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CRIME CONTROL THROUGH HOUSING MANAGEMENT

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DEPARTMENT OF LAW

**THESIS SUBMITTED FOR THE DEGREE OF
MASTER OF JURISPRUDENCE**

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ABSTRACT

Crime control through housing management

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M.Jur Thesis

2005

Over the last decade the management of social housing in England and Wales has extended to the formal control of bad behaviour. This thesis charts the political development of this increasingly important function and the legal infrastructure within which it operates. Part one explores the development of the crime control function of social landlords over the last decade within its political, social and economic context. Part two then provides a critique of the resultant emphasis upon public protection within housing policy by identifying the conflicts and tensions this has created with the competing discourses of legal due process and welfarism.

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Part I

AN OUTLINE OF THE DEVELOPING CRIME CONTROL FUNCTION OF SOCIAL LANDLORDS

This first part explores the development of the crime control function of social landlords over the last decade within its political, social and economic context. It sets out a brief history of council housing in England and Wales and the recent rise of the registered social landlord as an equal, if not superior, partner in social housing provision. It explains too the process by which social housing has become residualized, marginalised and consequently stigmatised as 'inherently criminogenic' within political discourses, making it a focus for government intervention. It then outlines the controversial legal sanctions now available to social landlords to manage crime and disorder around their housing stock and assesses the discourse of public protection used to justify them. Finally, it notes the recent creation of the section 218A duty on social landlords to prepare and publish policies and procedures on anti-social behaviour, drawing out the implications of this particular development for the contemporary role of housing management in policing bad behaviour.

Chapter 1

A BRIEF LEGAL AND POLITICAL HISTORY

1. Social housing provision in England and Wales

From the end of the First World War and Lloyd George's promise of 'Homes Fit for Heroes' the state, through local government, has to a greater or lesser extent taken a hand in the provision of rented residential housing.¹ However, in the immediate period following the Second World War the council sector bore little resemblance to its counterpart today. Although still the predominant element of the social rented sector, it has decreased greatly in size. Whilst it provided 30 per cent of all housing in the United Kingdom at its peak in 1971, it consists of just 14 per cent today.² As explored later in this thesis, the demographic of council residents has also altered considerably; from affluent working-class householders to a sector accommodating concentrations of the poor and socially excluded.

The security of tenure of local authority tenants is governed by statute. Prior to 1980, council tenants, unlike their counterparts in the private rented sector, enjoyed almost no statutory protections vis-à-vis their landlord.³ Local housing authorities, as public authorities, were deemed responsible landlords and therefore appropriately regulated by political rather than legal mechanisms.⁴ However, this has now changed. Under the Housing Act 1985 council tenants are predominantly "secure" tenants.⁵ A secure tenancy provides strong security of tenure, enabling landlords to regain possession of the property in only limited circumstances. It also allows tenants to exit the sector by purchasing their property under the 'right to buy' scheme. Furthermore, the allocation of council housing is also now regulated by statute. Councils must give reasonable preference to certain categories of

¹ D Hughes and S Lowe, *Public Sector Housing Law* (London: LexisNexis, 2000), Ch 1.

² Office of National Statistics, *Living in Britain: the 2002 General Household Survey* (London: HMSO, 2004).

³ Aside from the notice requirements imposed by the Protection from Eviction Act 1977.

⁴ A Stewart, *Rethinking Housing Law* (London: Sweet & Maxwell, 1996), Ch 4.

⁵ Although the introductory and demoted tenancies, introduced specifically to tackle crime and disorder, are of increasing importance.

vulnerable household, and must also provide short-term accommodation to the homeless.⁶

Whilst the council housing sector continues to contract, the growth of housing associations; private, often charitable, not-for-profit organizations providing homes for low-income households in general or more specifically particular vulnerable groups such as the mentally-ill or homeless, has increased exponentially in recent years. Registered social landlords (RSLs) are those housing associations registered with the Housing Corporation, a non-departmental public body that provides investment but also regulates the organizations they fund. RSLs have become increasingly institutionalized. Lately perceived by government as an answer to social housing provision beyond the state, they have taken control of large quantities of council stock through Large-scale Voluntary Transfers (LSVTs), often set up by councils themselves for this purpose.⁷ There has been a concentration too of public funding for new housing in the RSL sector. Housing associations and RSLs now make up a total of six per cent of all housing in the United Kingdom.⁸

Though often functioning in a manner indistinguishable from local housing authorities, housing associations work within a substantially different legal framework. Their tenants are subject to an alternative statutory regime to those within the council sector. The Housing Act 1988 provides them with the same protections afforded to private rented sector tenants; either relatively high security under the assured tenancy or extremely low security under the assured shorthold tenancy. Only guidance and regulation by the Housing Corporation ensures that RSLs at least predominantly provide fully assured tenancies to their tenants. Unlike local housing authorities, housing associations are under no direct obligation to house vulnerable households. However, registered social landlords

⁶ See Chapters VI and VII of the Housing Act 1996.

⁷ Transfers are directed particularly towards the government's "decent homes" standard, under which all social housing should be of a reasonable standard of repair by 2010, as registered social landlords, outside public sector controls, are able to raise private finance. 194 LSVTs by local authorities have now been approved, involving nearly 850,000 dwellings in England.

⁸ Office of National Statistics, above n 2.

are under a statutory duty to provide reasonable assistance to councils to enable them to fulfil their welfare role.⁹

There remains considerable confusion as to whether housing associations constitute public bodies with respect to their amenability to judicial review and the provisions of the Human Rights Act 1998.¹⁰ It appears from case law that associations are not subject to judicial review when exercising “their normal and essential functions as landlords”, even when they receive public funds.¹¹ However, it is arguable that this conclusion, established over 25 years ago, reflects an outdated source-based approach to the supervisory jurisdiction of the High Court. The more recent function-based analysis looks not to the origin of a body’s power – in this case that the landlord-tenant relationship derives from private law – but to whether that power is exercised in support of a public function.¹²

The status of housing associations for the purposes of the Human Rights Act 1998 is also uncertain. Whilst RSLs are not “core” public authorities for the purpose of section 6 of the 1998 Act, they may still be subject to the legislation in particular situations if found to have engaged in “functions of a public nature” in accordance with section 6(3)(b). The decisions in *Poplar Housing & Regeneration Community Association Ltd v Donoghue*¹³ and *R (on the application of Heather) v Leonard Cheshire Foundation*¹⁴ illustrate the case-by-case approach taken by the courts; housing associations can constitute public authorities, but only when carrying out functions “enmeshed” with those of the state.¹⁵ Relevant factors include the extent of public funding of the activity, whether the body was taking

⁹ Housing Act 1988, s 170.

¹⁰ J Morgan, ‘The Alchemists’ Search for the Philosophers’ Stone: The Status of Registered Social Landlords under the Human Rights Act’ (2003) 66(5) *MLR* 700.

¹¹ *Peabody Housing Association Ltd v Green* (1978) 38 P&CR 644. In this case the particular function was the service of a notice to quit.

¹² *R v Panel on Take-overs and Mergers, ex p Datafin plc* [1987] QB 815. Indeed, there has been a more recent suggestion that the situation could be different if an association takes over all the council stock in an area: *R v West Kent Housing Association, ex p Sevenoaks District Council* (1994) ‘Inside Housing’ 28 October, p 3. C.f. *R v Servite Houses, ex p Goldsmith* [2001] LGR 55.

¹³ [2002] QB 48.

¹⁴ [2002] 2 All ER 936.

¹⁵ *Poplar Housing & Regeneration Community Association Ltd v Donoghue* [2002] QB 48.

the place of a public authority, whether the body was provided with statutory powers and whether it exercised those powers in carrying out the activity.¹⁶

Social housing at the start of the 21st century is thus marked by considerable heterogeneity. The organisations operating within the sector are highly diverse, both in size, objectives and operational culture. They extend from the large, democratically-elected metropolitan councils to small housing associations providing supported housing for a particular vulnerable group. However, the growing importance of registered social landlords in the provision of mainstream social housing may soon lead to a degree of legal convergence within the sector. In 2002 the Law Commission published its proposals for the reform of the legal regulation of rented housing provision in England and Wales.¹⁷ A key theme of the consultation paper was the drawing together of the different statutory security regimes protecting the tenants of local authorities and registered social landlords. It suggested the creation of a single social tenancy regulating both types of social landlord to reflect the developing role of RSLs as equal partners to councils in the provision of housing services.¹⁸ It also argued that registered social landlords should be deemed by statute to be public authorities for the purposes of the Human Rights Act 1998, in relation to their not-for-profit housing activities.¹⁹

2. A developing crime control function

¹⁶ *R (on the application of Heather) v Leonard Cheshire Foundation* [2002] EWCA Civ 366. For more recent cases on the meaning of “functions of a public nature” not directly concerning registered social landlords see *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37 and *R (on the application of Beer t/a Hammer Trout Farm) v Hampshire Farmers Markets Ltd* [2003] EWCA Civ 1056.

¹⁷ Law Com 162, *Renting Homes (1): Status and security* (London: HMSO, 2001); Law Com 168, *Renting Homes (2): Co-occupation, transfer and succession* (London, HMSO, 2002).

¹⁸ The Scottish Executive has already implemented an almost identical scheme through the Scotland (Housing) Act 2001.

¹⁹ Law Com 162, above n 17, para 5.77. This has received a frosty reception from registered social landlords themselves who argue that such a status could have far-reaching consequences in terms of funding arrangements and their status for the purposes of European Community law. Though note that the European Commission has recently argued that RSLs should be deemed public authorities for the purposes of directives on procurement, strengthening the case for general public authority status: *Legal Action*, October 2004, p 25.

Social housing management has always entailed an element of informal social control, operating through the dual processes of allocation and eviction.²⁰

However, the extent to which providers have adopted an interventionist role and sought to modify the behaviour of their tenants differs both between local authorities and housing association sectors and at various points in history.²¹

Octavia Hill, the late-Victorian philanthropist and representative of the early housing association movement, was quick to exclude those tenants who failed to uphold her own rigorous moral standards.²² Local authorities, on the other hand, have generally preferred to manage property not people, taking interest only in traditional management issues such as rent collection and disrepair.²³

In the past decade, however, commentators have noted the development of an explicit and co-ordinated crime control function for social landlords stretching beyond informal social control.²⁴ These landlords have adopted the techniques and strategies of policing such as surveillance²⁵ and witness protection,²⁶ and more importantly (and controversially) are now armed with a raft of formal policing tools with which to manage problem behaviour in and around their housing stock. This has led Cowan to conclude that “housing and its management has become a crucial part of the crime control industry; housing departments have become the intermediators in the new criminal justice system”.²⁷

How then have housing officers come to play such a key part in national policing strategies? Jacobs *et al.* have recently posited three conditions that must be met in order for a particular problem to be constructed and acted upon within

²⁰ E Burney, *Crime and Banishment* (Winchester: Waterside Press, 1999).

²¹ D Clapham, ‘The social construction of housing management’ (1997) 34(5-6) *Urban Studies* 761-774.

²² Burney, above n 20.

²³ A Power, *Property before people* (London: Allen & Unwin, 1987). This has not always been the case. The “laissez-faire” approach to housing management reflects the eras in which local government provided housing for relatively affluent householders. During the 1930s, on the other hand, when it took on responsibility for those made homeless by slum clearance, the interventionist approach temporarily rose to the fore: Clapham, above 21.

²⁴ D Cowan, *Housing Law and Policy* (Basingstoke: Macmillan, 1999); D Cowan and C Pantazinis, ‘Social landlords as crime control’ (2001) 10(4) *Social and Legal Studies* 435-457; D Clapham, above n 21.

²⁵ See *Martin v United Kingdom* (63608/00), 19 February 2004 for a challenge before the ECtHR of a local authority’s surveillance operation against an alleged ‘nuisance neighbour’.

²⁶ See Chapter 2.

²⁷ Cowan, above n 24, p 492.

housing policy: the creation of a convincing narrative, the construction of a "coalition of support" and the subsequent implementation of institutional measures to address the issue.²⁸ The particular narrative around which the crime control function of social landlords has developed in recent years is the now ubiquitous problem of "anti-social behaviour", discussed in greater detail in Chapter 3. Chapter 2 outlines the raft of legal tools that constitute the institutional response. At this point, however, it can be noted that a coalition of support has developed between central government and certain social landlords as a result of a confluence of concern about increasing levels of crime and disorder within certain 'problem estates'.

(a) National government

At the start of the 21st century vast socio-economic inequality still exists in the United Kingdom. This polarisation is spatially-defined, with the existence of pockets of severe social exclusion and deprivation throughout the country. Residents in these areas suffer from a series of intrinsic problems: unemployment, discrimination, poor skills, low incomes, poor housing, high crime, ill health and family breakdown, creating a vicious cycle of deprivation.²⁹ It is a particular concern of the current Labour government, which has made a specific commitment to addressing the problems of these communities as part of its wider agenda to reduce social exclusion. It is for this purpose that it established the Neighbourhood Renewal Unit, as part of its Social Exclusion Unit, which recently published a National Strategy for Neighbourhood Renewal.³⁰

It is notable, however, that over the last decade, successive governments have directed their work on neighbourhood renewal narrowly towards a number of predominantly inner-city local authority housing estates, a move that has led consequently to a tenure-based association between social exclusion and council

²⁸ K Jacobs, J Kemeny and T Manzi, 'Power, discursive space and institutional practices in the construction of housing problems' (2003) 18(4) *Housing Studies* 429-446.

²⁹ J Pitts and T Hope, 'The Local Politics of Inclusion' (1997) 31(5) *Social Policy & Administration* 37-58.

³⁰ SEU, *A New Commitment to Neighbourhood Renewal: A National Strategy Action Plan* (London: HMSO, 2001). See also www.neighbourhood.gov.uk.

housing. This association is not without justification. Throughout the latter half of the 20th century, public sector accommodation experienced increasing “residualization” and the socio-economic marginalisation of many of its residents.³¹ Successive government policies, particularly but not solely as a consequence of Conservative ideology, have resulted in the progressive dismantling of the council sector. Tenants have been encouraged to exit the tenure through the right to buy legislation and the promotion of home ownership, whilst the building of local authority stock has ground to a halt. In addition, this decreasing council stock has been used to house greater numbers of vulnerable households, many of whom have crossed tenures from a declining private rented sector: as we have seen, under homelessness legislation and the regulation of general allocation procedures, local authorities have been subject to a specific duty to house certain vulnerable homeless households unable to obtain accommodation in the private market.³² The ultimate consequence of these processes is that in certain areas of council housing, older established high-income households vacated these neighbourhoods leaving in their place concentrations of children, young single adults, lone parents, single elderly people and immigrant families. Council housing has established itself as a safety-net tenure providing accommodation to households without alternatives.³³

It was this association between social exclusion and deprivation in areas of council housing that led to national strategies focusing upon neighbourhood renewal through intensive social housing management. For instance, the implementation of both the Priority Estates Project (PEP) and Housing Action Trusts (HATs) during the 1970s and 1980s focused upon ‘problem’ council estates

³¹ A Murie, ‘Linking Housing Changes to Crime’ (1997) 31(5) *Social Policy & Administration* 22-36.

³² Structured allocation procedures for homeless applicants were originally implemented by the Housing (Homelessness) Act 1977. The relevant legislation is now Part VI of the Housing Act 1996 (as amended by the Homelessness Act 2002). Note that s 170 of the Housing Act 1996 places an obligation on registered social landlords to co-operate to such extent as is reasonable in the circumstances in offering accommodation to people with priority under a local authority’s allocation scheme at that authority’s request.

³³ A Murie, ‘The social rented sector, housing and the welfare state in the UK’ (1997) 12 *Housing Studies* 437.

and identified housing providers as the agencies best able to provide solutions.³⁴ The PEP was set up by the Labour government in 1979 as a five-year experiment to tackle problems through housing management, and now operates as an independent, self-financing company. HATs were introduced by the Conservatives. The Housing Act 1988 made provision for the creation of these quango landlords to aid in the regeneration of some of the most deprived local authority areas in the country.³⁵ Six HATs were created under the 1988 Act. Currently five are still operating. Section 63(1) of the Housing Act 1988 sets out their four primary objectives: to repair and improve their housing stock; to manage that stock effectively; to encourage diversity of tenure; and to improve the social, environmental and living conditions of their areas.

However, more important for our purposes is that one of the key components - arguably *the* key component - of national strategies on neighbourhood renewal has been the effect of crime and disorder on urban regeneration: the product, arguably, of crime's general contemporary political salience. As part of its National Strategy on Neighbourhood Renewal, the Labour government sought advice from a number of Policy Action Teams, in particular on the destructive effect of so-called "anti-social behaviour" on these neighbourhoods: a politically constructed category of problem conduct to which we return later in this chapter.³⁶ The continued focus upon areas of council housing resulted in the construction of the tenure not only as a concentrated site of social exclusion but as 'inherently criminogenic'.³⁷ Using the terminology of Nikolas Rose, social housing was identified within political discourse as a 'marginal space' containing 'anti-citizens'

³⁴ DoE, *Priority estates project 1981: improving problem council estates* (London: HMSO, 1981). For an assessment of the PEP, suggesting that housing management was of only limited value as a source of neighbourhood renewal, see J Foster and T Hope, *Housing, Community and Crime: The impact of the Priority Estate Project* (London: HMSO, 1993).

³⁵ The first HAT, in North Hull, ceased operation in March 1999. The remaining five HATs are in Liverpool, Castle Vale (Birmingham), and the London boroughs of Waltham Forest, Tower Hamlets and Brent (Stonebridge HAT).

³⁶ SEU, *Policy Action Team 8: Report on Anti-social Behaviour* (London: HMSO, 2000).

³⁷ Cowan, above n 24.

incapable of regulating their behaviour and thus requiring particular intervention.³⁸

(b) Social landlords

However, the focus upon housing management as a solution to neighbourhood disorder is not simply the product of an independently-developed central government agenda. In fact, early pressure for an increased housing management role in tackling crime and disorder came not from within government but from social landlords themselves; more specifically the housing departments of a number of the larger metropolitan local authorities, such as Manchester, Newcastle and Liverpool. From the mid-1980s many of these councils were already informally engaged in crime prevention measures under the more general 'community safety' banner.³⁹ However, it was housing managers in particular who began to place emphasis upon the need to adopt a co-ordinated crime control function in the areas in which they operated.

These council landlords had two objectives.⁴⁰ First, they sought to respond effectively to the increasing complaints of their tenants. Prior to the development of organised community policing strategies within police departments, there had been a "policing vacuum" within many of the most vulnerable estates.⁴¹ In neighbourhoods consisting predominantly of social housing, social landlords were therefore often treated as the 'official' presence in the community and the first point of call for complaints about the behaviour of others.⁴² Even in the case of criminal activity, tenants might expect solutions from social landlords rather than the police.⁴³ Second, these landlords were desperate to respond to the problem of

³⁸ N Rose, 'Government and Control' (2000) 40 *Brit J of Crim* 321-339. Note, however, the conflict between this construction of the social tenant and the competing construction presenting him as capable of choice and requiring empowerment: J Flint, 'Housing and Ethnopolitics: constructing identities of active consumption and responsible community' (2003) 32(3) *Economy and Society* 611-629.

³⁹ A Crawford, *The Local Governance of Crime* (Oxford: OUP, 1997), p 35.

⁴⁰ Cowan, above n 24.

⁴¹ Clapham, above n 21, p 770.

⁴² Cowan and Pantazinis, above n 24.

⁴³ Hughes suggests that some neighbourhoods, notably northern mining communities whose relationship with the police is still defined by the strikes of the 1980s, turned to social landlords as a consequence of their

difficult-to-let estates, found particularly in the North of England.⁴⁴ Whole neighbourhoods of council housing existed with reputations so bad that it was almost impossible to recruit new tenants. Concern was arguably intensified by central budgetary mechanisms that penalised void stock, and the pressures of Best Value management principles, which demand greater efficiency in modern housing provision.⁴⁵

In 1995, a number of these social landlords joined together to form the Local Authority Working Group on Anti-social Behaviour, subsequently renamed the Social Landlords Crime and Nuisance Group (SLCNG). To achieve these objectives the organisation has sought to increase the legal powers at the disposal of housing managers to both protect and control their tenants through the co-ordinated lobbying of government ministers. Notably, its mission statement highlights its aim to ensure the prioritisation of anti-social behaviour in discourses on neighbourhood renewal: "We are committed to keeping crime and nuisance as a high profile issue".⁴⁶ More specifically, however, the importance of this particular professional dynamism in ensuring the continued focus of government policy on crime control through housing management in particular should not be underestimated.

(c) The dangers of unitenurialism

The focus of policy upon the criminology of council housing has long concerned housing commentators. They accept that the pronounced social exclusion experienced by the residents of many of these areas is paralleled by high rates of crime and anti-social behaviour.⁴⁷ However, they warn that the unitenurial debate

distrust of the police: D Hughes, 'The use of the possessory and other powers of local authority landlords as a means of social control, its legitimacy and some other problems' (2000) 29(2) *Anglo-Am LR* 167-203.

⁴⁴ A concern shared by central government: see SEU, *Policy Action Team 7: Report on Unpopular housing* (London: ODPM, 1999).

⁴⁵ Cowan and Pantazinis, above n 24. See also Local Government Act 1999, Part I and the *Best Value in Housing and Homelessness Framework* (BVHH). Local authorities are required to secure continuous improvement in the way in which they exercise their functions, having regard to a combination of economy, efficiency and effectiveness. Best value does not apply to RSLs, but the Housing Corporation demands the same principles.

⁴⁶ www.slcng.org.uk

⁴⁷ Murie, above 31.

that has emerged fails to appreciate that deprived neighbourhoods are not limited to areas of social housing, nor is social housing intrinsically linked to such deprivation. Both social exclusion and concomitant problems of crime and disorder are just as prevalent, if not more so, around areas of private housing and owner-occupation.⁴⁸ Indeed, even council estates themselves are no longer unitenurial neighbourhoods. The right to buy and large-scale voluntary transfers have resulted in local authority districts transformed into a multiplicity of owner-occupied, private rented and housing association accommodation.⁴⁹

The current Labour government explicitly accepts that neighbourhood deprivation and associated problems of crime and disorder are in no way limited to social housing. It notes that whilst many of these areas are dominated by local authority and housing association properties, there are many other areas, including private rented housing, suffering from low demand and serious social problems.⁵⁰ It is for this reason that its recent legislative initiatives have sought to adopt a tenure-neutral approach to the problem. Key to this approach is the increased focus upon the strategic role for local authorities *qua* local authorities rather than landlords.⁵¹ Together with the police, they are at the heart of Crime and Disorder Reduction Partnerships (CDRPs) established by the Crime and Disorder Act 1998 which formalise developing multi-agency approaches to crime control. Indeed, it is within this broader network that many of the new dedicated Anti-social Behaviour Units have been established, rather than housing departments. Whilst analysis of the powers now available to respond to neighbourhood disorder, particularly under the Anti-social Behaviour Act 2003, is beyond the

⁴⁸ Take for example the case of the North-west of England. Government data indicates that here neighbourhood deprivation is actually most acute around areas of private rented housing: SEU, above 30, para 1.8.

⁴⁹ Page notes that tenants of housing associations are of a similar socio-economic profile to council tenants: D Page, *Building for Communities: a study of new housing association estates* (London: JRF, 1993).

⁵⁰ SEU, above 30, para 1.5.

⁵¹ See ODPM, *Tackling anti-social behaviour in mixed tenure areas* (London: HMSO, 2003).

scope of this paper, the creation of the tenure-neutral anti-social behaviour order is of particular interest and considered further below.⁵²

However, despite these efforts there continues to be a focus upon crime control through housing management. For example, the first consultation paper released by the current government on the management of anti-social behaviour was entitled *Tackling Anti-social Tenants*.⁵³ Whilst noting that neighbourhood disorder was not limited to rented housing, the document focused exclusively on proposals to modify and extend the legal powers of social landlords. Subsequently the Anti-social Behaviour Act 2003 has introduced a new duty on social landlords alone to publish policies and procedures on anti-social behaviour.⁵⁴ Yet this is understandable. The move towards a tenure-neutral, strategic role for local authorities and the police was unlikely to preclude the continued operation of crime control processes now well-established within many housing departments, and the continued lobbying of the SLCNG in particular has ensured that housing management remains a focus of the government despite its acceptance that the problem extends beyond the social rented sector.

3. Conclusions

Over the past decade social housing management has become part of the burgeoning crime control industry in the United Kingdom. This development reflects the particular association in political discourse between areas of social housing and neighbourhood disorder. For central government, tackling the problem is central to its wider objective to engineer the renewal of deprived communities. Although it accepts that crime and anti-social behaviour are not concentrated solely in and around areas of social housing, many social landlords have proved motivated and enthusiastic agents of crime control. As such there has been a continued focus upon solutions through housing management.

⁵² The most recent initiative is the regulation of private rented housing in areas experiencing high levels of anti-social behaviour in an effort to tackle irresponsible landlords that fail to control their tenants' behaviour: Housing Act 2004, Part 3.

⁵³ DTLR, *Tackling Anti-social Tenants* (London: HMSO, 2002).

⁵⁴ *Ibid.* For a discussion of this duty, see Chapter 3.

Chapter 2

THE LEGAL TOOLS

Throughout the early 1990s, housing officers complained that their legal powers were too limited to meet the demands of their new policing role.¹ The first major piece of legislation to establish an explicit crime control component for social housing management was Chapter V of the Housing Act in 1996 enacted by the then Conservative government. The 1996 Act introduced a series of mechanisms founded in civil rather than criminal law: the introductory tenancy, a statutory housing injunction and extended grounds for possession for nuisance under the assured and secure tenancy regimes. Since 1997, however, the Labour government has accelerated the development of these powers. Over the last seven years, the demands of the SLCNG have been met through a raft of legislative measures contained in the Crime and Disorder Act 1998, the Police Reform 2002, the Homelessness Act 2002 and the Anti-social Behaviour Act 2003. This body of legislation amends the injunctions provided under the Housing Act 1996, strengthens the power of landlords to evict recalcitrant tenants, and perhaps most controversially, gives social landlords the power to impose anti-social behaviour orders. It has also restructured the allocation of council housing. Yet the initiatives continue. Further relevant reforms are likely to hit the statute book when the Housing Bill, currently before Parliament, is enacted.

The following section sets out the legal infrastructure behind these tools. The tools are considered under two broad categories: first, the inherent power of a landlord to allocate and evict; and second, forms of ancillary statutory injunctive relief.

1. Property-based powers

Allocation and eviction are inherent to the housing management function of social landlords and have always enabled them to exercise informal social

¹ They were supported in this conclusion by academic writing: see D Hughes *et al*, 'Neighbour Disputes, Social Landlords and the Law' (1994) *JSWFL* 201-228.

control over their tenants. However, in recent years the legal regulation of these processes has been reconstructed to support a broader policing role.

