

Cornerstone on Anti-social Behaviour

Second edition

Kuljit Bhogal LLB (Hons) (London)
Barrister, Cornerstone Barristers

Bloomsbury Professional

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3.01 *The civil injunction to prevent anti-social behaviour*

A THE HISTORY

3.01 The provisions relating to civil injunctions in Part 1 came into force in March 2015.²

The Coalition Government felt that new powers were required because anti- social behaviour orders (ASBOs) did not work, far too many were breached and they were treated by some as a 'badge of honour'. Practitioners also saw them as bureaucratic, slow and expensive to obtain. The use of other tools, such as anti- social behaviour injunctions (ASBIs), had increased and these were considered to be more effective. It is against this background that the Government sought to introduce the crime prevention injunction.³ During the Bill's passage through Parliament the crime prevention injunction became the injunction to prevent nuisance or annoyance (IPNA).⁴ The label IPNA had to be abandoned as a result of opposition to the way in which anti-social behaviour had been defined.⁵ What one is left with is simply the civil injunction, often referred to as simply the anti- social behaviour injunction or the s 1 injunction.

Of all the measures introduced by the Act, the injunction was the one which attracted the most concern from civil liberties groups, those interested in youth justice and those concerned about the powers of the state.

The Anti-Social Behaviour, Crime and Policing Bill ('the Bill) was described as 'fundamentally flawed' by 24 organisations who wrote a joint letter to the Home Secretary published in the Times.⁶ Their principal concern was expressed thus:

'Such ill-thought out legislation will sweep up all kinds of non-criminal and non-serious behaviour – wasting police time and clogging up the courts. It threatens to take resources away from genuinely harmful or distressing behaviour, where the police and other services should be focussed.'

Large parts of the Parliamentary debates focused on the definition of 'anti- social behaviour'. The Bill had defined anti-social behaviour as conduct causing or likely to cause 'nuisance or annoyance', regardless of the body making the application, the age of the respondent or whether the behaviour was related to a person's occupation of property.

From a very early stage there was concern that the definition of anti-social behaviour had been set at an inappropriately low level. Civil liberties organisations and charities warned that the Act could criminalise any nuisance or annoying behaviour in the streets, including peaceful protest, street preachers and even carol singers or church bell ringers.

- 2 The delay was caused by the need to amend the Legal Aid, Sentencing and Punishment of Offenders Act 2012 to allow public funding to be available in respect of injunctions.
- 3 See the Home Office's consultation document *More Effective Responses to Anti-Social Behaviour* (February 2011) and the White Paper *Putting Victims First: More Effective Responses to Anti-Social Behaviour* (May 2012). There is a fuller discussion of the consultation in Chapter 1.
- 4 In the draft Anti-Social Behaviour, Crime and Policing Bill.
- 5 For further details see Chapter 1.
- 6 10 June 2013. They included Liberty, JUSTICE, the Association of Youth Offending Team Managers, Big Brother Watch and the Children's Society, their comments being directed at the whole Bill and not just the proposed injunction.

The powers which have been replaced **3.02**

Lord Hope summarised many of the concerns in an instructive speech during the Parliamentary debates.⁷ His concerns struck a chord with the House, peers voting 306 to 178 in support of an amendment by the crossbench peer Lord Dear (a former chief constable of the West Midlands Police) which re-introduced (from the ASBO) a test of conduct causing or likely to cause 'harassment, alarm or distress'.⁸ The Government was then forced to table its own amendments to the definition of anti-social behaviour, changing the test from simply nuisance or annoyance to what is now found in s 2 of the Act.⁹

B THE POWERS WHICH HAVE BEEN REPLACED

3.02 The injunction is created by Part 1 of the Act, ss 1–21.10

The following powers have been repealed (subject to the transitional arrangements covered at 3.56 below):

- (a) ASBOs under ss 1 and 1B of the Crime and Disorder Act 1998 (CDA 1998);
- (b) anti-social behaviour injunctions, injunctions against the unlawful use of premises and injunctions against a breach of tenancy agreement (often collectively referred to as 'ASBIs') under ss 153A–153E of the Housing Act 1996 (HA 1996);
- (c) drinking banning orders under ss 1–14 of the Violent Crime Reduction Act 2006 (VCRA 2006);

- (d) intervention orders under s 1AA of the CDA 1998; and
- (e) individual support orders under s 1G of the CDA 1998.

