

Sexual Harm Prevention Orders and Necessity

Rory Kelly* and HHJ Martin Picton†

Necessity is a fundamental concept in criminal and human rights law. It brings to mind impossible choices regarding conjoined twins and challenging questions on the limits of free speech.¹ In this article, we examine necessity in another criminal justice context: the imposition of sexual harm prevention orders (SHPOs). SHPOs may be imposed on conviction or on complaint.² They contain prohibitions, such as on living with a child, which are imposed for preventive purposes.³ One of the requirements for the imposition of an SHPO on conviction is that “it is necessary to make a sexual harm prevention order” in order to protect the public or specified people from sexual harm.⁴ In appraising the case law on necessity and SHPOs, this article will speak to both themes of this special issue: transition and principle. Transition in that there have, over the last two decades, been significant developments in the approach of the appellate courts to establishing when behaviour orders, including SHPOs, are necessary. Principle in that the context of this transition has been setting limits on the use of coercive power by the state whilst recognising the role of behaviour orders in preventing harm. Consideration of the necessity requirement in imposing an SHPO is thus more than an ancillary point on an ancillary order. As will be apparent, our style – detailed analysis of the case law – and our aim – to consider the development of principles – are reflective of the style of David Thomas.⁵

The article has seven sections. In section one, we set out the SHPO regime in more detail. In section two, we contextualise the case law on SHPOs and necessity via brief comment on the judgment of House of Lords in *R (McCann) v Manchester Crown Court*.⁶ *McCann* concerned the anti-social behaviour order (ASBO), but remains the leading authority on the imposition of behaviour orders more generally. Despite this, the concept of necessity received little attention in the House of Lords. In section three, we engage with the case law on the necessity requirement to impose an SHPO to show how far the appellate courts have come since *McCann*. The section also sets out a proposed new formulation of the necessity test to impose an SHPO. Section four passes comment on the relationship between the likely effectiveness of an SHPO and the decision to impose it. Can an order be both necessary and yet likely to be ineffective? Section five then appraises the particular challenges in framing SHPOs that prohibit or limit internet access. Section six, considers whether there are incentives for defendants not to challenge the imposition of SHPOs. We conclude, in section seven, by returning to the themes of transition and principle.

The SHPO regime

The Anti-social Behaviour, Crime and Policing Act 2014 amended the Sexual Offences Act 2003 by introducing the SHPO. SHPOs are intended to protect the public from specified offenders who pose a risk of sexual harm.⁷ The order replaced the sexual offences protection order (SOPO).⁸ An SHPO may be imposed on conviction when two requirements are met. First, the court must have dealt with the defendant for a relevant offence; have found the defendant not guilty of a relevant offence by reason of insanity; or found that the defendant has done the act charged in respect of a relevant offence, but is under a disability. Relevant offences are

those listed in Schedule 3 (sexual offences) and Schedule 5 (violent offences) to the 2003 Act. These schedules make reference to a substantial range of offences including rape and voyeurism, but also causing death by dangerous driving and hijacking ships.⁹ Some offences that it may be thought ought to be capable of underlying an application for an SHPO are not included in either schedule; for example, “revenge porn”, breach of a SOPO and breach of an SHPO. As Lyndon Harris has noted in this Review, such list-based approaches may allow “the unusual or exceptional case to slip through the net”.¹⁰

Secondly, the court must also be satisfied that the order is necessary to protect the public generally, or specific members thereof, from sexual harm by the defendant, or to protect children or vulnerable adults outside the United Kingdom from such harm.¹¹ We engage with the case law on the necessity requirement in section three. For now, it is sufficient to note that the requirement is different from the equivalent provision for the imposition of a SOPO because it refers to “sexual harm” as opposed to “serious sexual harm”.¹²

An SHPO on complaint may be applied for in a magistrates’ court by the National Crime Agency or a relevant police authority.¹³ The applicant must show that two requirements have been satisfied before an order may be imposed. First, that the defendant has been convicted or cautioned for a schedule 3 or 5 offence; has been found not guilty of such an offence by reason of insanity; or has done the act charged but is under a disability. Therefore, though the order is available on complaint, it must still, generally, follow a conviction or caution.¹⁴ Secondly, the court must also be satisfied that “the defendant’s behaviour...makes it necessary to make a sexual harm prevention order” to protect the public, or the other groups listed above, from sexual harm.¹⁵ As will be apparent, there is a slight difference in the wording of the necessity requirement to impose an SHPO on conviction and on complaint. This difference may limit the factors that a court may consider when assessing whether an SHPO on complaint is necessary through its reference to the “defendant’s behaviour”. Factors beyond the defendant’s behaviour may be relevant to whether an order is necessary such as their proximity to a school or their age.¹⁶ Yet on a literal reading of the 2003 Act these factors could only be considered if the SHPO was made on conviction. We note this point has not yet been considered by an appellate court and the difference in wording is also not discussed in the relevant Home Office guidance.¹⁷

An SHPO, either made on conviction or complaint, may impose prohibitions on its recipient.¹⁸ Example prohibitions can be taken from the judgment of the Court of Appeal in *Parsons*: living with a female child; entering a house where a female child is present without the approval of Social Services; unsupervised communication with a female child (with exceptions); using a computer or device capable of accessing the internet (with exceptions); using cloud storage (with exceptions) and using private browsing or equivalent.¹⁹ Under the Act, it is not only an SHPO that must be necessary, but each of the prohibitions it imposes must be necessary too.²⁰ This is an important limit on the potential reach of SHPOs because it prevents orders being imposed where one prohibition is necessary, say a prohibition on living with children, but another prohibition would be merely convenient, say greatly limited internet access. Establishing the necessity of an order should not open the door to any and every possible prohibition.

Breach of an SHPO, without reasonable excuse, is an offence.²¹ The maximum sentence for breach is six months’ imprisonment on summary conviction and five years on indictment.²² A

court cannot conditionally discharge a person convicted of breaching an SHPO.²³ Whilst subject to an SHPO, a person will also be subject to notification requirements.²⁴ Being made subject to an SHPO thus has very serious direct and indirect consequences for the recipient. This much is clear even before a consideration of the wider social consequences of imposing the order; as Jeremy Horder has commented there is “obviously great stigma” in being subject to an SHPO.²⁵ With the seriousness of SHPOs in mind, we can now turn to consider when they will be considered “necessary”.

***McCann* and necessity**

It may, at first glance, appear odd that we begin our assessment of when SHPOs are necessary with a comment on *McCann*; a case that was decided the better part of two decades ago and which concerned the, now repealed, ASBO. Yet *McCann* remains the leading authority on the imposition of behaviour orders and it continues to be referenced in the Home Office guidance on imposing SHPOs.²⁶ Before we can explore the limits of *McCann* for present purposes, we must give some context on ASBOs and set out relevant aspects of the judgment itself.

