; Catch22; the Centre for Crime and Justice Studies; the Centre for Mental Health; Chance UK; the Children's Society; the Churches' Criminal Justice Forum; Circles UK; Clean Break; Clinks; DrugScope; the Fawcett Society; the Griffins Society; Gwalia Care and Support; Hafal; INQUEST; the Institute for Criminal Policy Research; JUSTICE; Leap; Nacro; the National Appropriate Adult Network; the New Bridge Foundation; Pact; Penal Reform International; the Police Foundation; the Prison Officers' Association; the Prison Reform Trust; Prisoners Abroad; Prisoners' Advice Service; the Prisoners Education Trust; the Prisoners Families and Friends Service; the Public and Commercial Services Union; the Quaker Crime, Community and Justice Group; RAPT; Release; the Restorative Justice Council; Rethink; Revolving Doors Agency; the RSA Prison Learning Network; Safe Ground; SOVA; the St Giles Trust; Transform Drug Policy Foundation; UNLOCK; Women in Prison; Women's Breakout; Working Chance; the Young Foundation; and Young Minds.¹ The Criminal Justice Alliance works to establish a fairer and more effective criminal justice system.

Introduction

The CJA is pleased to have the opportunity to respond to this consultation. We welcome the proposals to simplify the current range of orders, and we believe that the introduction of positive requirements could, if implemented carefully, make civil orders more effective in addressing antisocial behaviour (ASB). However, whilst we welcome reform of the system, we nevertheless firmly believe that the complex, deeply-rooted problems that lie at the heart of ASB can be addressed more effectively by ensuring the availability of support services in local communities, including youth services, family support and health services, as well as through projects that offer intensive support, rather than by recourse to formal measures.

The CJA is particularly concerned that civil orders, the breach of which can result in severe sanctions including custody, can act as a 'fast-track' into the criminal justice system for many individuals; they can also increase the reach of the criminal justice system, with greater numbers of people being drawn in having committed very minor criminal offences, or even having been convicted of no criminal offence at all. We welcome the Ministry of Justice's recognition, set out in

¹ Although the CJA works closely with its members, this consultation response should not be seen to represent the views or policy positions of each individual member organisation.

the recent green paper 'Breaking the Cycle', that prison should be reserved for serious and dangerous offenders, but believe that using civil orders to tackle ASB will militate against a more sparing use of custody.

The CJA believes that custody should not be available as a response to breach of any of the civil orders or powers set out in the consultation. In addition, we would recommend that clear guidelines are set out for the use of such orders and powers, and in particular for the use of the Criminal Behaviour Order and the Crime Prevention Injunction, so that these are used with restraint, and only in the most extreme circumstances. Formal measures such as civil orders do not provide the 'answer' to ASB, and should only ever be used as a last resort, when all other options have been tried and exhausted.

Reforming the toolkit

1. What do you think of our proposals for reform? In particular, do you think merging existing powers into the new orders proposed is a good idea?

The CJA welcomes plans to simplify the current range of orders, and believes that merging existing powers will mean a less cumbersome and more comprehensible system for practitioners, the public, and those upon whom orders are imposed. We also believe that, with careful implementation, the introduction of positive requirements to civil orders could make these more effective in tackling ASB. There are, however, a number of issues that will need to be addressed before any reforms are introduced.

Whilst we welcome reform of the current system, we believe that addressing ASB in both young people and adults should be done, in the main, without recourse to civil orders. As we detail below, projects that tackle the causes of ASB by engaging with and providing support to young people and adults are very effective. Moreover, unlike civil orders, they do not act as a fast-track into the criminal justice system by imposing sanctions for breach. It is our opinion that formal measures should never be a first port of call: indeed, they should only ever be employed when absolutely necessary, and steps should be taken to ensure that this is the case.

Where civil orders are used, there needs to be a clear focus on proportionality, and guidance should be produced for sentencers to ensure this. If this is not addressed, there is a real risk that many orders imposed will be unduly onerous; this is of particular concern in relation to the proposed Crime Prevention Injunction (CPI), which would be given to people who have not been convicted of any criminal offence. For those who have been convicted of a criminal offence, there is also a risk that, imposed alongside a criminal justice disposal, a Criminal Behaviour Order (CBO) could result in a disproportionate level of sanctioning. This would be unjust, and could also prove to be ineffective, with individuals being 'set up to fail'. As we have argued above, and in keeping with the demands of proportionality, we firmly believe that custody should not be available as a sanction for breach of a civil order. Custody is the most severe sanction available for a criminal offence, and should, as the Ministry of Justice has set out, be reserved for serious and dangerous offenders.

As well as a clear focus on proportionality, there will need to be, with the positive requirements of CBOs and CPIs, a requirement for the consent of the individual concerned: it would be both unfair and ineffective to compel those who are unwilling to receive treatment for, for instance, drug or alcohol dependency. Whilst the CJA acknowledges that, in some cases, prohibitions may be necessary, we would, overall, question the usefulness of these in tackling ASB, and recommend that these should only ever be used in the most extreme

circumstances. Moreover, they should only be used to provide short-term relief, and should never be employed as a long-term solution.