Vandalism, public drunkenness, aggressive begging, irresponsible dog ownership, noisy or abusive behaviour towards neighbours or bullying are all examples of when an injunction could be sought.¹¹ In practice, the new injunction can be used in almost¹² all of the situations previously covered by ASBIs. The Act does not affect the provisions relating to gang injunctions.¹³

The s 1 injunction combines the ASBO and the ASBI. The tests that were relevant to each of these old orders have survived with the result that many of the concepts covered in this chapter will be familiar to practitioners. However, the s 1 injunction is more than just the old ASBI with a new label. In particular there are now requirements to consult and/or inform, a greater number of bodies able

- 7 Extracts from his speech in the House of Lords can be found in Chapter 1.
- 8 HoL, Report stage, 1st sitting, 8 January 2014.
- 9 Nuisance or annoyance for housing-related anti-social behaviour; harassment, alarm or distress for everything else.
- 10 All statutory references are to the Anti-Social Behaviour, Crime and Policing Act 2014 unless otherwise stated.
- 11 Revised *Statutory Guidance for Frontline Professionals*, p 23.
- 12 There may be some terms and conditions of tenancy which could have been relied upon in an ASBI sought under HA 1996, s 153D where the behaviour may not meet the test for the new injunction.
- 13 Found in the Policing and Crime Act 2009.

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to apply and the injunction can include not only prohibitions but also positive requirements.

The s 1 injunction is undoubtedly a powerful remedy which can result in a person (not a child – see 3.22) being excluded from their home in certain circumstances. It can include terms which place significant limitations on a person's ability to, for example, (i) associate with others; (ii) access public places; and/or (iii) leave his own home as a result of a curfew. It can be applied for without notice being given to a respondent and a power of arrest can be attached. Applicants are advised to exercise care in ensuring that they seek injunctions only in those cases which merit them and then always in terms that are necessary and proportionate. Otherwise, as with almost every piece of new legislation in this field in the last 20 years, appeals will be likely.

The transitional arrangements and the enforceability of orders which were obtained prior to the Act coming into force are considered in more detail at 3.56 below.

C WHEN CAN AN INJUNCTION BE OBTAINED?

3.03 A s 1 injunction is available where a court:

- (i) is satisfied that the respondent has engaged or threatens to engage in **anti-social behaviour**; and
- (ii) considers it **just and convenient** to grant the injunction for the purpose of preventing the respondent from engaging in anti-social behaviour.¹⁴

These will be familiar concepts to practitioners and are considered below.

The Act specifically provides that the existence of anti-social behaviour is to be proved to the civil standard of proof.¹⁵ Unlike with ASBOs, there is no scope for argument on the issue of the burden of proof: even where an injunction contains requirements that are particularly restrictive or especially severe, they do not lose their civil character, as they are fundamentally preventive in nature, not punitive.¹⁶ Breaches of injunction, however, must be proved to the criminal standard of proof, as the court is being invited to punish the offender for breaching the injunction: see 3.44 and 3.54 below.

D WHAT IS ANTI-SOCIAL BEHAVIOUR?

3.04 Anti-social behaviour is defined in three alternative ways in s 2 as:

(a) conduct that has caused, or is likely to **cause harassment, alarm or distress** to any person;

¹⁴ s 1(1)–(3).

¹⁵ See s 1(2).

¹⁶ *Jones v Birmingham City Council* [2018] EWCA Civ 1189, [2018] 3 WLR 1695 per Sir Brian Leveson P.

What is anti-social behaviour? **3.05**

- (b) conduct capable of causing a **nuisance or annoyance** to a person in relation to that person's occupation of residential premises; or
- (c) conduct capable of causing **housing-related**¹⁷ **nuisance or annoyance** to any person.

The first alternative undoubtedly presents the 'highest' test. It applies irrespective of the identity of the applicant or the nature of the anti-social behaviour alleged. The second and third alternatives present 'lower' tests and only apply in the circumstances set out in the following paragraphs.

The second alternative applies only where the application for an injunction is made by a (social) housing provider,¹⁸ local authority or a chief officer of the police.

The third alternative applies only where the conduct in question is 'housing-related', meaning that it directly or indirectly relates to the housing management functions of a housing provider or local authority.

The reasons for employing a different test for 'housing related' conduct becomes clear from the Parliamentary debates: anti-social behaviour in the context of housing was considered to be of a 'different order' in that 'victims could not be expected to have the same degree of tolerance to anti-social behaviour where it takes place on their doorstep or in the immediate vicinity of their home. It is simply not reasonable to expect victims to move home in such circumstances in the same way as they could walk away from anti-social behaviour in a shopping centre or a public park'.¹⁹

The statutory definition of anti-social behaviour requires an understanding of the meaning of:

- (a) harassment, alarm or distress;
- (b) nuisance or annoyance; and
- (c) housing related.