ASBOs could be granted in civil proceedings if two requirements were satisfied: first, the defendant acted in an anti-social manner and, secondly, it was necessary to impose an ASBO to protect people in the local government area from further anti-social acts by them.²⁷ Breach of an ASBO was an offence with a maximum sentence of five years’ imprisonment.²⁸ This hybrid civil-criminal structure was meant to respond to two difficulties with using the criminal law to regulate anti-social behaviour.²⁹ First, people were said not to want to give evidence against those who engaged in anti-social behaviour in their community. The more stringent rules on adducing hearsay evidence in criminal trials were thus seen as a bar to tackling anti-social behaviour. Secondly, though incidences of anti-social behaviour were only “quasi-criminal”,³⁰ the cumulative effect of such incidences could be severe. The criminal law was said to be ill-equipped to tackle such cumulative problems. The ASBO was presented as a solution because it could be granted under civil evidential rules and thus avoided the hearsay rules in criminal trials.³¹ This meant a local authority employee, or a police officer could present statements on behalf of others that related to multiple incidents of alleged anti-social behaviour.

The questions which arose for the House of Lords in *McCann* were, first, whether proceedings leading to the imposition of an ASBO should be classed as criminal in nature for the purpose of domestic law, and, second, whether such proceedings involve a criminal charge under article 6 of the European Convention on Human Rights, the right to a fair trial?³² Two related issues underlay these questions: whether hearsay evidence was admissible in proceedings for an ASBO and the appropriate evidential standard in such proceedings.³³ The Court held unanimously that the imposition of an ASBO did not constitute a criminal charge under either domestic law or article 6.³⁴ In consequence, hearsay evidence was admissible. The Court also observed that due to the “seriousness of matters involved” the standard of proof for the imposition of an ASBO was, in effect, the criminal standard of beyond reasonable doubt.³⁵ Yet this heightened evidential standard only applied to the first imposition requirement: that the defendant had acted in an anti-social manner. Lord Steyn maintained the second imposition requirement, that an order was necessary, “does not involve a standard of proof: it is an exercise of judgment or evaluation.”³⁶ Explaining this distinction, his Lordship maintained “This approach should facilitate correct decision-making and should ensure consistency and predictability in this corner of the law.”³⁷

The compromise position in *McCann* was built around the ASBO's backward-looking imposition requirement: hearsay evidence may be introduced to prove, beyond reasonable doubt, that the defendant acted in an anti-social manner. In contrast the backward-looking requirement to impose an SHPO does not require proof that the defendant has behaved in a certain manner; instead, it generally requires that they have a relevant conviction. This requirement does not seem a likely point of contestation regardless of the evidential rules and standard employed. If a person has a conviction for a relevant offence, be it rape or hijacking a ship, the first imposition requirement will be satisfied. Parties to proceedings for an SHPO are thus more likely to frame their submissions around the forward-looking imposition requirement: whether an SHPO is necessary and, if so, what prohibitions are necessary. *McCann* is of less assistance for this enquiry.³⁸ It tells us that an assessment of the necessity of a behaviour order is one of "evaluation" but it neither sets out what factors are relevant to this evaluation nor how these factors should be evaluated. If appropriate safeguards against the inappropriate imposition of SHPOs are to be developed, it is these issues which must be central.

SHPO case law on necessity

There is now a developed body of case law on when it is necessary to impose an SHPO. This case law follows from *Smith*, a Court of Appeal decision that provided guidance on SOPOs.³⁹ In *Smith*, Lord Justice Hughes, as he then was, described "necessity" as only a "starting point" for satisfying the SOPO's second imposition requirement and set out the following three-part formulation.⁴⁰

- (i) Is the making of an order *necessary* to protect from serious sexual harm through the commission of scheduled offences?
- (ii) If some order is necessary, are the terms proposed nevertheless oppressive?
- (iii) Overall are the terms proportionate?⁴¹

Before turning to how this formulation has been adopted and developed in the context of SHPOs, some comment on the inter-relationships of the three parts of the test is required. The first part asks if some SOPO, with unspecified prohibitions, is necessary. The second and third parts then – if the first question is answered in the affirmative – deal with the particular order proposed. This approach gives rise to two related issues. First, though the statutory necessity requirement is focused on preventing future sexual harm, there is no part of the *Smith* formulation that explicitly focuses on identifying the risk posed by the defendant. Secondly, there appears to be an overlap in the work done by the different parts of the formulation.

What connects the above two issues is the breadth of the first part of the *Smith* formulation. The first part does not, on a literal reading, focus only on establishing what risk of harm the defendant poses; it is drafted as an initial assessment of whether some unspecified SOPO is necessary. This initial assessment must, presumably, of itself include an assessment of whether some order would be oppressive or disproportionate because these two concepts form part of the overarching notion of necessity. So much was recognised by Lord Justice Hughes in *Smith*, at least as regards proportionality: "The test of necessity brings with it the subtest of proportionality."⁴² This conception of necessity, as incorporating an assessment of the effects of a measure and the proportionality of these effects on the harm to be avoided, also reflects other uses of the term in criminal and human rights law.⁴³ Thus, we are left with a question: in applying the first part of the *Smith* formulation do we, in effect, also have to consider

oppressiveness and proportionality? Such a task would appear not only repetitive, but particularly challenging because there is not a SOPO with specified prohibitions to assess against these standards, only the notion of some general order.

The workings of the three parts of the formulation might arguably be more cleanly divided and presented in a manner that would be simpler to apply. Part one may be reframed as an assessment of whether the defendant poses a risk that would allow for a SOPO, or now an SHPO, to be imposed. This may be the work part one does, and is meant to do, anyway. We suggest an amendment to the first part of the *Smith* formulation, as it applies to SHPOs, in our proposed reformulation, below, to emphasise its purpose is not to allow for an abstracted and prima facie assessment of necessity, but to assess if the defendant poses a risk that would allow for an SHPO to be imposed. Before turning to SHPO case law, we also note that the *Smith* formulation was a clear advance on *McCann*. Necessity remains a concept of evaluation, but *Smith* provided more structure for this evaluation.

Since the amendment of the Sexual Offences Act 2003 in 2014, there has been a series of cases on the necessity requirement to impose an SHPO. In 2016, the Court of Appeal, in *Attorney General's Reference (NC)*, maintained the *Smith* formulation should be applied with "slight amendment".⁴⁴ The amended test in *NC* read:

- (i) is the making of an order necessary to protect the public from sexual harm through the commission of scheduled offences?
- (ii) if some order is necessary, are the terms imposed nevertheless oppressive? And
- (iii) overall, are the terms proportionate?