(a) Allocation of council housing

Since the first homelessness legislation in 1977 the law has regulated the allocation of local authority housing, prioritising certain categories of vulnerable applicant and resulting in an established welfarist role for council housing. Today, Chapters VI and VII of the Housing Act 1996 regulate, respectively, the provision of short-term accommodation to the homeless and the prioritisation of certain categories of household under general allocation lists for long-term renting. These obligations do not extend to registered social landlords; however, RSLs are under an obligation to co-operate with a local housing authority in discharging these functions to such extent as is reasonable in the circumstances.²

The primary duty under the homelessness legislation is to provide short term housing for a minimum of two years to applicants found to be a) homeless, b) eligible, c) in priority need and d) unintentionally homeless. The original Housing (Homeless Persons) Act 1977 first introduced the concept of intentional homelessness to deter individuals making themselves homeless in order to gain easier access to social housing. A person is to be treated as intentionally homeless if he or she has ceased to occupy accommodation as a consequence of a deliberate act or omission on his or her part. Whilst the concept was not specifically designed to target those with histories of anti-social behaviour, local housing authorities were clearly able to exclude those evicted from previous accommodation for nuisance behaviour on this basis. However, in line with current concerns about anti-social behaviour this is now explicitly sanctioned by the latest homelessness Code of Guidance issued to local housing authorities.³

A council is only obliged to provide long-term accommodation through their general allocation lists to applicants it deems 'qualifying persons'.⁴ It must

² HA 1996, ss 170 (general allocation) and 213 (homelessness duty).

³ ODPM/DoH, *Homelessness Code of Guidance* (London: ODPM, 2002), para 7.14.

⁴ HA 1996, s 161.

then give 'reasonable preference' and in certain circumstances 'additional preference' to a number of categories of particularly vulnerable applicant.⁵ Once again, whilst not explicitly designed to allow the exclusion of those with a history of anti-social behaviour from social housing, the discretion afforded to local housing authorities to decide whether an applicant is a qualifying person for the purpose of the duty has allowed exclusion on grounds of past behaviour to occur in practice.⁶ However, the Homelessness Act 2002 recently modified the duty by imposing three layers of explicit restrictions on the provision of housing to such people.⁷ First, section 160A(7) allows exclusion from general allocation lists for past anti-social behaviour. It introduces the concept of 'eligibility' to replace that of 'qualifying persons' and provides that an applicant should be treated as ineligible if a local housing authority is satisfied that he, or a member of his household, is guilty of 'unacceptable behaviour' serious enough to make him or her unsuitable to be a tenant. The test here is whether the behaviour would have entitled the authority to a possession order if, whether the case or not, the applicant had been a secure tenant.⁸ The 2002 Act additionally enables an authority to accept as eligible those households guilty of unacceptable behaviour but either refuse to give them preference in their allocation scheme⁹ or give greater priority to others without such a history.¹⁰

(b) Possession of assured and secure tenancies

The tenants of councils and the tenants of registered social landlords enjoy different statutory protections from eviction. The former are secure tenants under the Housing Act 1985 whilst the latter are (predominantly) assured tenants under the Housing Act 1988. Both the secure and assured tenancy

⁵ HA 1996, s 167(2). Reasonable preference must be given to those living in unsatisfactory housing conditions; those in temporary or insecure housing; families with dependent children; households containing a pregnant woman; individuals with a particular need for accommodation on medical or welfare grounds; and those unable to access secure housing as a result of their socio-economic circumstances.

⁶ D Cowan et al, 'Risking Housing Need' (1999) 26(4) *Journal of Law and Society* 403-26.

⁷ E Laurie, 'The Homelessness Act 2002 and Housing Allocations: All Change or Business as Usual?' (2004) 67(1) *MLR* 48-68.

⁸ HA 1996, s 160A(8).

⁹ HA 1996, s 167(2B) and (2C).

¹⁰ HA 1996, s 167(2A).

regimes demand that a social landlord may only retake possession of a tenant's home with a court order.

To gain such an order, the social landlord must first show the court that one of a number of grounds for possession is satisfied. One ground under both systems is that the tenant has breached a term of his tenancy agreement. Landlords increasingly include terms prohibiting specific forms of anti-social behaviour, for example racial harassment, and bring claims for possession on this basis. However, a specific discretionary ground for possession allowing eviction of "nuisance" tenants has existed since the first housing statute was enacted at the very start of the 20th century.¹¹ The Housing Act 1996 amended both the 1985 and 1988 Acts and significantly expanded this ground. Possession may now be granted under Ground 2, Schedule 2 of the HA 1985 or Ground 14, Schedule 2 of the HA 1988 if the tenant, or a person residing in or visiting the property:

- 1) has been guilty of conduct causing or likely to cause a nuisance or annoyance to a person residing, visiting or otherwise engaging in a lawful activity in the locality, or
- 2) has been convicted of
 - i) using the property or allowing it to be used for immoral or illegal purposes, or
 - ii) an arrestable offence committed in, or in the locality of, the property.

The second requirement is that the court must be satisfied that it is "reasonable" to order possession. Even if this requirement is satisfied, however, the court has a further discretion to stay or suspend the order, or postpone the date of possession.¹² The development of this broad judicial discretion is considered further in the context of a landlord's crime control function in Chapter 3.

(c) Introductory tenancies

The introductory tenancy set out in Part V of the Housing Act 1996 was one of the early successes of the SLCNG lobby.¹³ It enables a local housing

¹¹ Section 5(b) of the Increase of Rent and Mortgage Interest (Restrictions) Act 1920.

¹² See HA 1988, s 9.

¹³ HA 1996, ss 124 to 143. However, it is questionable whether the scheme is actually used as a tool to tackle anti-social tenants. In fact, most tenants (68 per cent) are evicted under an introductory tenancy for

authority, if it so wishes, to operate an introductory tenancy regime. If the local authority decides to exercise this power all new tenancies it grants will begin as introductory, rather than secure, tenancies. An introductory tenancy lasts for twelve months (unless possession is granted) at which point it becomes secure. An introductory tenant enjoys weaker rights than a secure tenant: for example, he cannot exercise the right to buy. More importantly, however, the tenant has extremely low security of tenure. If a local housing authority wishes to evict an introductory household, a court must grant possession if it is satisfied that the authority has complied with the necessary notice requirements.¹⁴ A tenant has the right to seek an internal review by a senior member of the local housing authority of the decision to seek possession.¹⁵ If, however, the original decision is upheld on review the court has no discretion to refuse possession.¹⁶

The Labour government has proposed to extend the introductory tenancy regime. The Housing Bill currently before Parliament, if enacted, will enable local housing authorities to extend an introductory tenancy by an additional six months. Such an extension does not require a court order: the landlord must simply comply with the necessary administrative formalities.¹⁷ The landlord must serve a notice of extension on the tenant at least eight weeks before the original expiry date of the introductory tenancy. A tenant has the right to an internal review of the decision to extend the trial period. If the decision is affirmed the tenancy is extended. It cannot be subsequently extended by a further period.

Registered social landlords cannot grant introductory tenancies. However, since 1998 they have been able to let to their tenants on assured shorthold tenancies for the first year: colloquially known as “starter” tenancies. RSLs can only use assured shorthold tenancies if “steps are needed to prevent or reverse social conditions in an area threatening the housing rights of most residents or the value of the stock”: i.e. in particular ‘problem’ estates. Unlike the

rent arrears. Only 19 per cent were actually evicted for anti-social behaviour: C Hunter et al, *Neighbour nuisance, social landlords and the law* (London: CIH/JRF, 2000).

¹⁴ HA 1996, s 127(2).

¹⁵ The internal review is regulated by the Introductory Tenants (Review) Regulations 1997.

¹⁶ See, however, the decisions in *Cochrane* [1998] EWCA Civ 1967 and *McLellan* [2001] EWCA Civ 1510, discussed in Chapter 4.

¹⁷ Housing Bill, c 146.

introductory tenancy regime, use of an assured shorthold tenancy does not require the RSL to engage in an internal review of the decision to evict; deployment is simply regulated by the Housing Corporation.¹⁸

(d) Demoted tenancies

The demoted tenancy is the most recent housing management initiative of the current government. The idea was originally posited by the Law Commission,¹⁹ was subsequently adopted by the government,²⁰ and was introduced as an amendment to the Housing Act 1996 by the Anti-social Behaviour Act 2003. The power of demotion is available to local housing authorities, registered social landlords and Housing Action Trusts. It allows a landlord to reduce the security of tenure of a secure or assured tenant to that of an introductory tenant at any point in the life of a tenancy. To demote a tenant, a landlord must apply for a demotion order from the county court. The court can only demote a tenancy if it is satisfied that the tenant, another resident or a visitor to the property has engaged or threatens to engage in anti-social conduct. Anti-social conduct is defined for this purpose as conduct "capable of causing nuisance or annoyance to any person and which directly or indirectly relates to or affects the housing management functions of a relevant landlord or using or threatening to use housing accommodation owned or managed by a relevant landlord for an unlawful purpose".²¹ The court must also be satisfied that it is reasonable to make the order.

The demoted tenancy lasts for twelve months unless the landlord has served a notice of proceedings for possession in that time. At this point the tenancy is promoted to higher security of tenure: a secure tenancy for a council tenant or an assured tenancy for an RSL tenant.²² The process by which a

¹⁸ Housing Corporation, *Performance standards - Addendum 4 to the social housing standards for general and supported housing: Anti-social behaviour* (London: Housing Corporation, 1999).

¹⁹ A form of demoted tenancy was introduced in Scotland by the Housing (Scotland) Act 2001, s 35. This provision allows demotion of a Scottish secure tenancy to a short Scottish secure tenancy (with low security of tenure) if a member of a household has been made subject to an anti-social behaviour order.

²⁰ Home Office, *Respect and Responsibility: taking a stand against anti-social behaviour* (London: HMSO, 2003), p 60.

²¹ This definition of housing-related anti-social behaviour is drawn from the Housing Act 1996, ss 153A and 153B implementing the new anti-social behaviour injunctions: see below.

²² It should be noted that whilst in most cases promotion will return a tenant to the security he enjoyed before demotion, this is not always the case. Some tenants of registered social landlords enjoy secure

demoted tenant can be evicted depends upon the status of the social landlord. Once a demoted tenancy has been imposed, a local housing authority can evict a demoted tenant under procedures almost identical to those regulating possession of an introductory tenancy. It must comply with the necessary notice requirements and must provide the tenant with an opportunity to seek an internal review of the decision to evict.²³ However, registered social landlords are under no statutory obligation to offer an internal review.

2. Injunctive powers

The injunction is now a key ancillary tool for social landlords. Prior to the Housing Act 1996, social landlords were limited to the use of equitable injunctions under the common law. Two approaches could be taken. An injunction could be sought to prevent breach of a specific nuisance term in a tenancy agreement. Further, section 222 of the Local Government Act 1972 provides local housing authorities with a power to enter into legal proceedings relevant to their government tasks.²⁴ The statutory anti-social behaviour injunction and the controversial anti-social behaviour order, however, are both of a different character. Whilst equitable injunctions require a prior cause of action in criminal or civil law, these mechanisms create their own statutory grounds for intervention.²⁵

(a) Housing injunctions

The first statutory housing injunction, available to local housing authorities but not registered social landlords, was once again introduced as part of the measures in Chapter V of the Housing Act 1996. It has been

status under the Housing Act 1980. However, they will still become assured tenants on promotion. The same problem arises with regard to former council tenants transferred to an RSL landlord under LSVT. Their 'preserved right to buy' protected on transfer would appear to be lost on promotion: see H Carr et al, *The Anti-social Behaviour Act 2003* (Bristol: Jordans, 2004).

²³ The internal review is regulated by the Demoted tenancies (Review of Decisions) (England) Regulations 2004.

²⁴ The Court of Appeal has recently confirmed that section 222 can be used to restrain criminal activity constituting a public nuisance: *Nottingham City Council v Zain* [2001] EWCA Civ 1248. Section 91 of the Anti-social Behaviour Act 2003 now enables social landlords to attach a power of arrest to a section 222 injunction.

²⁵ The Harassment Act 1997 also provides local housing authorities with the power to seek injunctive relief. Although used by local authorities in response to general anti-social behaviour it will not be dealt with in detail as part of this thesis.

described as a “swift, inexpensive and effective means of stopping anti-social behaviour”²⁶ by government, which particularly favours it as a legal remedy. It also appears to be preferred by many social landlords to the anti-social behaviour order: it is less resource intensive, and does not involve a mandatory consultation process. The Anti-social Behaviour Act 2003 has recently extended use of the mechanism to registered social landlords, and broadened its ambit following a number of restrictive interpretations of the previous law by the courts.²⁷ Section 13 of the 2003 Act implements the anti-social behaviour injunction (section 153A), the injunction against unlawful use of premises (section 153B) and the injunction against breach of tenancy agreement (section 153D).

The anti-social behaviour injunction is central to these powers. It can be granted at the discretion of the court if two conditions are fulfilled. The first is that the person against whom the injunction is sought ‘is engaging, has engaged or threatens to engage in anti-social conduct’. Anti-social conduct is defined as that ‘capable of causing nuisance or annoyance to any person’. Further, this conduct must be such that it ‘directly or indirectly relates to or affects the housing management functions’ of the landlord. The second is that the anti-social conduct is capable of causing nuisance or annoyance to:

- 1) a resident of housing owned or managed by the landlord;
- 2) a resident of other accommodation in the neighbourhood of the landlord’s housing;
- 3) a person engaged in lawful activity in or in the neighbourhood of the landlord’s housing;
- 4) a person employed in connection with the exercise of the landlord’s housing management functions.

The injunction prohibits the defendant from engaging in anti-social conduct as defined above. A court can attach an exclusion order and/or a power of arrest to each of the injunctions, where the anti-social conduct involves violence, threats of violence or a significant risk of harm to relevant victims.²⁸ Breach of

²⁶ DTLR, *Tackling Anti-social Tenants* (London: HMSO, 2002), para 1:4.1.

²⁷ An issue returned to in detail in Chapter 3.

²⁸ HA 1996, s 153C.

an injunction is treated as a contempt of court and punishable by a prison sentence of up to two years.

(c) Anti-social behaviour orders

The anti-social behaviour order (ASBO) is perhaps the best known, and most controversial, measure of the current government's policies on crime and disorder. The order is an injunction issued by a court that can be imposed in response to a broad range of anti-social conduct. Rather than being a contempt of court, however, breach of the order constitutes a criminal offence.²⁹ The idea of "ASBOs" first arose during Parliamentary debates on the original housing injunction included in the Housing Act 1996, once again after intensive lobbying by the SLNCG. It subsequently appeared as the "community safety order" in the 1997 Labour Party manifesto and was finally enacted into legislation by section 1 of the Crime and Disorder Act 1998, which came into force in April 1999. Whilst the anti-social behaviour order was lobbied for by the SLCNG, it was not specifically designed as a housing-management tool. The original order was made available to local housing authorities *qua* local authorities³⁰ and the police alone as part of their strategic crime control function. Following the Police Reform Act 2002, however, it can now be applied for in certain circumstances by registered social landlords and housing action trusts.³¹

Before applying for an order a social landlord must first consult with other local agencies. A local housing authority must consult with the chief of police of the area, whilst an RSL must contact both the chief of police and the local authority. An order can be made by a magistrates' court against anyone aged ten or over if it is satisfied of two conditions: first, that the person has acted in an anti-social manner, defined as "a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household

²⁹ The first application of this "hybrid" mechanism was the non-harassment order created by the Harassment Act 1997. The ASBO was accompanied in the 1998 Act by the sex offender order which operates on identical lines. Since 1998, a number of other injunctive powers have adopted this structure: see the Football Spectators Order implemented by the Football (Disorder) Act 2000 and the proposal to extend criminal liability to breach of a non-molestation order under the Family Law Act 1996.

³⁰ Whether district, borough or unitary councils.

³¹ Together with English county councils and the British Transport Police.

as himself”;³² and second, that the order is necessary to protect “relevant persons” from further anti-social acts. What constitutes “relevant persons” depends upon the authority making the application. With respect to social landlords it refers either to those within the area of the local housing authority or in the case of an application by an RSL or HAT residents those within the “vicinity” of the landlord’s housing.³³

The terms contained in the order are restricted to those “necessary for the purpose of protecting persons (whether relevant persons or persons elsewhere in England and Wales) from further anti-social acts by the defendant”.³⁴ They can both prohibit specific conduct and bar the defendant entirely from particular areas. The order lasts for a minimum of two years but can extend to a lifetime. Breach of the order without reasonable excuse is a criminal offence punishable by up to five years imprisonment.³⁵ The sentencing judge may not impose a conditional discharge.³⁶

The anti-social behaviour order was designed to respond to the concerns of agencies seeking to tackle anti-social behaviour that the housing injunction was too limited as a tool of social control. The availability of ASBOs to local authorities *non qua* landlords, and to the police, is an example of the government’s acceptance that anti-social behaviour is not simply a problem of social housing. The ASBO also enables agencies to target minors, against which traditional injunctions are unenforceable. Further, the civil nature of the application for an order addresses the perceived lack of effectiveness of the criminal law in responding to “courses of conduct” and the difficulties of proving behaviour to the criminal standard. Though injunctions, both equitable and statutory, are an established part of the legal landscape, the anti-social behaviour order has commanded a particularly hostile reception from legal academics, practitioners and civil libertarians.³⁷ We return to these issues in greater detail in Part II.

³² s 1(1)(a).

³³ s 1(1B).

³⁴ s 1(6).

³⁵ s 1(10).

³⁶ s 1(11).

³⁷ A Ashworth et al, ‘Neighbouring on the Oppressive’ [1998] 16(1) *Criminal Justice* 7-14.

The anti-social behaviour order, the flagship of the government's crime and disorder policies, had a surprisingly poor uptake in the years following its creation, and the wave of publicity that heralded its arrival threatened to become a damp squib. Whilst the government anticipated that 5,000 orders would be made each year, by the end of 2001 only 518 had been successfully deployed and use of the order was extremely uneven across the country.³⁸ The government, which had made considerable political investment in the order, was adamant that the ASBO must succeed. The solution was to streamline the mechanism to increase its effectiveness. As David Blunkett stated in oral questions: "I hope that, by examining any suggestions for slimming down the procedures and speeding up the process, we shall be able to persuade local authorities and the police to take them up".³⁹

The ASBO has been modified and extended by the Police Reform Act 2002 and recently the Anti-social Behaviour Act 2003. The Police Reform Act 2002 enables an agency to secure an order as part of other civil proceedings under section 1C of the Crime and Disorder Act 1998 (amended by the Police Reform Act 2002). As such, a social landlord bringing possession proceedings can now seek an ASBO simultaneously, thus reducing the delay (and cost) that would ensue in having to engage in two separate applications.⁴⁰ It is also open to a court to impose an "interim" ASBO (section 1D) in advance of the main proceedings for a full order if it considers it "just" to do so. This is a temporary measure which still has the full effect of an ASBO. It can also occur without any notice being given to the defendant at the discretion of the justice's clerk. The interim ASBO is discussed in greater detail in Chapter 4. Finally local authorities, but not registered social landlords, have been given the power to prosecute breaches of ASBOs, reducing their reliance upon the co-operation of the police.⁴¹

³⁸ Elizabeth Burney has put forward a number of factors contributing to the reluctance of local authorities and police to adopt the tool: see E Burney, 'Talking tough, acting coy: what happened to the anti-social behaviour order?' [2002] 41(5) *Howard Journal* 469-484.

³⁹ HC Deb 2 Jul 2001 Col 8.

⁴⁰ CDA 1998, s 1B enables a court to impose an ASBO as part of conviction in criminal proceedings also.

⁴¹ CDA 1998, s 1(10).

The Prime Minister recently announced that 2,600 ASBOs were imposed in 2003; double the amount of the previous four years.⁴² The government has also heralded the creation of a number of Home Office experts - dubbed "ASBO ambassadors" - who will be dispatched to encourage reluctant local authorities to make greater use of the order. After seven years and multiple reconstructions, use of the anti-social behaviour order is likely to increase exponentially.

3. The discourse of public protection

The contemporary policing function of social housing management is characterised by this constantly-evolving armoury of legal tools, which form the subject of Part II. As we shall see, these legislative developments are highly controversial, reflecting what many commentators fear is an undesirably strong punitive turn in housing policy. This section seeks to answer a more basic question: what are the objectives of these tools, and how are those objectives to be achieved? It is the contention of this thesis that the law has been justified and measured according to a single standard: the effective protection of the public. Indeed, in its most recent White Paper on anti-social behaviour, the government has made it clear that there was one 'consistent principle' underpinning its policies: "that the protection of the local community must come first".⁴³

The pursuit of public protection is increasingly evident in general political discourse on crime and disorder, and should be seen as a reflection of wider contemporary concerns with personal insecurity. Security is itself a negotiated concept, and clearly certain risks have been prioritised above others. Whilst it is accepted that the greatest risks to our physical well-being are accidents, the focus of political attention has been directed almost wholly towards the threat posed by crime.⁴⁴ Notably, although crime rates continue to fall in the United Kingdom⁴⁵ the fear of crime is still high and reducing it has become almost more important to government than crime control itself. In its most recent

⁴² *Prime Minister's speech on anti-social behaviour*, 28 October 2004.

⁴³ Home Office, above n 20, para 2.51.

⁴⁴ L Zedner, 'The Concept of Security: an agenda for comparative analysis' (2003) 23 *Legal Studies* 153-176.

⁴⁵ T Dodd et al, *Crime in England and Wales 2003/04* (London: HMSO, 2004)

Queen's Speech, the government announced a vast array of new legal measures directed towards protection of citizens from the tripartite threat posed by terrorism, serious crime and anti-social behaviour.⁴⁶ It is the threat posed by anti-social behaviour – low-level neighbourhood disorder – from which housing managers are now expected to protect their tenants (and indeed other residents of the neighbourhoods in which they operate).

The discourse has met with considerable cynicism. The reaction of many to the Queen's Speech, for instance, is that we are witnessing resort to the "politics of fear", as the government manipulates the insecurity of the electorate for political gain. As with anti-social behaviour legislation more generally, the particular sanctions created for use by social landlords have been viewed as nothing more than acting-out by the state in reaction to a constructed "moral panic".⁴⁷ Enacting punitive legislation suggests to the population that "something is being done" to increase their security, irrespective of any practical benefit provided. Indeed, the recent push to increase the use of the "mediagenic" anti-social behaviour order is seen as key to success in the forthcoming general election.

However, whilst massive political capital has been invested in the current government's crime and disorder policies, it would be unfair to view the pursuit of public protection solely as a cynical manipulation of the current climate of fear. Garland has recently argued that contemporary crime control simultaneously evinces two objectives: on the one hand, he accepts that increasingly "hysterical punitivism" aims to satisfy the public's fears and re-establish its faith in the state. However, on the other hand it is directed towards the wholly rational, highly calculated objective of ensuring that the public is effectively protected in practice.⁴⁸ Thus, although one can conclude that the often hysterical political rhetoric pointing to neighbours from hell, feral children and the other members of a threatening urban underclass have

⁴⁶ HL Deb 23 Nov 2004 Col 1.

⁴⁷ See in particular the approach of Professor David Cowan: *Housing Law and Policy* (Basingstoke: Macmillan, 1999), Ch 18.

⁴⁸ D Garland, *The Culture of Control* (Oxford: OUP, 2001).

ensured the exaggeration of the size and seriousness of the problem,⁴⁹ at the heart of these initiatives is a justified concern to guarantee the protection of those whose lives are genuinely blighted by the effects of neighbourhood disorder.

This thesis therefore considers the policing powers of housing managers as rational steps to ensure the protection of communities actually affected by anti-social behaviour. However, as we shall see in Chapter 5, it also argues that the apparent focus upon these powers as some kind of panacea for these communities is misjudged and potentially even counter-productive. At this stage, though, it is useful to identify exactly how these tools seek to ensure practical security. Two broad forms of social control operate through the powers: management through discipline, and management through exclusion.

(a) Management through discipline

The Prime Minister recently visited Harlow, Essex, to relaunch his policies on anti-social behaviour. Whilst there, he made the following pronouncement on the efforts of local authorities to tackle anti-social behaviour in the area:

“what has to happen is that the penalty [the perpetrators] are paying for being a nuisance becomes more of a hassle for them than to stop being like that. We have to get to a critical mass so people say it is no longer worth doing it.”⁵⁰

This, then, is the disarmingly simple solution underpinning the powers of social housing managers: persuading perpetrators to modify their conduct by increasing the severity of sanctions for non-compliance.

The housing injunction and anti-social behaviour order are well-established forms of targeted restraint through court order backed by punishment for breach. The injunction relies upon the impact of a potential future fine or imprisonment for contempt of court, whilst the anti-social behaviour order has drastically increased the potential penalty for breach: from

⁴⁹ Can it really be said that tackling anti-social behaviour is “a war for civilization as we know it”? See F Field, *Neighbours from Hell* (London: Politicos, 2004), p 18.

⁵⁰ ‘Blair hails crackdown on anti-social behaviour’, *The Telegraph*, 31 August 2004.

a maximum two years of imprisonment to up to five years in an attempt to intensify its deterrent effect.⁵¹

What is more interesting, however, is the extent to which access to, and continued occupation of, social housing has been fully harnessed for its deterrent potential. The government has sought to employ the ontological insecurity of tenants in their home as an additional source of social control. This insecurity is of course inherent to the landlord-tenant relationship: grounds for eviction have always existed for nuisance behaviour. However, recent developments - the expanded grounds for eviction under the 1996 Act and the introductory and demoted tenancies - have ensured that the threat has intensified considerably. Similarly the prospect of exclusion from council allocation lists for future rehousing (or at least reduced priority) for past conduct is an attempt to encourage individuals to align themselves with the constructed behavioural norms of housing managers. In particular, these measures are explicitly aimed at preventing what the government sees as the cycle of eviction and automatic rehousing of those anti-social households with priority need.⁵² It argues that the deterrent value of eviction is lost if perpetrators know they are assured new accommodation from the local housing authority.

Cowan posits what he calls a “responsibility thesis” to describe these developments in social housing provision. The right to your home, or to future allocation of social housing, is now dependent upon your continued responsibility towards your landlord and, more importantly, your community.⁵³ However, this argument is not limited to social housing policy. Under the current Labour government, the welfare state as a whole has become a key front from which to control recalcitrant individuals. Social security has been reconstructed as subject to the terms of a communitarian social contract: a move towards benefit conditionality. As Anthony Giddens proclaims, the Third

⁵¹ The courts appear to be taking breaches of ASBOs extremely seriously: see *R v Braxton* [2004] EWCA Crim 1374 and *R v Thomas* [2004] EWCA Crim 1173.

⁵² Home Office, above 20, para 4.41.

⁵³ Cowan, above 47.

