

Anti-Social Behaviour, Crime and Policing Act 2014 (“ASBCPA 2014”)

Background

- Theresa May announced in 2010 that the government intended to launch a review of anti-social behaviour orders (ASBOs),
- By 2011 the Home Office launched a consultation.
- On 22 May 2012, the government published a *White paper, Putting victims first: more effective responses to anti-social behaviour* setting out plans for dealing with anti-social behaviour.
- On 13 December 2012, the Home Office published a draft Anti-Social Behaviour Bill for pre-legislative scrutiny setting out its proposals and to bring up to date, and streamline the existing anti-social behaviour regime.
- The Anti-Social Behaviour, Crime and Policing Bill 2013-2014 received Royal Assent on 13 March 2014.

The ASBCPS 2014 *replaced* many powers, those relevant for housing practitioners include;

- Anti-social behaviour orders established by section 1 of the Crime and Disorder Act 1998.
- Anti-social behaviour injunctions established under section 153A to 157 of the Housing Act 1996.
- Anti-social behaviour premises closure orders established by 1A of the Anti-social Behaviour Act 2003
- Crack house closure orders established by Part 1 of the Anti-Social Behaviour Act 2003.
- Noisy premises closure orders established by the Anti-Social Behaviour Act 2003.
- Section 30 dispersal order established by the Anti-Social Behaviour Act 2003.

It can be overwhelming knowing where to start when approached by a housing client in relation to possession proceedings, especially if the landlord relies on a mandatory ground or proceedings are already underway and/or imminent. The purpose of the paper is to provide a resource for defendant practitioners. The paper covers an overview of the ASBCPA 2014 and housing. It does not attempt to cover every aspect of ASBCPA 2014, for example, acceptable behaviour contracts.

The scope of this paper covers:

1. Legal framework
2. Case law
3. Legal Aid
4. A practical approach/strategy for solicitors defending ASB, injunctions and closure orders.

1. Legal framework:

Anti-Social Behaviour, Crime and Policing Act 2014 (“ASBCPA 2014”)

ASBCPA 2014 introduced a new *mandatory ground* for possession therefore it is no longer necessary for a landlord, in certain circumstances to prove that it would be reasonable and proportionate to make a possession order. The purpose of the mandatory ground was

introduced to speed up the possession process in cases where anti-social behaviour or criminal behaviour has already been proven by another court i.e. in the magistrates' court where a landlord has obtained a closure order against the tenant. The idea being that it supports victims of anti-social behaviour achieve redress sooner without the ordeal of going through a further trial in civil courts dealing with the same issue of anti-social behaviour.

Local housing authorities are required to have a policy in place to deal with ASBCPA 2014. It is always worth reading the policy.

Mandatory Ground

Secure tenancies – section 84A, HA 1985 (provided certain conditions are met).

Section (1) if the court is satisfied that any of the following conditions is met, it must make an order for possession. *Subject* to subsection (2) (and to any available defence based on the tenant's Convention rights, within the meaning of the Human Rights Act 1998.

Section (2) the landlord must have complied with any obligations it has under section 85ZA (review of decision to seek possession).

Sections 3-7 deal with the 5 conditions which should be met, and set out below as follows;

Section (3): Condition 1

- (a) the tenant, or a person residing in or visiting the dwelling-house, has been convicted of a serious offence, and was committed
- (b) the serious offence—
 - (i) Wholly or partly in, or in the locality of, the dwelling-house,
 - (ii) Elsewhere against a person with a right (of whatever description) to reside in, or occupy housing accommodation in the locality of, the dwelling-house, or
 - (iii) Elsewhere against the landlord of the dwelling-house, or a person employed (whether or not by the landlord) in connection with the exercise of the landlord's housing management functions, and directly or indirectly related to or affected those functions.