The most important slight amendment the court made was the replacement of the phrase "serious sexual harm" with "sexual harm" to reflect the lower test for imposing SHPOs. Other cases have emphasised different factors when discussing the imposition of SHPOs. These include *Sokolowski* in which the Court of Appeal added that sentencing courts should not "rubber stamp" an SHPO because it is in standard terms or has been agreed by the parties.⁴⁵ The Court of Appeal has also repeatedly held that a "safety first" approach should not be taken to the necessity test: there must be a real risk of future harm.⁴⁶

The closest we have to a *Smith*-like decision in the context of SHPOs is *Parsons*, which sets out the following overarching guidance on the imposition of SHPOs:

- (i) [F]irst no order should be made by way of SHPO unless necessary to protect the public from sexual harm. If an order is necessary, then the prohibitions imposed must be effective; if not, the statutory purpose will not be achieved.
- (ii) Secondly and equally, any SHPO prohibitions imposed must be clear and realistic. They must be readily capable of simple compliance and enforcement. It is to be remembered that breach of a prohibition constitutes a criminal offence punishable by imprisonment.
- (iii) Thirdly, none of the SHPO terms must be oppressive and, overall, the terms must be proportionate.
- (iv) Fourthly, any SHPO must be tailored to the facts. There is no one size that fits all factual circumstances.⁴⁷

We will return to effectiveness and enforcement in the sections that follow. We can now, however, set out a draft formulation of the necessity requirement to impose an SHPO that

builds on *Smith*, but amends the first part of that formulation to emphasise the importance of establishing the risk posed by the defendant. The proposed formulation also aims to consolidate more recent appellate commentary on SHPOs and thus aims to make the current law clearer and easier to apply (as opposed to substantially rethinking it).

Proposed formulation

- (i) Does the defendant pose a risk of sexual harm to the public or particular members of the public?
- (ii) If so, will the proposed SHPO provide an effective response to the risk the defendant poses?
- (iii) If so, are the prohibitions in the proposed SHPO oppressive?
- (iv) If not, are the proposed prohibitions proportionate to the risk of harm the defendant poses? In answering this question the judge should bear in mind both the type of harm risked and the likelihood of the harm occurring without an order.
- (v) If so, has the proposed order been drafted in a manner which is clear and realistic?⁴⁸

The proposed test is structured so that each part must be satisfied before the next can be considered. This approach, if adopted, would emphasise to sentencing judges that each step is of importance of itself not just for building some more instinctual or mean conception of necessity. An SHPO, for instance, should not be imposed just because it would be clear and non-oppressive if the defendant posed no risk of sexual harm to the public. This formulation: avoids the potential for a court that finds the first *Smith* question satisfied from then finding the latter parts satisfied too readily in consequence. It imposes a more rigorous logic to every step of the process that has to be undertaken before the imposition of a behaviour order that will in all cases have significant consequences for the recipient.

Three more minor matters in the proposed formulation require brief comment. First, we do not explicitly require that the proposed SHPO should be tailored to the facts as in *Parsons*. This omission is not due to any disagreement with the *Parsons*. SHPOs should be tailored to the facts of the case at issue. Instead, we think that any SHPO would be appropriately fact specific if the proposed formulation were employed. Secondly, when we discuss proportionality, we also set out that the sentencing judge should consider both the type of harm risked and the likelihood of it occurring. If the judge only considered the type of harm risked, and not its likelihood, this may unbalance the scales when assessing the proportionality of the SHPO at issue and may prejudice the defendant. Thirdly, we retain the language of oppressiveness and proportionality in our reformulation. We take the difference between these two concepts to be as follows. Oppressiveness is an assessment of the suggested SHPO and its prohibitions whereas proportionality is an assessment of the order as compared to the risk posed by the defendant. So a suggested SHPO may be so oppressive that it may not satisfy the third part of the formulation or it may satisfy the third part, but then not be proportionate to the risk posed by the defendant and thus fail the fourth part. With the proposed formulation outlined, we can now turn to consider effectiveness and its relationship to necessity.

Necessity and effectiveness

Following from *Parsons*, the second part of our suggested formulation requires that for an SHPO to be necessary it must be effective. The concept of effectiveness is essentially a practical one and it may relate to necessity in complex ways. What makes an SHPO effective? How likely must it be that an SHPO would be effective before it could be considered necessary? It is difficult to claim, we suggest, that an ineffective or ineffectual prohibition, or set of prohibitions, could be considered necessary. Part (i) of the overarching guidance in *Parsons*, referred to above, appears to be predicated on that basis – ineffective prohibitions will not achieve the statutory purpose. In this section, we outline three aspects of the effectiveness question related to the drafting of the order, the ability to monitor compliance, and the capacity of the defendant to obey the order.

As to drafting, it would seem that prohibitions on contact are at their clearest when they address named individuals or well-defined places. The position becomes more problematic when a prohibition seeks to address a class of individuals or refers to locations in general terms. There have, for instance, been any number of non-contact prohibitions that have had to be amended to accommodate incidental contact occasioned by normal everyday existence and other analogous situations.⁴⁹ As a result, a formula that prohibits contact with children under 16 other than “such as is inadvertent and not reasonably avoidable in the course of lawful daily life” is now commonplace, and the absence of such language may in itself provide a legitimate ground of appeal.⁵⁰ Without such a caveat it is hard to see how non-contact prohibitions could be considered effective. Such non-contact prohibitions lend themselves to inadvertent breach. An offender subject to such an SHPO will be placed in a position whereby they could be faced with impossible choices – is going into a shop or café going to result in a breach? In addition, we note that the more general the drafting of a prohibition on contact the more it is likely to limit the capacity of the defendant to function in society. This should provide a weighty consideration when assessing both whether the prohibition is oppressive and whether it is proportionate.