These phrases are considered further below.

Harassment, alarm or distress

3.05 Practitioners will recognise the phrase 'harassment, alarm or distress' from the CDA 1998 in relation to ASBOs.

In *R v Jones*²⁰ the Court of Appeal gave guidance as to the meaning of this phrase:

'... we do wish to draw a distinction between activity likely to cause harassment, alarm or distress, and activity which merely causes frustration, disappointment, anger, or annoyance. That is plainly not what the Crime

¹⁷ Defined in s 2(3), see further 3.07 below. ¹⁸ See s 20(1).

¹⁹ HoL, Third Reading, 27 January 2014, Under-Secretary of State, Home Office, Lord Taylor of Holbeach, col 981.

²⁰ [2006] EWCA Crim 2942.

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and Disorder Act 1998 is aimed at. It is aimed at actions likely to cause what might be globally described as “fear for one’s own safety”; merely being frustrated at the delay on a train does not come within that meaning, even though in one sense it might be said to cause distress.’

Although there has been a change in the standard of proof²¹ the observations set out above remain relevant to defining ‘harassment, alarm or distress’ for the purposes of the new injunction.

Nuisance or annoyance

3.06 The phrase ‘nuisance or annoyance’ has appeared in housing statutes for many years, including the discretionary grounds for possession, Housing Act 1985, Sch 2, Ground 2, (secure tenancies) and Housing Act 1988, Sch 2, Ground 14, (assured tenancies). It also appeared in the test for ASBIs.

The caselaw under those provisions is relevant to an application for an injunction under s 1. Whether conduct is capable of causing nuisance or annoyance is often obvious, may be case-specific and is often a question of fact and degree. It is not restricted, for example, to private or public nuisance as defined by the law of tort. It has been held that nuisance is to be assessed ‘according to plain and sober and simple notions’²². ‘Annoyance’ was considered in *Tod-Heatly v Benham*:²³

“‘Annoyance’ is a wider term than nuisance, and if you find a thing which reasonably troubles the mind and pleasure, not of a fanciful person or of a skilled person who knows the truth, but of the ordinary sensible English inhabitant of a house—if you find there is anything which disturbs his reasonable peace of mind, that seems to me to be an annoyance, although it may not appear to amount to physical detriment to comfort. You must take sensible people, you must not take fanciful people on the one side or skilled people on the other ... it seems to me there is danger of annoyance, though there may not be a nuisance.’

The courts have held that the following behaviour constitutes nuisance or annoyance:

- (a) playing of loud music, slamming car doors, revving of engines;²⁴
- (b) racial abuse;²⁵
- (c) repair of motor vehicles;²⁶

²¹ For the purposes of ASBOs the existence of harassment, alarm or distress has to be proved to the criminal standard, beyond reasonable doubt: *R (McCann) v Crown Court at Manchester, Clingham v Kensington and Chelsea Royal London Borough Council* [2002] UKHL 39, [2003] 1 AC 787.

²² *Walter v Selfe* (1851) 4 De G & Sm 315. 322, per Bruce-Knight VC. ²³ (1888) 40 Ch D 80, 98, per Bowen LJ.

²⁴ *Woking Borough Council v Bistram* (1995) 27 HLR 1, CA.

²⁵ *Kensington & Chelsea Royal London Borough Council v Simmonds* (1997) 29 HLR 507.

²⁶ *West Kent Housing Association Limited v Davies* (1999) 31 HLR 415, CA.

(d) stone-throwing and spitting;²⁷

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- (e) supply of drugs and consequent noise and disturbance caused by frequent visitors to premises;
- (f) abuse, harassment and intimidation; ²⁸
- (g) damage to property;²⁹
- (h) setting vehicles alight;³⁰
- (i) throwing bricks and iron bars at motor vehicles;³¹
- (j) graffiti.³²

Other examples of behaviour which is capable of causing nuisance or annoyance include: groups of youths congregating so as to cause obstruction or intimidation, feeding pigeons so that they regularly visit a particular property (with the consequent noise, dust, faeces and feathers), late night DIY activities, regular holding of bonfires, hoarding goods in communal areas/gardens and domestic abuse which can be heard by neighbours.

Housing-related

3.07 Section 2(1)(c) relates to conduct causing ‘housing-related’ nuisance or annoyance.

This is defined in s 2(3) as ‘directly or indirectly related to the housing management functions’ of a housing provider or a local authority.