Section (4): Condition 2

A court has found in relevant proceedings that the tenant, or a person residing in or visiting the dwelling-house, has breached a provision of an injunction under section 1 of the Anti-social Behaviour, Crime and Policing Act 2014, other than a provision requiring a person to participate in a particular activity, and—

- (a) the breach occurred in, or in the locality of, the dwelling-house, or
- (b) the breach occurred elsewhere and the provision breached was a provision intended to prevent—

(i) conduct that is capable of causing nuisance or annoyance to a person with a right (of whatever description) to reside in, or occupy housing accommodation in the locality of, the dwelling-house, or

(ii) conduct that is capable of causing nuisance or annoyance to the landlord of the dwelling-house, or a person employed (whether or not by the landlord) in connection with the exercise of the landlord's housing management functions, and that is directly or indirectly related to or affects those functions.

A breach of an undertaking does not fall within the meaning of condition 2 and therefore some landlords may therefore be reluctant to agree undertakings for this reason.

Section (5): Condition 3

The tenant, or a person residing in or visiting the dwelling-house, has been convicted of an offence under section 30 of the Anti-social Behaviour, Crime and Policing Act 2014 consisting of a breach of a provision of a criminal behaviour order prohibiting a person from doing anything described in the order, and the offence involved—

(a) a breach that occurred in, or in the locality of, the dwelling-house, or

(b) a breach that occurred elsewhere of a provision intended to prevent—

(i) behaviour that causes or is likely to cause harassment, alarm or distress to a person with a right (of whatever description) to reside in, or occupy housing accommodation in the locality of, the dwelling-house, or

(ii) behaviour that causes or is likely to cause harassment, alarm or distress to the landlord of the dwelling-house, or a person employed (whether or not by the landlord) in connection with the exercise of the landlord's housing management functions, and that is directly or indirectly related to or affects those functions.

Section (6): Condition 4

The dwelling-house is or has been subject to a closure order under section 80 of the Anti-social Behaviour, Crime and Policing Act 2014, and

(b) access to the dwelling-house has been prohibited (under the closure order or under a closure notice issued under section 76 of that Act) for a continuous period of more than 48 hours.

Section (7) Condition 5

(a) the tenant, or a person residing in or visiting the dwelling-house, has been convicted of an offence under—

- (i) section 80(4) of the Environmental Protection Act 1990 (breach of abatement notice in relation to statutory nuisance), or
 - (ii) section 82(8) of that Act (breach of court order to abate statutory nuisance etc.), and
- (b) the nuisance concerned was noise emitted from the dwelling-house which was a statutory nuisance for the purposes of Part 3 of that Act by virtue of section 79(1)(g) of that Act (noise emitted from premises so as to be prejudicial to health or a nuisance).

Section (8) conditions 1-5 *cannot* be met in circumstances if an appeal against the conviction, finding or order concerned which has not been finally determined, abandoned or withdrawn or the final determination of the appeal results in the conviction, finding or order being overturned.

Assured tenancies - under Ground 7A, Schedule 2, HA 1988 (provided certain conditions are met) see conditions 1-5 above.

The absolute ground for possession is intended to be used in the most serious cases by landlords.

Notice seeking possession

Secure tenancies – Section 83ZA HA 1985

A notice seeking possession (NoSP) must be served before the issue of possession proceedings when seeking to rely on the new mandatory ground. The NoSP must:

1. State clearly that the court will be asked to make an order under section 84A of the HA 1985 for the possession of the dwelling-house.
2. Set out reasons for the decision to apply for the possession order (with condition(s) above). It is not sufficient to list the condition alone as reasons must be given.
3. Inform the tenant of any right to request a review under s85ZA, including the time within which the request must be made.
4. Specify the date after which proceedings for the possession may start (at least the same period as would be given by a notice to quit; that is, a minimum of 28 days for weekly periodic tenancy or one month for a monthly periodic tenancy, or with a fixed term tenancy one month.
5. Inform the tenant that, if they need help or advice about the notice and what to do about it, they should take it immediately to a Citizens' Advice Bureau or a housing aid centre, a law centre or a solicitor.