A well drafted SHPO may still be ineffective. A central issue here is the capacity of the police, or others, to monitor the defendant’s compliance with a proposed order. We will consider the particular challenges of regulating use of the internet through SHPOs in the following section. The point here is a more general one. It may be that compliance with any type of prohibition could be too hard to monitor be it online or offline. It is worth quoting at some length from *Boness* here. By way of context, *Boness* was a conjoined appeal concerning the imposition of ASBOs. In his judgment, Lord Justice Hooper considered a previous decision, *Werner*, in which the defendant had stolen multiple items from hotel rooms. The ASBO imposed on Werner contained a prohibition on her entering any hotel or guest house in the Greater London Area. His Lordship commented,

It seems to us that there is another problem with the kind of order in *Werner*. In the absence of a system to warn all hotels, guesthouses or similar premises anywhere within the Greater London Area, there is no practical way of policing the order. The breach of the ASBO will occur at the same time as the commission of any further offence in a hotel, guesthouse or similar premises. The ASBO achieves nothing— if she is not to be deterred by the prospect of imprisonment for committing the offence, she is unlikely to be deterred by the prospect of being sentenced for breach of the ASBO. By committing the substantive offence she will have committed the further offence of being in breach of her ASBO, but to what avail? The criminal statistics will show two offences rather

than one. If on the other hand she “worked” a limited number of establishments, it would be practical to supervise compliance with the order. The establishments could be put on notice about her and should she enter the premises the police could be called, whether her motive in entering the premises was honest or not.⁵¹

His Lordship highlighted two issues that seem of relevance to efficacy. First, does the proposed order provide a protection not already available in the criminal law? Secondly, and more importantly here, could the defendant’s compliance with the order be monitored? The question of monitoring compliance must be a fact specific endeavour. If a person committed repeated sexual offences in a *Werner*-type scenario, it may be that three or four hotels could quite easily be put on notice of an SHPO, but it would be a different matter entirely to have every hotel in London put on notice and to expect them all to be ready to help enforce the order.

There is a strong argument that for a court to be persuaded that it is necessary to impose a prohibition there is a need to demonstrate that by so doing there is some real, as opposed to theoretical or in truth merely illusory, value. Value for these purposes can reasonably be equated with effectiveness. We would suggest that the value of a proposed order would seem illusory if there was no practicable means of monitoring the defendant’s compliance with the order. This is, of course, quite different from saying a defendant under an SHPO has to be monitored at all times.

The apparent protective impact of an SHPO, coupled with a determinative sentence, has been held to obviate the need to impose a public protection sentence.⁵² Relatively few cases appear, however, to address critically just how effective an SHPO may be in curbing or reducing the risk of future offending. Where is the divide between an effective and an ineffective SHPO and how do we assess which side of this divide a proposed order would fall on? A notable exception is *Hewitt*.⁵³ In considering the terms of an SHPO that were assessed on appeal to be the practical equivalent of a blanket ban on internet access, the court decided that prohibitions so expressed lacked efficacy and thus failed to satisfy the statutory purpose because they could not be enforced. The court observed that:

The police do not have the time or resources effectively to monitor the appellant’s use of any computer or hand-held device, to install monitoring software or to oversee and check on its’ use even if it were installed. As to cloud storage, as referred to in *Parsons*, its use is practically ubiquitous as it is built in to most operating systems; any device used by the appellant, including were the SHPO to remain in place, those in public libraries, would utilise the cloud and fall foul of the prohibition 5) in the order. Those terms of the SHPO are unworkable and not capable of enforcement. They amount to a blanket ban and as such they are oppressive and disproportionate.⁵⁴

The commission of further sexual offences by an offender who is subject to a SOPO/SHPO is almost always going to involve the breach of one or more prohibitions in their existing order. There is therefore potential for the offender to face a separate charge on breach for which he or she may be separately punished. The basis for the making of an order is, however, prevention rather than the triggering of some enhanced or additional punishment in the event of further offending.⁵⁵

If the making of an SHPO means that some other public protection measure is not adopted, then it would seem reasonable to expect a court, when so proceeding, to want to know how

effective an SHPO was likely to be. Could the defendant comply? Could compliance be monitored or enforced? How often will an offender be visited by the person whose task it is to monitor his or her behaviour in the community? Will the police have the capacity to check with people other than the defendant whether they are monitoring compliance? When, if ever, can the imposition of an SHPO per se be taken to have a sufficient deterrent impact so as to be effective? In the context of the limitations placed upon police resources in recent years it might reasonably be suggested that, in order for a court to satisfy itself that a proposed SHPO (or one or more of the prohibitions therein) pass the test of necessity, these and similar questions should be being asked and answered.

What about the offender who lacks the mental capacity required so as to be able effectively to comply with an SHPO? Here the point is not of monitoring compliance, but of capacity to comply. The legislation provides for the imposition of an SHPO in respect of an offender who has been found not guilty by reason of insanity or who is subject to a disability but has been found to have done the act alleged.⁵⁶ It would seem logical that an SHPO should not be made in respect of an offender who lacks the mental capacity so as to be able to comply. That was an approach that was adopted in respect of ASBOs (when in force).⁵⁷ The position will be less problematic if the insanity or other disability was temporary and/or capable of being treated or is otherwise of a nature that does not make it unreasonable to impose a behaviour order. In *Pashley* the court upheld the making of a SOPO in respect of an offender whose learning disability meant that he functioned as a nine year old and had been held to be permanently under a disability such that any proceedings arising from a breach of the SOPO could only result in a further such finding.⁵⁸ The court addressed the argument that it was inappropriate to impose a SOPO on such an offender on the basis that the statute had been drafted so as to permit the imposition of an order on someone under a disability and thus Parliament has determined that it is appropriate as long as the relevant criteria are met.⁵⁹ The court felt compelled, however, to add riders to the prohibitions that sought to explain their effect in terms the appellant might understand.⁶⁰ The fact that the court considered it necessary to do so perhaps leaves unanswered whether the prohibitions could be considered effective and therefore necessary if it was in fact impossible so to do.

In *Humphreys*, Mr Justice Stuart-Smith ruled that magistrates were both entitled to and right to impose a criminal behaviour order on an offender who was capable of understanding the terms of the order, but was more likely to breach the order due to his longstanding and untreated condition of ADHD.⁶¹ In the course of the judgment it was noted that the second requirement to impose a criminal behaviour order referred to the making of one as having to “*help*” prevent anti-social behaviour as opposed to an order being “*necessary*”.⁶² Yet, even with this lower standard in mind, the court was resistant to the notion that an order could be helpful when a defendant was either incapable of understanding the order or complying with it.⁶³ It was also suggested in *Humphreys* that if the subject of the criminal behaviour order breached it in circumstances where they were incapable of preventing themselves from so doing such may amount to a defence of reasonable excuse.⁶⁴ Where the potential recipient of an SHPO could not understand the order or comply with it, this may be a strong indication that it could not be described as effective. The SHPO case law has not yet addressed the question of effectiveness with the degree of rigour that the factor merits. This section is not a complete response to the issues raised by the concepts of efficacy and necessity, but we have endeavoured to draw out three relevant considerations: is the order drafted in such a way that compliance is possible; will it be possible to monitor compliance with the order; does the defendant have the capacity

to comply with the order? The fact that something is described as preventive does not mean it will necessarily have preventive efficacy.