We fully support the proposal that breach of a CPI would not be a criminal offence and would not result in a criminal record. We are, however, concerned by the proposal that breach of other powers, including the Direction Power, would be a criminal offence. The consultation's statement that "we are keen to avoid criminalising people, particularly young people" is welcome: criminal convictions can act as a significant barrier to, amongst other things, gaining employment, and so can prevent many people with a criminal record from making positive and stabilising changes in their lives. We would therefore advise that, in order to avoid unnecessarily criminalising people, breaches of the Direction Power and the Community Protection Order should be dealt with under civil law.

The CJA believes that restorative justice (RJ) has a significant role to play in addressing ASB, and we are pleased to see the proposals for wider use of it. RJ can be used for both young people and adults, helping those responsible for ASB to understand the impact of their behaviour, whilst also increasing the confidence of communities that ASB is being tackled by engaging them in the process. As such, we believe it offers a robust and effective alternative to formal measures such as civil orders.

4. Do you think there are risks related to the introduction of any new orders?

The CJA has real concerns about the proposals to lower the threshold to impose a Crime Prevention Injunction by using the legal definition currently in place for Anti-social Behaviour Injunctions, and to impose CPIs based on the civil standard of proof. If these proposals are implemented, there is a real risk of disproportionate sanctions being imposed for minor behaviour, with no checks in place to provide effective safeguards against this. There is also a risk of net widening, with a greater number of people becoming subject to civil orders. Though breach of a CPI would not be a criminal offence and would not result in a conviction, given the sanctions proposed for breach, this is of acute concern to the CJA.

We are, as we have highlighted above, firmly opposed to the use of custody as a sanction for breach of any civil order, and believe that there is a significant risk that this will work against the Ministry of Justice's commitment to reserve prison for serious offenders: it could, in fact, mean that individuals convicted of no criminal offence at all are given custodial sentences. The prison estate is severely overcrowded at present, with the prison population currently at 111% of the CNA level.² If this problem is to be tackled successfully, there needs to be effective and sustained joint-working between the Ministry of Justice and the Home Office to ensure that individual departmental policies do not work in opposition to one another.

5. Do you think these proposals risk particular groups being disadvantaged in a disproportionate way? If so, how?

As we argue below, we believe that CBOs and CPIs should not be imposed on those with mental health problems and learning disabilities or difficulties: civil orders of this kind can result in fast-tracking into the criminal justice system, which is clearly at odds with the Government's stated intention of diverting vulnerable individuals into appropriate treatment and support services. We also believe that orders of this type are unsuitable for young people; however, as with the ASBO, there is a risk that they will be imposed disproportionately on those under 18. We therefore recommend that, with young people, addressing ASB should be focused

² http://www.hmprisonservice.gov.uk/assets/documents/10004C9Fpop_bull_mar_11.doc

on informal interventions that provide intensive support and encouragement.

Criminal Behaviour Order

1. What do you think of the proposal to create a Criminal Behaviour Order?

The CJA welcomes the consultation's recognition that the Anti-social Behaviour Order on Conviction's focus on prohibition "does not enable the underlying causes of an individual's behaviour to be addressed". As such we welcome, albeit rather cautiously, the introduction of positive requirements as part of the proposed new Criminal Behaviour Order (CBO), which we believe could make civil orders more effective in dealing with ASB. There are, however, several issues that we would urge careful consideration of before any reforms are implemented.

We would, first of all, urge recognition that addressing ASB without the use of formal measures such as CBOs can be extremely effective. Research published in 2006 by the Department for Communities and Local Government on the Intensive Family Support Projects, which ran during 2003 in six local authority areas and focused on families that had been evicted or were under threat of homelessness due to ASB, showed that for the vast majority of families involved, the projects "had helped them achieve remarkable changes". The study found that in 85% of families complaints about ASB had either ceased or had reduced to a level where the tenancy was no longer deemed to be at risk at the point where they exited the project. Moreover, project workers assessed that in 80% of cases families' tenancies had been successfully stabilised with an associated reduction in the risk of homelessness, and that in 92% of cases the risk to local communities had either reduced or ceased completely by the time families left the project. The study also found that the projects offered excellent value for money "as they have the potential to reduce considerably the short-term and longer-term costs of many agencies, including those providing services relating to housing, criminal justice, policing, education, and health."³ As such, we would urge that steps are taken to ensure that CBOs are never used as a first response to dealing with ASB; it is our contention that they should only be used in cases where non-formal approaches are no longer a realistic option.