Additional requirements:

If the landlord intends to rely on rent arrears Ground 1 Schedule 2 of the HA 1985, the NoSP must:

- specify the ground on which the court will be asked to make the order; and
- give particulars of the ground.

A NoSP relying on either condition 1,3, or 5 in section 84A must:

- State the conviction on which the landlord proposes to rely; and
- Be served on the tenant within the period of 12 months beginning with the day of the conviction or, if there is an appeal against the conviction, the period of 12 months beginning with the day on which the appeal is finally determined or abandoned.

A NoSP relying on condition 2 in section 84A must:

- State the findings on which the landlord proposes to rely; and
- Be served on the tenant within the period of 12 months beginning with the day on which the court has made the finding or, if there is an appeal against the finding, the period of 12 months beginning with the day on which the appeal is finally determined, abandoned or withdrawn.

A NoSP which states that the landlord proposes to rely on condition 4 in section 84A must:

- State the closure order concerned; and
- Be served on the tenant within the period of three months beginning with the day on which the closure order was made, or, if there is an appeal against the making of the order, the period of three months beginning with the day on which the appeal is finally determined, abandoned or withdrawn.

A landlord cannot dispense with the requirement for a notice seeking possession (section 83(1)(b), Housing Act 1985, when an absolute ground is relied upon.

Assured tenancies

There is *no* statutory review procedure for assured tenancies, simply that the proceedings cannot be commenced for at least 28 days for a weekly periodic tenancy or one month for a monthly periodic tenancy or a month for fixed term tenancies.

The *Assured Tenancies and Agricultural Occupancies (Forms) (England) Regulations 2015 (SI 2015/620)* provide a new prescribed NoSP following the ASBCPA 2014 amendments.

Section 8 of the HA 1988 also provides a further restriction on the service of any NoSP in terms of time that has elapsed from any conviction, finding or closure order:

Where the landlord proposes to rely on condition 1, 3 or 5 in Ground 7A, the NoSP must be served on the tenant within:

- the period of 12 months beginning with the day of the conviction; or
- if there is an appeal against conviction, the period of 12 months beginning with the day on which the appeal is finally determined or abandoned.

Where the landlord proposes to rely on condition 2 in Ground 7A, the NoSP must be served on the tenant within:

- The period of 12 months beginning with the day on which the court has made the finding; or
- If there is an appeal against the finding, the period of 12 months beginning with the day on which the appeal is finally determined, abandoned or withdrawn.

Where the landlord proposes to rely on condition 4 in Ground 7A, the NoSP must be served on the tenant within:

- The period of three months beginning with the day on which the closure order was made; or
- If there is an appeal against the finding, the period of three months beginning with the day on which the appeal is finally determined, abandoned or withdrawn.

Review process.

Secure tenancies:

Section 96, ASBCPA 2014 gives a secure tenant the right to request a review of a decision to seek possession when landlord relies on mandatory ground.

Assured tenancies:

There is no statutory right of a review (note same as demoted tenancies). However, *Reform of anti-social behaviour powers guidance* suggests that the Private Registered Providers (“PRPs”) ought to adopt a review process similar to local authorities.

What is the process? – see **Absolute Ground for Possession for Anti- Social Behaviour (review Procedure) England Regulations 2014 (SI 2014/2554)** – attached to these notes.

The request for a review must be made in writing within 7 days of the notice seeking possession. If the landlords’ decision goes against the tenant then written reasons should be given. The review must be completed before the first day that possession proceedings can be commenced.

- There is a right to a hearing or the review can take place without a hearing.
- Regulation 4 allows the review to be sent by post or email.

Oral hearing

Once a secure tenant has requested an oral hearing the landlord must send a written notice to the tenant stating the date, time and the place of the oral hearing. The hearing should not be set for at least 5 days after the day on which the notice is received by the applicant.

It is possible to request a hearing to be postponed (see regulation 6(3).) in which case the revised date must also be in writing (regulation 9).