Necessity and internet access

Our focus in this section is, in one sense, narrower than that in the previous section: we will consider effectiveness in the context of prohibitions on internet access. In another sense, the section has a broader focus in that we will consider other aspects of the necessity test as it applies to such prohibitions. As will be seen, the regulation of access to the internet is a significant challenge in a society in which the internet is becoming ever more prevalent.

Offending of a sexual nature not uncommonly features internet usage in one form or another. The internet may be used to facilitate committing sexual offences in person. In addition, it may be used as a means to access indecent images of both adults and children. The prevalence of offenders appearing before the courts for downloading indecent images of children is remarkable. In September 2018, the NSPCC publicised figures they obtained via freedom of information requests indicating that in 2017/2018 there were 22,724 child abuse image offences recorded by the police in the UK.⁶⁵ That is one recorded offence every 23 minutes and an increase of almost one quarter from the previous year. A particularly troubling type of case is where offenders have used social media, accessed via the internet, in order to contact children, or individuals they believed to be children, in pursuit of sexual engagement of some kind, either remotely or by way of seeking to arrange opportunities that may allow for physical contact. The internet brings with it many benefits, but its capacity to be used to commit and facilitate sexual offences requires serious scrutiny.

Accordingly, where it may reasonably be anticipated that an offender has a potential to reoffend, consideration as to restricting computer and/or internet usage is likely to arise in the context of the sentencing exercise and the potential imposition of an SHPO. This carries with it what the courts have come to recognise as something of a clash of necessities: (a) the necessity to impose a prohibition that may limit the capacity of an offender to use a computer and/or the internet for future offending; and (b) the necessity for people to access the internet in order to function in modern society.

The undesirability of blanket bans on internet access and use was recognised in *Smith* in 2011:

A blanket prohibition on computer use or Internet access is impermissible. It is disproportionate because it restricts the defendant in the use of what is nowadays an essential part of everyday living for a large proportion of the public, as well as a requirement of much employment...⁶⁶

In 2017, the Court of Appeal, in *Parsons*, noted that “the importance of the internet for everyday living has increased considerably even since the decision in *Smith*”.⁶⁷ The court went on, in the same paragraph, to record that

...the need for an individual to be able to access the internet and to possess devices capable of accessing the internet, has become ‘the established norm’. The internet is now an integral part of social life, of commercial transactions and is very much encouraged in dealings between an individual and government departments or local authorities. The massive expansion of social media further highlights developments in this regard.

The court concluded that, whilst it was unwilling to say that a blanket ban on internet usage can “never” be justified, it could not “envisage that such a prohibition would be appropriate in anything other than the most exceptional cases. In all other cases, a blanket ban would be unrealistic, oppressive and disproportionate – cutting off the offender from too much of everyday, legitimate living.” In our view, the judicial remarks in *Smith* and *Parsons* are sensible reflections of the growing importance of the internet in society. The necessity test should be sensitive to societal change. A prohibition on access to social media, for instance, may be justified in an appropriate case, but the same prohibition would likely have a far greater effect today than it would have had in 2005.

In *Hewitt*, the court was dealing with an offender aged 40 who had been offending for nine years.⁶⁸ He had persistently made use of the internet in order to gain access to indecent images of children (or people he believed to be children) and he had done so despite being subject to SOPOs. Hewitt also had a substantial list of previous convictions including sexual assault of a child. The judge at first instance imposed an SHPO that included something close to a blanket ban – requiring Hewitt not to own, possess or use any computer other than in a public library. The order also contained a variety of other prohibitions directed toward controlling activities that featured in both the index and previous offences, including a prohibition on owning, possessing or using any mobile phone “capable of accessing the internet”. Applying the reasoning in *Smith* and *Parsons*, the Court of Appeal allowed the appeal deleting the prohibitions that prevented the offender from owning or using a computer other than in a library, making use of “cloud” or other forms of remote storage and owning or using a mobile telephone with the capacity to access the internet. The judgment includes the comment that:

There may be a case where a blanket ban such as has been imposed in this case is proportionate even though oppressive, but we do not consider that the appellant’s offending, repugnant as it is, would justify such a ban. The use of the internet is an essential and integral part of everyone’s life and it’s use essential to transactions between individuals, statutory bodies and other entities.⁶⁹

Even where prohibitions are not phrased so as to impose a blanket ban the terms will be open to challenge if that is their practical effect. *Connor* involved an offender who had, in the course of offending spanning a period of four years, made contact with a child via the internet and deceived the victim into providing an indecent image of himself.⁷⁰ The offender had also engaged in covert filming of children and adults, doing so for sexual purposes. In addition to being sent to custody, the appellant was made the subject of an extensive SOPO which, it would appear, did not receive the attention that the court on appeal considered that it should. A prohibition restricting the offender to using only a “desktop computer specifically authorised & provided by his employer for the purposes of employment” which would also be required to have “internet monitoring software approved by his managing Police Officer” installed was struck down. The court, having considered *Smith* and *Parsons*, concluded that the clause

would probably have the effect of preventing the appellant from using the internet at all for any purposes since it permits use only of a desktop computer provided by his employer. Even were he to obtain employment it does not follow that he would be provided with a desktop computer. The prohibition is obviously oppressive and disproportionate.⁷¹

A less restrictive package of computer and internet prohibitions, consistent with that suggested in *Parsons*, was substituted.

The court, in *Connor*, was also unimpressed with a prohibition that sought to prevent the appellant accessing “social websites” and engaging in “any form of communication with person who is/are or appear to be under 18 years of age”.⁷² The court expressed the view that the appellant would be prevented from accessing “all social media (taking a broad interpretation of social websites for this purpose)” and further considered that the term “social website” was “imprecise and unhelpful”.⁷³ The court instead substituted a “standard” prohibition against unsupervised contact with any child under 18. A further clause that prohibited the appellant from possessing “any device including mobile telephones and computer tablets that is/are capable of recording still or video images” was also struck out as was a prohibition in respect of the possession of an internet enabled mobile phone. The court commented that even “at the time the order was made there were few mobile phones that did not have a camera or could not have internet access. It is unlikely that such phones will still be in circulation by the time the order comes to an end.”⁷⁴ This observation underlines the difficulty of future-proofing SHPO terms.⁷⁵ The judgment concluded that most of the problems with the order as originally drafted could have been avoided if sufficient time had been allocated to its consideration. The court suggested that Resident Judges and listing officers should ensure that in every such case the list should reflect the time needed for the court to deal with the issue appropriately.⁷⁶

In the decisions reviewed in *Hewitt*, the judges at first instance were persuaded that in order to address the risk of harm it was necessary to limit very substantially the circumstances in which the offenders might possess or use internet enabled devices, whether to access the internet or to record images. The conclusion must have been reached that absent the restrictions identified the offenders would be unable to regulate their use of the internet so as to avoid the commission of further offences and the consequent occasioning of sexual harm. Preventing sexual harm is, undoubtedly, a laudable aim. Yet the courts have been hesitant of total prohibitions on internet access, or anything close, because the internet is becoming fundamental simply to function in modern society. Given the ubiquity of the internet, we are left to wonder what facts will be taken to present such a serious risk of sexual harm that a near blanket ban could be imposed.

