

- H9 It followed from the requirement that the order must be necessary to protect persons from further anti-social acts by the offender, that the court should not impose an order which prohibited an offender from committing a specified criminal offence if the sentence which could be passed following a conviction for the offence should be a sufficient deterrent. If following a conviction for the offence, the offender would be liable to imprisonment, then the order would add nothing other than to increase the sentence, if the sentence for the offence was less than five years' imprisonment. If the offender was not deterred from committing the offence by a sentence of imprisonment for the offence, the order was not likely further to deter and therefore was not necessary. It had been said in *P* that the Court was not persuaded that the inclusion of matters among the prohibitions which were criminal offences was to be actively discouraged. The Court in that case took the view that there was no harm in reminding offenders that certain matters did constitute criminal conduct. The Court would only comment that the test for making an order was not whether the offender needed reminding that certain matters did constitute criminal conduct, but whether the order was necessary.
- H10 It had been held, rightly in the Court's view, that an order should not be used merely to increase the sentence of imprisonment which an offender was liable to receive. In *Kirby* [2006] 1 Cr.App.R.(S.) 26 (p. 151) an order had been made prohibiting the offender from driving, attempting to drive or allowing himself to be carried in any motor vehicle which been taken without the consent of the owner, and driving or attempting to drive a motor vehicle until the expiration of the appellant's period of disqualification. The judge's purpose in making the order was to secure the result that if the appellant committed such offence again the court would not be limited to the maximum penalty for the offences themselves but would be able to impose up to five years' imprisonment for breaches of the anti-social behaviour order. The Court in *Kirby* considered that this was not a way in which the power should normally be exercised. This decision was in conflict with *Hall* [2005] 1 Cr.App.R.(S.) 118 (p.671), but in *Williams* [2006] 1 Cr.App.R.(S.) 56 (p.305) the Court preferred *Kirby* to *Hall*. The Court in the present case also agreed with *Kirby*. Different considerations might apply were the maximum sentence was only a fine, but the court must still go through all the steps to make sure that an order was necessary.
- H11 The aim of an order was to prevent anti-social behaviour. What the police or other authorities needed was to be able to take action before the anti-social behaviour took place. If for example a court was faced by an offender who caused criminal damage by spraying graffiti, then the order should be aimed at facilitating action to be taken to prevent graffiti being sprayed by him or others. An order in clear and simple terms preventing the offender from being in possession of a can of spray paint in a public place gave the police or others responsible for protecting property an opportunity to take action in advance of the actual spraying and made it clear to the offender that he had lost the right to carry such a can for the duration of the order.
- H12 in addition to the court considering that the order prohibiting the offender from doing something was necessary to protect persons from further anti-social acts by the offender, the terms of the order must be proportionate in the sense that they must be commensurate with the risk to be guarded against. This was particularly important where the order might interfere with Convention rights protected by the Human