Reviews without a hearing

The tenant must be given written notice that they can make written representations in support of their application. A deadline to provide written representations should be given.

CPR 55

In circumstances where a NoSP has been properly served, proceedings issued at the correct time and the review process correctly adhered to and a condition met, then unless there is an Article 8 ECHR, Equality Act 2010 or other public defence a court **MUST** make the possession order. The Possession Order should provide a date for possession no more than 14 days after the order. In cases of exceptional hardship it is possible to extend time (section 89(1), Housing Act 1980) to a date later.

Possible Defences to consider.

Article 8 – Right to respect for private and family life

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Equality Act 2010 and ASBCPA 2014

Burden of Proof – s136 of the Equality Act 2010 the measure taken was not because of disability, and if it was it was proportionate.

Section 149 (1) of the Equality Act 2010

(1) A public authority must, in the exercise of its functions, have due regard to the need to—

- a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
- (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
- (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

Section 15 of the Equality Act 2010 states

Discrimination arising from disability

(1) A person (A) discriminates against a disabled person (B) if—

- (a) A treats B unfavourably because of something arising in consequence of B's disability, and
- (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

Public Sector Equality Duty – 5 April 2011

In the exercise of their functions, public authorities in England, Scotland and Wales must have due regard to the need to:

- Eliminate unlawful discrimination, harassment and victimisation and any other unlawful conduct in the Equality Act 2010.
- Advance equality of opportunity
- Foster good relations.

For more information see Equality and Human Rights Commission.

Judicial Review

Civil Injunctions: Part 1 of the ASBCPA 201

Consider could an alternative remedy be used in the first instance:

- A verbal/written warning
- A community resolution – agreement between the parties
- Mediation
- Acceptable Behaviour contracts/Agreements
- Parenting contracts
- Support and counselling

(See ASB statutory Guidance published by the Home Office 24 December 2017)

Civil injunctions

There are 2 conditions – see section 2 Part 1 ASBCPS 2014

On the balance of probabilities, the person has engaged or threatens to engage in anti-social behaviour.

If the anti-social behaviour is housing related then this will be conduct capable of causing nuisance or annoyance to any person in relation to their occupation of residential premises or conduct capable of causing housing related nuisance or annoyance to any person. Housing related means behaviour directly, indirectly relating to social landlord's housing management functions, for example, the protection of social housing stock to ensure compliance with tenancy agreements.

In relation to housing related anti-social behaviour injunctions, these can be made where the subject of the injunction *may not* have engaged in behaviour themselves but **allowed** it to continue, for example, where a visitor or lodger has been acting anti-socially than an injunction can be used against the visitor, lodger or owner if the test for applying for the injunction can be satisfied.

Notice- see section 6

An application for an injunction can be made with or without notice. **An application on a without notice should only be sought in extremely serious circumstances.**

If a without notice application is made, under section 6 Part 1 ASBCPA 2014 the court will either:

- Adjourn the proceedings and grant an interim injunction (see section 7)
- Adjourn the proceedings without granting an interim injunction, i.e the court believes notice should have been given.
- dismiss the application.

Court documents

The following documents should be completed by those applying for an injunction: Check to make sure that the documents are completed correctly

N16A: Application for an injunction (County Court)

N16 (1) General form of injunction for interim application or originating application

Witness statements, statements of truth and notice of intention to rely on hearsay evidence (if required)

Evidence in support of proceedings relating to anti-social behaviour and harassment are set out in Part 65 of the CPR.

In cases involving anti-social behaviour it is likely that much of the evidence will be hearsay evidence, for example, because witnesses are concerned about identification and being subject to further anti-social behaviour. This evidence will generally appear in the anti-social behaviour officer's statement where residents have informed the officer that anti-social behaviour has taken place and they do not want to be identified or the information has been heard second-hand.

Civil Evidence Act 1995 at section 4 sets out the factors which the Court should have in mind when evaluating hearsay evidence. For hearsay evidence to be admissible in injunction proceedings, notice must be given (4, *Civil Evidence Act 1995*).