‘Housing management functions’ are defined in s 2(4) as being those functions conferred by an enactment or the powers and duties of the housing provider or local authority as the holder of an estate or interest in housing accommodation. These would include:

- estate management;
- protecting the physical integrity and sustainability of housing stock and common parts;
- ensuring tenants comply with their obligations;
- tackling anti-social behaviour, maintaining a safe environment for tenants;
- protecting agents and employees in their work.

27 Ibid.

28 *Knowsley Housing Trust v McMullen* [2006] EWCA Civ 539, [2006] HLR 43, CA.

29 Ibid.

30 Ibid.

31 Ibid.

32 *R v Brzezinski* [2012] EWCA Crim 198, CA.

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In *Swindon BC v Redpath*³³ the Court of Appeal adopted a broad view of housing management functions and made it clear that ‘housing-related’ in the context of an ASBI was not limited to a local authority’s own tenants:

’55 ... viewed as a whole, I consider that the council’s housing management functions easily embrace its sense of responsibility to its continuing tenants and also to owner-occupiers in Warneage Green for the conduct of its former tenant, Mr Redpath, who has pursued his vendetta against his former neighbours irrespective of the loss of his tenancy.

56 In this connection, I do not accept Mr Luba's submissions that a local authority would not be acting within its housing management functions if it sought an ASBI to prevent dog-fouling in the vicinity of its tenants' front- doors, irrespective of whether that might or might not affect their rent. Nor does it seem to me to matter whether such fouling takes place on the street, but so as to annoy the authority's tenants, as distinct from within the confined boundaries of a local authority's housing estate. Nor do I accept his submissions about the limited circumstances in which there would be jurisdiction where the defendant to be enjoined puts a brick through someone's window. It seems to me that where, as here, such conduct puts any of the landlord's tenants in fear, there is jurisdiction.'

There is no reason why any more limited approach should be adopted to housing management functions for the purposes of the s 1 injunction.

Just and convenient

3.08 The requirement that the court must consider it 'just and convenient' to grant the injunction for the purpose of preventing the respondent from engaging in anti-social behaviour represents a change from the previous ASBO/ ASBI regime. With the ASBO, the court had to be satisfied that an order was 'necessary'. With the ASBI the court had a general discretion to make an order where satisfied that the alleged anti-social behaviour, unlawful use of premises or breach of tenancy existed.

The extent to which this requirement poses an additional hurdle remains untested and in practice appears to pose little difficulty for applicants if they can prove their factual case. The test may ultimately prove to be a lower standard than 'necessary'. An applicant for a s 1 injunction under the Act is certainly well advised to submit evidence of the steps that have been taken in an attempt to address the behaviour before the application for the injunction was made.

It was established under the previous legislation that, where there were several different tools that a local authority could use to address a particular problem, the applicant authority essentially had a choice: there was no principle of 'closest fit' that restrains judicial discretion to make an order where the statutory preconditions are satisfied.³⁴

33 [2009] EWCA Civ 943, [2010] HLR 13.

34 *Birmingham City Council v James* [2014] 1 WLR 23.

When does the anti-social behaviour need to have occurred? **3.09**

This principle could usefully be deployed to meet an argument that a civil injunction is not just or convenient because alternative powers are also available. In practice, applicants should consider each of the various alternative powers in proportionality assessments as part of their decision-making process, having regard to their ASB (and, where appropriate, other) policies.

Conversely, it is also relevant to note that as long ago as February 2000 the Court of Appeal confirmed in *Newcastle City Council v Morrison*³⁵ that an authority is not required to apply for an injunction to restrain unlawful conduct before they commence possession proceedings:

‘Thirdly, I think that the recorder was wrong to see the question of reasonableness as turning on the notion that there was an alternative and, as he thought, more appropriate remedy available. In *Sheffield City Council v Jepson* (1993) 25 H.L.R. 299, it was submitted that the authority landlord ought to have sought an injunction before resorting to possession proceedings. Ralph Gibson L.J. held that, although the authority could have obtained an injunction rather than seeking possession, he saw no reason why a council should be required or expected to take that course. It is in the public interest that necessary and reasonable conditions in tenancy agreements of occupiers of public housing should be enforced fairly and effectively. Mr Holland suggests this a different case where the tenant was personally in breach of a tenancy agreement in relation to the keeping of a dog. It seems to me that what Ralph Gibson L.J. said in the *Sheffield* case clearly applies to the present case.’

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