We are pleased that the consultation emphasises the need for civil orders to be proportionate, in accordance with current case law. However, we are concerned that, imposed in addition to a court's sentence for a criminal offence, there is a real risk that a CBO could mean that an individual is subjected to a disproportionately onerous set of sanctions as a result of a particular offence. In addition, there is also the possibility that those who are sentenced for a criminal offence and also receive a CBO may be 'set up to fail'; many of those for whom a CBO may be considered appropriate may have chaotic lifestyles, and completing a criminal justice disposal, as well as adhering to the conditions of a civil order, may be unrealistic. As such, clear guidance will need to be provided for sentencers on the imposition of CBOs alongside criminal justice sanctions, to ensure that a proportionate and productive approach is taken. Guidance will also help to ensure consistency and so fairness across sentencing practice. In keeping with the demands of proportionality and as we have argued above, custody should not be available as a sanction for breach of the CBO.

As with treatment requirements imposed as part of a Community Order, it will be essential that any positive requirements of the CBO are made with the consent of the individual concerned: it would be both unfair and ineffective to compel participation in, for instance, drug or alcohol treatment. Moreover, the refusal to

³ Department of Communities and Local Government (2006) *Antisocial behaviour intensive family support projects*, Housing research summary 230, London: Department of Communities and Local Government.

participate in such requirements should not result in more onerous sanctions being imposed. The availability of support services will need to be looked at, to ensure that sentencers are, in practice, able to impose positive requirements: for example, a recent report by the Centre for Mental Health, a member of the Criminal Justice Alliance, has identified the under-resourcing of alcohol provision and highlights that “demand for all types of intervention and treatment exceed supply ... in both general health care and in offender-specific settings”.⁴ The lack of appropriate support services for specific groups also needs to be addressed. As has been raised by the Transition to Adulthood Alliance,⁵ which the CJA is a member of, in their response to this consultation, there is a lack of appropriate services for young adults aged 18-24; this is also the case for women, and for those from black and minority ethnic communities. If services are not available in the local area, prohibitions should not be imposed as a substitute for positive requirements. Orders should be made in accordance with the circumstances of the particular case and the needs of the individual concerned, not on the basis of local availability; if positive requirements are deemed appropriate but are not available, then an order should not be made. Thought will also need to be given to how those who are given positive requirements as part of a CBO can be supported effectively to comply with the order, since they will not necessarily have support from the Probation Service (this will be dependent on the sentence imposed as a result of the criminal conviction).

The CJA acknowledges that, on occasion, imposing prohibitions as part of a civil order may be necessary in order to provide communities with relief from the impact of ASB. However, we would question, overall, the effectiveness of such sanctions, and would argue that prohibitions as part of a civil order cannot provide a long-term solution to ASB. The high breach rate for ASBOs points to the inability of prohibition-focused orders to tackle the deep-rooted and complex problems that underlie ASB: according to the most recent government statistics, of 18,566 ASBOs issued between 1 June 2000 and 31 December 2009, 10,380 were breached at least once, giving a breach rate of 55.9%.⁶ Studies have consistently highlighted the view of practitioners that enforcement alone can never be an effective response to tackling ASB, and that a more ‘balanced’ response, which includes preventive work, is needed.⁷ As such, we would recommend that prohibitions should only be used in the most extreme cases, as a last resort, and that guidance should be produced to ensure this.

The CJA believes that CBOs should not be imposed on those with mental health problems and learning disabilities. The use of ASBOs can, as the Centre for Mental Health has pointed out, result in the fast-tracking of vulnerable individuals into the criminal justice system;⁸ we are concerned that the use of CBOs could have the same effect, with individuals originally sentenced for low-level offences becoming subject to far more severe sanctions as result of breaching the order. Such fast-tracking does not, clearly, fit with the Government’s emphasis on diversion from the criminal justice system for those with mental health problems, as set out in

⁴ p. 2: Fitzpatrick R. and Thorne L. (2011) *A label for exclusion: Support for alcohol-misusing offenders*, London: Centre for Mental Health.

⁵ For further information, see the Transition to Adulthood Alliance’s website - <http://www.t2a.org.uk/>

⁶ Home Office (2010) *Antisocial Behaviour Order statistics England and Wales 2009*, London: Home Office.

⁷ See, for instance Hough, M., Jacobsen, J., McDonald, E. and Millie, A. (2005) *Antisocial behaviour strategies*, York: Joseph Rowntree Foundation; also Home Office (2011) *Describing and assessing interventions to address antisocial behaviour*, Research report 51, London: Home Office.

⁸ Centre for Mental Health (2007) *Antisocial Behaviour Orders and mental health - The evidence to date*, London: Centre for Mental Health.