Civil Evidence Act 1995 Section 4.

- (1) In estimating the weight (if any) to be given to hearsay evidence in civil proceedings the court shall have regard to any circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence.
- (2) Regard may be had, in particular, to the following—
 - (a) whether it would have been reasonable and practicable for the party by whom the evidence was adduced to have produced the maker of the original statement as a witness;
 - (b) whether the original statement was made contemporaneously with the occurrence or existence of the matters stated;
 - (c) whether the evidence involves multiple hearsay;
 - (d) whether any person involved had any motive to conceal or misrepresent matters;
 - (e) whether the original statement was an edited account, or was made in collaboration with another or for a particular purpose;
 - (f) whether the circumstances in which the evidence is adduced as hearsay are such as to suggest an attempt to prevent proper evaluation of its weight.

Further consideration when looking at hearsay evidence.

- The relative weight a court will attach to hearsay evidence compared to direct evidence from a witness.
- If it is more than likely that a witness is likely to be identified because of the nature of the complaint, is it fair for them to remain anonymous or should they be called to give proper evidence and cross examined, given the consequences for the tenant if breaching an injunction (could lead to mandatory ground for possession).

Attaching a power of arrest to an injunction Part 1 section 4 ASBCPA 2014

A court granting an injunction can attach a power of arrest to it where it considers that:

- The anti-social behaviour in which the respondent has engaged or threatens to engage consists of or includes the use or threatened use of violence against another person.
- There is a significant risk of harm to other persons from the respondent.
- If an applicant wishes to apply to have a power of arrest attached to an injunction then it must submit written evidence in support of this, stating why there is high risk of harm to others if any of the injunction prohibitions or requirements are breached. However, a power of arrest cannot be attached to a positive requirement.

Part 1 section 13 - Power to exclude person from home in cases of violence or risk of harm

An injunction can exclude a person over the age of 18 from their home if they have been engaging in anti-social behaviour.

The power of exclusion should be only used in limited circumstances and considerations given should be article 8 of the ECHR and the issue of proportionality – especially if applied for on a without notice application.

An injunction containing this power of exclusion must meet the following conditions:

- The court considers that the anti-social behaviour includes the use or threatened use of violence against other persons, or there is a significant risk of harm to other persons, from the respondent. Harm is defined in Part 1 Section 20 ASBCPA 2014 and includes emotional and psychological harm.
- The injunction must have been applied for by a chief officer for police for the police area that the dwelling is located in, a local authority or by a social landlord (although note, in the case of a social landlord, exclusion can only relate to properties owned or managed by them). In the case of excluding private tenants or owner-occupiers, the police or relevant local authority should take the lead on exclusion and, where the individual is a renter, inform and consult their landlord.

Breach of a civil injunction:

It may be considered to be contempt of court punishable by an unlimited fine or imprisonment for up to two years by the County Court. Although breach is not a criminal offence, the criminal standard of proof ("beyond reasonable doubt") will be applied when proving breach of an injunction.

In social housing cases, one important consequence of a finding by a court that a defendant has breached a negative obligation of an injunction under section 1 of the ASBCPA 2014 is that a mandatory ground for possession may arise (section 84A, *Housing Act 1985*; *Ground 7A, Part 1, Schedule 2, Housing Act 1988*). For this reason, social landlords may be less willing than under previous legislation to compromise injunction claims in exchange for an undertaking from the defendant in the terms of the injunction applied for.

It is possible that before issuing committal proceedings the local authority or police can issue a warning letter rather than immediately instituting committal proceedings.

Varying or discharging an injunction- See Part 1 section 8 of ASBCPS 2014

An injunction may be varied or discharged on the application of:

- The person who applied for the original injunction.
- The respondent.

An application to vary an injunction could include adding an additional prohibition or requirement to the injunction, extending or reducing the duration of a prohibition or attaching a power of arrest.