Way seeks to invoke “no rights without responsibilities” as a “prime motto of the new politics”.⁵⁴

The current government has extended and intensified the assault on all forms of social security. For instance, the Child Support, Pensions and Social Security Act 2000 now enables local authorities to deny the right to social security to convicted criminals who breach a community sentence.⁵⁵ The Government has made it known that it is considering the withdrawal of the universal child benefit from the parents of persistent truants and offenders. It has also recently consulted on a proposal to remove housing benefit from tenants where they or a member of their household are deemed guilty of persistent anti-social behaviour, although this was subsequently dropped after considerable protest. Even now, the Housing Bill currently before Parliament proposes revoking the right to buy and consent to mutual exchange of anti-social secure tenants. In each case, the emphasis upon the responsibility a welfare recipient owes towards the state that supports him is expected to encourage his “remoralization” and consequent self-regulation.

(b) Management through exclusion

Whilst the primary focus of these legal powers is their capacity to change behaviour, they also evince an ancillary objective: expulsion and exclusion of recalcitrant perpetrators of anti-social behaviour. The most important example of an exclusionary technique exercised by housing managers is of course restricted access to social housing. Restrictive allocation policies operate not only as a deterrent, but as a form of risk management to insulate social housing from those deemed potentially troublesome.⁵⁶ The introductory tenancy extends this process for the first year of the tenancy to filter out anti-social households before they gain secure status: “[p]roviders accept that, at the point of allocation, it is not possible (or perhaps socially desirable) to weed out all who potentially might commit anti-social behaviour. Therefore, the risk of such an eventuality can be further minimized by the ability to evict the household

⁵⁴ A Giddens, *The Third Way: the Renewal of Social Democracy* (Cambridge: Polity Press, 1998), p 65.

⁵⁵ Social Security (Breach of Community Order) Regulations 2001.

⁵⁶ D Cowan et al, ‘Risking Housing Need’ (1999) *J of Law and Soc* 26(4) 403-26.

within a short period, and subject to minimum safeguards".⁵⁷ However, if risk management at point of entry is unsuccessful eviction, from secure and assured tenancies, or more easily from demoted tenancies, enables social landlords to remove recalcitrant tenants at a later stage.

The exclusionary component of injunctions and anti-social behaviour orders should also be noted. Both mechanisms enable a social landlord to expel an individual not simply from a tenure but from entire areas of public space. The injunction requires that the conduct involve the use or threatened use of violence or significant risk of harm to the victim or victims. The anti-social behaviour order does not require any such threat, but exclusion must be judged necessary to prevent further acts of anti-social behaviour.

4. Conclusions

The controversial solution to problems of anti-social behaviour advocated by both government and housing managers is the use of increasingly punitive civil law sanctions by which perpetrators are controlled through discipline and exclusion. This chapter has set out the main examples in some detail: the power of eviction, intensified by the introductory and demoted tenancy regimes; restrictions on the allocation of social housing to those with histories of bad behaviour; and anti-social behaviour injunctions and orders. It has noted too that the overarching justification for these measures is the protection of the public. Whilst on the one hand this particular discourse has been misused as a component of the new 'politics of fear', it has been suggested that the government, and social landlords themselves, genuinely believe that these legal powers are an efficacious response to the very real concerns of residents of deprived communities.

⁵⁷ *Ibid.* The introductory tenancy has been criticised for assuming that anti-social individuals can be identified within the first year of a tenancy. There is no evidence to suggest that problems usually emerge during this period. This is the reason why the Housing Bill will enable a landlord to extend the tenancy for a further six months. Further, the demoted tenancy now enables easy eviction at any point during the life of the tenancy.

Chapter 3

THE SECTION 218A DUTY

Over the last seven years Parliament has concentrated upon the creation and modification of legal sanctions with which social housing managers might manage anti-social behaviour in and around their housing stock. Whilst the 2003 Anti-social Behaviour Act has certainly been part of that process, it has also introduced another important measure. Section 218A of the Housing Act 1996, inserted by section 12 of the 2003 Act, imposes a new statutory duty on social landlords. It demands that local housing authorities, housing action trusts and registered social landlords must, within six months of the commencement of section 12, prepare and publish a policy and procedures on the management of anti-social behaviour.¹

The objectives of the section 218A duty are twofold. On the one hand the documentation that social landlords release is expected to promote clear norms of behaviour so that residents are aware of their responsibilities. On the other, it aims to increase the political accountability of landlords to those affected by anti-social behaviour. As the government stated in *Tackling Anti-social Tenants*, where the duty was originally proposed, it “would open the landlord to scrutiny with regard to the adequacy of the procedures and also as to whether they had followed their own procedure in any particular case. Whilst this would not have the specific force of a duty it would increase the landlord’s accountability in this area of housing management”.²

The creation of the section 218A duty illustrates a number of novel characteristics of the current government’s approach to crime control through housing management. These characteristics are as follows: the duty has made explicit the link between the crime control function of social landlords and the particular political discourse of anti-social behaviour; it has finally formalised the policing role of social housing managers; and it extends equal responsibility to

¹ s 12 only extends to England and Wales. It came into force in England on June 30 2004: Anti-social Behaviour Act 2003 (Commencement No 3 and Savings) Order 2004/1502. Commencement in Wales is subject to Order of the Welsh Assembly.

² DLTR, *Tackling anti-social tenants* (London: HMSO, 2002), p 11.

both local housing authorities and registered social landlords. Finally, this chapter explores the deliberate decision not to impose on landlords a specific, legally enforceable duty to protect those affected by anti-social behaviour - perhaps the most controversial aspect of section 218A.

1. The ambit of a landlord's policing function: "housing-related anti-social behaviour"

Whilst this thesis has brought the contemporary policing function of housing managers within the general rubric of crime control, the section 218A duty dictates that landlords are formally responsible for the management of "anti-social behaviour" in their area. Anti-social behaviour has been given a statutory definition for the purpose of the duty, drawn from the definitions used for the purpose of the new anti-social behaviour injunctions set out above. It has two limbs. It refers on the one hand to conduct which "consists of or involves using or threatening to use housing accommodation owned or managed by a relevant landlord for an unlawful purpose". However, it also extends, more broadly, to conduct which is "capable of causing nuisance or annoyance to any person, and which directly or indirectly relates to or affects the housing management functions of a relevant landlord".³ This definition raises two important questions. First, what is meant generally by anti-social behaviour; and second, to what extent are landlords only responsible for conduct that is "housing-related"?

(a) The uncertain meaning of "anti-social behaviour"

The concept of anti-social behaviour is currently ubiquitous in the United Kingdom. Adopted by the current government as a central plank of its crime and disorder policies, and promoted heavily by the media, it has entered public consciousness and colloquial expression, particularly in relation to use of the anti-social behaviour order. Yet to what conduct does the term refer? Though promoted

³ HA 1996, s 218A(8). The definitions are drawn from the HA 1996, ss 153A and s 153B anti-social behaviour injunctions.

as an objectively definable category of behaviour, its ambit is on closer analysis extremely unclear. The definition for the purpose of the section 218A duty illustrates this: its broadest element refers simply to the responsibility of social landlords to manage conduct “which is capable of causing nuisance or annoyance to any person”. This phrase has been drawn from the nuisance grounds under the secure and assured tenancy regimes, so does have a clear legal meaning. “Nuisance” need not amount to a tortious nuisance and “annoyance” constitutes a broader alternative limb including any behaviour which “disturbs [the] reasonable peace of mind” of another person.⁴ Yet even so, it provides little guidance as to the kind of behaviour that has been targeted. This lack of conceptual clarity is paralleled in political discourse. Whilst the term has gained common political currency, academic commentators have criticised its inherent ambiguity: it “lacks definition and theoretical rigour”.⁵ Notably, policy literature has been singularly unhelpful in providing anti-social behaviour with a clear definition. The most recent White Paper on the subject simply concludes that “[a]nti-social behaviour means different things to different people”.⁶

The absence of a prescriptive definition of the types of behaviour legitimately dealt with under the rubric of “anti-social behaviour” is a deliberate move to allow social landlords, and other agencies engaged in community crime control, to construct local behavioural norms relevant to their particular neighbourhoods. This argument is substantiated by the draft guidance on the duty. On setting out the definition of anti-social behaviour the document adds: “[t]his description is wide enough to encompass most landlords’ own understanding of antisocial behaviour”.⁷ Rather than central government defining the crime control function of

⁴ *Tod-Heatly v Benham* (1889) LR 40 Ch D 80. The definition supersedes the legal definition previously employed by the Crime and Disorder Act 1998; conduct that causes others ‘alarm, harassment or distress’, lifted from the Public Order Act 1986.

⁵ S Matthews, ‘Enforcing respect and reducing responsibility’ (2003) 2(4) *Community Safety Journal* 5-8.

⁶ Home Office, *Respect and Responsibility* (London: HMSO, 2003), para 1.6.

⁷ ODPM, *Anti-social behaviour: policy & procedure - draft statutory code of guidance* (London: HMSO, 2004) para 2.3.

social landlords they have been provided with the capacity to problematize conduct as they see fit.⁸

However, policy documents do suggest examples of common anti-social conduct. The draft guidance on the section 218A duty, for instance, puts forward the following non-exhaustive list: “noise nuisance; intimidation and harassment; the fouling of public areas; aggressive and threatening language and behaviour; actual violence against people and property; hate behaviour that targets members of identified groups because of their perceived differences; and using housing accommodation to sell drugs, or for other unlawful purposes”.⁹

This list provides some idea of the general focus of the term. It is clearly a concept aimed at redirecting attention to “quality of life” issues affecting the day-to-day experiences of residents within their neighbourhoods. What is noticeable, however, is the broad range of conduct it targets. Academic commentators have sought to unravel the political rhetoric and identify the sub-categories of behaviour covered by the concept. Scott and Parkey, for instance, point out that these issues actually consist of three inter-related problems: neighbour disputes; neighbourhood problems; and crime.¹⁰ Neighbour disputes involve personal altercations between households over nuisance behaviour, particularly noise, children, pets or boundaries.¹¹ It encapsulates concerns about so-called “nuisance neighbours” focused upon in particular by the media.

Neighbourhood problems on the other hand are environmental issues experienced more generally within neighbourhoods. Examples include litter and graffiti and young people “hanging about” on street corners. Neighbourhood problems are the focus of the government’s neighbourhood renewal strategy. This political interface between low-level disorder and community degeneration is

⁸ Although social landlords also have a responsibility to consult with their tenants: see s 105, HA 1985 and s 137, HA 1996. See also Draft guidance (London: HMSO, 2003), *ibid.*, paras 2.11-2.14.

⁹ ODP, above n 7, para 3.2.

¹⁰ S Scott and H Parkey, ‘Myths and realities: anti-social behaviour in Scotland’ (1998) 13(3) *Housing Studies* 325. See also the alternative approach taken by E Burney, *Crime and Banishment* (Winchester: Waterside, 1999). She suggests three overlapping concepts: nuisance, neighbours and crime. The worst forms of anti-social behaviour, she argues, are those involving all three components.

¹¹ Research indicates that the majority of complaints from residents concern noise: P Papps, ‘Anti-social behaviour strategies: individualistic or holistic?’ (1998) 13(5) *Housing Studies* 639-656.

explicitly in line with the demands of Wilson and Kelling's influential "broken windows" thesis.¹² Litter and graffiti and other negative characteristics of public spaces are seen as deterring residents and visitors from neighbourhoods through the fear of crime, leading to their decline and the rise of more serious criminal activity.

However, both neighbour disputes and neighbourhood problems can also involve criminal activity, particularly if they escalate into violence or intimidation. A good example is drug-dealing. The presence of a "crack house" is a clear neighbourhood problem, and also criminal. It is this type of serious anti-social conduct that tends to feature in both government rhetoric and media reportage.

Anti-social behaviour thus stretches from minor incivilities to serious criminal behaviour. This gives rise to two issues. First, the problem with this lack of clarity is that it obfuscates the need for different solutions to the various problems that fall within its ambit. For example, neighbour disputes might be better resolved through mediation¹³ whilst criminal activity often requires a more drastic response, potentially involving legal sanctions. This is particularly worrying given the broad definition of anti-social behaviour adopted for the purpose of legal sanctions. It was the view of the Law Commission that a social landlord should have to prove that it was dealing with *serious* anti-social behaviour before being able to access its new legal procedures.¹⁴ This has not occurred in practice, however, and as such hypothetically, subject to the discretion of the court, legal sanctions can be imposed for a wide range of minor offences.

The second problem is an apparent conflict of interest between social landlords and the police. We saw in Chapter 1 that the police have tended to avoid the most deprived estates, leaving crime control to social landlords. However, to what extent is it more appropriate that criminal activity at least remains the preserve of the police?¹⁵ An immediately obvious issue is whether a clear divide

¹² J Wilson and G Kelling, 'Broken Windows', *Atlantic Monthly*, March 1982.

¹³ See A Brown et al, *The Role of Mediation in Tackling Neighbour Disputes and Anti-social behaviour* (Edinburgh: Scottish Executive, 2003).

¹⁴ Law Com 162, *Renting Homes (1): Status and Security* (London: HMSO, 2001), para 13.38.

¹⁵ P Papps, above n 11.

between the crime control function expected of social landlords and that of the police can be established. In the absence of an inherent quality to anti-social behaviour, especially one that delineates it from criminal activity, social landlords are left with a lack of clarity regarding ownership of the problem at the crime end. Whilst developed partnership working between the two organisations may result in organised division of labour, the broad definition of anti-social behaviour in the statutory definition does nothing to resolve the problem formally.

(b) “Housing-related”: from housing management to strategic management?

The definition of anti-social behaviour adopted by the section 218A duty is limited by an additional, important requirement: that the conduct must be housing-related. Social landlords are clearly not expected to take on a general policing role. As such, the link established by the duty between their crime control function and the accommodation they manage seeks to establish a legitimate ambit for their powers of social control. This concept has been defined in two ways. First, social landlords are responsible for illegal behaviour that actually occurs on their premises. The concern here is with the management of housing itself; for instance prostitution and drug-dealing occurring on the property. This is a relatively uncontroversial concern of housing management given that the behaviour is directly connected with the use of the landlord’s own stock.

However, the second limb of the duty is potentially more controversial. It constructs a policing role for social landlords extending far beyond concerns with conduct within the home: conduct that directly or indirectly affects their housing management function. According to draft guidance on the section 218A duty, this “housing management function” includes directly “any activity that the landlord would undertake in the day to day and strategic management of the stock [including] tenant and community participation, maintenance and repairs, rent and rent arrears collection, neighbourhood management and dispute resolution”, and indirectly “social care and housing support, environmental health and refuse

collection and other services provided that enable the efficient operation of the landlord function”.¹⁶

The section 218A duty therefore posits an expansive policing role for social landlords extending beyond the control of conduct within the home itself. What is particularly interesting is that social landlords are expected to respond to behaviour that affects what has been termed the “strategic management” of their housing stock. Anti-social behaviour that takes place in public spaces around social housing inevitably impacts upon basic housing management. As we have seen, social landlords have found themselves having to confront the problem of low-demand for their housing. Lack of demand is founded upon the reputation of entire estates. The need to tackle general anti-social behaviour affecting these areas such as street drug-dealing and prostitution, begging and gang violence directly affects attempts to instigate renewal of these localities, and consequently the task of reducing void stock. As such, social landlords are under pressure to diversify into general wardens of entire districts.

The broad interpretation of housing-related anti-social behaviour contained in the section 218A duty provides an interesting backdrop to an assessment of recent reforms to the nuisance grounds for eviction and the housing injunction. The law regulating these powers has not always provided such an expansive approach to social control. Originally, the focus of the tools was very much upon restraint of behaviour occurring on premises. However, over the years they have been restructured to reflect the strategic, neighbourhood management role now promoted by section 218A. The pressure for these changes has come from two sources. First, judicial dynamism has tended to push for expansive interpretations of statute in an effort to provide effective relief for petitioning landlords. Second, where this has proved impossible Parliament has ultimately responded with direct statutory reform to facilitate the broader role increasingly sought by housing managers. The following section charts these developments.

¹⁶ ODPM, above n 7, para 2.5.

(i) The nuisance grounds for possession

Prior to their modification by the Housing Act 1996, the original nuisance grounds under the 1985 and 1988 Housing Acts were structured in order to restrict the policing function of social landlords to the control of conduct taking place on the premises. They enabled a social landlord to evict a tenant in two situations: first, if the tenant was found to have made immoral or illegal use of the premises in which he lived, and second, on grounds of conduct by the tenant or another resident of the property affecting either “adjoining occupiers” under the 1985 Act or “neighbours” under the 1988 Act. The first part of the ground directly focused upon the use of property, whilst the second almost certainly assumed that conduct affecting adjoining occupiers or neighbours must emanate from the property itself.

However, as council landlords began to develop their formal crime control functions it became clear that this structure hampered the effective operation of a broader strategic management role. The case of *Northampton Borough Council v Lovatt*,¹⁷ decided under the unamended provisions of the 1985 Act, illustrated the limitations of the ground for social landlords wishing to take on such a role. The council had sought possession of Mrs. Lovatt’s home on the grounds of nuisance behaviour caused by both her and her sons. However, it relied upon anti-social conduct, including burglary and assault, which had taken place in various locations around the Spencer Estate in which they lived. The landlord argued that although the conduct at issue must affect an adjoining occupier, it need not emanate from the property itself. The tenant countered that this was not the case, and that it was inappropriate to use the Housing Acts as a general tool of social control beyond the restraint of conduct directly connected with the use of demised premises.

In fact the ground itself did not as a matter of construction require a connection between the conduct affecting neighbours and use of the premises.¹⁸ Instead, the judgment turned on the assessment of the court as to the legitimate

¹⁷ (1998) 30 HLR 875.

¹⁸ The decision in *Lovatt* did little to clarify the ambit of the nuisance grounds. The Spencer Estate was a clearly demarcated area. It would have been difficult to know exactly what would be “fairly regarded” as the extent of a Council’s legitimate housing management function.

policing role of social landlords. For Pill LJ, on the one hand, a broader strategic approach was out of the question. He was adamant that Ground 2 of the Housing Act 1985 did not have as its purpose general social control but was instead solely concerned with bad behaviour taking place on the premises themselves. The Act, he remarked, “demonstrates a Parliamentary intention to protect people living near the premises who are likely to be adversely affected by activities carried on there. I can find no broader social purpose either for the protection of other interests of the landlord or general neighbourhood protection against bad behaviour by a tenant or resident”.¹⁹

However, recognition of the developing crime control function of social landlords persuaded the majority to adopt an expansive interpretation of the statute. It was held that the conduct on the Spencer Estate did indeed fall within Ground 2 of the 1985 Act. For the majority the Acts appropriately extended to allow for possession for behaviour affecting “neighbours” that took place within the Estate. As Chadwick LJ held, “The conduct against which Ground 2 must have been intended to provide the Council with some protection is not confined to what is being done by its tenants and those residing with them on the demised property itself; but extends to what is being done within the area in which persons affected may fairly regard the Council (as local housing authority and landlord) as responsible for the amenities and quality of life, including freedom from harassment, enjoyment of which they are entitled to expect”.²⁰

The decision of the majority in *Lovatt* may well have been influenced by the fact that the Housing Act 1996 was in force at the time of the decision.²¹ Parliament has affirmed the judiciary’s attempt to broaden the application of the nuisance grounds. The 1996 Act now makes absolutely clear that social landlords are to use eviction as a policing tool for conduct both in and around the home by extending the grounds to include conduct affecting a person “residing, visiting or otherwise

¹⁹ (1998) 30 HLR 875 at 888.

²⁰ (1998) 30 HLR 875 at 895.

²¹ D Hughes, ‘The use of the possessory and other powers of local authority landlords as a means of social control, its legitimacy and some other problems’ [2000] 29(2) *Anglo-Am LR* 167-203.

engaging in a lawful activity in the locality” of a landlord’s housing. Moreover, the Court of Appeal has subsequently interpreted the concept of “locality” to widen considerably the range of victims of anti-social behaviour on behalf of whom a social landlord can intervene.²² The term “is an ordinary, readily understood English word without specialised or refined meaning. The operation of the section is flexibly linked to a geographical place”.²³ Its ambit is ultimately a question of fact for a judge according to the particular facts of a case.²⁴ The examples given of the potential ambit were as follows: “That area may be the part or the whole of a housing estate. It may straddle parts of two housing estates or include local shops serving the housing estate but within its boundaries”. As such, the current grounds for eviction are now far better equipped to support the strategic management of the estates and neighbourhoods surrounding a landlord’s housing stock.

(ii) The housing injunction

Similar judicial developments have occurred with respect to housing injunctions, although greater difficulties have arisen for the courts. Prior to the Housing Act 1996 social landlords were limited to the use of equitable injunctions which enabled only the restraining of breaches of the tenancy agreement. The statutory injunction created by the Housing Act 1996 continued this association with the direct management of housing stock. It focused upon the use of the home by proscribing illegal or immoral use of the property. It also went further to include behaviour affecting an individual “residing in, visiting or otherwise engaging in a lawful activity in residential premises to which this section applies or in the locality of such premises”.

The Court of Appeal in *Enfield Borough Council v DB*²⁵ was required to interpret the phrase. The decision established two important points, which

²² *Manchester City Council v Lawler* (1999) 31 HLR 119.

²³ *Ibid.* per Judge LJ. Note that *Lawler* was concerned with the use of the word “locality” in the context of the s 152 injunction. But the concept is of equal applicability to the nuisance grounds for possession: see Ward LJ in *Nottingham City Council v Thames* [2002] EWCA Civ 1098 at [17].

²⁴ *Ibid.*, per Butler-Sloss LJ.

²⁵ [2000] 1 WLR 2259.

themselves highlight again the reluctance of certain members of the judiciary to countenance a broad policing function for social landlords. First, extended protection for those “in the locality” of local authority premises extends only to those engaged in lawful activity there, not to residents or visitors. The two judges, Waller and Buxton LJ, differed in their approach to the interpretation of the legislation. Waller LJ held that, as a matter of statutory construction, the phrase did not allow grammatically for the protection of either residents or visitors in the locality of residential premises owned by the landlord. Whilst Buxton agreed that the concept of ‘visitors in the locality’ was nonsensical, he believed that the wording of the statute did extend to residents in the locality of local authority premises. However, he was clearly concerned that it could not have been the intention of Parliament to allow a local authority to intervene under a Housing Act to protect residents who were not themselves council tenants.²⁶

Second, the Court held that there must additionally be a “connection”, “link” or “nexus” between a person in the locality affected by conduct and the residential premises. Examples of such a connection provided by Waller LJ were employees visiting the residential properties: milkmen, gas men and water board officials. Once again, this was explicitly a policy-based restriction of the statute. The concern was that without this association, a landlord could inappropriately intervene to protect anyone who, however accidentally, was affected whilst in the vicinity of local authority housing. This was obviously seen as an inappropriately broad policing role for social landlords.

Two consequences of the decision in *Enfield* for strategic neighbourhood management are as follows. In *Enfield* itself, the authority sought an injunction in response to threats of violence by a local authority tenant against staff in a social services office in the locality of local authority housing. It was held that there was no nexus between the lawful activities engaged in by the staff and the residential

²⁶ Waller LJ’s linguistic interpretation was favoured over Buxton LJ’s purposive approach by Ward LJ in *Nottingham CC v Thames* [2002] EWCA Civ 1098.

housing.²⁷ The second consequence is that the Court of Appeal has refused to extend protection to owner-occupiers affected by anti-social behaviour living in the locality of local authority housing. As we have seen, *Enfield* prevents landlords from seeking an injunction to protect residents in the locality of local authority premises. However, in *Manchester CC v Lee*²⁸ the claimant sought to argue that the owner-occupier affected was engaging in lawful activity in the locality. It was held by the Court that whilst this was the case, the victim did not have the requisite nexus with the residential premises simply as a result of his proximate owner-occupation. This decision would clearly also extend to victims housed within the private rented sector or by registered social landlords in the locality of local authority premises.²⁹

However, in parallel with the development of the crime control function of social landlords, the Court of Appeal in later cases clearly wished to move towards a more expansive interpretation of the legislation. The Court in *Enfield* were intent on securing a restrictive interpretation of section 152(1)(a) for fear that it would extend the legislation beyond the ambit appropriate for a Housing Act. However two years later, Ward LJ in *Nottingham CC v Thames*³⁰ was extremely reluctant to follow the ratio of that case. He saw the section 152 injunction as “a remedy designed for the council for the good management of their housing estate rather than for the protection of a particular tenant of council accommodation”.³¹ He therefore argued that if he had been able to approach the question of nexus afresh, he would have imposed a far-reaching test: “was the threatened/assaulted person engaging in some lawful activity in the locality of council housing?” He suggested that it would then be open to the discretion of the judge to ensure that the local authority had the necessary interest in restraining the conduct in pursuit of the good management of the estate.

²⁷ This conclusion was confirmed by Ward LJ on similar facts in *Nottingham CC v Thames* [2002] EWCA Civ 1098.

²⁸ [2003] EWCA Civ 1256; [2004] 1 WLR 349.

²⁹ See Pill LJ in *Manchester CC v Lee* [2003] EWCA Civ 1256 at [12].

³⁰ [2002] EWCA Civ 1098.

³¹ *Ibid.* at [5].

Similarly, Pill LJ in *Manchester City Council v Lee*³² explicitly noted the problem of anti-social behaviour on estates that the Housing Act 1996 seeks to address, and concluded that “I would approach the section and decided cases on the basis that too restrictive an interpretation is, if possible, to be avoided”.³³ However, he concluded in that case that the approach preferred by Ward LJ in *Thames* was inappropriately wide, implicitly unwilling simply to rely upon the discretion of the judge to restrict injunctions to those necessary for the good management of estates. Instead, Pill LJ reaffirmed the requirement of a connection between the anti-social conduct and a landlord’s residential premises.

However, once again Parliament has intervened where the Court of Appeal has felt unable. The new anti-social behaviour injunction created by the Anti-social Behaviour Act 2003 now explicitly protects (a) anyone with a right (of whatever description) to reside in or occupy other housing accommodation in the neighbourhood of a council or RSL’s housing, (b) a person engaged in lawful activity in or in the neighbourhood of such housing and (c) a person employed (whether or not by the relevant landlord) in connection with the exercise of a landlord’s housing management functions. Furthermore, it is irrelevant where the conduct actually occurs, although it must still directly or indirectly affect the housing management function of the landlord.

The term “neighbourhood”, although sometimes used as a synonym for “locality”, may well support an even wider spatial area within which a social landlord can impose injunctions. Further, within that area the new definition now extends protection to both residents of other tenures excluded by *Lee* and housing officers refused protection under *Thames*. The irrelevancy of the location of the anti-social behaviour enables a landlord to respond to an altercation between two neighbours that takes place away from their homes. However, there is no explicit rejection in the legislation of the *Enfield* decision that lawful activity in the neighbourhood of housing must have a nexus with the landlord’s housing stock,

³² [2003] EWCA Civ 1256.