'Breaking the Cycle'. We would therefore recommend that safeguards are put in place to guard against the use of CBOs on those with mental health problems and learning disabilities or difficulties. Screening should take place before any application is made; for those who do have mental health problems or learning disabilities, no order should be imposed, and there should be diversion into local services. There will need to be robust monitoring to ensure the effectiveness of such measures: the Centre for Mental Health has highlighted that, although current guidance for sentencers and practitioners clearly states that careful consideration should be given to the imposition of ASBOs on vulnerable individuals, a Home Office review of ASBOs found that for 60% of those issued an ASBO there was a mitigating factor such as mental distress, addiction or learning difficulties.⁹

We would also question whether such orders should be imposed on young offenders. A 2005 report by the Home Affairs Committee highlighted the concerns of a number of organisations that the ASBO's focus on prohibition is unhelpful, and could lead to further social exclusion for already marginalised young people.¹⁰ Whilst the introduction of positive requirements could counter this, and ensure that the CBO takes a more balanced response to dealing with ASB, it is questionable that addressing the causes of ASB in young people is most effectively done through the use of civil orders. Indeed, addressing ASB through the use of formal orders such as CBOs can be counter-productive, since breach can lead to young people becoming further entrenched in the criminal justice system and even entering custody: research conducted for the Youth Justice Board and published in 2005 found that, for young people, 43% of all breached ASBOs result in custody, and 15.5% of all ASBOs imposed on young people result in custody.¹¹ The destructive effects of custody on young people are well known, and have been recognised by the determined and successful efforts of the YJB, YOTs and others to reduce the use of custody for those under 18.

We believe that, for young people, projects that carry out preventive work and address the problems that underlie ASB without recourse to formal measures such as civil orders should be the norm. The Positive Futures programme, run by Catch22, a member of the Criminal Justice Alliance, provides a good example of how effective such projects can be. Launched in 2001, Positive Futures is a national activity-based social inclusion programme for 10 to 19 year olds that helps young people from deprived communities steer clear of drugs, alcohol and crime and move forward in their lives. The programme reaches young people through activities that they want to engage in, including football, dance, boxing, fishing, fitness and arts-based projects. By getting young people excited and involved, staff and volunteers are able to build relationships, mutual trust and respect, and through this, provide both challenge and support on a long-term basis: young people often join the programme in their early teens and go on to take on leadership roles. Since the start of Suffolk Positive Futures holiday programme in Ipswich, police have recorded a 50% reduction in crime by 10-19 year olds. The project was also awarded the Office for Criminal Justice Reform's Justice Award for their work in Stowmarket, where there has been a 25% reduction in anti-social behaviour.¹²

⁹ Centre for Mental Health (2007) *Antisocial Behaviour Orders and mental health - The evidence to date*, London: Centre for Mental Health.

¹⁰ House of Commons Home Affairs Committee (2005) *Antisocial behaviour*, Fifth report of session 2004-5, London: The Stationery Office.

¹¹ Youth Justice Board (2005) *Antisocial Behaviour Orders: An assessment of current management information systems and the scale of Antisocial Behaviour Order breaches resulting in custody*, London: Youth Justice Board.

¹² Catch22, submission to Independent Commission on Youth Crime

Finally, the consultation does not make it clear what standard of proof will be needed to prove that an individual is responsible for ASB, and for a CBO to be imposed. This will need to be addressed; it should not be assumed that, if an individual has been convicted of a criminal offence, this also constitutes sufficient proof of ASB. As we argue below in relation to the Crime Prevention Injunction, we believe that the imposition of any civil order should depend upon the criminal standard of proof.

3. What are your views on the proposal to include a report on the person's family circumstances when applying for an order for someone under 16?

As set out above, the CJA does not believe that CBOs should be used for those under 18. However, if they are implemented for under 18s, we would agree with the proposal to include a report on the family circumstances for those under 16. We also believe that, in the majority of cases, any support given as a result of these reports should be provided without recourse to formal measures such as parenting orders which, if breached, can result in prosecution.

5. Should there be minimum and maximum terms for Criminal Behaviour Orders, either for under 18s or for over 18s? If so, what should they be, and should they be different for over or under 18s?

The CJA believes that there should be a maximum term for Criminal Behaviour Orders. Maximum terms would help to ensure that, when imposed, CBOs are proportionate, as would clear guidance for sentencers, as we have recommended above. The provision of maximum terms and guidelines would also ensure consistency and so fairness in the use of CBOs by sentencers. In addition, research conducted for the Youth Justice Board has highlighted that, according to some Youth Offending Teams, many ASBOs are breached because their length means that young people cannot envisage the end of their orders, and there is, therefore, little incentive to obey their restrictions.¹³ Imposing maximum terms would help to address this problem.

The CJA believes that, for those over 18, the maximum term should be two years, and if CBOs are implemented for those under 18, it should be one year. We would also echo the Transition to Adulthood (T2A) Alliance's recommendation that, if a distinct maximum term is set for those under 18, it should be extended to young adults aged 18-24. A recent review of research and other literature relating to the issue of the maturity of young adult offenders, commissioned by the Barrow Cadbury Trust, which convenes the T2A Alliance, and conducted by the University of Birmingham, has found that "development of those areas of the brain concerned with higher order cognitive processes and executive functions, including control of impulses and regulation and interpretation of emotions, continues into early adulthood; the human brain is not 'mature' until the early to mid-twenties".¹⁴ As such, young adults potentially face greater difficulties in controlling behaviour, are more prone to risky behaviour and are less able to plan for the future. By introducing lower maximum terms for 18-20 year olds, the vulnerability, immaturity and ongoing development of this age group would be clearly and fairly recognised. Whether imposed on adults or young people, CBOs should be subject to regular review so that those who have made progress in changing their behaviour can have their orders terminated earlier than the term originally set.