If an application to vary or dismiss an injunction is dismissed, then the party who applied for the variation or dismissal is prevented from making any further applications to vary or discharge the injunction without the consent of the court and other party (*section 8(4)*).

Appealing against the grant, refusal, variation or discharge of an injunction

The route of appeal against an injunction depends on the age of the respondent:

- In the case of a respondent under the age of 18, the route of appeal against an injunction granted by the Youth Court will be to the Crown Court (*section 15*).
- In the case of a respondent over the age of 18, the route of appeal against an injunction granted by the County Court will be to the High Court.

The Court of Appeal in *Jones v Birmingham City Council and another* [2018] EWCA Civ 1189 has confirmed that civil injunctions do not engage Article 6 of the European Convention on Human Rights (ECHR).

Note for practitioners

1. Check to see that the correct procedure has been followed.
2. An injunction must, as far as reasonably practicable, avoid disruption to education or work or an existing order. Whether your client has care responsibilities should be taken into consideration – see Part 1 section 1 (5) ASBCPA 2014.
3. A court will not make an order in circumstances in which there is clear evidence that the respondent lacks the capacity to comply with its terms: this is sometimes referred to as "specific capacity" or "Wookey capacity" (*Wookey v Wookey* [1991] Fam 121;

Closure Orders Part 4 ASBCPA 2014

See - Anti Social behaviour powers: Statutory Guidance for frontline professionals (updated December 2017) states at p.58, that the function of a closure order is as follows:

“the closure power is a fast, flexible power that can be used to protect victims and communities by quickly closing premises that are causing nuisance or disorder”.

Power of court to make closure orders are set out in section 80 of ASBCPA 2014.

- (1) Whenever a closure notice is issued an application must be made to a magistrates' court for a closure order (unless the notice has been cancelled under section 78).
- (2) An application for a closure order must be made—
 - (a) by a constable, if the closure notice was issued by a police officer;
 - (b) by the authority that issued the closure notice, if the notice was issued by a local authority.
- (3) The application must be heard by the magistrates' court not later than 48 hours after service of the closure notice.
- (4) In calculating when the period of 48 hours ends, Christmas Day is to be disregarded.
- (5) The court may make a closure order if it is satisfied—
 - (a) that a person has engaged, or (if the order is not made) is likely to engage, in disorderly, offensive or criminal behaviour on the premises, or
 - (b) that the use of the premises has resulted, or (if the order is not made) is likely to result, in serious nuisance to members of the public, or
 - (c) that there has been, or (if the order is not made) is likely to be, disorder near those premises associated with the use of those premises,**and that the order is necessary to prevent the behaviour, nuisance or disorder from continuing, recurring or occurring** (emphasis added)
- (6) A closure order is an order prohibiting access to the premises for a period specified in the order.

The period may not exceed 3 months.
- (7) A closure order may prohibit access—
 - (a) by all persons, or by all persons except those specified, or by all persons except those of a specified description;
 - (b) at all times, or at all times except those specified;
 - (c) in all circumstances, or in all circumstances except those specified.
- (8) A closure order—
 - (a) may be made in respect of the whole or any part of the premises;
 - (b) may include provision about access to a part of the building or structure of which the premises form part.

(9) The court must notify the relevant licensing authority if it makes a closure order in relation to premises in respect of which a premises licence is in force.

The Court will need to assess the evidence and consider whether (a), (b) and (c) are satisfied.

The Applicant will only need to persuade the Court, on the balance of probabilities that imposing a closure order is proportionate under Section 80 (5) of the ASBCPA.

Practitioners note:

What policy does the landlord have in place before deciding to apply for a closure order, was the policy followed, if not – raise in the defence.

Article 8 – Right to respect for private and family life

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 8 ECHR is engaged by the making of the closure order. In R (on the application of Cleary) v Highbury Corner Magistrates' Court [2006] EWHC 1869 (admin) it was held at §7 inter alia:

"...since a closure order may well dispossess people from their homes for up to six months, article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms is of central importance, and the magistrates' court cannot make a closure order unless they are satisfied that it is necessary and proportionate to do so to achieve...a legitimate aim".