³³ *Ibid.* at [24].

and it is possible that such a limitation may be assumed by the Court of Appeal again.

2. Formalization of the crime control function of social landlords

The legislative developments of the last decade are the consequence of the active lobbying of certain social landlords, most notably the larger metropolitan councils operating through the SLCNG. Although the last Conservative government provided social landlords, or more specifically local housing authorities, with legal powers under the Housing Act 1996, it was responding to the demands of those landlords who had decided independently to incorporate crime control processes into their housing management operations.

The section 218A duty, it is submitted, reflects a new approach by government towards the role of social housing management in controlling anti-social behaviour. The duty now formally recognises the primary responsibility of *all* social landlords for disorder in the areas within which they operate. By co-opting the sector as a whole and institutionalizing its policing tasks, the duty demands action from those social landlords who have not, as yet, independently developed their own crime control processes. Commentators have suggested that the development of legal powers for social landlords is evidence of what David Garland calls a “responsibilization strategy”, whereby organizations beyond the formal criminal justice system are drawn by government into crime control processes.³⁴ However, in truth, previous legislation merely responded to the petitions of self-responsibilized social housing providers. The section 218A duty, on the other hand, is perhaps a more fitting example of responsibilization, for it entails a proactive move to harness the resources of housing management to meet national priorities. It should be noted of course that there has been movement by the majority of social landlords away from what Scott and Parkey term a “negligible” approach towards the management of anti-social behaviour,³⁵ with

³⁴ D Garland, *The Culture of Control* (Oxford: OUP, 2001). See, for example, D Cowan and C Pantazinis, ‘Social landlords as crime control’ (2001) 10(4) *Social and Legal Studies* 435-457.

³⁵ Scott and Parkey, above n 10.

most engaged in at least some level of crime control. However, certain of the smaller local authorities and registered social landlords are still failing to take action.³⁶ For those reluctant to take on this responsibility as part of their housing management function the section 218A duty will no doubt encourage greater responsiveness.

This development arguably illustrates the changing approach of central government towards the role of official agencies in the management of neighbourhood disorder. In an attempt to relieve itself of the problems of vulnerable areas, the Conservative party placed ultimate responsibility for crime and disorder upon the residents of affected neighbourhoods.³⁷ Rather than providing agencies with legislative powers to respond to anti-social behaviour, it sought to appeal to community and 'active citizens' as a solution.³⁸ Consequently it blamed residents themselves for their failure to exact informal social control over troublemakers. To an extent, the Labour party has adopted the same approach as a component of its own policies on civic renewal. Drawing upon the work of Etzioni it has argued that every citizen owes responsibilities to govern both themselves and their communities.³⁹

However, in a recent article Flint notes that the government has increasingly reduced its reliance upon the ability of vulnerable neighbourhoods to regulate themselves.⁴⁰ Instead, it has transferred responsibility from individual citizens back to the "direct role of the state as an 'official' presence in the governance of neighbourhood disorder".⁴¹ He argues that this is the consequence of an acceptance that the neighbourhoods most in need of help are those least able to

³⁶ C Hunter and J Nixon, 'Social Landlords' Responses to Neighbour Nuisance and Anti-Social Behaviour: From the Negligible to the Holistic?' (2001) 27(4) *Local Government Studies* 89-104. The authors posit three reasons for this: the absence of formal monitoring of the nature and scale of the problem in their areas; difficulties in developing partnerships with other agencies and the obviously interrelated problem of insufficient resources.

³⁷ A Crawford, *The Local Governance of Crime* (1997).

³⁸ J Flint, 'Social housing agencies and the governance of anti-social behaviour' (2002) *Housing Studies* 17(4) 619-637.

³⁹ See, for example, David Blunkett's active civil renewal agenda: D Blunkett, *Civil Renewal: a new agenda*, *The CSV Edith Kahn Memorial Lecture*, 11th June 2003.

⁴⁰ J Flint, 'Return of the Governors: the new governance of neighbourhood disorder in the UK' (2002) 6(3) *Citizenship Studies* 245-264.

⁴¹ *Ibid.*

draw upon the social capital required to exact informal social control upon recalcitrant individuals. Thus, its appeals to 'community' and the 'active citizen' are replaced by the encouragement of increased intervention by state institutions. The recently intensified role of social landlords fits Flint's model. Rather than relying predominantly upon the exercise of informal social control by communities, the section 218A duty reflects the central importance now placed upon official intervention by social landlords, reinforcing their position as Flint's formal state "governors".

3. Registered social landlords as equal partners

Chapter V of the Housing Act 1996 concentrated attention predominantly upon solutions targeting anti-social tenants of local authorities. The legislation created an array of policing tools for council landlords to control behaviour. Whilst it extended grounds for eviction for nuisance to all social housing providers, it granted use of the introductory tenancy regime and the statutory housing injunction to local housing authorities alone. There are two potential reasons for this early differentiation between council and registered social landlords. First, in the mid-1990s, it was still predominantly local authorities at the heart of the SLCNG, lobbying for greater powers. Few registered social landlords had yet sought to engage in crime control processes. However, a second possibility is that in any case the government may well have deemed the extension of policing functions to registered social landlords as inappropriate, given their quasi-private nature.

The section 218A duty, imposed equally upon registered social landlords and local housing authorities, reflects the government's appreciation of the exponential increase in the growth of the RSL sector, particularly through the transfer of council stock under LSVTs. RSLs are an increasing presence in deprived neighbourhoods: the early focus upon council housing alone failed to reflect the tenure diversification of many estates where RSLs are now major housing providers. Furthermore, a number of the larger RSLs are now core members of the

SLCNG and have lobbied alongside local housing authorities for greater powers. The equal duty has been paralleled by the extension to RSLs of many of the legal sanctions previously restricted to local authorities. They now have access to demoted tenancies and the new anti-social behaviour injunctions created by the Anti-social Behaviour Act 2003. Further, they are able to impose anti-social behaviour orders under the Police Reform Act 2002.

It is worrying that little debate has occurred as to the legitimacy of this parity of role between local housing authorities and registered social landlords. This development is a pragmatic step; the result of an acceptance that deprived estates are increasingly managed either in whole or part by registered social landlords. However, this does not of itself justify shared policing responsibilities. The quasi-private nature of RSLs raises questions about the appropriateness of an extended policing function beyond control of the use and occupation of actual housing premises.

Three concerns might be raised about the extended policing function of registered social landlords. First, unlike councils, RSLs do not enjoy a democratic mandate. They are unelected and therefore, arguably, an illegitimate provider of formal crime control. Of course, they are overseen by the Housing Corporation which does ensure close regulation of their activities. However, this still does not enable direct participation from local residents. Take for instance the duty to publish policies and procedures on the management of anti-social behaviour. If a council landlord fails to adhere to this document, residents can respond through the ballot box. Registered social landlords, on the other hand, are free from such scrutiny.

Second, it is questionable whether organisations operating according to corporate principles can be trusted to adhere to principles of social justice to the same degree as local authorities. It is true, as we have seen, that local housing authorities have found themselves subject to "Best Value" considerations and are therefore themselves sensitive to corporate processes. Conversely, many RSLs have been established with clear welfarist aims: for example, those providing housing

for vulnerable groups. However, other registered social landlords, particularly those set up under LSVTs, are arguably concerned solely with the efficient provision of social housing, albeit not for profit. Compared to these organisations local government still retains an arguably more appropriate welfarist ideology, operating according to the needs of the social rather than mere financial considerations, although clearly further empirical work would be necessary to assess exactly how RSLs diverge from councils in their crime control practices.

The final concern is that as private sector organisations RSLs continue to operate largely outside the bounds of public law and the Human Rights Act. Disciplinary and exclusionary crime control necessarily involves serious intrusions into the lives of those targeted by legal sanctions, but RSLs are currently able to carry out this function free from these basic forms of legal scrutiny. However, it is arguable that in fact the crime control function of RSLs should be treated as a public function for these purposes. As noted in Chapter 1, it is the 'normal and essential' functions of a landlord that are excluded from the ambit of judicial review. A public function under section 6 of the HRA has been held by the courts as one that is 'enmeshed' with the functions of the state through, in particular, the positioning of the body in the shoes of a public authority and the availability and use of statutory powers for the purpose of the relevant activity.⁴² It is submitted that under either system crime control through the operation of statutory sanctions should be deemed capable of scrutiny by the administrative courts.⁴³ The section 218A duty itself reinforces this claim. Social landlords are no longer concerned merely with housing management, but the broader strategic management of entire neighbourhoods in line with national policing policies.

4. Liability of a social landlord to the victims of anti-social behaviour

⁴² See Chapter 1.

⁴³ See, for instance, the argument of Holbrook and Underwood that the operation of the demoted tenancy regime by RSLs should be deemed a public function for the purpose of both judicial review and the HRA: *Legal Action*, October 2004, p 23.

During the 1990s Mal Hussain and his wife ran a small shop on the Rylands Estate in Lancaster. For years they were subjected to the worst possible kinds of racial harassment: the shop was targeted by racists with graffiti, bricks through the windows, fire-bombings and other arson attacks, death threats and violent assaults, alongside constant verbal abuse. However, whilst a number of the perpetrators were eventually prosecuted for a series of minor criminal offences, the Hussains were desperate for those who were tenants of the council to be evicted. Yet Lancaster City Council, even after considerable pressure from the household, failed to take any action for possession of the properties. The experience of the Hussains, one that made the national newspapers,⁴⁴ illustrates that empowering social landlords does not automatically ensure the ultimate protection of those affected by anti-social behaviour. The legal tools available to them are discretionary, and as such they are free to refuse to take action.

Such a situation is increasingly unlikely to arise, as more and more social landlords are responsibilized into engaging in co-ordinated crime control practices. As Hunter notes in recent research, although social landlords may differ in their approach they have almost all moved from a “minimalist” or “negligible” approach to the management of anti-social behaviour.⁴⁵ In any case, the section 218A duty will likely increase the political accountability of social landlords to residents affected by the bad behaviour of others. Yet political accountability is still of limited value to an individual victim. If a council landlord fails to take action against a particular perpetrator of anti-social behaviour, the victims of that behaviour can turn to the democratic process to press their demands for relief. Individual grievances might also lie with complaints to the Housing Corporation, Independent Housing Ombudsman or Local Authority Ombudsman which provide another layer of regulatory control over the practices of council and RSL landlords. However, these are relatively indirect and blunt tools with which to try and change local government policies, and there is no certainty that they will lead

⁴⁴ ‘How racists forced storeholder to shut up shop’, *The Independent*, 10 August 2004.

⁴⁵ Hunter and Nixon, above n 36.

to a response in particular circumstances. As such, attention has been drawn to possible sources of legal remedy against social landlords.

(a) Public law

An individual affected by anti-social behaviour may well be able to pursue a remedy against a local housing authority in public law. From the outset, however, under current case law this limits the capacity of an affected individual to seek relief from a registered social landlord. Bright and Bakalis suggest a number of routes by which a victim might potentially be able to enforce a response from a council landlord.⁴⁶ A victim could seek judicial review of the decision not to act based on the general expectations arising from the availability of legal sanctions such as eviction and injunctions with which to respond to the problem. Liability might also arise from expectations based on specific assurances to the particular victim, frustration of which could amount to an abuse of power.⁴⁷ It might stem further from the statutory duty on local authorities to consider the crime and disorder implications of their actions as imposed by section 17 of the Crime and Disorder Act 1998, although this is limited by the difficulty in enforcing general duties of this kind under administrative law. Finally, Bright and Bakalis argue duties could be constructed as a result of the positive obligation of public authorities to protect Convention rights, most notably Article 8 (right to respect for private life) and, in the most serious cases, Article 2 (right to life).⁴⁸

As Bright and Bakalis accept, each of these public law routes is likely to suffer from the “balancing exercises and constitutional hazards” inherent in such actions.⁴⁹ On the one hand, a number of procedural hurdles (in particular time limits and standing) are imposed on those wishing to bring actions under judicial review or the Human Rights Act. Further, an applicant suffers from the “hands-off” approach to issues of housing policy adopted by the courts in their review

⁴⁶ S Bright and C Bakalis, ‘Anti-social behaviour: local authority responsibility and the voice of the Victim’ [2003] 62(2) *CLJ* 305-334.

⁴⁷ See for instance *R (Bibi) v Newham LBC* [2002] 1 WLR 237.

⁴⁸ *Kroon v Netherlands* [1994] 19 EHRR 263; *Botta v Italy* [1998] 26 EHRR 241.

⁴⁹ Bright and Bakalis, above n 46

capacity. The High Court is particularly loath to involve itself in too intrusive an assessment of decision-making constituting questions of social policy.⁵⁰ Even when the review involves questions of human rights breaches, judicial deference to executive decision-making in areas of housing policy in particular has been made explicit⁵¹ and the balancing process inherent in Article 8 is likely to involve consideration not only of the victim but of the perpetrators too. As such, the courts will be reluctant to interfere. Finally, even if a review is successful the most likely outcome is for the court to order a landlord to make the decision again compliantly, which on public law grounds will not necessarily result in a response to the bad behaviour.

One recent successful public law challenge is that of *Donnelly, Re Application for Judicial Review*.⁵² In that case the Gambles, tenants of the Housing Executive of Northern Ireland and known to be associated with terrorist paramilitary activity, had engaged in extremely serious intimidation against their neighbours, the Donnellys. The Executive, however, failed to apply its own procedures for dealing with anti-social behaviour and instead offered to rehouse the victim. The Housing Executive gave a number of reasons for doing so, including concerns about the risk to the health and safety of its own staff. Applying for a judicial review, it was argued that the Housing Executive acted unlawfully and that failure to take action was in breach of Article 8 and Article 1, Protocol 1.⁵³ The application was dismissed by Weatherup J, who found that the risk to personal safety was not an irrelevant consideration. Further there had not been a breach of Article 8 as the Executive 'had achieved a fair balance between the appellant's rights and the public interest in an effective public housing system'. The infringement of the Donnellys' rights under Article 1, Protocol 1 was justified in the same way. The decision was also not *Wednesbury* unreasonable.

⁵⁰ *R v DPP, ex p Kebilene* [2000] 2 AC 326 at 381 *per* Lord Hope.

⁵¹ *Southwark LBC v Tanner* [2001] 1 AC 1 at 8 *per* Lord Hoffman.

⁵² [2003] NICA 55.

⁵³ Articles 2, 3 and 6 were held by the judge to not be engaged. This was subsequently confirmed by the Court of Appeal.

The subsequent appeal was upheld. In its ruling the Court of Appeal agreed with *Weatherup J* that the risk to the personal safety of Housing Executive staff was a relevant consideration. However, it held that the Housing Executive had not discharged its duty to take reasonable and appropriate measures to secure the victim's rights and that refusing to commence proceedings for possession was in breach of Article 8 and Article 1, Protocol 1 of the Convention. Yet the reason for this conclusion was not substantive but procedural. It was held that the Executive had failed to provide the court with the necessary information from which it could reach a conclusion as to its justifications for the breach.⁵⁴ The court required sufficient information to be made available to allow it to judge whether or not a decision which interferes with rights is necessary and proportionate. It held finally that an appropriate remedy was for the Executive to reconsider its decision in compliance with the Convention.

The decision illustrates the demands that the Human Rights Act 1998 now places on public authority landlords to provide adequate evidence to the court as to why their decision not to take action against anti-social behaviour by their tenants complies with the European Convention. However, the decision does not establish judicial review as a particularly valuable route for victims of anti-social behaviour. It is still likely that a public landlord that provides the court with such information will easily satisfy the demands of both public law and the Convention, given the courts' reluctance to interfere in political decision-making. Moreover, it should be noted that the ultimate outcome of the challenge for the Donnellys was not action to remove the Gambles, but merely an order by the court that the Executive should reconsider its original decision.

(b) Private law

It is arguable therefore that only when social landlords are held accountable to victims in private law for the behaviour of their tenants can individuals like the Hussains ensure they are adequately protected. In particular a private law right is

⁵⁴ [2003] NICA 55 at [11].

not subject to the cautious, hands-off approach taken by the courts to scrutiny of decision-making under administrative law. If established a private law right is also specifically enforceable, ensuring that social landlords can be made to remedy the problem. However, whilst actions in private law have been actively pursued by victims in recent years, this route has ultimately failed to provide them with the necessary platform. Most notably, challenges to the failure of a social landlord to control the anti-social behaviour of its tenants through the tort of nuisance have failed, given the considerable hurdles a claimant must overcome to establish liability.⁵⁵

It is well-established that actions in nuisance are limited by the rule that a landlord is only liable for the behaviour of its tenant if he or she has expressly or impliedly authorised the behaviour about which the complaint is made.⁵⁶ It is clear that mere inaction is not enough to establish implicit authorisation. Instead the nuisance caused must be an inevitable consequence of the demise of the leasehold to its creator. In *Smith v Scott*⁵⁷ a household's history of anti-social behaviour prior to their rehousing beside the claimants was held not to constitute sufficient evidence of an inevitable future nuisance, particularly as such behaviour was specifically prohibited by the tenancy agreement. In addition, claimants are restricted in their actions by the rule that acts of nuisance must emanate from the property itself. In the case of Mr. Hussain, the attacks had taken place instead from the public highway.⁵⁸ In fact, the claimants would have been better off the perpetrators had not been tenants of the local authority: the cases of *Page Motors*⁵⁹ and *Winch v Mid-Beds*⁶⁰ extend liability to nuisances emanating from trespassers if the landowner has knowledge of the behaviour and simply allows it continue.

⁵⁵ For analysis see M Davey, 'Neighbours in law' [2001] *Conv* 31 and J Morgan, 'Nuisance and the Unruly Tenant' (2001) 60(2) *CLJ* 382.

⁵⁶ *Smith v Scott* [1973] Ch 314; *Hussain v Lancaster City Council* [2000] QB 1. This position has not changed following the Human Rights Act 1998: see *Mowan v Wandsworth* [2000] EWCA Civ 357.

⁵⁷ [1973] Ch 314.

⁵⁸ Although arguably given that the local authority controlled these areas under the Highways Act 1980 it was an occupier of those parts and thus subject to the "adoption" rule in *Sedleigh-Denfield v O'Callaghan* [1940] AC 880: see D Collins [2002] *Law Teacher* 241. For a general criticism of the "emanation" rule: Morgan (2001) 60(2) *CLJ* 382.

⁵⁹ *Page Motors Ltd v Epsom and Ewell BC* (1982) 80 LGR 337.

⁶⁰ *Winch v Mid-Bedfordshire DC* [2002] All ER (D) 380.

Whilst recent attempts by the victims of anti-social behaviour to force social landlords to take action against their tenants on tortious principles have failed, Bright and Bakalis have explored other routes by which a local housing authority might be made liable in private law to a victim of anti-social behaviour for the behaviour of others. Liability could arise, for instance, from expectations arising from the landlord-tenant relationship when both the perpetrator and victim are occupiers of the landlord's housing. In particular, the authors argue that remedies could follow moves by the judiciary towards a more expansive interpretation of the duty not to derogate from grant, in the context of assurances contained in published policies and procedures published under the 218A duty.

What is more interesting, however, is that both the government and the Law Commission have sought to respond to the difficulties faced by victims wishing to hold landlords responsible in law for the anti-social behaviour of their tenants by proposing the creation of a statutory duty on social landlords to take action against such conduct.⁶¹ The government did not set out the exact form that such a duty would take. However, the Law Commission suggested that the duty should take effect in contract as a mandatory term of a social tenant's tenancy agreement. This would specify "that the landlord should take all reasonable steps to ensure that the occupier should be able to occupy the home unaffected by anti social behaviour by other occupants of other premises owned by the landlord".⁶² Damages, and more importantly injunctions enforcing the term, could be sought by the victim if a landlord failed to respond to the anti-social behaviour of their tenants.

However, the government ultimately dismissed the possibility of such a duty. Instead, it chose an alternative, procedural, duty on social landlords to simply publish policies and procedures on the management of anti-social behaviour, which subsequently became section 218A of the Housing Act 1996. The Law

⁶¹ DLTR, *Tackling Anti-social Tenants* (London: HMSO, 2002); Law Com 162, *Renting Homes (1): Status and security* (London: HMSO, 2001), para 13.33.

⁶² *Ibid.*

Commission's proposal has been similarly shelved.⁶³ Lawyers often assume that legal rights are the most appropriate way in which to ensure just and efficacious solutions to social problems. However, the reluctance of the government to provide victims with a legal "voice" through statutory intervention, and its preference for the section 218A duty, is a clear indication that the private law liability of social landlords, whether founded upon tort, contract or a statutory duty, has proved a problematic proposal.

(c) Accountability of social landlords in private law: an inappropriate remedy?

An initial criticism of the proposal for a specific statutory duty on social landlords put forward by Andrew Ashworth is the doctrinal difficulty with vicarious liability in law: "in principle we should each be treated as an autonomous human being, responsible for our own conduct but not for the conduct of other autonomous beings".⁶⁴ It is submitted that this caution towards vicarious liability is not particularly persuasive given that social landlords are institutions not individuals. As such, their autonomy is more justifiably infringed for the social good. However, even if one adopts this utilitarian analysis, it is still questionable whether imposing liability on social landlords in this way will actually result in a desirable overall outcome in an area of such complex social policy.

The government's own utilitarian justification for rejecting its proposal for an enforceable statutory duty was made explicit in its consultation paper and was echoed in the Law Commission's report. It was the desire "to avoid the kind of canvassing for legal work which has happened in disrepair claims".⁶⁵ This distrust of the profession permeates other government policies: in particular, with respect to immigration appeals.⁶⁶ There is an implication here too that providing victims

⁶³ Law Com Rep 284, *Renting Homes* (2004), para 15.18.

⁶⁴ A Ashworth, 'Social control and "anti-social behaviour": the subversion of human rights?' [2004] 120 *LQR* 263, 270.

⁶⁵ DTLR, *Tackling Anti-social Tenants* (London: HMSO, 2002). See also Law Com, above 63, paras 15.18 and 15.19.

⁶⁶ See also the recent White Paper on organised crime in which the government asks for views "on how else defence tactics simply to frustrate the trial process can most effectively be tackled would be most welcome":

with the power to sue a social landlord for its failure to take action to combat anti-social behaviour will have negative implications for resource allocation. Opening up social landlords to the risk of litigation for their failure to comply with the duty could channel funds to individual complainants that could be better spent elsewhere.

However, there are two additional issues not mentioned in the government assessment of equal importance. First, vicarious liability of social landlords should be approached with caution because it will involve the courts in the delicate balancing of competing policy issues. In considering whether reasonable steps have been taken to bring an end to anti-social behaviour it is not enough simply to demand that a social landlord takes legal action against the perpetrator. In Chapter 5, this thesis examines the criticisms of commentators that the emphasis placed by the government upon injunctions, ASBOs and eviction is an inappropriate and unsustainable way in which to tackle such conduct. Instead, a more holistic approach tackling the causes as well as the symptoms of this behaviour is often required. To demand that a court oversee such complex and political decision-making is inappropriate. The specific statutory duty could even lead to a litigious environment around the crime control function of these organisations, resulting instead in an increased resort to legal sanctions (particularly eviction) which are clearly indicative of “action” as a risk aversion strategy. The Law Commission touches on this problem by proposing that its contractual duty would be drafted in such a way as to not affect the allocation decision-making of the local authority.⁶⁷ The suggestion here is that providing housing to an individual with a history of bad behaviour would otherwise be viewed as a breach of the contractual term by the courts.

Secondly, social landlords do not have clear ownership of the control of crime and anti-social behaviour carried out by their tenants. In the case of serious criminal activity such as that experienced by the Hussains, it seems inappropriate

Home Office, *One Step Ahead* (London: HMSO, 2004) Cm 6167. The creation interim ASBO was also partially justified as preventing delaying tactics by defence lawyers: see Chapter 4.

⁶⁷ Law Com 162, *Renting Homes (1): Status and Security* (London: HMSO, 2001), para 13.5.

to empower a victim to seek relief from a landlord alone when the police clearly have a responsibility to take action in response to that behaviour too. Indeed, the management of anti-social behaviour increasingly involves co-operation between various local agencies.⁶⁸ Actions against individual landlords will likely impinge upon the effective operation of such multi-agency strategies.

Notably, these utilitarian concerns appear to have informed the decision of the Court of Appeal not to extend liability to social landlords for nuisance caused by their tenants. In the eyes of Sir Christopher Staughton the decision in *Mowan* was a “deplorable result” and ostensibly the courts in both *Hussain* and *Mowan* simply felt tied to century-old case law. However, it is arguable that although it was possible to extend the law in these case, the Court of Appeal was concerned ultimately to ensure local authority immunity on these public policy grounds.⁶⁹ Bright argues for instance that the court was indeed concerned to avoid intruding upon the difficult decision-making demanded of a social landlord by deciding whether a landlord has taken reasonable steps to end a nuisance caused by its tenants.⁷⁰ Moreover, there is a clear appreciation of the complexity of the fight against anti-social behaviour in Thorpe LJ’s warning that “the wrongs which the plaintiffs have suffered must be fought by multi-disciplinary co-operation and not by civil suit against one of the relevant agencies”.⁷¹

4. Conclusions

This chapter has argued that the recently imposed section 218A duty to publish policies and procedures on the management of anti-social behaviour provides evidence of important changes in the contemporary policing role of social landlords. The focus upon anti-social behaviour ties social landlords to tackling a potentially vast range of bad behaviour occurring across entire neighbourhoods

⁶⁸ Anti-social Behaviour Units are increasingly set up as part of Crime and Disorder Reduction Partnerships formed between local authorities and the police rather than housing departments.

⁶⁹ For an assessment of the broader approach taken by the Australian and US courts, which emphasises the capacity of a landlord to take action to remedy a nuisance rather than its authorisation see D Collins [2002] *Law Teacher* 241.

⁷⁰ S Bright, ‘Liability for the Bad Behaviour of Others’ (2001) *OJLS* 21(2) 311 at 317.

⁷¹ [1999] 4 All ER 125 at 148.

within which they operate. Adopting a crime control function is also no longer a choice for housing managers: the sector has been formally responsabilized and all organisations are expected to engage in control processes. Registered social landlords are to be treated as equal partners to local housing authorities, reflecting the increasingly important role they play in modern housing provision, though whether private companies make legitimate policemen is open to question. However, importantly the duty stops short of providing the victims of anti-social behaviour with an actionable legal remedy against a recalcitrant landlord on clear, and understandable, public policy grounds.

Part II

PUBLIC PROTECTION AND HOUSING MANAGEMENT: SOME CONFLICTS AND TENSIONS

Underpinning the new crime control function of social landlords is a new rationale: securing for individuals and communities effective protection from bad behaviour. Social landlords have been armed accordingly with a raft of legal tools with which to effect that protection: increased powers of eviction, housing injunctions and the controversial anti-social behaviour order. The following chapters take a closer look at the impact that this protectionist rationale has had on the structure of these tools, and the extent to which competing discourses have tempered that overriding objective.