Even where a prohibition on access to the internet could be clearly drafted and would be proportionate, questions of efficacy may arise. As set out above, in *Hewitt* the court commented on this issue in these terms: “The police do not have the time or resources effectively to monitor the appellant’s use any computer or hand-held device, to install monitoring software or to oversee and check on its’ use even if it were installed”.⁷⁷ SHPOs cannot be legitimately imposed simply because the sort of behaviour they address gives rise to perfectly legitimate public disquiet. On a simplistic level, if someone uses a computer in order to look at indecent images of children then an answer to the problem that repugnant activity represents would appear to be provided by preventing the offender using computers thereafter. Yet if an SHPO cannot be effective prevention — either due to a deterrent effect or because it can be monitored appropriately — it is hard to see how its imposition could satisfy the statutory necessity requirement. In considering effectiveness, a number of questions may arise. For example, how often and how thoroughly will any computer in the possession of, or being used by, the offender be examined? Will such an examination reveal whether, for example, the offender has been using the device in “private browsing” or “incognito” mode? Do the terms of the SHPO seek to prevent an offender from making use of a Virtual Private Network which provides the capacity to undertake anonymous and untraceable internet usage? We would suggest that

matters such as these are yet to receive sufficient attention at either first instance or on appeal. It is hoped the reformulated necessity test above could provide some assistance to judges who face these issues in future cases.

Defence incentives not to challenge whether the necessity requirement has been met

We have already referred to one of the reasons why the process by which an SHPO ends up being made may lack the necessary rigour – an absence of sufficient court time. In *Smith* and numerous cases that followed it, the Court of Appeal has emphasised the need for the prosecution to give notice of any proposed SOPO/SHPO so that the defence may consider the proposal in advance and raise objection to the making of an order as a whole or any of its proposed terms.⁷⁸ The Court of Appeal continues to have to deal with a steady stream of complaints as to the terms of orders imposed. This is despite the requirements set out in Part 31 of the Criminal Procedure Rules that apply where the prosecution seek to persuade a court to impose an SHPO.⁷⁹ As the previous section will have made clear, the decision as to whether or not to impose an SHPO may be very complicated. Is a particular draft prohibition on internet access proportionate to the risk of sexual harm posed by the defendant? Would the prohibition be effective? These are not easy questions. If they are to be answered appropriately, it is vital courts and defendants have sufficient notice that the prosecution will pursue an SHPO, and the courts have sufficient time to consider submissions.

A theme that appears to run through the appellate case law in this area is that at the sentencing hearing the main focus of attention is on the issue of whether the offending merits custody, if so for how long and, if for a period of two years or less, whether the sentence should be suspended. From the offender's perspective, the main issue seems likely to be the retention of liberty and/or the earliest release date from any sentence of immediate custody. It is conceivable this may tempt the defence advocate to promote a tough looking SHPO as a basis upon which to argue any of the following. First, a more severe public protection sentence might be avoided. Secondly a shorter immediate sentence might be imposed. Thirdly, and best of all (at least from the offender's perspective), that a suspended sentence/community order, coupled with a very restrictive SHPO, is a sufficient sentence instead of an immediate custodial term. There may, we would suggest, thus be contextual pressure on a defence advocate not to challenge the necessity of an SHPO with oppressive or disproportionate prohibitions.

At the same time, the prosecutor may be under pressure to deal with cases expediently. The danger here is then that a particularly severe SHPO could be part of a sentence that is taken to satisfy both parties' interests even in a case where an order may not be appropriate. In addition, the decision as to whether an SHPO ought to be imposed is but one of a number the sentencing judge will have to make, and will likely be secondary to the decision as to whether an offender is taken to the cells to start serving an immediate custodial term or whether they retain their freedom. Again, sentencing judges may face such questions under considerable time restraints. It is easy to see how concerns such as future-proofing the terms of an SHPO, or even the imposition of an SHPO, could quickly become secondary.

We would suggest this combination of factors may operate so as to produce less than optimal SHPOs. Here we can again draw from Lord Justice Hooper's decision in *Boness*.

We were told during the course of argument that the imposition of an ASBO is sometimes sought by the defendant's advocate at the sentencing stage, hoping that the court might make an ASBO order as an alternative to prison or other sanction. A court must not allow itself to be diverted in this way—indeed it may be better to decide the appropriate sentence and then move on to consider whether an ASBO should be made or not after sentence has been passed, albeit at the same hearing.⁸⁰

It may not always be easy to separate the tasks of deciding the appropriate primary disposal of a case and whether an SHPO should be imposed. If public protection issues arise then, as discussed earlier, there may be a link between the nature of the primary sentence that the judge settles upon combined with the imposition of an alternative means of seeking to promote public safety that an SHPO may represent. Yet the thrust of the point made by Lord Justice Hooper must apply to the context of SHPOs: the decision to impose an SHPO is one that should be taken seriously and not just acquiesced to by the sentencing judge because the defence advocate has not challenged the order. We hope the draft reformulation set out above is of some use to sentencing judges in undertaking this enquiry. A broader point to be drawn out here is that concerns of principle are by no means the sole preserve of the appellate courts and academics. It is first instance courts that will often act as the only check on the imposition of SHPOs for convenience as opposed to on a principled basis.

Conclusion

The development of the necessity test in the context of SHPOs and other behaviour orders speaks to both the themes of transition and principle. *McCann* offered little comment on how judges should go about deciding when an ASBO was necessary. *Smith* then provided an amount of structure for this decision-making in the context of SOPOs. This structure has been further refined in cases that concern SHPOs such as *NC* and *Parsons*. The decision as to whether to impose an SHPO may bring out significant competing interests; it is a coercive measure designed to prevent sexual harm. It is thus vital that judges have appropriate means by which to structure their decision-making. We hope the suggestions made in this article on the necessity test and on effectiveness can further structure the assessment of whether a particular defendant ought to be made subject to an SHPO.

* UCL, Faculty of Laws.

† Circuit judge, Bristol. Our thanks to Lyndon Harris and David Ormerod for their comments on earlier drafts.

¹ On conjoined twins, see *Re A (Children)* [2000] All ER 961. On necessity and free speech, see *Pastörs v Germany* (Application no. 55225/14) 3 October 2019 [36]-[49].

² Sexual Offences Act 2003, s 103A(2)-(3).