¹³ Youth Justice Board (2005) *Antisocial Behaviour Orders: An assessment of current management information systems and the scale of Antisocial Behaviour Order breaches resulting in custody*, London: Youth Justice Board.

¹⁴ This review will be published soon by the Barrow Cadbury Trust. For more details contact Max Rutherford, Criminal Justice Programme Officer at the Barrow Cadbury Trust, at m.rutherford@barrowcadbury.org.uk or on 020 7632 9066.

6. *Should the legislation include examples of possible positive requirements, to guide applicant authorities and the courts?*

Examples of positive requirements should be made available, although it may be more appropriate for this to be issued as guidance to applicant authorities and the courts, rather than being set out in legislation. In addition, as set out above, we believe that guidance should be made available for sentencers so that they are able to specify appropriate requirements that also meet the requirements of proportionality. We would also recommend that steps are taken to ensure that sentencers are fully aware of the range of support options available in their local area. Research conducted by the Centre for Crime and Justice Studies, a member of the CJA, has identified amongst sentencers a clear lack of knowledge about the availability of community order requirements in their local areas, which appears to be contributing to the infrequent use of requirements such as the Mental Health Treatment Requirement (MHTR) and the Alcohol Treatment Requirement (ATR): although 40% of offenders on community orders are thought to have a diagnosable mental health problem,¹⁵ in 2009, just 809 MHTRs commenced out of a total of 231,444 requirements issued with community orders,¹⁶ and although almost half of probation clients are recorded as having an alcohol problem,¹⁷ the ATR account for just 3% of all requirements commenced in 2009.¹⁸ The implication for CBOs is clear: if sentencers are not made aware of the positive requirement options available in their area, this could lead to significant underuse of them. Actual availability of different support services can also be problematic, as highlighted above in relation to alcohol support services, and this will need to be addressed in the proposed reforms are to be effective.

7. *Are there examples of positive requirements (other than formal support provided by the local authority) which could be incorporated in the order?*

It is essential that the support provided to those on CBOs meets their needs by addressing the causes of their behaviour. Suitable options for positive requirements may include drug or alcohol treatment, family and relationship support, support with housing problems, and with education, training and employment. Moreover, since ASB is often a result of complex, overlapping issues, positive requirements will need to be tailored to reflect this, and local services will need to work flexibly and together to provide the support needed. However, as we have argued above, it will be essential that proportionality is maintained, and that individuals subject to CBOs, many of whom may have chaotic lifestyles, are not overloaded with requirements and so set up to fail.

8. *Do you think the sanctions for breach of the prohibitive elements of the order should be different to those for breach of the positive elements?*

Yes. At present, sanctions for the breach of an ASBO are imposed primarily according to the harassment, alarm or distress involved in the breach of the order; that a court order has been breached is a secondary consideration.¹⁹ We believe that this is the right approach, and would recommend that it continues following the implementation of CBOs. Breaching the positive requirements of an order is

¹⁵ Khanom, H., Samele, C. and Rutherford, M. (2009) *A Missed Opportunity? Community Sentences and the Mental Health Treatment Requirement*, London: Centre for Mental Health.

¹⁶ Ministry of Justice (2010) *Offender Management Caseload Statistics 2009* - available at <http://www.justice.gov.uk/publications/docs/omcs-2009-complete-210710a.pdf>

¹⁷ Fitzpatrick R. and Thorne L. (2011) *A label for exclusion: Support for alcohol-misusing offenders*, London: Centre for Mental Health.

¹⁸ Ministry of Justice (2010) *Offender Management Caseload Statistics 2009* - <http://www.justice.gov.uk/publications/docs/omcs-2009-complete-210710a.pdf>

¹⁹ Sentencing Guidelines Council (2008) *Breach of an Antisocial Behaviour Order: Definitive guideline*, London: Sentencing Guidelines Council.

unlikely to involve causing harassment, alarm or distress, and as such, it would be appropriate that the sanctions are different both in nature and degree. Since the aim of any positive requirements of a CBO should be to engage an individual with the support they need to address the causes of their ASB, we would recommend that any sanctions imposed for breach should focus on encouraging engagement, rather than punishing non-compliance.

Crime Prevention Injunction

1. What do you think of our proposals to replace the ASBO on application and a range of other court orders for dealing with anti-social individuals with the Crime Prevention Injunction?

As we have argued above, the CJA believes that the most effective response to ASB comes from projects that offer intensive support to those responsible to help them change their behaviour, not from civil orders. In cases where the proposed Crime Prevention Injunction is used, however - and we would reiterate that such a measure should always be used with restraint - we believe that the use of positive requirements takes a more constructive approach than the use of prohibitions. In addition, we believe that the proposal that breach of a CPI wouldn't be a criminal offence, and wouldn't result in a criminal record, is wholly sensible. There are, nevertheless, a number of concerns for us around the introduction of CPIs, and we would urge careful consideration of these.