Chapter 4 highlights the success of protectionist arguments in persuading government to reduce the due process rights of defendants. Concerns raised by social landlords about delay and uncertainty of outcome in legal proceedings, and the problem of witness intimidation, have had a huge impact on recent reforms. The chapter looks at two in effects in particular: the replacement of juridified security of tenure for social tenants with a form of internal administrative review, and the creation of the “hybrid” anti-social behaviour order. In each case it examines the effect of (predominantly unsuccessful) challenges to these developments in the courts, most notably under Article 6 of the European Convention on Human Rights.

Chapters 5, 6 and 7 then focus upon the conflict between the protection of the public through punitive sanctions and the welfare needs of often extremely vulnerable perpetrators. Chapter 5 focuses upon the political criticisms of this approach. It notes the concern of commentators that the use of disciplinary and exclusionary legal sanctions by social landlords can provide only limited protection for communities, whilst exacerbating the social exclusion already experienced by targeted individuals. It then assesses the extent to which government and social landlords have begun to develop a more holistic approach to the problem of neighbourhood disorder, focusing upon support not punishment.

Chapters 6 and 7 go on to explore whether and to what extent the operation of the legal tools available to social landlords to protect the public have been tempered by welfarist legal discourse. Chapter 6 looks at the development of the legal tools themselves. It notes in particular that the concept of reasonableness in possession proceedings under the assured and secure tenancy regimes has been reconstructed by the Court of Appeal in line with protectionist objectives to prevent consideration of the welfare of the defendant or his household. Chapter 7 then examines the interface between these tools and other welfarist legislation. It explores the unexpected impact of the Disability Discrimination Act 1995 on legal proceedings by landlords against the mentally ill, and the use of various manifestations of the welfare principle to protect child perpetrators in ASBO proceedings.

Chapter 4

DISPENSING WITH DUE PROCESS: PROBLEMATIZING COURT PROCEDURES

There is a perception amongst social landlords that court procedures weaken their efforts to protect the public from anti-social behaviour. Two interrelated strands of criticism have emerged: first, that the trial process provides insufficient speed and certainty of relief for the community; and second, that it has been undermined by the intimidation of witnesses. Recent legislative initiatives have consequently sought to “re-align” the legal system in favour of the interests of victims of anti-social behaviour (and thus the landlords seeking to protect them). This has occurred, however, at the expense of the procedural rights of defendants, who have become increasingly passive participants in legal proceedings.

This chapter looks more closely at two particularly controversial consequences of this problematization. First, it notes the reduction in due process rights of council tenants in possession proceedings through the expansion of internal review processes in the place of traditional, juridified forms of security of tenure. Second, it assesses the constitutional implications of the “hybrid” anti-social behaviour order, with its pragmatic manipulation of the civil-criminal distinction. In both cases, the chapter focuses upon recent challenges to this legal infrastructure under Article 6 of the European Convention, which has been invoked to counter these developments and reinstate the procedural rights of defendants, with varying degrees of success.

1. Perceptions of social landlords: delay, uncertainty and witness intimidation

The criminal justice system involves constant negotiation between the competing discourses of crime control and due process.¹ Whilst the system is the cornerstone of formal state-sponsored social control in western liberal

¹ H Packer, *The Limits of the Criminal Sanction* (1969).

democracies, this function has been tempered by the development of procedural rights for defendants, reflecting historical, constitutional concerns about the potential of the state to exercise oppressive power over the citizenry. One manifestation of the politics of security, and concomitant demands for measures to ensure greater public protection, is increased incursion into these rights. This is perhaps most noticeable in the current reaction to the threat of international terrorism. However, it extends also to general criminal activity. The current government's policies on crime and disorder have focused upon ensuring more guilty defendants are punished through the reduction in their due process rights. As it states in its recent White Paper *Justice for All*: "our programme of reform is guided by a single clear priority: to rebalance the criminal justice system in favour of the victims and the community so as to reduce crime and bring more offenders to justice".²

Whilst the policing function of social housing management operates outside the formal criminal justice system, it also reflects a move towards reduced due process rights for defendants in pursuit of more effective protection from anti-social behaviour. Many social landlords, particularly those lobbying from within the SLCNG, have consistently complained to the government that their ability to effectively protect residents is frustrated by three aspects of the court process.

First, they have experienced delays in the application for legal remedies. Eviction, injunctions and ASBOs are employed in response to persistent anti-social conduct rather than single, isolated acts of bad behaviour: social landlords are concerned not with past offences but with on-going courses of conduct. They therefore engage with the court processes that regulate the use of these sanctions against a backdrop of continuing problem activity and as such the speed with which a court deals with an application for relief is brought into sharp focus.

² Home Office, *Justice For All* (London: HMSO, 2002). See the critique of Ashworth ('Criminal Justice Reform: Principles, Human Rights and Public Protection' [2004] *Criminal Law Review* 516) who argues that the government has problematized the wrong issue. Rather than seeing due process as the problem it should focus upon increasing the extremely low detection rates of the police.

Second, social landlords are also concerned at the uncertainty of outcome of applications. As we have seen, the law regulating possession of secure and assured tenancies and applications for anti-social behaviour orders and injunctions provides the courts with a broad discretion.³ Landlords argue that judges have failed to appreciate the seriousness of the problem of anti-social behaviour and too often use this discretion to refuse applications for relief. They suggest that failure to secure a particular sanction enables persistent conduct to continue unabated, fails to protect those affected and suggests to the perpetrator that he or she can continue to behave badly with impunity. However, failure is presented as having further, far-reaching consequences. It can also have a systemic impact, as victims and witnesses become disillusioned with the inability of social landlords to successfully negotiate the court process and thus refuse to participate in future applications. The message to both the landlord and the community is that the courts are unwilling to help in resolving these problems.

Third, and perhaps most importantly, landlords are worried that the court processes fail to support vulnerable witnesses. The government has taken the issue extremely seriously with respect to the mainstream criminal justice system.⁴ The problem has been particularly associated, however, with the forms of crime and disorder brought within the rubric of anti-social behaviour.⁵ Such conduct is usually engaged in by members of the same neighbourhood as the victims,⁶ and consequently the parties are far more likely to know each other. Recent research shows that in just under half of ASBO cases perpetrators have used threats, and in over a third actual intimidation against witnesses.⁷ Witness intimidation operates

³ The “reasonableness” requirement under the nuisance grounds for eviction; the “necessity” component of the anti-social behaviour order; and the residual discretion afforded to the court on applications for an anti-social behaviour injunction.

⁴ Home Office, *Witness Intimidation: Strategies for Prevention* (London: HMSO, 1997); CPS, *No witness – no justice: towards a national strategy for witnesses* (London: HMSO, 2003); Audit Commission, *Victims and Witnesses – providing better support* (London: HMSO, 2003).

⁵ J Nixon and C Hunter, ‘Taking a stand against anti-social behaviour? No, not in these shoes’ Housing Studies Association Conference, Spring 2004.

⁶ Indeed, they are often neighbours.

⁷ S Campbell, *A review of anti-social behaviour orders: Home Office Research Study No. 236* (London: HMSO, 2002). See also J Nixon et al, *The use of legal remedies by social landlords to deal with neighbour nuisance: CRESR Paper H8* (Sheffield: Sheffield Hallam University, 1999).

both outside and inside the courtroom. Outside, it can be exacerbated by delay and the prospect of a failed application for legal relief, which place pressure on landlords trying to support vulnerable witnesses. Inside, the prospect of having to give evidence before a perpetrator can be too much for many witnesses who may ultimately refuse to participate in proceedings.

The tripartite problem of delay, uncertainty and witness intimidation, and the threat it poses to effective protection of communities from anti-social behaviour, has had important consequences for the development of the law. Whilst we shall see that empirical research has tended to refute much of the anecdotal evidence of lobbying social landlords, the government has actively engaged with these issues in its policy-making. The following sections look at two of these policies in particular. The first is the increasing use made of internal review procedures under the introductory and demoted tenancy regimes to replace the broad judicial scrutiny employed by the 1985 and 1988 Housing Acts. The second is the creation of the “hybrid” anti-social behaviour order, with its controversial use of civil proceedings on application with criminal sanctions on breach, and the recent development of the interim ASBO.

2. Possession proceedings and internal review

Over the years a number of relatively uncontroversial procedural reforms have helped to ensure that possession proceedings provide more effective protection for the victims of anti-social behaviour. First, the government has increased the speed with which claims for possession for anti-social behaviour reach the courts.⁸ Under the assured and secure regimes, a social tenant must generally be given a minimum of two weeks’ notice of the bringing of proceedings for possession.⁹ Chapter V of the Housing Act 1996, however, has amended the Acts to allow expedited notice for possession under the nuisance grounds. Although a landlord must still serve notice on a tenant it no longer requires a

⁸ See DTLR et al, *Getting the best out of the court system: information for local authorities and other social landlords* (London: HMSO, 2002).

⁹ HA 1988, s 8; HA 1985, s 83.

notice period before the issuing of possession proceedings. More recently, the current government has also modified the Civil Procedure Rules to enable accelerated applications for possession in cases involving threats to person or property.¹⁰

Attempts have been made also to increase the certainty of outcome of possession proceedings. The Anti-Social Behaviour Act 2003 now makes it a statutory requirement for judges to take into account the effect of anti-social behaviour on victims when considering the reasonableness of possession of an assured or secure tenancy.¹¹ In deciding whether to order possession a court must now consider in particular the effect that the nuisance or annoyance has had on persons other than the person against whom the order is sought; any continuing effect the nuisance or annoyance is likely to have on such persons; and the effect that the nuisance or annoyance would be likely to have on such persons if the conduct is repeated.

Measures have also improved the protection of vulnerable witnesses. Since 1994 it has been a criminal offence to intimidate witnesses in criminal proceedings.¹² However, the development of an increasing array of new civil sanctions led the government to extend this offence to civil proceedings also.¹³ Further, a now well-established characteristic of the sanctions employed by social landlords is the right to use professional witnesses such as housing or police officers in court proceedings. The nuisance ground under the assured or secure tenancies includes behaviour "*likely to cause a nuisance or annoyance*". Accordingly, evidence can be presented by those not actually affected by the conduct, allowing vulnerable witnesses to avoid appearing in court altogether.¹⁴

The primary focus of this section, however, is upon a far more controversial incursion upon the due process rights of social tenants. Increasingly households have found themselves occupying their home under statutory tenancies providing

¹⁰ Part 55, introduced in October 2001.

¹¹ HA 1988, s 9A; HA 1985, s 85A.

¹² Criminal Justice and Public Order Act 1994, s 51

¹³ Criminal Justice and Police Act 2001, ss 39 and 40.

¹⁴ Of course, the upshot of the definition is that there need not actually be a victim at all.

minimal security of tenure. As set out in Chapter 2, since 1996 the introductory tenancy regime has enabled local housing authorities to restrict temporarily the security enjoyed by social tenants under the Housing Act 1985. A court must grant a possession order of an introductory tenancy to a claimant landlord if he has complied with the necessary notice requirements. The only protection afforded to the tenant is the right to seek an internal review of the original decision carried out by a senior employee of the authority. The current government has extended use of the introductory tenancy procedure. It has created the demoted tenancy enabling temporary reduction to this level of security at any point during the life of a secure tenancy at the discretion of the court. Further, the current Housing Bill provides for an administrative procedure by which a landlord can extend an introductory tenancy for a further period of six months.

There is nothing new in the use of internal administrative review rather than independent judicial scrutiny of executive decision-making in housing management: for instance it regulates local authority decision-making with respect to homelessness applications.¹⁵ What is noticeable, however, is the extent to which it has become a key part of policies on anti-social behaviour. The nature of the introductory and demoted tenancies is explicitly a response to the particular concerns voiced by social landlords about the effect of delay, uncertainty and witness intimidation on effective public protection. As the Conservative government made clear when presenting its proposals for the introductory tenancy:

“the way in which the courts work results in difficulties in following through possession cases quickly because of delays in getting the cases before the court; inconsistency over what is regarded as acceptable evidence, witness intimidation exacerbated by delays in court hearings, and what authorities see as their difficulty in convincing the courts of the serious nature of the nuisance caused by the tenant.”¹⁶

¹⁵ HA 1996, ss 202-204.

¹⁶ DoE, *Anti-Social Behaviour on Housing Estates: Consultation Paper on Probationary Tenancies* (London, HMSO, 1995).

In effect, the absence of a full judicial hearing on the merits of the case (i.e. the establishment of the necessary ground for eviction and whether it is “reasonable” to order possession) enables social landlords to take greater control over the pace of proceedings, ensures the success of an application to the court and prevents the need for witnesses to appear in court.

(a) Public protection vs. public law

Whilst satisfying the dominant discourse of public protection the internal review process has worrying implications for the rights of social tenants. For those occupiers faced with the prospect of summary eviction the loss of recourse to an independent tribunal is of clear concern.¹⁷ It was therefore predictable that challenges would be brought by defendants against the system. Two important cases decided before the Court of Appeal sought to raise public law and human rights defences in possession proceedings under an introductory tenancy on the grounds that the internal review had not been carried out appropriately. As a result of these challenges, the Court of Appeal has modified the structure of the scheme in such a way as to partially defeat its protectionist objective.

(i) The *Cochrane* procedure

The first challenge, on general public law principles, occurred in 1999 in the case of *Manchester City Council v Cochrane*.¹⁸ The claimant council sought possession of a home let under an introductory tenancy. The defendant tenant had appealed against the original decision to evict and, following an internal review, the council reaffirmed its intention to retrieve the property. In the county court, the defendant sought to defend the action on public law grounds, following the decision in *Wandsworth BC v Winder*.¹⁹ He argued that the council had failed to comply with the procedures set out in the Introductory Tenants (Review)

¹⁷ The socio-legal issues arising from internal review are considered further, below.

¹⁸ [1999] L&TR 190.

¹⁹ [1985] AC 461.

Regulations 1997 and, further, that the conduct of the review failed to satisfy the requirements of natural justice.

At first instance the district judge held that the county court had the jurisdiction to entertain a public law defence to the proceedings. The Court of Appeal however refuted the claim. Sir John Knox, providing the main judgment, accepted that the conduct of the internal review was clearly subject to scrutiny under public law. However, he provided two reasons why a finding of illegality could not, as a matter of law, be used as a private law defence. First, the structure of the introductory tenancy regime provides the county court with absolutely no discretion to refuse possession in such circumstances. The illegality of an internal review on public law principles does not affect the right of the landlord to possession. Provided that the council has complied with the notice requirements set out in section 128, section 127(2) of the 1996 Act makes possession mandatory. Secondly, the judge noted that the Housing Act 1996 had not provided the county court with the necessary jurisdiction to entertain judicial review,²⁰ whilst by virtue of section 38(3) of the County Court Act 1981 the county court did not have residual jurisdiction to enter into judicial review. Sir John Knox was additionally concerned by the policy implications of such an outcome. Even if the county court had jurisdiction he noted that a finding of illegality in such circumstances would force the court to decide the proceedings in favour of the tenant, potentially resulting, perversely, in his conversion to a secure tenant before the claimant could bring a further action.

However, rather than dismissing the application outright, the judge forged a compromise. He held that if the county court is satisfied that a tenant has a real chance of obtaining leave to bring proceedings for judicial review of the internal review, it can temporarily adjourn possession proceedings pending an application to the High Court. In this way the original possession claim remains undetermined, preventing conversion to a secure tenancy in the interim.

²⁰ Cf the jurisdiction provided under Chapter VII of the HA 1996 with respect to appeals of homelessness applications.

Critically, both Sir John Knox and Judge LJ complained in the final paragraphs of the decision that they had been forced to resort to judicial review as a scrutinising mechanism due to poor legislative design. They pointed out that under Part VII of the Housing Act 1996 dealing with homelessness decision-making, the county court had been provided by statute with the necessary jurisdiction to entertain public law challenges to administrative decision-making. However, this was not the case with respect to the introductory tenancy. As Sir John Knox concluded:

“I am unpersuaded that proceedings by way of judicial review coupled with a stay of county court proceedings for possession could properly be regarded as anything other than a slow and cumbersome process. Indeed it is to my mind regrettable that Parliament should have given only such minimal powers to the county court by section 138(1) of the Act, when read with section 127(2), but for the reasons which I have given that does appear to be the clear effect of those provisions. This sits ill with the tendency evinced by Part VII of the Act to confer upon the county court powers wide enough to enable it to deal with public law defences in connection with proceedings under the Housing Acts. It would of course be necessary to confer the necessary flexibility to avoid introductory tenancies becoming secure tenancies where such a result was undesirable. These are however matters with which the legislature will, if it thinks fit, no doubt deal.”²¹

It is submitted that neither landlords nor tenants really benefited from the decision in *Cochrane*. On the one hand it had the potential to undermine the objective of speed sought by the framers of the introductory tenancy. Given that the purpose of the regime is the swift and certain eviction of nuisance tenants, the “slow and cumbersome” judicial review process, if entered into by a defendant, will clearly delay eviction. However, on the other hand the adjournment procedure ensured only weak protection for tenants from abuse of the internal appeals process. Unlike a private law defence, permission must be granted by the court under Order 53, and in any case an application for judicial review, even if granted, is also a difficult and expensive route for a defendant to take. Furthermore, even if the internal review was subsequently found to be illegal it would be open to the council to simply repeat the process compliantly. The court would then be obliged

²¹ [1999] L&TR 190 at 204.

to issue a possession order under the original, adjourned proceedings. On balance then, at least at this stage in the judicial development of the introductory tenancy regime, it was defendants to possession proceedings who still found themselves in the weaker position given the considerable procedural hurdles they would have to surmount to exercise their limited public law rights.

(ii) Compatibility with Article 6: the decision in *McLellan*

Soon after the compromise reached in *Cochrane*, the introductory tenancy was once again challenged, this time under the Human Rights Act 1998. In *R (on the application of McLellan) v Bracknell Forest Borough Council*²² the system was attacked on two grounds. First, it was argued that (in the words of Waller LJ, at the “macro” level) the statutory system was incompatible with Article 8. However secondly it was contended that as the granting of a possession order constituted the determination of a tenant’s civil rights and obligations, he was owed a fair trial and that the internal appeals process, coupled with the *Cochrane* procedure, did not amount to a satisfactory system for this purpose. In particular, it did not provide adequate protection at the “micro” level for an individual tenant’s Article 8 rights. Waller LJ concluded, nonetheless, that in both cases the introductory tenancy regime was compatible with the European Convention.

At the “macro” level, Waller LJ pointed out that the jurisprudence of the European Court provided Parliament with a broad margin of appreciation when constructing legislation implementing social policy initiatives.²³ With this in mind, he concluded that whilst the introductory tenancy regime triggered Article 8²⁴ it was necessary and proportionate given the interest of both council tenants and their landlords in effectively tackling anti-social behaviour. In particular, the scheme contained a number of important safeguards for the tenant as part of the internal review. A landlord must give reasons for seeking the termination of the tenancy, whilst the tenant can make oral or written representations, call witnesses,

²² [2001] EWCA Civ 1510. Note also further refinements post-*McLellan* in *Forbes v Lambeth LBC* [2003] EWHC 222 and *Cardiff City Council v Stone* [2002] EWCA Civ 298.

²³ See *Donoghue v Poplar Housing and Regeneration Community Association Ltd* [2001] EWCA Civ 595.

²⁴ *Lambeth London Borough Council v Howard* (2001) 33 HLR 58.

seek legal representation and cross-examine any person giving evidence for the landlord. If the local authority landlord decides after the review to pursue the termination, it must again provide reasons.

Waller LJ assessed the second part of the challenge; the “micro” level, against the legal backdrop of the decision of the House of Lords in *Alconbury*.²⁵ This important case concerned the compatibility of Article 6 with an administrative power by which the Secretary of State, who was clearly not an independent and impartial tribunal, determined the defendant’s civil rights and obligations under planning law. Waller LJ held that Article 6 was indeed engaged as a landlord’s decision to seek possession of an introductory tenancy constituted a determination of a tenant’s civil rights and obligations. However, drawing on European jurisprudence, notably *Albert and Le Compte v Belgium*,²⁶ Waller LJ held that even if the administrative decision does not satisfy the requirements of Article 6, it might be compatible in aggregate if recourse is available to a judicial body with “full jurisdiction”; not full decision-making power, but a degree of scrutiny necessary “to deal with the case as the nature of the decision requires”.²⁷ In *Alconbury*, judicial review was found to constitute full jurisdiction. Waller LJ concluded that although the introductory tenancy system did involve a determination under Article 6, it was compatible overall with the *Alconbury* standard given the availability of the *Cochrane* procedure by which a tenant could seek judicial review of the landlord’s decision to evict.

Central to this conclusion was the fact that the appeal did not involve disputes over primary facts.²⁸ As such, a more intensive form of scrutiny was deemed unnecessary. In order to satisfy this requirement, Waller LJ finally reconfigured the objectives of the internal review as follows:

²⁵ *R v Secretary of State for the Environment, Transport and Regions, ex p Alconbury Developments Limited and conjoined appeals* [2001] UKHL 23. For further developments with regard to compliance of Article 6 with homelessness applications under the 1996 Act see *Begum (Runa) v Tower Hamlets LBC* [2003] UKHL 5.

²⁶ (1983) 5 EHRR 533.

²⁷ *McLellan* [2001] EWCA Civ 1510 at [87].

²⁸ *Bryan v UK* (1995) 21 EHRR 342.

“If the council in providing reasons alleges acts constituting nuisance, and if the allegations themselves are disputed that at first sight seems to raise issues of fact. But under the introductory tenancy scheme it is not a requirement that the council should be satisfied that breaches of the tenancy agreement have in fact taken place. The right question under the scheme will be whether in the context of allegation and counter-allegation it was reasonable for the council to take a decision to proceed with termination of the introductory tenancy. That is again a matter which can be dealt with under judicial review either of the traditional kind or if it is necessary so to do intensified so as to ensure that the tenant's rights are protected.”²⁹

As explained here, the substantive judicial review demanded by Article 6 was to be of a more intensive degree than that available under traditional public law. In addition to review on *Wednesbury* grounds, Waller LJ held that scrutiny should extend to assessment of the compliance at the “micro” level of the decision with a tenant’s Article 8 rights with which any decision of a public authority to seek possession of a residential property will interfere.³⁰ He advocated, in line with Lord Slynn in *Alconbury*,³¹ the incorporation of the principle of proportionality into the judicial review process.³² He emphasised, however, that this did not amount to a reassessment of the merits of the original decision. Finally, this assessment of a tenant’s Article 8 rights by the county court did not depend upon the tenant having sought an internal review of the original decision, although this fact might be relevant to any assessment.

In summary, under the *Cochrane/McLellan* procedure the county court may now adjourn proceedings for the possession of an introductory tenancy to enable a tenant to seek relief in public law before the High Court. Two forms of relief are

²⁹ *McLellan* [2001] EWCA Civ 1510 at [97].

³⁰ *Lambeth London Borough Council v Howard* (2001) 33 HLR 58. The recent decision of the House of Lords in *Harrow LBC v Qazi* [2004] 1 AC 983 has limited the capacity of a court to refuse a possession order on Article 8 grounds when a tenant has no contractual or proprietary interest in his or her home. However, it is submitted that this does not overrule the decision in *McLellan* as the decision itself of a local authority to evict an introductory tenant is still subject to section 6 of the Human Rights Act 1998, and adjournment of possession proceedings for judicial review does not provide a defence to those proceedings. What it does seem to overrule however is Waller LJ’s assumption ([2001] EWCA Civ 1510 at [42]) that even if the landlord was not a public body (for example a registered social landlord) the court as a public body would have to consider the compliance of a possession order with Article 8(2): see [2004] 1 AC 983, paras 142-144 *per* Lord Scott.

³¹ [2001] UKHL 23 at [51].

³² See also *R v Secretary of State for the Home Department, ex p Daly* [2001] UKHL 26.

available. First, the tenant may challenge the operation of the internal review of the original decision to seek possession on general public law grounds of illegality or impropriety. Second, the tenant may challenge not only the operation of the internal review but the decision of the council landlord to seek possession as contravening his Article 8 rights. The court itself can also instigate this human rights review of its own accord. Given the potential interference with a fundamental right, the standard of review is that of intensified, sub-*Wednesbury* reasonableness, or 'anxious scrutiny'.³³ Although this standard does not involve a full merits-based assessment by the High Court, it still provides a broader platform for the county court to process substantive challenges to a particular application for possession; a concern which was made explicit by counsel for the local authority.³⁴ The *McLellan* decision has therefore increased to some (unpredictable) degree the possibility that the county court may grant a defendant tenant access to the *Cochrane* procedure, with inevitable consequences for effective public protection. It is probable that in most cases challenges will be ultimately unsuccessful, given the "hands off" approach taken by the courts even in cases involving fundamental human rights. Yet even if this is the case, the delay inevitable in an application to the High Court will ensure prolonged suffering for the community affected by the particular anti-social behaviour.

However, the law has not stood still. Following the decisions of the Court of Appeal, there is evidence that the internal review process is undergoing a process of redesign as lawyers attempt to restructure it in such a way as to reduce the risk of lengthy review processes undermining the effective protection of affected communities, whilst ensuring compatibility with both public and human rights law.

(iii) The structure of the demoted tenancy

The first of these developments can be identified on closer analysis of the new demoted tenancy regime. Nominally local housing authorities must follow an

³³ *R (Sivasubramaniam) v Wandsworth County Court* [2002] EWCA Civ 1738 at [52].

³⁴ *McLellan* [2001] EWCA Civ 1510 at [36].

identical process for evicting demoted tenants as they do when evicting introductory tenants. They must comply with statutory notice requirements under section 143E and carry out a review of the original decision on request. As such one might presume that the *Cochrane/McLellan* procedure applies in full to such possession proceedings. However, section 143D has made an important amendment to the structure. Whereas under the introductory tenancy a possession order must be granted by the court if the notice requirements have been complied with, section 143D provides that it must also be satisfied that the appropriate review procedures have been complied with. The effect of this provision is to enable a tenant to rely on evidence of failure to follow the review procedure set out in the 2004 Regulations as a private law defence, rather than through the *Cochrane* procedure.

This modification is to be welcomed. The majority of public law challenges are likely to be procedural rather than substantive. They are also far simpler for a court to adjudicate upon, involving an objective assessment of the steps taken by the landlord prior to the possession proceedings. Keeping them in the county court will therefore ensure they are dealt with speedily and efficiently. However, the government has not yet gone as far as to provide county courts with jurisdiction to entertain all judicial review questions relating to the decision-making of the landlord, including potential infringements of human rights. Public law issues other than a failure to comply with the procedures must still follow the *Cochrane* route. Furthermore, human rights challenges to the original decision must also operate through application to the High Court. The decision to retain the *Cochrane/McLellan* procedure here seems quite rational, however, from a protectionist perspective. A private law defence in the county court is a right exercisable without the need for prior judicial permission. The government clearly hopes to avoid a raft of drawn-out substantive challenges being brought in the county court, particularly on the broader Article 8 grounds, by ensuring applications in the High Court are subject to the discretion of the trial judge.