³ Sexual Offences Act 2003, s 103A(2)(b) and (3)(b).

⁴ Sexual Offences Act 2003, s 103A(2)(b).

⁵ DA Thomas, *Principles of Sentencing* (London: Heinemann, 1970).

⁶ [2002] UKHL 39, [2003] 1 AC 787.

⁷ Home Office, *Guidance on Part 2 of the Sexual Offences Act 2003* (2018) p.36.

⁸ Anti-social Behaviour, Crime and Policing Act 2014, Sch 5 para 3(1).

⁹ Sexual Offences Act 2003, sch 3 paras 1 and 34, and sch 5 paras 49 and 159.

¹⁰ L. Harris, 'Jones (*Christopher Wyn*)' [2019] (1) Criminal Law Review 58, 60 (note).

¹¹ Sexual Offences Act 2003, s 103A(2)(b).

¹² That equivalent requirement, which no longer applies in England and Wales, is contained in Sexual Offences Act 2003, s 104(1).

¹³ Sexual Offences Act 2003, s 103A(4).

-
- ¹⁴ Other behaviour orders available on complaint do not require a conviction. See, for instance, the sexual risk order: Sexual Offences Act 2003, s 122A. As another comparison, see the risk of sexual harm order: Sexual Offences Act 2003, s 123. The latter order has been repealed in England and Wales.
- ¹⁵ Sexual Offences Act 2003 Act, s 103A(3)(b).
- ¹⁶ Home Office, *Guidance on Part 2 of the Sexual Offences Act 2003* (2018) pp.41-42.
- ¹⁷ Home Office, *Guidance on Part 2 of the Sexual Offences Act 2003* (2018).
- ¹⁸ Sexual Offences Act 2003, s 103C(1). Though the inability to include positive requirements in SHPOs is not as significant a limit as it may appear: see, *MEM* [2016] EWCA Crim 1290.
- ¹⁹ *Parsons* [2017] EWCA Crim 2163, [2018] 1 WLR 2409 [76] (Gross LJ).
- ²⁰ Sexual Offence Act 2003, s 103C(4).
- ²¹ Sexual Offence Act 2003, s 103I(1).
- ²² Sexual Offences Act 2003, s 103I(3).
- ²³ Sexual Offences Act 2003, s 103I(4).
- ²⁴ Sexual Offences Act 2003, s 103(G).
- ²⁵ J. Horder, *Ashworth's Principles of Criminal Law* (9th edn, OUP 2019) p.19.
- ²⁶ Home Office, *Guidance on Part 2 of the Sexual Offences Act 2003* (2018) p.43.
- ²⁷ *R (McCann) v Manchester Crown Court* [2002] UKHL 39, [2003] 1 AC 787 [6] (Lord Steyn).
- ²⁸ Crime and Disorder Act 1998, s 1.
- ²⁹ A.P. Simester and A. von Hirsch, 'Regulating Offensive Conduct through Two-Step Prohibitions' in A. von Hirsch and AP Simester (eds), *Incivilities* (Hart Publishing 2006) pp.175-177.
- ³⁰ A phrase used in the House of Lords: *R (McCann) v Manchester Crown Court* [2002] UKHL 39, [2003] 1 AC 787 [82] (Lord Hope).
- ³¹ The restrictions on hearsay evidence in criminal trials were loosened, after the introduction of the ASBO, by the Criminal Justice Act 2003. See, D. Birch, 'Hearsay: Same Old Story, Same Old Song?' [2004] (7) Criminal Law Review 556.
- ³² *R (McCann) v Manchester Crown Court* [2002] UKHL 39, [2003] 1 AC 787 [4] (Lord Steyn).
- ³³ *R (McCann) v Manchester Crown Court* [2002] UKHL 39, [2003] 1 AC 787 [4] (Lord Steyn). Though, strictly, the evidential standard issue was obiter: *Jones v Birmingham City Council* [2018] EWCA Civ 1189, [2019] QB 521 [45] (Sir Brian Leveson P).
- ³⁴ *R (McCann) v Manchester Crown Court* [2002] UKHL 39, [2003] 1 AC 787 [40] (Lord Steyn), [84] (Lord Hope), [115] (Lord Hutton).
- ³⁵ *R (McCann) v Manchester Crown Court* [2002] UKHL 39, [2003] 1 AC 787 [37] (Lord Steyn), [81]-[83] (Lord Hope), [114] (Lord Hutton).
- ³⁶ *R (McCann) v Manchester Crown Court* [2002] UKHL 39, [2003] 1 AC 787 [37] (Lord Steyn), see also [83] (Lord Hope).
- ³⁷ *R (McCann) v Manchester Crown Court* [2002] UKHL 39, [2003] 1 AC 787 [37] (Lord Steyn).
- ³⁸ Later case law on the ASBO considered the necessity requirement in more detail. See, *Boness* [2005] EWCA Crim 2395, [2006] 1 Cr App R (S) 120; *P* [2004] EWCA Crim 287, [2004] 2 Cr App R (S) 63. We engage with *Boness* below.
- ³⁹ *Smith* continues to be cited in government guidance on SHPOs: Home Office, *Guidance on Part 2 of the Sexual Offences Act 2003* (2018) p.38.
- ⁴⁰ *Smith* [2011] EWCA Crim 1772, [2012] 1 Cr App R (S) 82 [6] (Hughes LJ). This test followed from the judgments in *Collard* [2004] EWCA Crim 1664, [2005] 1 Cr App R (S) 155; *Mortimer* [2010] EWCA Crim 1303.
- ⁴¹ *Smith* [2011] EWCA Crim 1772, [2012] 1 Cr App R (S) 82 [6]-[8] (Hughes LJ) (original emphasis).
- ⁴² *Smith* [2011] EWCA Crim 1772, [2012] 1 Cr App R (S) 82 [4] (Hughes LJ).
- ⁴³ By comparison, in *Re A (Children)* [2001] 2 WLR 480, 573, Lord Justice Brooke set out the requirements of necessity as follows: "(i) the act is needed to avoid inevitable and irreparable evil; (ii) no more should be done than is reasonably necessary for the purpose to be achieved; (iii) the evil inflicted must not be disproportionate to the evil avoided." Interestingly, this formulation also contains a problematic reference to necessity in its first requirement. The important point here, however, is that the assessment of necessity as a defence includes an assessment of the effects of the action and the proportionality of these effects on the harm to be avoided. Likewise, in assessing whether an interference with freedom of expression is "necessary in a democratic society" the European Court of Human Rights assesses the proportionality of the restriction used, say, a criminal conviction, to the legitimate aim pursued, say, protecting the reputation and rights of others. See, for instance, *Pastörs v Germany* (Application no. 55225/14) 3 October 2019 [36]-[49].
- ⁴⁴ [2016] EWCA Crim 1448, [2017] 1 Cr App R (S) 13 [9] (Patterson J).
- ⁴⁵ [2017] EWCA Crim 1903 [2018], 4 WLR 126 [5] (Hickinbottom LJ).
- ⁴⁶ See, for instance, *Lewis* [2016] EWCA Crim 1020, [2017] 1 Cr App R (S) 2 [10] (Elias LJ).