We are surprised and concerned by the proposal that imposition of a CPI would rest on the civil standard of proof. In *McCann*, the House of Lords ruled in 2002 that, whilst ASBOs are civil orders, the criminal standard of proof should be applied in deciding whether an individual had acted in an antisocial manner. According to Lord Hope, "the condition in section 1(1)(a) [of the Crime and Disorder Act 1998] 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."²⁰ The implications of being proved to have acted antisocially will, with the introduction of the CPI, remain serious: an individual will be required to adhere to positive requirements, prohibitions, or both, and there will be sanctions as a consequence of breach. As such, we believe that, as ruled by the House of Lords in the case of ASBOs, the criminal standard of proof should apply.

There should be, as with the CBO, a requirement for proportionality in terms of the positive requirements or prohibitions imposed; this isn't explicitly stated in the consultation. We would also recommend that guidance for sentencers is produced to enable this. Moreover, as with CBOs, we would emphasise that positive requirements should only be imposed with the consent of the individual concerned, and that refusal to participate in such requirements should not result in the imposition of more onerous sanctions. Again, as with CBOs, we would highlight the importance of appropriate support services being available in local areas so that positive requirements are a realistic option; where these services are not available, prohibitions should not be imposed as a substitute, and the order should not be made. The issue of support for those given CPIs, in order to help them complete their orders successfully, will need to be looked at carefully; since those given CPIs will not have been convicted of a criminal offence, they will not receive any support from the Probation Service. We would also question the value of imposing prohibitions as part of a CPI in most cases, and would recommend that they should only be used in the most extreme cases, as a last resort. Finally, in line with the requirements of proportionality, custody should not be available as sanction for breach. This is particularly important in relation to CPIs, which will be imposed on individuals convicted of no criminal offence.

²⁰ *R v Crown Court at Manchester ex parte McCann and others* [2002] UKHL 39, paragraph 83.

As we have set out above in relation to CBOs, CPIs should not be imposed on those with mental health problems and learning disabilities. Though breach of a CPI would not be a criminal offence and would not result in a criminal record, it could, whether heard in the Magistrates' or the County Court, result in a custodial sentence (a sanction which, as we have set out above, we do not support): there is, therefore, a very real risk that CPIs will actively work against the Government's policy of diversion for such individuals. We also believe that CPIs should not be used for those under 18. Young people have been disproportionately represented amongst those given ASBOs - the most recent figures show that between 2000 and 2009, almost 40% of ASBOs were issued to 10-17 year olds,²¹ despite them only making up about 13% of the population - and we are concerned that this disproportionate application to young people would be replicated with the introduction of CPIs. Though breach of these orders would not be a criminal offence, the use of CPIs for under 18s could nevertheless result in young people entering custody for minor, non-imprisonable offences, which is of considerable concern to us. As we have highlighted earlier in this response, we believe that, for young people, support that tackles the causes of ASB without use of formal measures provides the most effective response.

2. Which test should the court apply when deciding whether to impose a Crime Prevention Injunction - that the individual's behaviour caused 'harassment, alarm or distress' or the lower threshold of 'nuisance or annoyance'?

The CJA has serious concerns about the proposal to use the legal definition currently in place for Anti-social Behaviour Injunctions in considering whether to impose a CPI. We agree with the observation that the current definition set out in the Crime and Disorder Act 1998 for imposition of an ASBO, that an individual's behaviour had caused or was likely to cause "harassment, alarm or distress to one or more persons not of the same household as himself", "leaves the ASBO with a remarkably wide potential coverage";²² replacing this with "conduct causing or likely to cause nuisance or annoyance to a person not of the same household as himself" would lower the threshold even further, meaning that a civil order could be imposed as a result of an even broader range of behaviour than is currently encompassed. Given the demands that could be imposed upon an individual through the requirements and prohibitions of a CPI, this is a worrying proposal. The sanctions that would be available following breach of such an order make it more troubling still: it is conceivable that very minor behaviour could, ultimately, result in a custodial sentence.

In addition to the disproportionality that could result, we are concerned about the possibility of net widening. A greater number of people could become subject to a CPI as a result of the proposed definition, which could, in turn, result in larger numbers being sanctioned if orders are breached. The very subjective nature of the definition proposed and indeed, that of the definition currently used in the Crime and Disorder Act in relation to ASBOs, also need to be looked at, and consideration given to how a more objective standard could be developed: there needs to be a safeguard that protects against the oversensitivity or intolerance of others.²³

²¹ Home Office (2010) *Antisocial Behaviour Order statistics England and Wales 2009*, London: Home Office.