(iv) The proposals of the Law Commission

In its consultation paper the Law Commission put forward its own rather radical proposals for a probationary-style tenancy to replace the introductory and demoted tenancies. Impliedly responding to the concerns of the Court of Appeal in *Cochrane*, and the further difficulties arising after *McLellan*, the Law Commission noted the inadequacy of the modified introductory tenancy procedures. It thus proposed two alternatives to the current system which it hoped would redress the failings of the introductory tenancy regime whilst satisfying the requirements of Article 6. It should be noted that following the consultation period the Commission decided to drop the proposals for summary eviction, citing the increased bureaucracy they would create and the fear of some respondents that they were a disproportionate response to the problem of anti-social behaviour.³⁵ However, the plans still provide an interesting example of legal problem-solving.

Option A for the new tenancy requires only that the social landlord comply with relevant notice requirements, once again removing the county court's discretion to refuse a possession order. Only after eviction has actually taken place can the occupier apply to the court to have the decision reviewed. However, the jurisdiction of the court here extends beyond judicial review. It enables an assessment of the reasonableness of the eviction, as under the assured and secure tenancy regimes, and as such provides the opportunity for a merits-based scrutiny by the courts; including the balancing of human rights considerations.³⁶ Option B on the other hand demands that a social landlord first carries out an internal administrative review of the decision as demanded by the current system. Once this condition has been satisfied the county court will again be obliged to order possession. Following eviction, however, the court will be limited to judicial review of the decision to evict. In both cases, if the decision is found to be unreasonable under Option A or illegal under Option B, rehousing and/or damages could be awarded.

³⁵ Law Com Rep 284, *Renting Homes* (London: HMSO, 2004), para 15.3.

³⁶ *Lambeth London Borough Council v Howard* (2001) 33 HLR 58.

Both Option A and Option B share one important characteristic: unlike the introductory tenancy judicial scrutiny of the landlord's decision-making only occurs after possession has been granted. Thus speed and certainty of action against a recalcitrant tenant is ensured. Furthermore, scrutiny of the administrative process is the responsibility of the county court not the High Court, ensuring that when public law challenges are made they can be dealt with during the same proceedings. However, the difference between the two approaches lies in the balance struck between administrative and judicial processes in order to comply with the *Alconbury* balancing-act. In each case the extent of the appellate jurisdiction of the court reflects the concomitant degree of administrative scrutiny. Under Option A there is no internal review and therefore the county court must engage in a full merits-based assessment following eviction. Under Option B, however, the internal review is counterbalanced by a weaker judicial review procedure.

In truth, Option A appears of little practical benefit to either landlord or tenant. The uncertainty inherent in a merits-based review would likely make the risk of future compensation or rehousing too great – better to have the decision to evict verified before proceeding with eviction. On the other hand, it is arguable that the courts may be more disinclined to find a decision unreasonable *ex post facto*. Option B relies on the internal review procedure to balance the weaker scrutiny of judicial review to comply with Article 6 in much the same way as the introductory tenancy in *McLellan*. However, the review process takes place *after* the mandatory eviction of the household, ensuring the absence of any delays in securing a possession order from the court. Consequently there is far less risk involved for a social landlord of a finding of subsequent illegality.

(b) The end of security of tenure?

The creation of the demoted tenancy for council landlords, and the proposed reform of the introductory tenancy to allow an extension of the tenancy by up to six months, illustrates the increasing reliance upon introductory tenancy-type

procedures rather than the intensive judicial scrutiny provided for by the Housing Acts. This is the consequence of the perceived need of social landlords for greater speed and certainty of relief and improved witness protection. As we have seen, the interface between public law rights, particularly human rights, and the internal review process, have threatened to undermine the efficacy of this legislative structure in ensuring public protection by increasing delay and uncertainty of outcome. However, changes to the demoted tenancy and the proposals of the Law Commission will likely “design out” this problem.

The increasing use made of the internal review process raises a question of real importance: where will these developments end? Worryingly, there are indications that the government is heading towards a controversial conclusion: the removal of social tenants’ traditional security of tenure entirely as a drastic but necessary solution to the “crisis” of anti-social behaviour. The evidence can be found in the consultation paper *Tackling Anti-social Tenants*. Although ultimately the consultation led to the creation of the demoted tenancy regime, another proposal was posited first in the paper. That proposal was the ability of social landlords to apply an introductory tenancy (or starter tenancy) regime to all secure or assured tenancies *on a permanent basis*.³⁷ This proposal brings into stark relief the impact that the overwhelming public protection imperatives of Labour’s crime and disorder policies may ultimately have on housing law. The government’s prioritisation of crime control could pave the way for a return to the politico-administrative regulation enjoyed by local housing authorities prior to 1980, through the substantial deregulation of social housing tenure.

In an article written soon after the enactment of the Housing Act 1996 the introductory tenancy was presented by Smith and George as part of a “hidden agenda” by the then Conservative government to remove security of tenure for social tenants through sleight of hand.³⁸ In doing so it sought, first, to make local authority housing less attractive to prospective tenants and, second, in the long

³⁷ DTLR, *Tackling anti-social tenants* (London: HMSO, 2002) p 14. This would apply to anti-social behaviour alone, rather than both anti-social behaviour and rent arrears.

³⁸ N Smith and C George, ‘Introductory tenancies: a nuisance too far?’ (1997) 19(3) *JSWFL* 307.

term to deregulate local authority housing provision entirely. In reality, the argument is extremely far-fetched. The first objective is counter-intuitive, as the ultimate objective of introductory tenancies was a reduction in anti-social behaviour around council housing to make council housing more, not less, attractive to tenants. Further, the sleight of hand envisaged by the authors whereby introductory tenancies were the thin end of the wedge of deliberate deregulation is also weak given that it is but one of a series of mechanisms; housing injunctions and extended grounds for eviction, which were concerned directly with the problems of crime and disorder.

However, it is now apparent that security of tenure is indeed at risk, not through a desire of government to destroy social housing but in order to effectively protect its occupants. Arguably, if you were to ask those residents of council estates affected by serious anti-social behaviour if they would forgo their own security of tenure to ensure the effective eviction of those causing serious harm to their communities, one might imagine many agreeing to such a solution. With respect to the proposal to extend permanently the self-regulation of the introductory tenancy scheme, the government tentatively foresees just such a consensus amongst occupants of social housing, arguing that “tenants may be prepared to see a reduction in the security of their tenure in return for safety, peace and quiet”.³⁹

Is this appropriate? For many housing academics and practitioners, broad judicial discretion to prevent abuse by landlords is a vital component of housing law and any restriction of that discretion an unjustifiable infringement of the rights of tenants. The internal review process has serious implications for the accountability of administrative decision-making. As we have seen, the concept of reasonableness under the 1985 and 1988 Housing Acts provides the county court with extensive discretion under almost every ground for possession. This approach, enabling an impartial judge to ensure independently the justice of every claim, reflects the inherently adversarial, antagonistic nature of the landlord-tenant

³⁹ DTLR, above n 37, p 14.

relationship presumed by the framers of the legislation. The introductory tenancy on the other hand places power wholly in the hands of the local authority landlord.

Two further factors support a cautious approach. First, the call for further reductions in due process rights by social landlords is questionable on practical grounds. There is a tendency on the part of government to respond unequivocally to the demands of social landlords, suggesting resort to anecdotal and practitioner-led policy-making. Take for example the concerns of some social landlords about the destructive effect of delay and uncertainty experienced when bringing possession proceedings for anti-social behaviour. Academic research suggests that in fact there was no clear empirical evidence following the reforms introduced by the Housing Act 1996 that further modifications to increase speed and certainty were required.⁴⁰ Indeed, we shall see in Chapter 5 that the Court of Appeal had already restricted considerably the potential for a tenant to use the reasonableness requirement to defend possession actions. What is surprising, however, is that the consultation paper *Tackling Anti-social Tenants* acknowledged this finding, but went on to conclude that nonetheless it was necessary to respond to the concerns of landlords themselves.⁴¹ In practice, it is arguable that those landlords advocating the reduction of due process rights of defendants in order to tackle delay, uncertainty and witness intimidation could do far more to develop their own administrative processes rather than relying on the dismantling of due process rights.⁴² Better relationships with the courts might well help speed up trials, without resort to internal reviews or interim ASBOs. Better prepared applications are more likely to succeed. Vulnerable witnesses can and should be protected without necessarily withdrawing them from the legal process entirely.

Second, there is evidence of a particular conceptualisation of social housing providers in political discourse - that of the "socially responsible landlord" - as a result of which reductions in due process rights for defendants in legal

⁴⁰ C Hunter et al, *Neighbour Nuisance, Social Landlords and the Law* (London: CIH/JRF, 2000).

⁴¹ DTLR, above n 37, para 1:3.1.

⁴² Hunter et al, above n 40; SEU, *Policy Action Team 8: Report on Anti-social Behaviour* (London: ODPM, 2000).

proceedings are not seen as of particular concern. There appears to be a common assumption in policy discourse that social landlords will seek possession for anti-social behaviour with caution – the same assumption underpinning the politico-administrative regulation of the council housing sector prior to 1980. Reliance has been placed consequently on best practice rather than judicial regulation. Take for example this excerpt from the Law Commission's consultation paper:

"Their [i.e. social landlords'] desired outcome is not to remove the anti social occupier, but to change behaviour. In this connection, we are impressed with the success claimed by Manchester City Council for the use of injunctions in changing behaviour. Eviction is, in some senses, an admission of failure".⁴³

This construction of the social landlord is of course contested. From the perspective of those defending possession claims, for example, the relationship between landlord and tenant is still understandably perceived as antagonistic. An important example can be found in an article by Ben Taylor of the North West Housing Law Practitioners Group, a solicitor who defends tenants in possession proceedings, who argues that the Government's policies represent a push "to remove decision-making from the hands of the courts and place it in the hands of decision-makers".⁴⁴ He contends instead that "any deviation away from the court having full discretion whether or not to make an order for possession is a further erosion of tenants' rights which can be open to misuse/abuse by unscrupulous/improperly trained housing officers".⁴⁵

Noting the government's proposal to extend the ambit of the introductory tenancy regime, Taylor argues that the internal review procedure provides inadequate protection for tenants from such abuse because of the absence of rights accorded to those engaged in judicial proceedings. The introductory tenant cannot compel witnesses to attend on their behalf and cannot draw on public funding for representation and those involved in conducting the inquiry have neither impartiality nor the training to deal with conflicting allegations. Indeed, contrary

⁴³ Law Com 162, *Renting Homes (1): Status and Security* (2001), para 13.7.

⁴⁴ B Taylor, 'Tackling anti-social tenants – a different perspective' [2003] *JHL* 23.

⁴⁵ *Ibid.*

to the discourses underpinning anti-social behaviour that those accused are objectively culpable, allegations are often the result of feuds, with the landlord having sided with the party who complains first. In addition, a recent empirical study of internal review procedures suggests that many tenants ultimately fail to take up their right to have a decision to evict reviewed by their landlord given their perception, *inter alia*, that it is unlikely to affect the original decision.⁴⁶

3. The anti-social behaviour order: an unacceptable hybrid?

The “hybrid” structure of the ASBO was a predictable development from the housing injunctions implemented by the Housing Act 1996. Indeed, it was already a characteristic of the restraining order provided for by the Protection from Harassment Act 1997.⁴⁷ The public protection objectives of the mechanism were clear from the outset. It was designed to take full advantage of the recognised procedural benefits of civil mechanisms, whilst harnessing the superior deterrent potential of the criminal sanction. As one Minister put it “one of the main reasons for introducing the civil tort is to gain access to that lesser test so that more victims or potential victims might be protected”.⁴⁸

The civil law eases considerably the procedural demands on a social landlord. It is perhaps arguable that social landlords, accustomed to the reduced due process rights of defendants in proceedings for possession or injunctions, were particularly interested in retaining these benefits. An order, in line with other injunctions, can be sought on the basis of evidence proved on the balance of probabilities. However, given the particular concerns of social landlords, of far greater import is the ability of a claimant agency to make use of hearsay evidence under the Civil Evidence Act 1995 and Magistrates' Courts (Hearsay Evidence in Civil Proceedings) Rules 1999, allowing the withdrawal of vulnerable witnesses from the court process.

⁴⁶ D Cowan, *The Appeal of Internal Review* (London: Hart, 2003).

⁴⁷ For other examples of hybrid injunctions see s 1(1) and ss 13 and 14 of the Company Directors Disqualification Act 1986; Public Order Act 1986, ss 14A and 14B and Football Spectators Act 1989, ss 14A and 14J.

⁴⁸ HC Deb 18 Dec 1996 Col 968.

This pragmatic approach to the criminal-civil distinction, described as a “Trojan horse” application of the civil law, has engendered serious and sustained criticism.⁴⁹ Commentators point to the failure of the mechanism to provide suitable procedural safeguards for defendants faced with considerable criminal penalties on breach for behaviour which need not constitute a criminal or even civil wrong. More interestingly, however, Andrew Ashworth has assessed the ASBO in the context of public protection. He suggests, directly in line with the argument of this thesis, that the desire for effective public protection at any cost has led to further movement from a constitutional to a security state.⁵⁰ He points out that given the extreme consequences for defendants, both the penalties on breach and the restrictions on otherwise entirely legal conduct (in particular, exclusion from public spaces), the government has displayed an unprincipled disregard for the basic procedural rights of criminal defendants. In particular, the ASBO allows agencies to circumvent the additional protections enshrined as human rights by Article 6(2) and (3) of the European Convention.

Yet criticism has been redirected from the government to the judiciary following the decision of the House of Lords in *Clingham v Kensington & Chelsea RBC* and *R v Crown Court and Manchester ex p McCann*.⁵¹ The case confirms that an application for an anti-social behaviour order is a civil process under both the European Convention and domestic law, although the House imposed the criminal standard of proof to reflect the seriousness of the implications for a defendant. Criminal lawyers, particularly Andrew Ashworth, seem confident that the decision incorrectly applied the jurisprudence of the European Court. Their Lordships were explicitly supportive of the protectionist objectives behind the ASBO’s “hybrid” structure: in particular the importance placed upon supporting vulnerable witnesses through the use of hearsay evidence.

(a) The House of Lords and *McCann*: erroneous legal reasoning?

⁴⁹ A Ashworth et al, ‘Neighbouring on the Oppressive’ [1998] 16(1) *Criminal Justice* 7-14.

⁵⁰ A Ashworth, ‘Criminal Justice Reform: Principles, Human Rights and Public Protection’ [2004] *Criminal Law Review* 516-532.

⁵¹ [2002] UKHL 39.

The first part of the challenge, whether the application for an ASBO was a civil procedure under domestic law was dealt with perfunctorily by the House of Lords. Lord Steyn held that under domestic law criminal proceedings must be given its “ordinary meaning”.⁵² As such the House of Lords engaged in a fairly superficial assessment of the structure of the order. It paid particular attention to the following attributes of the ASBO procedure: that it was initiated by the civil process of complaint; it did not charge the defendant with any crime; nor did it involve the Crown Prosecution Service. Further, the proceedings did not in themselves result in a criminal conviction, did not appear on the defendant's criminal record and resulted in no penalty,⁵³ and whilst the consequences of the order were potentially serious, so were those of other forms of civil injunction. However, at the heart of their Lordships’ analysis was an assumption that it was necessary in principle to view the two stages, application and breach, separately.⁵⁴ Thus, whilst breach proceedings clearly involved criminal punishment, the purpose of the order itself was preventative rather than punitive.

Yet the expectation of commentators,⁵⁵ and indeed critics within Parliament itself during debates on the Crime and Disorder Bill,⁵⁶ was that the ASBO would inevitably stall when challenged under Article 6 of the European Convention. It was thought that the “anti-subversion doctrine” employed by the European Court in *Engel v Netherlands (No 1)*⁵⁷ would ensure that application for an ASBO, whilst ostensibly a civil matter, was classified autonomously under the Convention as a criminal procedure, guaranteeing the specific rights contained in Article 6(3) for

⁵² *Ibid.* at [21].

⁵³ It was held however that an application for an ASBO was a determination of a defendant's civil rights for the purpose of Article 6(1). The terms of an order could foreseeably impose restrictions on a defendant that interfered with his private life, his freedom to express himself either by words or conduct or his freedom to associate with other people. As such, there was an obligation on the court to act with “scrupulous fairness” in ASBO proceedings to ensure the defendant suffered no injustice. However, the use of hearsay evidence was not itself unfair in this context.

⁵⁴ [2002] UKHL 39 at [23].

⁵⁵ Ashworth et al, above 49.

⁵⁶ See for example the concerns of the House of Lords during the passage of the Crime and Disorder Bill at HL Deb 30 Apr 1998, Standing Committee B. It was pointed out that the likely challenge to section 1 of the Crime and Disorder Act 1998 on human rights grounds would be an extremely embarrassing situation for a government that had enacted the Human Rights Act in the same year.

⁵⁷ (1976) 1 EHRR 647. See B Emmerson and A Ashworth, *Human Rights and Criminal Justice* (London: Sweet & Maxwell, 2001), ch 4.

those against whom an application was brought. In particular, this would effectively prevent landlords relying upon hearsay evidence, given its likely contravention of Article 6(3)(d).⁵⁸

The House of Lords, examining the decision in *Engel*, considered the three criteria for determining whether proceedings involved 'a criminal charge' under Article 6; namely the classification in domestic law, the nature of the charge and the severity of the penalty. It also accepted the jurisprudence of the European Court that whilst it was established that the proceedings were civil under domestic law, the latter two components were of far greater import, making the classification autonomous.⁵⁹

Whilst commentators have criticised a number of other aspects of the decision,⁶⁰ the controversial crux of their Lordships' analyses of Article 6 was once again the ostensibly preventative rather than punitive purpose of the order itself. They pointed out that the relevance of this distinction was an established part of European case law, citing the Italian "Mafiosi" cases of *Guzzardi v Italy*⁶¹ and *Raimondo v Italy*.⁶² They argued first that this differentiation meant that the order could not constitute a criminal charge and as such the second limb became meaningless.⁶³ Further, they similarly refused to interpret the imposition of an order as a penalty. The focus of the order was explicitly upon protecting those affected rather than punishing the perpetrator. Although a defendant could be made subject to greater potential sanctions than he would face for the same behaviour under the mainstream criminal law and its potential exclusionary terms

⁵⁸ *Unterpertinger v Austria* (1986) 13 EHRR 175; *Kostovski v Netherlands* (1989) 12 EHRR 434; *Saidi v France* (1993) 17 EHRR 251.

⁵⁹ The second limb was wholly irrelevant for Lord Hope, who suggested that the making of an order as a preventative measure did not involve a charge of a criminal offence at all.

⁶⁰ See for example C Bakalis, 'Anti-social behaviour orders - criminal penalties or civil injunctions?' [2003] 62(3) *CLJ* 583-586, in which the author suggests that the House of Lords' disregard for the fact that the ASBO was directed at the world at large and could only be brought by a public authority was contrary to European case law, citing *Ozturk v Germany* (1984) 6 EHRR 409 and *Benendoun v France* (1994) 18 EHRR 54.

⁶¹ (1980) 3 EHRR 333.

⁶² (1994) 18 EHRR 237.

⁶³ [2002] UKHL 39 at [72]. MacDonald argues that the "Mafiosi" cases were primarily concerned with Article 5 not Article 6 and were some of the earliest decisions of the ECtHR: S MacDonald (2003) 66 *MLR* 630.

could result in a restriction of liberty, they were not a form of punishment and therefore did not constitute a penalty.⁶⁴

It is submitted that this assessment of the application stage is unimpeachable. Section 1(1) demands explicitly that the court must be satisfied that the order is necessary to prevent further acts of anti-social behaviour. By focusing solely upon the future acts of the defendant, the legislative structure precludes any punitive motivation behind an order. The defendants sought to argue, however, that whilst the application stage may be wholly preventative the accepted punitive objectives of the ASBO at the breach stage should be taken into account under Article 6. Key to this argument was the decision of the European Court in *Steel v United Kingdom*,⁶⁵ cited as indistinguishable from the case before the court. In that case the European Court was asked to identify whether the civil procedure of breach of the peace was a criminal offence for the purpose of, *inter alia*, Article 6. It held that it was so, because a refusal at that stage to be bound over to keep the peace would result in committal to prison.

There can be little doubt, however, that the decision in *Steel* was distinguishable. The House of Lords pointed out, rightfully, that whilst imprisonment for such a refusal was a possible consequence of the same proceedings at which breach of the peace was established, punishment for breach of an ASBO could only be imposed following a separate, subsequent application to the magistrates court: "A conviction and punishment will only be imposed if the defendant, by his own choice, subsequently breaches the order and separate and distinct proceedings are brought against him".⁶⁶ As such, their Lordships failed to identify "an immediate and obvious penal consequence" pursuant to the application proceedings themselves.⁶⁷

Academic commentators, disappointed at the outcome of the *McCann* decision, have tried their best to identify bases upon which to challenge the House

⁶⁴ *Ibid.* at [75] and [76], *per* Lord Hope.

⁶⁵ (1999) 28 EHRR 603.

⁶⁶ *Ibid.* at [94], *per* Lord Hutton.

⁶⁷ *Ibid.* at [32], *per* Lord Steyn. See also *ibid.* at [107] and [108] *per* Lord Hutton.

of Lords' reasoning, focusing almost entirely upon their Lordships' "principled" distinction between the application and breach stage of the ASBO process. Their argument is that the mechanism should be viewed as a whole, enabling the breach stage to be considered in an assessment of the status of the application stage. Thornton, in the first place, has made the practical observation that there is a high chance that the order will be breached: a concern discussed in more detail in Chapter 5. As he writes: "[n]o local authority will apply for an order unless the defendant has a bad record of misbehaviour, and the defendant is unlikely to give up his misdoings at the drop of a magistrates' order. In reality most applications will lead first to the making of an anti-social behaviour order and secondly to a further order [sic] on a proven breach, with a penalty".⁶⁸

However, the likelihood of breach in practice is obviously not itself enough. Commentators have therefore put forward a number of European Court judgments in favour of treating the two parts as a whole. Ashworth, for instance, draws support from the case of *Welch v United Kingdom*⁶⁹ in which the European Court assessed whether a confiscation order pursuant to conviction for drug supply offences was a penalty for the purposes of Article 7. In doing so, it explicitly took into consideration the possibility of imprisonment for a future breach of the terms of the order, viewing both the order and punishment for breach as a whole. MacDonald, on the other hand, points to the cases of *Weber v Switzerland*⁷⁰ and *Bendenoun v France*⁷¹ concerned directly with Article 6.⁷² In *Weber* the Court held that a fine imposed upon the defendant for revealing confidential information about a judicial investigation amounted to a criminal penalty given firstly the high amount for which he was liable, but also because a failure to pay it could lead to conversion of the fine into a term of imprisonment. In *Bendenoun*, a case involving the issuing of fines for various customs and tax offences, the Court

⁶⁸ P Thornton, 'Anti-social behaviour orders are not criminal' (2003) 27 *All England Legal Opinion* 1.

⁶⁹ (1995) 20 EHRR 247.

⁷⁰ (1990) 12 EHRR 508.

⁷¹ (1994) 18 EHRR 54.

⁷² S MacDonald, 'The Nature of the Anti-Social Behaviour Order' (2003) 66 *MLR* 630.

again took into consideration the fact that the defendant could be liable to imprisonment for a future failure to pay.

However, although in each of these cases future punishment for breach was seen as a relevant factor in assessing whether the original order was part of criminal proceedings, it is submitted that they do not aid in an interpretation of the structure of the anti-social behaviour order. In each case these future penalties for breach of the order were not enough in themselves to warrant treating the order as a penalty: each order was also judged to have punitive elements *per se*. For example, in *Welch*, the European Court held that its identification of the order as a penalty was derived from a combination of factors: in particular, the fact that the order itself was directed to the proceeds involved in drug dealing and was not limited to actual enrichment or profit, and the discretion to take account of culpability in fixing the amount of the order, as well as the possibility of imprisoning the offender in default of payment. In the same way the Court identified in *Weber* and *Benedoun* a partially punitive objective to the original fines.

Whilst it is submitted that these cases do not provide the necessary support, one argument by MacDonald is of greater value. He has posited that the two components are structurally connected given the intention evinced by government that punishment on breach of an order should reflect the impact of the 'course of conduct' proved at the application stage. If courts are to punish an individual on the grounds of this prior conduct, the two parts of the mechanism must be treated as interdependent. MacDonald then goes on to suggest that in fact imprisonment for behaviour including not only the act of breach but that conduct giving rise to the original application will ultimately breach Article 5 of the Convention (right to liberty), given that it fails to fit within any of the categories listed in Article 5(1). In particular, Article 5(1)(b) is not satisfied as punishment is exacted not merely for breach of the order, but for all the prior anti-social behaviour giving rise to the original application. Neither is Article 5(1)(a) satisfied given that this punishment is founded upon evidence established in civil proceedings, which cannot constitute trial by 'a competent court'.

The *McCann* ruling is currently under appeal to the European Court of Human Rights which, according to Ashworth, is likely to view anti-social behaviour order in a different light to the House of Lords. A broad consensus exists amongst academic commentators that their Lordships failed to properly apply established Strasbourg jurisprudence. However, of the arguments proposed against the decision only one has particular merit: that the government's objective to allow punishment on breach for conduct proved only at the application stage establishes an interdependence between the two stages not simply under Article 6, but with repercussions also for compliance with Article 5.

(b) The House of Lords and *McCann*: politically motivated?

The House of Lords in *McCann* arguably had the capacity to interpret the application stage for an anti-social behaviour order as criminal proceedings. Yet what is most interesting about their Lordships' judgments for the purpose of this thesis is the explicit and unflinching political support for the government's objectives; in particular the desire to protect vulnerable witnesses through the use of hearsay evidence. Lord Steyn, for instance, made clear from the outset that without the availability of such evidence "it would inevitably follow that the procedure for obtaining anti-social behaviour orders is completely or virtually unworkable and useless". He continued: "My starting point is ... an initial scepticism of an outcome which would deprive communities of their fundamental rights".⁷³ He went on that "an extensive interpretation of what is a criminal charge under article 6(2) would, by rendering the injunctive process ineffectual, prejudice the freedom of liberal democracies to maintain the rule of law by the use of civil injunctions".⁷⁴ Lord Hutton added:

"I consider that the striking of a fair balance between the demands of the general interest of the community (the community in this case being represented by weak and vulnerable people who claim that they are the victims of anti-social behaviour which violates their rights) and the

⁷³ [2002] UKHL 39 at [18].