⁴⁷ The text given here is abbreviated for convenience: [2017] EWCA Crim 2163, [2018] 1 WLR 2409 [5] (Gross LJ).

⁴⁸ This last requirement may be taken to fall outside of the necessity requirement. By comparison, see *Parsons* [2017] EWCA Crim 2163, [2018] 1 WLR 2409 [5] (Gross LJ). Nonetheless, we include it for completeness.

⁴⁹ See, for example, *Hemsley* [2010] 3 All ER 965 and *P* [2013] EWCA Crim 67.

⁵⁰ See, for example: *Begg* [2019] EWCA Crim 1578 [5]; *Hamer* [2017] EWCA Crim 192, [2017] 2 Cr App R (S) 13 [7]. Though the formula is not appropriate in every case: *NC* [2016] EWCA Crim 1448, [2017] 1 Cr App R (S) 13 [15]-18]. Further, we are cognisant of the reasonable excuse defence, but note judges have been particularly critical of broad prohibitions that may cause inadvertent breach. See, for instance, *Hemsley* [2010] EWCA Crim 225 [6]. Further reason to avoid such broad prohibitions is provided by the difficulties a person may face in trying to correct a poorly drafted order: *Hoath and Standage* [2011] EWCA Crim 274.

⁵¹ *Boness* [2005] EWCA Crim 2395, [2006] 1 Cr App R (S) 120 [46] (Hooper LJ).

⁵² See for example *Wheller* [2018] EWCA Crim 774 applying *Terrell* [2007] EWCA Crim 3079, [2008] 2 All ER 1065. For critical commentary on the interrelationship of the choice between an extended determinate sentence and a determinate sentence, and the decision as to whether to impose an SHPO, see Lyndon Harris and Sebastian Walker, 'Difficulties with dangerousness: determining the appropriate sentence - Part 2' [2018] (10) Criminal Law Review 782.

⁵³ [2018] EWCA Crim 2309, [2019] 1 Cr App R (S) 34.

Hewitt [2018] EWCA Crim 2309, [2019] 1 Cr App R (S) 34 [18] (Russell J).

⁵⁵ In the context of the ASBO, see *Boness* [2005] EWCA Crim 2395, [2006] 1 Cr App R (S) 120 [32] (Hooper LJ).

⁵⁶ Sexual Offences Act 2003, s 103A(2).

⁵⁷ *R (Cooke) v DPP* [2008] EWHC 2703 (Admin), (2008) 172 JP 596; *Fairweather v Commissioner of Police for the Metropolis* [2008] EWHC 3073 (Admin).

⁵⁸ [2015] EWCA Crim 1540.

⁵⁹ *Pashley* [2015] EWCA Crim 1540 [11]-[12] (Davies J).

⁶⁰ *Pashley* [2015] EWCA Crim 1540 [16] (Davies J).

⁶¹ *Humphreys v CPS* [2019] EWHC 2794 (Admin) [27]-[28] (Stuart-Smith J).

⁶² *Humphreys v CPS* [2019] EWHC 2794 (Admin) [17] (Stuart-Smith J) having cited the Anti-social Behaviour, Crime and Policing Act 2014, s 22(4). (Our emphasis)

⁶³ *Humphreys v CPS* [2019] EWHC 2794 (Admin) [24] (Stuart-Smith J). See also the remarks of Lady Justice Butler-Sloss in *Wookey v Wookey* [1991] Fam 121, 130-131 (CA), cited by Mr Justice Stuart-Smith at [19].

⁶⁴ *Humphreys v CPS* [2019] EWHC 2794 (Admin) [30] (Stuart-Smith J).

⁶⁵ NSPCC, 'Child abuse image offence recorded every 23 minutes in the UK' (NSPCC, 13 September 2018) <<https://www.nspcc.org.uk/what-we-do/news-opinion/child-abuse-image-every-23-minutes-UK/>> accessed 26 January 2020.

⁶⁶ *Smith* [2011] EWCA Crim 1772, [2012] 1 Cr App R (S) 82 [20] (Hughes LJ).

⁶⁷ *Parsons* [2017] EWCA Crim 2163, [2018] 1 WLR 2409 [9] (Gross LJ).

⁶⁸ *Hewitt* [2018] EWCA Crim 2309, [2019] 1 Cr App R (S).

⁶⁹ *Hewitt* [2018] EWCA Crim 2309, [2019] 1 Cr App R (S) 34 [19] (Russell J).

⁷⁰ [2019] EWCA Crim 234, [2019] 2 Cr App R (S) 19.

⁷¹ *Connor* [2019] EWCA Crim 234, [2019] 2 Cr App R (S) 19 [19] (Thirlwall LJ).

⁷² *Connor* [2019] EWCA Crim 234, [2019] 2 Cr App R (S) 19 [4] (Thirlwall LJ).

⁷³ *Connor* [2019] EWCA Crim 234, [2019] 2 Cr App R (S) 19 [20]-[21] (Thirlwall LJ).

⁷⁴ *Connor* [2019] EWCA Crim 234, [2019] 2 Cr App R (S) 19 [24] (Thirlwall LJ).

⁷⁵ The desire to future-proof orders give rise to complicated issues. The courts should, on the one hand, surely not close their eyes to obvious and imminent technological developments, but, on the other, they should not engage in guessing what the future holds. We note both the defendant and the police can apply to vary an SHPO: Sexual Offences Act 2003, s 103E.

⁷⁶ *Connor* [2019] EWCA Crim 234, [2019] 2 Cr App R (S) 19 [31]-[32] (Thirlwall LJ).

⁷⁷ [2018] EWCA Crim 2309, [2019] 1 Cr App R (S) 34 [18] (Russell J).

⁷⁸ *Smith* [2011] EWCA Crim 1772, [2012] 1 Cr App R (S) 82 [26] (Hughes LJ); *Sokolowski* [2017] EWCA Crim 1903 [2018], 4 WLR 126 [11] and [21] (Hickinbottom LJ).

⁷⁹ Criminal Procedure Rules 2015/1490. In brief, part 31 sets out the rules of notice, and evidence related to behaviour orders made on conviction.

⁸⁰ *Boness* [2005] EWCA Crim 2395, [2006] 1 Cr App R (S) 120 [29] (Hooper LJ).