²² p. 26: Gardner, J., von Hirsch, A., Smith, A.T.H., Morgan, R., Ashworth, A. and Wasik, M. (1998) 'Clause 1: The hybrid law from hell?', *Criminal Justice Matters* 31, London: Routledge.

²³ *Ibid.*

3. Do you think the Crime Prevention Injunction should be heard in the County Court or the Magistrates' Court?

The CJA believes that the Crime Prevention Injunction should be heard in the Magistrates' Court. As we have argued above, CPIs should rest on the criminal standard of proof, which magistrates are familiar with. Moreover, as the consultation recognises, magistrates are the focal point for local justice within a community, and they have experience of dealing with ASB cases. We would recommend, however, that since the CPI will be a new order and different in nature to the ASBO on application, all magistrates should receive full training ahead of its implementation. Guidance on its use should also, as we have set out earlier, be produced for sentencers.

4. If you think that the injunction should be heard in the Magistrates' Court, do you think the Crime Prevention Injunction for those under the age of 18 should be heard in the Youth Court?

As we have argued above, we do not believe that the Crime Prevention Injunction should be imposed on those under the age of 18. However, if it is introduced for young people, then it should be heard in the Youth Court.

5. Should the Crime Prevention Injunction carry a minimum and/or maximum term? If so, how long should these be, and should they be different for over or under 18s?

As we have put forward in relation to Criminal Behaviour Orders, and for the same reasons, there should be maximum terms for Crime Prevention Injunctions. For those over 18, the maximum term should be two years, and if CPIs are implemented for those under 18, it should be one year. Moreover, if a distinct maximum term is set for those under 18, it should be extended to young adults aged 18-24. CPIs should, like CBOs, be subject to regular reviews, and if an individual has made progress in changing his or her behaviour, there should be an option for the order to be terminated early.

6. Should there be a list of possible positive requirements in the primary legislation to provide guidance to judges?

As we have argued above regarding CBOs, examples of positive requirements should be made available, although it may be more appropriate for this to be issued as guidance rather than being set out in legislation. There should also be guidance for sentencers to help them impose appropriate requirements proportionately; steps need to be taken to ensure that sentencers are fully aware of what options are available to them locally; and steps also need to be taken to ensure that a range of support options are actually available in local areas, so that sentencers are able to impose appropriate positive requirements.

7. Are there examples of positive requirements (other than formal support provided by the local authority) which could be incorporated in the order?

As we have highlighted above, a range of options will need to be available, and the positive requirements available as part of a CPI will need to take into account that ASB is, very often, the result of complex, overlapping issues, rather than discrete, separate problems. There will need to be effective joint working between local services to ensure that appropriate support is available. As with CBOs, however, it will be essential that proportionality is maintained, and that individuals are not overloaded with requirements and so set up to fail.

8. What are your views on the proposed breach sanctions for over 18s and for under 18s for the Crime Prevention Injunction?

The CJA welcomes the proposal that breach of the CPI would not be a criminal offence. However, we are concerned that, in spite of this, custody is still proposed as a possible sanction for breach of the order. Custody is the most severe sanction

available, and it cannot be appropriate or justifiable to use it in cases where the original behaviour prompting the order has not constituted a criminal offence. In addition, as we have argued above in relation to CBOs, the sanctions for breach of positive requirements should be different to those for breach of prohibitions, since it is unlikely that breach of positive requirements will cause harassment, alarm or distress.

If CPIs are introduced for under 18s, custody should not be available as possible sanction for breach. We would also question the wisdom of imposing a curfew order or an activity order on a young person who is clearly already struggling to keep to the terms of the original order imposed: this may simply be setting them up to fail even further. Any sanctions should be aimed at helping them to adhere to and complete their order successfully.

Community Protection Order

1. What do you think of the proposal to bring existing tools for dealing with persistent place-related anti-social behaviour together into a single Community Protection Order?

The CJA believes that bring existing tools together into a single Community Protection Order will help to simplify the system. However, the plans to impose financial penalties as sanctions for breach of the order need to be thought about carefully. We are particularly concerned by the proposed use of fixed penalties in response to a breach. A report by Revolving Doors, a member of the CJA, has highlighted the problematic nature of financial penalties that are not linked to an individual's income and ability to pay, observing that "these fines may lead people to resort to crime as a means of getting the money to pay the fine ... [they] can be seen as a fast track into the criminal justice system for vulnerable people if used inappropriately."²⁴ As such, we would argue that any fines imposed should take into account an individual's financial circumstances. We would also question whether breach of a Community Protection Order needs to be a criminal offence, and would suggest that, as with Crime Prevention Injunctions, breach of the order could be dealt with under civil law. Criminal convictions can act as significant barrier to, amongst other things, gaining employment, and so can prevent many people with a criminal record from making positive and stabilising changes in their lives.

Direction Power

2. Do you think the power should be available to PCSOs as well as police officers?

3. What safeguards could be put in place to ensure that this power is used proportionately and does not discriminate against certain groups, particularly young people?