⁷⁴ *Ibid.* at [31].

requirement of the protection of the defendants' rights requires the scales to come down in favour of the protection of the community and of permitting the use of hearsay evidence in applications for anti-social behaviour orders".⁷⁵

It has been argued by Andrew Ashworth that the decision to impose a criminal standard of proof illustrates the acceptance of their Lordships that the ASBO was in truth a criminal procedure, but that the need to secure the use of hearsay evidence in these proceedings was overall conclusive of the issue.⁷⁶ This political objective was of greater import in the case than the intricacies of the European jurisprudence. It is no surprise, therefore, that their Lordships' legal reasoning has been criticised by academic commentators; in particular Ashworth who suggests that the government and the House of Lords have colluded in breaching the spirit, even if not the letter, of the European Convention. It appears that their Lordships were swept away by the political clamour for greater public protection without proper consideration of the law.

If one views the judgments in *McCann* as predominantly the product of political rather than legal reasoning, it is still necessary to question whether there really is a clear policy justification for the decision. In fact, it is submitted that the House of Lords' assumptions about the importance of maintaining the civil status of the application stage is misplaced. The problem with its approach is that it fails to appreciate the broad range of behaviour that the anti-social behaviour order is used for. By modifying the legal system to allow the use of professional witnesses and hearsay evidence in every case, all cases of anti-social behaviour are deemed to involve witness intimidation either inside or outside the courtroom. Witness intimidation has become an inherent attribute of the concept. Lord Steyn argued that "[s]ection 1 is not meant to be used in cases of minor unacceptable behaviour but in cases which satisfy the threshold of persistent and serious anti-social behaviour".⁷⁷ Yet in reality the definition of anti-social behaviour, as we have seen,

⁷⁵ *Ibid.* at [113]

⁷⁶ A Ashworth, 'Social Control and Anti-social Behaviour: the subversion of human rights?' [2004] 120 *LQR* 263-291.

⁷⁷ [2002] UKHL 39 at [25].

is wide enough to cover all manner of situations in which witness intimidation is a negligible risk.

It is possible instead to posit a more subtle solution to the problem. It would have been open to their Lordships for instance to deem the initial application stage criminal and then craft a procedural system whereby hearsay evidence could be admitted on a case-by-case basis at the discretion of the presiding judge. Indeed, this is the approach now taken by Chapter 2 of the Criminal Justice Act 2003 which provides the judiciary with the discretion to allow hearsay evidence to be presented in criminal proceedings if to do so would be in the interests of justice. In doing so they would have at least ensured that the need for hearsay evidence was considered afresh in each set of application proceedings.

(c) The interim anti-social behaviour order

The section 1D interim anti-social behaviour order, introduced by the Police Reform Act 2002, was part of the raft of modifications to the mechanism implemented by the government in response to its poor take-up post-1998. It was an extension once again consequent to the lobbying of government by local agencies, including social landlords. In this case, they had argued that it was a necessary expedient to ensure effective public protection through speedier resolution of anti-social behaviour. Securing an anti-social behaviour order appears to be an extremely slow process.⁷⁸ According to a recent report on the success of the ASBO, on average it took 66 working days (just over 13 weeks) from the date of application to the date of the final hearing to secure an order.⁷⁹ Notably, the obligatory consultation with other local government agencies and the court hearing itself meant the eventual remedy might be imposed some months after the initial administrative decision to seek it had been made. During this period there was also the possibility of witness intimidation. The interim order, on the other hand, avoids the need for a full trial on the merits of a decision. Instead, instant relief can be sought in advance of the proper hearing with the full deterrent force

⁷⁸ And indeed expensive: the average cost of an ASBO is £5,350 (Campbell, above n 7).

⁷⁹ *Ibid.*, p 10.

of an ASBO. In particular, it was suggested by the government that the supposed delaying tactics of defence lawyers would be redressed, as defendants would proactively seek to have the order overturned as soon as possible.

Yet as with the other new measures discussed above, there was little actual evidence of an overwhelming need for the interim order. Research on use of the anti-social behaviour order prior to the 2002 Act suggested that delays in application could be adequately dealt with through better administrative interface with the court system. Indeed, behind the average were a broad range of times: some cases were decided in a little as four working days, whereas the longest took 173 working days (almost 35 weeks). As the report concluded: "if the primary problem was the speed of the application through the system, then this is an issue about listings and adjournments ... ASBOs can and do work successfully in areas with the motivation and successful procedures in place".⁸⁰

The interim order again raises questions about the balance drawn between public protection and the procedural rights of defendants. To provide protection in advance of the full application hearing authorities can now apply to either the magistrates or the county court for an interim order, which the court may grant where it considers that it is "just" to make an order.⁸¹ The order is for a fixed period pending the full hearing and can prohibit the defendant from doing anything described in the order.⁸² The effect of breach of an interim order is the same as for a full ASBO. Furthermore, an application may also be made without giving notice to the defendant if the justices' clerk gives leave.⁸³ Leave may only be granted if the clerk is satisfied that it is necessary for the application to be made without notice. Where an application is granted without notice, the order must be served on the defendant as soon as practicable, and does not come into effect until it has been served. If a without notice order is not served on the defendant within seven days it ceases to have effect.

⁸⁰ Campbell, above n 7, pp 41 and 104.

⁸¹ s 1D(2).

⁸² s 1D(3).

⁸³ Magistrates' Courts (Anti-social Behaviour Orders) Rules 2002, rule 5.

The use of interim injunctive relief, either with or without notice, is of course nothing new. Both equitable injunctions and statutory housing injunctions have always been available in such circumstances. However, the interim order threatens to bring even more defendants within the ambit of the criminal justice system pursuant to even fewer procedural hurdles for social landlords. It was with this in mind that the without notice interim order was recently challenged under article 6 of the European Convention on Human Rights in *R (on the application of M) v Secretary of State for Constitutional Affairs*.⁸⁴ The particular order challenged had been issued against M as part of a blitz of 66 drug-dealers in the Little London area of Leeds by Leeds City Council and West Yorkshire Police. The defendant argued that although a civil procedure, the application for such an order did not satisfy the requirement of a fair trial under Article 6(1).

The Court of Appeal ultimately held that the making of an interim ASBO without notice is not a determination of civil rights within Article 6, but a temporary measure regulating behaviour until the determination of the parties' rights at the substantive hearing. The meaning of 'determination' was held by the Court of Appeal to be the final point of the legal process. As such, because the interim ASBO proceedings were to be followed by the full ASBO proceedings they did not fall within the ambit of Article 6. Of course, from the perspective of the defendant there is a determination inasmuch as breach of the interim order will lead to identical consequences to that of a normal ASBO; a point argued by defence counsel. However, whilst European jurisprudence allows for consideration of the impact on defendants of an interim order when deciding whether interim applications engage article 6, it will only be determinative if the remedy causes "irreversible prejudice" to the defendant's interests and "drains to a substantial extent the final outcome of the main proceedings of its significance".⁸⁵ The safeguards provided by the legislation further supported the conclusion of the Court of Appeal: although there was no provision for an automatic early return date, the justices' clerk must be satisfied that it is necessary for the application to be

⁸⁴ [2004] EWCA Civ 312.

⁸⁵ *Markass Car Hire v Cyprus*, ECtHR 6th November 2002.

made without notice and, moreover, the order can only be made for a limited period when the court considers that it is just to make it, and the defendant can immediately apply to have it reviewed or discharged.

The Court of Appeal then went on to argue that if in the alternative Article 6 *was* engaged, the interim ASBO should be looked at as a whole, in line with the principle in *Alconbury*, discussed above with respect to the introductory tenancy.⁸⁶ The ‘ancillary’ interim order when viewed together with the subsequent full ASBO hearing was compliant with the Convention.⁸⁷ The appellant argued that to ensure compliance with Article 6, on an application for an interim ASBO without notice a more rigorous test was required than simply whether it was ‘just’ to order the remedy. He cited *McCann* and the criminal standard of proof demanded by the court in that case before it could issue an ASBO. The local authority should thus have been required to put forward an extremely strong *prima facie* case that the full application would succeed on its merits. The argument was rejected by the Court of Appeal as an unnecessary fettering of the discretion of the magistrates’ court. The court must, however, consider all relevant circumstances, including the fact that the application has been made without notice.

The Court of Appeal thus attempted to place interim injunctions entirely outside the ambit of Article 6, whilst simultaneously holding this legislative structure compliant with the article in any case. What is interesting, however, is whether the reasoning in *M* can extend to a situation in which a defendant breaches an interim ASBO before the full hearing: a point that was not raised during the litigation. In such circumstances, could it not be argued that there had been a “determination” under article 6, given that the full hearing was consequently drained of its relevance as the defendant would in any case be liable to criminal prosecution? Furthermore, would possible sentencing on establishing that breach, taking into account all the evidence including that proved only to the

⁸⁶ [2001] UKHL 23.

⁸⁷ Even if Article 6 is not engaged the process must still be fair. However, there was no procedural unfairness in the making of an interim order without notice, and certainly nothing intrinsically objectionable about the power to grant such an order.

civil standard on application, satisfy the requirements of a fair trial given that there would no longer be a full jurisdiction in line with *Alconbury* when the proper merits of a full order could be heard?

4. Conclusions

This chapter has identified and explored the conflict constructed by the government and social landlords between public protection objectives and the due process rights of defendants. The prioritisation of public protection, as manifest in the call for greater speed and certainty of relief together with the protection of vulnerable lay witnesses, has led to a recent raft of legislative initiatives. Most controversial of these are the internal review procedure adopted by the introductory and demoted tenancy regimes, and the civil-criminal law hybrid anti-social behaviour order. Worryingly, there is evidence in *Tackling Anti-social Tenants* that suggests that the government has seriously considered the sacrifice of security of tenure for council tenants altogether, whilst the interim order represents a further incursion into the procedural rights of criminal defendants.

The government is willing to risk forgoing due process rights because of its obsession with public protection, arguably at any cost. This reflects a tendency of contemporary government to see the threat posed by the criminal as greater than the threat posed by the state; in this case the possible misuse of power by social landlords. As Garland concludes, “[t]he call for protection from the state has been increasingly displaced by the demand for protection by the state ... The risk of unrestrained state authorities, of arbitrary power and the violation of civil liberties seem no longer to figure so prominently in public concern”.⁸⁸ This restructuring of the balance of power between the state and citizen has been aided considerably by the success of the landlord lobby in persuading government, and the Law Commission, that it can be trusted to apply sanctions, particularly eviction, with restraint.

⁸⁸ D Garland, *The Culture of Control* (Oxford: OUP, 2001), p 12.

What this chapter has also hopefully brought into relief is that the requirements of effective public protection have been dictated by social landlords themselves. There is a tendency on the part of government to respond unequivocally to the demands of landlords rather than objective analysis, suggesting resort to anecdotal and practitioner-led policy-making. This has led consequently to a focus on reducing legal rights rather than improving administrative processes. The evidence suggests, however, that landlords should perhaps be encouraged to look more closely at their own administrative processes before attempting to dismantle the hard-won security of tenure of social tenants. In the same way, the anti-social behaviour order has been justified on grounds of the very real difficulties of landlords protecting vulnerable witnesses, but little effort has been made to develop co-ordinated administrative working practices to ensure their safety. Finally, the development of the interim anti-social behaviour order, particularly when employed without notice, is not without difficulty. Crafted in response to the failure of local agencies to make great enough use of the original order, and pursuant to the demands of only a number of social landlords who themselves might be accused of not using the original mechanism effectively, it is a politically knee-jerk, “blunderbuss” solution to the problems faced by social landlords in ensuring effective public protection.

The final theme explored in this chapter was the fact that each of these reductions in due process rights has been subject to challenge in the higher courts under Article 6 of the European Convention. These developments have provided an interesting perspective from which to assess the European jurisprudence in this area, although the article has had minimal effect in limiting the protectionist objectives of the legislation. The civil nature of the anti-social behaviour order was confirmed finally by the House of Lords in *McCann*, much to the chagrin of legal academics and, as such, the right of social landlords to present hearsay evidence to the courts has been assured. This paper has highlighted the clear political support evinced by their Lordships for the protectionist objectives of the legislation, which provided an explicit backdrop to their decision-making. However, it has suggested

that in any case European jurisprudence did not in fact provide a clear basis for a finding in favour of the defendants given the difficulties in forming a conceptual link between the wholly preventative application stage and the clearly punitive breach stage. The interim order has also sustained an attack under Article 6, although here it must be questioned whether the Court of Appeal paid enough attention to the implications of a breach of an order before the full ASBO hearing.

The challenge to the introductory tenancy regime under Article 6, however, has met with a greater measure of success. In an effort to satisfy the *Alconbury* standard establishing an 'aggregate' approach to the compliance of administrative decision-making with the article, the Court of Appeal in *McLellan* expanded the *Cochrane* procedure to enable a more intensive substantive assessment of the compliance of possession with Article 8. Thus the originally mandatory grounds for a court order for possession under the introductory tenancy have been tempered through an interesting private-public law interface. Yet lawyers intent on securing the original protectionist objectives of the internal review procedure (certainty, speed and witness protection) have sought to restructure the system to ensure compliance with the Human Rights Act 1998, as noted on analysis of the demoted tenancy and the Law Commission's recent proposals.

Chapter 5

CONSIDERING THE WELFARE OF THE PERPETRATOR (1): SOCIAL POLICY

The dominant discourse of public protection has directed the attention of housing management toward the victim of anti-social behaviour. The characteristics of the perpetrator are largely ignored, although many are labouring under acute socio-economic problems. This chapter argues that, given these problems, the focus upon management of conduct through discipline and exclusion can provide only limited protection from anti-social behaviour, and may well create more far-reaching difficulties by exacerbating the social exclusion already experienced by those targeted.

1. The dangers of punitive housing management

Whilst those affected by anti-social behaviour are usually the most disadvantaged in society and often clearly in need of protection, troublesome households are highly likely to be extremely vulnerable themselves. This is particularly true of the residents of social housing. As set out in Chapter 1, housing officers have found themselves operating within increasingly deprived neighbourhoods, experiencing high levels of structural, socio-economic problems. Indeed, their role in tackling crime and anti-social behaviour is a key part of the government's commitment to bringing about the renewal of these communities. These households, residents of the same neighbourhoods as their victims, suffer from the same structural problems of unemployment, poor education and lack of opportunities.

Furthermore, a considerable proportion of those engaging in anti-social behaviour experience an array of other difficulties associated with the socially excluded. In a recent assessment of the ASBO case files of social landlords, it was found that two-thirds of defendants had special needs or other specific problems; 18 per cent had some form of mental illness; 18 per cent had experience of physical or sexual abuse; 9 per cent had a physical disability; drug problems were identified

in 12 per cent of cases; alcohol was a problem in 11 per cent of cases; and in 15 per cent of cases children were out of control and the parents lacked the skills to cope with them.¹

An appreciation of the wide-ranging and often serious social-economic problems experienced by many perpetrators is key to constructing sustainable solutions to their anti-social behaviour, as this chapter will argue. Yet government rhetoric tends to ignore these issues entirely. There are two reasons for this: a combination of the influences of protectionist and moralist discourses upon the debate on anti-social behaviour. In the first place, the dominant discourse of public protection has concentrated attention firmly upon the victims and potential victims of crime and disorder. The perpetrator on the other hand is of little interest, aside from the threat that he or she poses to others. He is instead constructed as “the other”; a deviant minority from whom the majority of “decent, law-abiding people” must be protected.² This divisive approach, by which perpetrators are effectively placed outside a constructed “community”, enables political rhetoric to gloss over the motivation and causes behind their behaviour. This is notable, for example, in the structure of the legal definitions of anti-social behaviour. The section 218A duty, together with the nuisance grounds for eviction, the housing injunction and the anti-social behaviour order, defines the conduct that warrants intervention solely in terms of its effect on others: it must cause ‘nuisance or annoyance’ or ‘alarm, harassment or distress’ to the victim. The reasons for that behaviour, on the other hand, are irrelevant.³

However, it is interesting to note that even when the difficult circumstances of perpetrators are recognised they have been dismissed as irrelevant. This is a product of the moralistic foundation upon which the discourse of public protection

¹ C Hunter et al, *Neighbour Nuisance, Social Landlords and the Law* (London: CIH/JRF, 2000). See also S Campbell, *A review of anti-social behaviour orders: Home Office Research Study No. 236* (London: Home Office, 2002): 60 per cent of those accused of anti-social behaviour suffer from mental illness, addictions or learning difficulties.

² E Burney, *Crime and Banishment* (Winchester, Waterside, 1999).

³ See A Brown, ‘Anti-social behaviour, crime control and social control’ [2004] *Howard Journal* 43(2) 203-211, who describes the fight against anti-social behaviour as a “triumph of behaviourism” for ignoring entirely the motivations and causes behind such conduct.

operates. Contemporary political rhetoric increasingly conceptualises offenders in simple moral terms.⁴ Anti-social behaviour in particular is presented as the consequence of individual pathology rather than the structural problems faced by residents of deprived communities such as poverty, unemployment and substance abuse. More specifically, there is an assumption that such conduct is simply the result of selfishness on the part of the perpetrator, who is concomitantly constructed as a rational, but irresponsible, actor: whatever an individual's circumstances he or she can still choose not to behave badly.

The choice of language within government discourse is revealing here: anti-social individuals actively "flout" the rules of society;⁵ they must be "brought to justice" for their behaviour; the majority must "take a stand" and fight the wrongs they have been made to suffer. Indeed, labelling theory has been used to argue that the term 'anti-social behaviour' itself presumes fault on the part of the perpetrator.⁶ As such, even when it acknowledges that many perpetrators labour under such problems the government has made clear that it is unwilling to accept them as mitigating considerations. As the White Paper *Respect and Responsibility* makes clear: "Family problems, poor educational attainment, unemployment, alcohol and drug misuse can all contribute to anti-social behaviour. But none of these problems can be used as an excuse for ruining other people's lives. Fundamentally, anti-social behaviour is caused by a lack of respect for other people."⁷

This discourse of blame and censure provides a justificatory basis for the increasingly punitive approach to public protection from anti-social behaviour taken by the government. In particular, Haworth and Manzi argue that moralistic rhetoric has quickly permeated the practices of social housing management.⁸ Housing officers have developed their crime control practices entirely outside the formal criminal justice system, with its traditional penal-welfarist approach to

⁴ A Haworth and T Manzi, 'Managing the Underclass: Interpreting the Moral Discourse of Housing Management' (1999) 36(1) *Urban Studies* 153-165.

⁵ Home Office, *Respect and Responsibility* (London: HMSO, 2003), p 7.

⁶ P Papps, 'Anti-social behaviour strategies: individualistic or holistic?' (1998) 13(5) *Housing Studies* 639-656.

⁷ Home Office, *Respect and Responsibility* (London: HMSO, 2003).

⁸ A Haworth and T Manzi, above n 4.

criminality through which 'care and control' professionals still seek to understand and resolve the causal factors giving rise to deviant behaviour. As a professional group social landlords have never had a particular adherence to socio-structural explanations of crime and disorder. As such, Alison Brown argues that their policing function has developed entirely independently as a 'new site of power and knowledge' founded wholly upon moral explanations of bad behaviour.⁹

The extent to which behaviour should be seen as the product of individual pathology or socio-economic context is a question of aetiology beyond the scope of this thesis. Certainly, some forms of anti-social behaviour targeted by the government, such as littering, are relatively easy to explain as a lack of respect or consideration. Further, one might agree that there is something morally culpable about violent, intentional and intimidatory behaviour that cannot be excused by a difficult background. However, the expansive definition of anti-social behaviour does seem to include categories of individual who could not be presented easily as merely selfish or inconsiderate. The notion of rational choice to explain crime and disorder has considerable political appeal; allowing blame of perpetrators and supporting ever-increasing punitivism.¹⁰ Yet can it realistically be said that structural problems have no role to play in causing anti-social behaviour? The problems of prostitution and begging; the effect of mental illness on behaviour; and ~~the inability of parents to control their children reveal huge causal~~ complexities hidden behind political rhetoric.

In summary, the welfare of perpetrators has been largely ignored in official discourse. The prioritisation of public protection has directed attention towards those affected by crime and disorder, yet even when the government recognises the vulnerabilities affecting many perpetrators its adherence to moral explanations of anti-social conduct means that in any case it continues to hold them fully responsible for their behaviour. Why does this matter? This next section argues that the government's reluctance to acknowledge that socio-economic factors are the cause of much of the anti-social behaviour dealt with by social housing

⁹ Brown, above n 3.

¹⁰ D Garland, *The Culture of Control* (Oxford: OUP, 2001), p 131.

managers has two important consequences. First, it illustrates the dubious value of punitive legal sanctions as an effective way to ensure short-term public protection. Second, it illustrates the extent to which those sanctions threaten to increase the social exclusion experienced by already vulnerable perpetrators.

(a) Ineffective public protection

The basic assumption of government is that anti-social behaviour is merely a problem of disrespect and irresponsibility. Perpetrators have been conceptualised as rational actors that have ultimately chosen to behave as they do. These individuals are therefore assumed to adhere to the principles of rational choice theory; that their behaviour is “calculated, utility-maximising conduct resulting from a straightforward process of individual choice”.¹¹ This explains the emphasis placed upon the management of anti-social behaviour through disciplinary processes: as rational actors, perpetrators will respond eventually to a great enough threat.

Deterrence of this kind can and does successfully modify behaviour. Yet the fact that so many of those now susceptible to sanction have serious problems themselves suggests that many individuals targeted by these measures are unlikely to respond to the ever-increasing threats to which they are now subject. Effecting long term changes in people’s behaviour cannot occur simply through ever greater threats, as the structural problems they experience are likely to prevent them from exercising rational choice. Take, for example, one particular assessment by Jones and Segar assessing the impact of anti-social behaviour orders on prostitution.¹² They argue that prostitutes labouring under the demands of their pimps and the need to remain close to their homes and children feel obliged to return to the localities from which they have been excluded regardless of the consequences. Indeed, the ASBO has been shown to be far from infallible. Two recent studies of reoffending have shown that around one third of those assessed breached their

¹¹ Garland, n 10, p 130.

¹² H Jones and T Sager, ‘Prostitution and the anti-social behaviour order’ [2001] *Crim LR* 873.



orders.¹³ The principles of rational choice theory seem a poor representation of the reality for many of those targeted.

Furthermore, without confronting the causes of anti-social behaviour it is unlikely that exclusionary techniques can provide long term solutions to an individual's conduct. Sometimes removing an individual from a particular area through eviction or exclusionary terms in ASBOs or injunctions can resolve problems by allowing the separation of perpetrators from the situations giving rise to their behaviour. However, where bad behaviour is the result of more complex social causes, displacement is more likely to be the ultimate consequence.¹⁴ As commentators consistently point out, eviction in particular simply moves many problem households on, sometimes into private rented accommodation in the same area where they are less easily subject to surveillance.¹⁵ Any sustainable solution to anti-social behaviour must confront the root causes rather than simply shifting the issue elsewhere.

(b) Exacerbating social exclusion

As we have seen, the protection of residents of deprived neighbourhoods from the effects of anti-social behaviour is part of a wider commitment by government to the renewal of the country's most deprived neighbourhoods. Managing disorder is but one component of its desire to address the social exclusion experienced in particular on certain inner-city housing estates. Neighbourhood renewal is to be achieved not only by tackling crime and disorder, but through a range of other measures targeting the long term structural problems of these communities: the creation of employment opportunities, improved health, better skills, and an improvement in the quality of housing and the physical environment.¹⁶

¹³ C Hunter et al, *Social landlords' use of anti-social behaviour orders* (Sheffield: Sheffield Hallam University, 2001); Campbell, above n 1.

¹⁴ A Crawford, *The Local Governance of Crime* (Oxford: OUP, 1997), p 286.

¹⁵ C Hunter et al, above n 1.

¹⁶ SEU, *National strategy on neighbourhood renewal* (London: ODPM, 2001).

It is therefore an irony of the move towards increasingly punitive civil sanctions that, whilst designed to help in reducing the social exclusion experienced by deprived communities, they have the potential to exacerbate the social exclusion of many targeted households. The combination of protectionist and moral discourses discussed above has ensured that the perpetrators of anti-social behaviour are excluded from efforts to tackle social exclusion. They have been constructed as the cause rather than a consequence of that social problem, and are thus placed outside the “community” to be protected and renewed.

One of the most worrying consequences of recent government initiatives is the potential for routine exclusion of increasing numbers of households from the social housing sector on grounds of behaviour. Ostensibly at least, the allocation of social housing has always been guided by the principle of need.¹⁷ As increasingly limited stock is allocated with preference to the homeless, and other vulnerable groups under general allocation lists, the sector has for some time provided a safety net for the socially excluded. It appears however that of all the components of the British welfare state, the provision of social housing has most often departed from the principle of need. Unlike other forms of welfare, local authority housing has never been seen as a universal right and has therefore found itself “disproportionately prey” to moral debates about the standards of behaviour of householders.¹⁸

What we are now witnessing is the inexorable prioritisation of protectionism above welfarist considerations, leading to increasingly explicit intrusions upon the principle of need. Even before direct attempts by government to harness allocation processes as a way to responsabilize recalcitrant tenants, the “conveniently indeterminate”¹⁹ legislative structure regulating the allocation of council housing had been harnessed by local housing authorities to exclude individuals on behavioural grounds. Social landlords have been excluding vast numbers of households from their allocation lists for bad behaviour for some time. By 2000, 52

¹⁷ D Cowan et al, ‘Risking Housing Need’ (1999) 26(4) *Journal of Law and Society* 403-26.

¹⁸ Haworth and Manzi, above n 4.

¹⁹ D Cowan et al, above n 17.

per cent of local housing authorities and 46 per cent of RSLs operated exclusion policies.²⁰ However, the reforms of the Homelessness Act 2002 are likely to intensify this practice. Furthermore, statistics show that the period between 1996 and 1998 showed a 127 per cent increase in eviction from social housing, blamed predominantly upon the implementation of the introductory tenancy regime.²¹

It is quite clear that a tension exists between the exclusionary techniques employed in response to protectionist concerns and the principle of need that should arguably underpin the provision of social housing. Is it really appropriate for social housing to be withheld or retrieved in response to bad behaviour, given that such sanctions target those often most in need of that support?²² Although commentators emphasise that the move away from rights to social housing and towards the responsibilities that tenants and their households owe to both their landlord and community threatens the ultimate welfare objectives of the sector, the debate is complicated by the increasingly limited availability of social housing. It is arguable that in areas of high demand, behaviour is a legitimate and necessary way in which to distinguish between households in need competing for accommodation. However, Cowan notes that in practice regular exclusion tends to operate in areas of low-demand, which suffer from the most serious anti-social behaviour. As such, landlords have found themselves refusing access to vast numbers of applicants whilst simultaneously managing an equally large number of void properties.²³

In addition to the dangers posed by exclusion from social housing, other forms of exclusionary technique operated by social landlords may lead to further problems. Exclusion from public spaces through an injunction or ASBO, for instance, represents a worrying example of extreme risk management in conjunction with the increasing banishment of 'undesirables' from quasi-public

²⁰ C Hunter et al, above n 1.