In considering lawfulness and whether a closure order would be a disproportionate interference with the Respondent's right to a home and private life, factors to think about.

1. Does the Respondent's behaviour arise as a direct consequence of his disability and is therefore not within his conscious control.
2. Wookey v Wookey [1991] Fam 21 – an anti-social behaviour injunction should not be made where an individual's mental impairments means that he or she is truly incapable of complying with its conditions. The reason being is that it cannot protect the public
3. In Jamie Cooke v DPP [2008] EWHC 2703 (Admin) it was held that to impose an Anti-Social Behaviour Order where an offender is "incapable of complying with an order"..."then an order is incapable of protecting the public and cannot therefore be said to be necessary to protect the public". (at §10)

Factors to consider:

1. Is it necessary to impose a closure order, if not why? i.e. only in certain circumstances a respondent behaves in way alleged, is there a care plan or a recent change to a care plan that could be monitored as an alternative, or a change of medication, is there a change of behaviour in the Respondent's attitude, i.e. now willing to engage with a care plan or treatment plan that was previously refused? Is there any additional new tenancy support.
2. Is the behaviour as bad frequent or as bad as portrayed and or as intrusive? Are there ways to show it is not as bad as made out. It may be helpful to demonstrate it in a clear, concise way for a Judge, i.e. a schedule of allegations with the Respondents response – limit vast allegations made or a graph or timeline.
3. Proceedings under ASBCPA 2014 are draconian and should only be used as a *last resort*. Especially in circumstances such as injunction and closure order applications is it possible to argue it would be better for evidence to be tested during possession proceedings (if the same have been issued).

Case law

Harris v London Borough of Hounslow [2017] EWCA Civ 1476:

COA confirmed that a tenant who requested a statutory review outside the relevant seven days was not entitled to a statutory review or a fresh NoSP giving a further seven days to request a statutory review.

Goode v Paradigm Housing, October 2015:

County Court Appeal of a Ground 7A possession claim, following a closure order. The tenant did not have legal representation at the first hearing and had requested an adjournment to seek the same and it was refused. No review had been offered. Whilst permission granted to appeal the matter settled with an SPO

Paragon Asra Housing Limited v James Neville [2018] EWCA Civ 1712:

Equality Act and Eviction

The appeal on the issue of whether disability discrimination should be considered afresh on an application for stay of warrant following breach of a suspended possession order.

When making the possession order, the court has undertaken the relevant proportionality inquiry. It has satisfied itself that possession must be given and that, if it is not, the order can lawfully be enforced. The order is binding between the parties. The tenant can have no right, absent any relevant change of circumstances, to require the court to re-consider the same question upon the landlord's claim to enforce the order. The recognition of such a right would be a recipe for repeated applications of a vexatious nature. There is no such right. There will be cases where between the making of the possession order (whether suspended or outright) and its enforcement **there has been a material change of circumstances** such that a legitimate question will arise as to whether it is still proportionate to enforce the possession order. In such a case, the court will have to re-consider the section 15(1)(b) proportionality inquiry.
Comment

Once there has been a determination of the merits of possession, and of any Equality Act issues, in the making of a possession order – suspended or otherwise – this judgment makes clear that there would have to be a substantial change in circumstances that would require a fresh consideration on Equality Act grounds at warrant stage. Further acts that would amount to a breach of suspended possession order, without more, or without something different, will not merit a re-examination of a disability defence at warrant stage.

Note for practitioners – what happens when possession is settled by an SPO- is it worth drafting the preamble to include any agreement reached between the parties on the issue of disability?

Jones v Birmingham City Council and another [2018] EWCA Civ 1189:

COA has confirmed that civil injunctions do not engage Article 6 of the European Convention on Human Rights (ECHR) (see Legal update, Civil injunctions for preventing gang-related violence not incompatible with Article 6 ECHR (Court of Appeal)).