4. What do you think would be the most appropriate sanction for breach of the new Direction power?

The CJA is concerned that, if implemented, the proposals set out on the Direction Power will make it too broad ranging, and unchecked by safeguards. We are, in particular, concerned by the proposals to remove the requirement of having a designated area from which to move individuals or groups from, and to make the power available to PCSOs as well as police officers, and advise against these. We would also advise against making non-compliance with the power a criminal offence, which we are concerned could have a disproportionately severe impact on many young people: as has been highlighted by the 'Change the Record' campaign, run by Nacro, a member of the CJA, many young people are prevented from entering further education or finding employment as a result of minor criminal

²⁴ p.91; Pratt, E. and Jones, S. (2009) *Hand to mouth: The impact of poverty and financial exclusion on adults with multiple needs*, London: Revolving Doors.

convictions.²⁵ As with breach of a Community Protection Order, we believe breach of the Direction Power should be dealt with under the civil law, and the sanction imposed should be proportionate.

Out of court disposals

1. How do you think more restorative and rehabilitative informal tools and out-of-court disposals could help reduce antisocial behaviour?

The CJA welcomes proposals to use restorative and rehabilitative informal tools more widely. Restorative practices can be extremely effective in addressing ASB, helping individuals to understand the impact of their behaviour, and increasing the confidence of local communities by engaging them in these processes. Indeed, Ministry of Justice research has demonstrated the broad-ranging benefits of restorative justice (RJ) processes. According to the research, RJ produces high satisfaction rates for victims, with 85% saying they were very or quite satisfied with the RJ they experienced, and almost 80% saying they would recommend it to others. Moreover, as the evidence report published alongside 'Breaking the Cycle' documents, analysis of the MoJ research data found that RJ reduced the frequency of reoffending by around 14%.

Restorative practices are suitable for both young people and adults. The Youth Restorative Disposal (YRD), for instance, piloted in police forces from April 2008-September 2009, used police officers trained in restorative techniques to deal with low-level offending by young people, helping them to face up to the impact of their behaviour, to examine why they had behaved in this way, and to offer an apology. The evaluation of the scheme found that victim satisfaction was high, and there was also a high level agreement from practitioners that YRDs represented an appropriate and proportionate response. Additionally, it was found that when compared with a reprimand, the cost of administering a YRD saved £426.²⁶ The South Somerset Community Justice Panel provides a very good example of how RJ can work successfully to address ASB by adults. All panel members are local volunteers trained as restorative justice facilitators; cases are referred to the panel by agencies including the police, local authorities and housing associations. Through a conference, attended by all parties involved, an Acceptable Behaviour Contract is drawn up and agreed to ensure that the behaviour is not repeated. Over 900 people have taken part in conferences since the start of the panel. According to the panel, the victim satisfaction rate is 97%, and the 'relapse' rate is just 3%.²⁷

The CJA has concerns about a PND scheme to allow people to pay to attend appropriate educational courses. Whilst we recognise the value of educational courses, we assume that, as part of the PND scheme, there would be a fixed 'fee', as it were, that everyone would be required to pay, regardless of their financial means. As we have set out above, however, it is essential that any financial penalty imposed takes into account an individual's financial circumstances: this helps to ensure that the penalty is proportionate, that it does not push individuals towards offending behaviour, and increases the likelihood that it will be paid. We are also concerned that imposing a financial penalty alongside requiring individuals to attend an educational course, as this scheme would, could be disproportionate to the actual behaviour being sanctioned.

²⁵ For further information, see the 'Change the Record' campaign website - <http://www.changetherecord.org/about/>

²⁶ Shewan, G. (2010) *The Business Case for Restorative Justice and Policing* - available at http://www.restorativejustice.org.uk/resource/the_business_case_for_restorative_justice_and_policing/

²⁷ <http://www.southsomerset.gov.uk/community-safety/get-involved/community-justice-panel>

As we set out in our response to 'Breaking the Cycle'²⁸, we would recommend against giving police powers to impose conditional cautions without the authorisation of the Crown Prosecution Service. Given that conditional cautions can result in onerous conditions, the oversight of the Crown Prosecution Service is appropriate, to ensure that the conditions are proportionate and achievable. We do, however, fully support the proposals to end the current system of automatic escalation of out-of-court disposals for young people, and believe this will have a very positive impact.

2. What are the barriers to communities getting involved in the way agencies use informal and out-of-court disposals in their area?

We welcome the recognition that communities should be involved in informal and out-of-court disposals. However, it is important to recognise that, whilst many members of the community may be willing to volunteer their time, training, support and infrastructures are essential for community involvement to be organised and effective, and funding must be made available to ensure this. We would also emphasise the importance of involving a diverse range of people from local communities, including ex-offenders. As such, we are fully supportive of the proposals set out in 'Breaking the Cycle' to reform the Rehabilitation of Offenders Act, which should enable more people with previous convictions to become involved in volunteering activities in their local communities.

²⁸ Available at <http://criminaljusticealliance.org/cjabreakingthecycle.pdf>