Forward v Aldwyck Housing Group Limited Number: [2019] EWHC 24 (QB)

This was an appeal against a possession order made against a vulnerable individual. The only ground of appeal was that the judge was wrong to have rejected a defence to the possession claim based upon the public sector equality duty in section 149 of the Equality Act 2010 ("PSED"). The appeal was dismissed as it was decided it was proportionate to evict.

Dacorum BC v Powell: Heard in the Court of Appeal at the end of last year and awaiting judgment. Re impact of Public Sector Equality Duty on warrant application (especially when other arguments have failed!).

R (on the application of Cleary) v Highbury Corner Magistrates' Court [2006] EWHC 1869 (admin) it was held at §7 inter alia:

"...since a closure order may well dispossess people from their homes for up to six months, article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms is of central importance, and the magistrates' court cannot make a closure order unless they are satisfied that it is necessary and proportionate to do so to achieve...a legitimate aim".

The Home Office released New Guidance on the use of the Anti-social Behaviour, Crime and Policing Act 2014 which was published on 24 December 2017.

- Section 2.1 covers civil injunctions
- Section 2.6 Closure powers
- Section 2.7 Absolute ground for possession

Legal Aid

- 1- In Possession proceedings relating to ASB then an application for funding should be made in the usual way. It is possible to delegate functions if there is a hearing/direction to be complied with within 28 days.
- 2- Injunction proceedings
 - a. Under Part 1 ASBPCA 2014 *are* in scope, under paragraph 36 Schedule 1 of LASPO 2012 and delegated functions can be exercised in the usual way (see above).
 - b. To make an application to *discharge* an injunction then this should be made under the "Residual" category instead of housing, note that CCMS does not let you record using delegated functions but it is possible to delegate, please see http://ccmstraining.justice.gov.uk/data/assets/pdf_file/0017/8090/ASBSCPA.pdf the attached guide and link below.
 - c. Do *not* make the mistake of applying under Housing Act 1996- injunction for ASBPCA 2014 injunction applications on CCMS (which appears to still be available) because your application will be rejected as the relevant part of the Housing Act 1996 has been repealed.
- 3- Closure Orders are *not* in scope of LASPO 2012 so Exceptional Case Funding needs to be obtained to fund these cases. In making the application set out that there is a risk that the client will lose their home if unable to be legally represented to defend the closure order, owing to the availability of a mandatory ground for possession in circumstances where a possession order is made. Given that you cannot delegate, there may be an issue in representing at first hearing unless the client is able to seek pro bono assistance at the first hearing.

Practical Approach

- Consider CPR 18 requests – good reason to adjourn proceedings.
- Will it be necessary to witness summons an individual to give evidence?
- Consider evidence carefully and look for technical failures, have the correct procedures and review process been followed.
- Schedule of allegations – take charge, narrow the issues to be tested.
- Obtain evidence at an early stage.
- Be pragmatic, if discretionary grounds relied upon (reasonable and proportionate) is there a solution to abate nuisance, can it be abated, how? make proposals.
- Consider policy arguments i.e, Home Office guidance, have these been complied with.
- In relation to decision making, especially with vulnerable tenants, consider history and engagement, what did the local authority PRP know about the tenant before issuing proceedings- is this relevant to a pleading a defence?
- Does your client have capacity – there is a presumption of capacity and the party alleging incapacity has the burden of rebutting the presumption.
- Signpost, i.e. is a Care Act 2014 assessment needed
- Court of Protection (“COP”) has the power to make decisions on personal welfare and property affairs issues, including dealing with where a person should live. COP will consider the persons best interest and consider their wishes and feelings.
- GDPR – there is always extremely sensitive material being tested, be mindful of protecting your client. Don't just serve sensitive material, try and agree in advance, who will be looking at it and what will happen to the document at the end of the matter, i.e. will it be destroyed? You do not want your client's personal information shared within different departments at the Council.