²¹ *Ibid.*

²² D Cowan and C Pantazinis, 'Social landlords as crime control' (2001) 10(4) *Social and Legal Studies* 435. Similar concerns are posited by McKeever in the context of the use of social security as a source of social control: 'Social security as a criminal sanction' (2004) 26(1) *JSWFL* 1-16.

²³ D Cowan, *Housing Law and Policy* (Basingstoke: Macmillan, 1999).

spaces such as shopping malls and the precincts of housing developments.²⁴ Removing individuals from a particular area not only prevents them from breaching the behavioural norms dictated by a social landlord but restricts too their capacity to engage in even legitimate activities within the locality. It seeks to address the problem by simply removing its source entirely. The consequence for the defendant is not simply the threat of sanction for bad behaviour, but their arguably disproportionate removal from interaction with civil society.²⁵

And finally, the anti-social behaviour order threatens to draw increasing numbers of individuals (in particular young people)²⁶ into the net of the criminal justice system. The government has professed that the role of the order is preventative not punitive: compliance is the objective rather than criminalisation. But as we have seen in practice breach is a very real possibility. Recently the Guardian engaged in a special investigation about the sudden rise in the number of children in custody in the last few years.²⁷ The article went on to place the blame squarely upon the consequences of breach of ASBOs. The number of children jailed for such breaches has increased from an average of 2.3 in April 2000 to a staggering 48.75 by August 2004.²⁸ Incapacitation is unlikely to resolve the long term problems faced by many of these individuals and more than likely to do considerable harm. Once again, the question is whether increasing the potential for imprisonment is a wise strategic move for a government intent on reducing social exclusion.

2. Towards holism?

In the light of these concerns, academic commentators have consistently argued that the only long term solution to the complex factors contributing to anti-social behaviour is a holistic approach that tackles not only the symptoms but the

²⁴ Burney, above n 2.

²⁵ *Ibid.*

²⁶ Three quarters of ASBOs issued between April 1999 and September 2002 were imposed on those aged 21 or under: Campbell, above n 1.

²⁷ N Davies, 'Wasted lives of the young let down by jail system', *The Guardian*, 8 December 2004.

²⁸ The article also went on to note that 80 per cent of children that end up in Youth Offender Institutes suffer from at least two mental disorders.

underlying causes of the problem.²⁹ Without such an approach neighbourhoods are unlikely to see sustainable reductions in crime and anti-social behaviour and, indeed, the social exclusion of perpetrators may ultimately exacerbate the problems of these communities. It has been suggested that a reassessment of protectionist discourse is therefore required. Whilst the government has relied heavily upon the management of problem populations through discipline and exclusion, is not sustainable protection of these neighbourhoods more likely to be achieved through greater emphasis upon tackling the causes of anti-social behaviour? To reiterate, this thesis does not suggest that there is no place for the use of legal sanctions: public protection can sometimes be achieved in the short term and can be necessary to prevent the considerable suffering of the victims of anti-social behaviour. However, the punitive rhetoric of government has the potential to lead to a disproportionate and unworkable reliance on such tools.

This was the conclusion reached by Policy Action Team 8 of the Social Exclusion Unit in its report on effectively tackling anti-social behaviour.³⁰ The document strongly advocates a holistic approach to the problem, focusing on a “three-pronged” approach. Enforcement through the use of legal sanctions must operate within a framework of prevention and resettlement. Prevention can take two forms. First, it can seek to provide individual support for perpetrators to promote early intervention and prevent escalation of problems. Rather than seeking to discipline a perpetrator through the threat of sanction, landlords should work with them to tackle the underlying causes of their behaviour. Second, work needs to be done to resolve wider societal issues.³¹ Of course, tackling the fundamental underlying problems of the most deprived neighbourhoods, unemployment and poverty, is something social landlords cannot hope to solve on their own and is instead a national objective.

²⁹ C Hunter, ‘Anti-social behaviour and housing – can law be the answer?’ in Cowan and Marsh (eds) *Two Steps Forward: Housing Policy into the New Millenium* (2001); Papps, ‘Anti-social behaviour strategies: individualistic or holistic?’ (1998) 13(5) *Housing Studies* 639.

³⁰ SEU, *Policy Action Team 8: Report on Anti-social Behaviour* (London: ODPM, 2000).

³¹ Papps, above n 29.

What is surprising is that although the political rhetoric of government continues to focus upon the vote-winning formula of greater punitivism, in practice there can be found signs of a more balanced understanding of the complexities of anti-social behaviour. This arguably illustrates the tension that exists *within* government between the need to secure the support of the electorate through populist policy-making and an appreciation of the practical reality of sustainable solutions. Most importantly, the government has accepted in full the recommendations of PAT 8. Both *Tackling Anti-social Tenants* and *Respect and Responsibility* touch on the need to engage in preventative measures, but not to any great extent. However, draft guidance on the section 218A duty advises that rehabilitation of perpetrators is of importance to any long term strategy to manage anti-social behaviour.³²

Perhaps the most important development is the acceptance by government that eviction is of little long term value in managing anti-social behaviour. It has made clear that it does not wish to see an increase in possession proceedings, accepting both that it more often than not simply moves problem households on and that it has the potential to increase social exclusion. It has also emphasised the importance of alternatives to legal sanction. One idea formally backed by the government is the use of Acceptable Behaviour Contracts and Parenting Contracts. These documents are legally unenforceable. Instead, they set out the responsibilities expected of an offender or his or her parents in an attempt to focus their minds upon the problems they are causing. They are often extremely successful,³³ and avoid the need to resort to legal sanctions. It has also pushed for greater rehabilitation. Perhaps the best known example of a resettlement programme is the Dundee Families Project, which has recently been commended explicitly by the Home Secretary. The project houses dysfunctional families at risk of eviction and provides them with a full range of support services. In a recent

³² Home Office, *Draft guidance on policies and procedures* (London: HMSO, 2003).

³³ See for example S Bullock and S Jones, *Acceptable behaviour contracts: tackling anti-social behaviour in the London Borough of Islington* (London: HMSO, 2004).

report it has been judged a considerable success³⁴ and a similar scheme has been recently set up by Manchester City Council.

One interesting component of the government's rehabilitative strategies is the creation of a series of mandatory orders imposing support on certain vulnerable categories of individual. Parenting orders implemented by the Crime and Disorder Act 1998 and recently created individual support orders³⁵ imposed by a court as part of ASBO proceedings, demand positive obligations on either a parent or a child to receive support from agencies to deal with their parenting skills or problem behaviour. Breach of either order is punished by a fine. Whether forcing an individual to receive such help will ensure the necessary co-operation with support agencies is debatable, although early signs suggest that the orders have proved surprisingly successful.³⁶ The human rights implications of these orders are extremely interesting, but beyond the scope of this paper. In any case, the parenting order has recently been judged compliant with the Human Rights Act 1998 by the Court of Appeal.³⁷

Finally, there are likely to be benefits from the increasing emphasis upon inter-agency working. For instance, section 1 of the CDA 1998 imposes a procedural obligation on social landlords to consult other local agencies before applying for an anti-social behaviour order. The unexpected consequence of this obligation, according to a recent report on the use of ASBO,³⁸ has been the development of a problem-solving approach to the problems of anti-social behaviour enabling the crafting of preventative solutions that avoid the need for resort to use of the order. The report suggests that bringing together various support agencies often highlights the previous absence of co-ordinated help for perpetrators. In the case of registered social landlords in particular, who are otherwise outside the "loop" of local authority governance, this process is arguably

³⁴ J Dillane et al, *Evaluation of the Dundee Families Project, Final Report* (Edinburgh: Scottish Executive, 2001).

³⁵ CDA 1998, s 1AA as amended by ss 322 and 323 of the Criminal Justice Act 2003.

³⁶ C Henricson, *Government and Parenting* (London: JRF, 2003).

³⁷ *R (on the application of M) v Inner London Crown Court* [2003] EWHC 301.

³⁸ Campbell, above n 1

invaluable in bringing anti-social behaviour to the attention of relevant support agencies.³⁹

Yet whilst the attention of government has refocused upon addressing the underlying causes of anti-social behaviour, it is unclear to what extent it is truly committed to this approach. First, there has been little organised attempt by government to ensure the transmission of best practice.⁴⁰ Second, for social housing managers to engage in meaningful preventative and rehabilitative action to tackle the root causes of anti-social behaviour they need available to them the necessary resources. However, no provision for financial support to social landlords has been made to ensure that this can occur. In addition, whilst the government has accepted that eviction should be used with caution, it has demanded simultaneously that landlords instead make increased use of injunctions and ASBOs. Recent guidance on the ASBO is particularly interesting, illustrating the progressive function creep undergone by the mechanism. The ASBO was originally presented as a response to “criminal or sub-criminal” anti-social behaviour. This suggested a focus upon serious intimidatory behaviour. However, guidance notes have subsequently failed to mention this standard and instead include a broad range of low-level conduct: prostitution, graffiti, smoking or drinking whilst underage, begging and noise nuisance as acceptable targets of the order.⁴¹

There are worrying signs also of a changing attitude within government as to the appropriate point at which legal intervention can be justifiably resorted to. On the one hand, the government appears to advocate prevention above sanction, reserving the latter when all other methods fail. As it states in *Respect and Responsibility*: “much of our framework aims to prevent anti-social behaviour; and

³⁹ However, the consultation requirement does not oblige consulting groups to reach a consensus as to the appropriateness of an order.

⁴⁰ C Hunter and J Nixon, Social Landlords’ Responses to Neighbour Nuisance and Anti-Social Behaviour: From the Negligible to the Holistic?’ (2001) 27(4) *Local Government Studies* 89-104.

⁴¹ Home Office, *A Guide to Anti-Social Behaviour Orders and Acceptable Behaviour Contracts* (London: HMSO, 2002). In fact, the flexibility of the ASBO has resulted in some bizarre applications of the mechanism by local agencies far beyond their original remit. They have been used to prohibit a farmer from allowing his pigs to roam beyond his land, in response to the illegal flyposting of a major record label and to stop a young person from sitting on the top deck of a bus.

where influencing, supporting and negotiation fail we need the right powers to take effect swiftly to ensure compliance and to protect the broader community".⁴² This suggests an admirably cautious approach to the use of sanctions, demanding that other alternatives should be explored first: law as "last resort". However, whilst eviction is to be used sparingly, government has recently advocated earlier use of injunctions and ASBOs to "nip anti-social conduct in the bud". In particular, whilst draft guidance on use of the anti-social behaviour order suggested that other forms of response likely to be appropriate to deal with lower-level problems, such as mediation, should be pursued before applying for an order, the most recent document is at pains to emphasise that the ASBO in particular should not be seen as a tool of last resort.⁴³ Such guidance once again threatens to undermine the encouragement of early support services.

In any case, whilst the government has shown a (relatively) more circumspect understanding of anti-social behaviour in recent months, the success of a holistic approach depends wholly upon a concomitant ideological change amongst social landlords. Burney, however, argues that the continued superficial political rhetoric of punitivism, pushed perhaps as a vote-winning tool, may well continue to ensure a punitive approach by housing managers.⁴⁴ At this stage, much must still be done to effect change in working practices. Hunter and Nixon have recently carried out important empirical work on the practical management of anti-social behaviour by social landlords. Whilst the majority of social landlords have taken on responsibility for dealing with anti-social behaviour their approach is predominantly reactive rather than holistic.⁴⁵ Action is only taken after complaint and whilst legal action is usually reserved for the most serious cases it tends to extend to eviction alone. The research also noted that social landlords were

⁴² Home Office, above n 5, para 2.43. My italics.

⁴³ Home Office, above n 5, p 9.

⁴⁴ Burney, above n 2.

⁴⁵ Hunter and Nixon, above n 40 (drawing upon Scott and Parkey's classification of minimalist, traditional and innovative approaches: S Scott and H Parkey, 'Myths and realities: anti-social behaviour in Scotland' (1998) 13(3) *Housing Studies* 325).

themselves adamant that they see legal sanctions as a last resort.⁴⁶ However, closer analysis found that in fact very few in practice referred households to support agencies or even ensured that they were visited by a housing officer before proceeding with legal action.

3. Conclusions

This chapter has sought to identify the limitations of the punitive approach to public protection advocated by central government rhetoric and increasingly implemented by social landlords. Management of anti-social behaviour through discipline and exclusion, whilst of value in certain situations involving extreme bad behaviour, is an often inappropriate and ultimately unsustainable solution to the problem. Instead, it is vital that social landlords are encouraged to adopt a holistic approach that tackles the causes as well as the symptoms of such conduct. There are signs that beyond the hysterical populism the government is moving towards a more circumspect policy. However, the continued emphasis upon the anti-social behaviour order as some sort of panacea has serious implications for the future.

⁴⁶ C Hunter and T Mullen, *Legal Remedies for Neighbour Nuisance: Comparing Scottish and English Approaches* (York: York Publishing Service, 1998).

Chapter 6

CONSIDERING THE WELFARE OF THE PERPETRATOR (2): THE LEGAL TOOLS

Chapter 5 explored the political criticisms of the punitive, moralistic approach taken by the government and social landlords towards the management of anti-social behaviour. It noted, however, that beneath the rhetoric there are signs of a more rounded understanding of the problem, which accepts both the limitation of legal sanctions as a source of sustainable public protection and their capacity to increase social exclusion.

Chapters 6 and 7 now take a legal perspective. They explore whether, and to what extent, such welfarist considerations have been incorporated into the legal processes regulating social landlords' management tools. This chapter looks first at the structure of the tools themselves. It notes in particular moves by the Court of Appeal in possession proceedings under the assured and secure tenancy regimes to restrict the broad discretion under the Housing Acts traditionally available to trial judges to assess the effect of eviction on secure and assured tenants and their households. It then looks at whether welfare considerations can be incorporated into the framework of the introductory and demoted tenancy regimes and anti-social behaviour injunctions and orders.

1. The Court of Appeal and possession proceedings: interpreting 'reasonableness'

Social landlords wishing to gain possession of a home let on a secure or assured tenancy on the grounds of nuisance behaviour by members of the household must comply with the identical statutory processes contained in the 1985 or 1988 Housing Acts. A landlord cannot evict a tenant without a court order. Although the court must first ensure itself that the definitional element has been satisfied, the fundamental question is whether it is 'reasonable' for the judge to grant a possession order in the circumstances. Even if the court decides

that it is reasonable it can still choose to suspend the possession order on terms.¹

The traditional test for reasonableness in possession proceedings was set out by Lord Green MR in *Cumming v Dawson*.² Whether it is reasonable to make a possession order is to be judged, taking account of all relevant circumstances as they exist at the date of the hearing, in a broad commonsense way giving such weight as the judge thinks right to the various factors relevant to the situation.³ A judge is given the freedom to decide upon a just balance between the interests of both landlord and tenant, and the public.⁴ In cases involving nuisance or annoyance to neighbours, the judge must explicitly take into consideration the interests of those affected by the behaviour.⁵ This extremely broad judicial discretion, which enables the county court to ensure that injustice is avoided in each particular case, reflects political acceptance of the adversarial nature of the landlord-tenant relationship and the need to protect tenants from unscrupulous or arbitrary eviction.

The effect of the Human Rights Act 1998 on the operation of the reasonableness requirement was recently assessed by the Court of Appeal. In *Lambeth LBC v Howard*,⁶ the Court of Appeal was asked to consider the impact of Article 8 of the Convention on the granting of possession under Ground 2. Sedley LJ confirmed in that case that an eviction of a residential occupier would always fall within Article 8(1).⁷ Justification of that interference under Article 8(2) should therefore feature as part of the discretion afforded to the court, as a public body, in adjudicating upon the reasonableness of granting possession in a particular case. The court must decide whether eviction is in accordance with the law (as is almost always the case) and, more importantly, necessary in a democratic society to achieve a legitimate aim. In *Howard* Sedley LJ assumed that the relevant aims in the context of eviction for anti-social behaviour were

¹ HA 1988, s 9; HA 1985, s 85(1).

² [1942] 2 All ER 653.

³ *Ibid.*, per Lord Greene MR at 655.

⁴ *London Borough of Enfield v McKeon* (1986) 18 HLR 330.

⁵ *Woking BC v Bistram* (1993) 27 HLR 1; *Darlington BC v Sterling* (1996) 29 HLR 309. This consideration now has a statutory foundation: Anti-social Behaviour Act 2003, s 16.

⁶ (2001) 33 HLR 58. See too *Gallagher v Castle Vale Action Trust Ltd* (2001) 33 HLR 72.

⁷ However, note the recent decision of the House of Lords in *Qazi* [2003] UKHL 43 which limits the applicability of Article 8 when the tenant has no proprietary or contractual right to remain in his or her home.

the prevention of disorder or crime and the protection of the rights and freedoms of others. In the case of the latter he referred specifically to “one of the most important freedoms and one of the most important rights in modern urban society, albeit that neither is spelt out in the Convention, freedom from fear and the right to live in peace”.⁸

However, after incorporating Article 8 into the reasonableness standard, Sedley LJ then suggested that the practical effect of compliance with the 1998 Act will be immaterial:

“As this court has said more than once, there is nothing in Article 8, or in the associated jurisprudence of the European Court of Human Rights, which should carry county courts to materially different outcomes from those that they have been arriving at for many years when deciding whether it is reasonable to make an outright or a suspended or no possession order. Nevertheless ... it can do no harm, and may often do a great deal of good, if the exercise is approached for what it is, an application of the principle of proportionality.”⁹

Two important issues arise from this construction of the reasonableness requirement. First, it should be noted that one’s ‘home’ according to the Convention is a concept autonomous of any underlying property or contractual interest.¹⁰ As such all members of the household, not simply the tenant, will have their Article 8 rights infringed on eviction. Second, whilst not confirmed by ratio it is almost certain that the 1998 Act takes horizontal effect.¹¹ The court as a public body for the purpose of the Act must apply its discretion under the reasonableness requirement in line with the Convention, whether or not the landlord is itself deemed a public body. Thus registered social landlords and other housing associations (together with private landlords) are indirectly subject to the Convention.

Under normal conditions the broad discretion afforded to the county court through the reasonableness ground provided a fairly acceptable system of scrutiny. The judge in possession proceedings acted as an independent arbiter

⁸ [2001] EWCA Civ 468 at [32].

⁹ *Ibid* at [31].

¹⁰ *Harrow LBC v Qazi* [2003] UKHL 43.

¹¹ See for instance the dicta of Sedley LJ to this effect in *Gallagher v Castle Vale Action Trust Ltd* [2001] EWCA Civ 944 at [44].

with the power to assess fully the merits of the application for possession, able to take into consideration all the circumstances of the case and ensure that the needs of the landlord, tenant and in the case of nuisance behaviour other residents, were appropriately balanced. The perceived threat of anti-social behaviour, however, has fundamentally altered the approach to the concept taken by the courts. In a series of cases from the mid-1990s, notably as the crime control function of social landlords really began to take off, the Court of Appeal overturned a series of county court decisions refusing possession orders in cases of extremely serious neighbour nuisance in which the potential negative effect of eviction on the tenant or other members of the household was held to outweigh the impact of the behaviour on the victims.

The Court of Appeal has traditionally made it clear that it is loathe to interfere with a trial judge's assessment of the reasonableness of a possession order. There are only three reasons why it will do so: if the judge takes into account irrelevant considerations, fails to take into account relevant considerations or reaches a conclusion that is so misguided as to be 'palpably wrong'. In each case these factors were used by the Court to overturn the original decision. However, more importantly it took the opportunity to restructure the reasonableness requirement, narrowing its focus through the rejection of certain considerations as irrelevant, to ensure a primary emphasis upon public protection rather than the needs of the perpetrator.

It is important to assess these developments in the context of the Court of Appeal's general attitude towards the reasonableness requirement in the context of anti-social behaviour. There can be little doubt that the Court is well-aware of the serious impact a refusal to order possession can have. In *West Kent Housing Association v Davies*¹² Robert Walker LJ, in constructing his reasons for allowing the appeal against the trial judge's decision not to order possession, said:

"it seems to me that the judge seriously underestimated the effect both on the neighbours of Mr and Mrs Davies in Lime Road and other parts of the estate and on the Housing Association itself of the message that is given if serious breaches--and these were very serious breaches--occur and the

¹² (1999) 31 HLR 415.

court, on the matter being taken to it, makes no order against tenants who are found to have committed those breaches. The Housing Association has, it seems, been doing its best to improve the quality of life for those living on this estate. To take a matter like this to court calls for considerable effort and determination on the part of a socially responsible landlord, in marshalling a case, and in obtaining witnesses who are prepared to give evidence despite the possibility of intimidation. It cannot to my mind be right that the court should not recognise the seriousness of a case of this sort.”¹³

The excerpt illustrates an appreciation on the part of the Court of the implications for social landlords of a failed application for relief, as examined in Chapter 4. In particular it notes the possibility of devaluation of the general deterrent effect of terms in tenancy agreements prohibiting anti-social behaviour, and the difficulty in securing the co-operation of residents as witnesses in future applications, if a court does not order possession. The decisions that follow should therefore be viewed in this context: as attempts to limit the uncertainty of applications for possession for serious anti-social behaviour, and thereby increase landlords’ capacity to protect the public through eviction, by restricting the opportunity for a tenant to put forward mitigating circumstances in his or her defence.

(a) The decision in *Mousah*: a presumption in favour of social landlords?

Perhaps the most well-known ruling on the application of reasonableness in nuisance cases is that of *Bristol City Council v Mousah*.¹⁴ Mr. Mousah, a paranoid schizophrenic, had allowed his house to be used for the sale and consumption of crack cocaine in direct contravention of a term of his tenancy agreement. The property had been subject to a series of police raids and numerous people had been arrested. The council sought possession of the property under Ground 1, Schedule 2 of the Housing Act 1985 (breach of the tenancy agreement). At trial the judge found that notwithstanding the serious breach of the agreement it was not reasonable to make an order for possession. Evidence was given by Mr Mousah’s consultant psychiatrist as to his schizophrenia. The psychiatrist said that the eviction would have a “negative

¹³ *Ibid.* at 425.

¹⁴ [1997] 30 HLR 32.

influence on his mental health". On the basis of this the judge found, *inter alia*, that the public interest in not allowing the use of properties for drug dealing was outweighed by the public interest in keeping someone off the streets whose illness might cause him to become dangerous, both to himself and others.

The Court of Appeal overturned the original decision as, *inter alia*, 'palpably wrong' and held that it was indeed reasonable to evict the defendant.¹⁵ In the view of Beldam LJ, the principle a trial judge should follow in such circumstances is as follows:

"the public interest, in my view, is best served by making it abundantly clear to those who have the advantage of public housing benefits that, if they commit serious offences at the premises in breach of condition, save in exceptional cases, an order for possession will be made. The order will assist the housing authority who, under section 21 of the [Housing Act 1985], has the duty to manage the housing stock and have the obligation to manage, regulate and control allocations of their houses, for the benefit of the public. In my view the public interest would be best served by the appellant being able in a case such as this to relet the premises to someone who will not use them for peddling crack cocaine."¹⁶

Beldam LJ concluded, however, that there were no such "exceptional circumstances" in this case as the judge had misunderstood the evidence about Mr Mousah's mental health: there was no evidence that he would be a danger to the public or himself if he was evicted.

The judgment of the Court of Appeal in *Mousah* creates a presumption in favour of possession in cases involving certain serious acts of anti-social behaviour. It is now the task of the defendant to provide the court with evidence of "exceptional circumstances" giving rise to mitigation. Thus the threshold for acceptance of mitigating factors has been raised considerably. The objectives of the Court of Appeal were clearly directed towards more effective public protection. Indeed, the quotation from Beldam LJ's judgment, above,

¹⁵ Arguably, the decision in *Mousah* could have been justified on far clearer grounds. No mention was made in the case of section 8 of the Misuse of Drugs Act 1971. This provision creates a criminal offence committed by anyone concerned in the management of any premises who knowingly permits or suffers, *inter alia*, the supply of a controlled drug on those premises. Surely it is always reasonable to evict a tenant engaging in such behaviour in order to avoid your own criminal liability? Of course, the offence is itself controversial given the practical difficulties in running 'dry-houses' for addicts. See, for example, *R v Brock (John Terrence)* [2001] Crim LR 320, in which two managers of a supported housing scheme were prosecuted under section 8 for the drug-dealing going on with their knowledge within their establishment.

¹⁶ [1997] 30 HLR 32 at 38.

highlights both disciplinary and exclusionary rationales: the *Mousah* presumption will act as a clear sign to others that such conduct will not be tolerated whilst ensuring that the perpetrator is removed from the neighbourhood.

However, the practical applicability of the *Mousah* decision is questionable. What constitutes a “serious offence” or an “exceptional circumstance”? In *Mousah*, the judges were unpersuaded by the evidence that Mr Mousah’s schizophrenia would be exacerbated by eviction.¹⁷ It is therefore entirely reasonable to imagine that cogent and compelling reasons why possession would have particularly serious consequences for the defendant could still satisfy the *Mousah* test. Further, it is unclear from the judgment whether it is necessary that conduct should be in contravention of a specific term of the tenancy agreement. In *Canterbury City Council v Lowe*¹⁸ the defendant household had engaged in a prolonged harassment of a neighbouring family involving verbal abuse and the assault of the tenant’s daughter outside her school. However, Kay LJ was adamant that the *Mousah* decision was inapplicable on the facts. He suggested instead that the decision was limited to serious criminal offences in breach of an actual term of the tenancy agreement. Drug-dealing and racial harassment are both examples that come to mind. Nevertheless, the ruling in *Mousah* illustrates the desire of the Court of Appeal to curtail the discretion of the county court to consider the welfare of the perpetrator in favour of greater certainty of outcome for social landlords.

(b) Eviction as a last resort: considering alternative remedies

The government has made it clear that it does not wish to see an increase in the use of eviction by social landlords in response to nuisance behaviour, and that possession should be seen as a last resort, since it understands that this “remedy” is unlikely to provide a lasting solution for neighbourhoods affected by anti-social behaviour and will likely increase the social exclusion of evicted households. Instead, the government tentatively supports greater preventative

¹⁷ Though compare the judgment in *Croydon LBC v Moody* [1998] EWCA Civ 1683, discussed below, in which it was confirmed that respect should be accorded to the evidence provided by expert witnesses of a defendant’s mental illness.

¹⁸ (2001) 33 HLR 583.

and rehabilitative efforts, but in reality hopes for more use of injunctions and ASBOs. The question, however, is whether it is open to the county court in possession proceedings to assess the relative merits of alternative remedies as part of its own discretion.

It is now established authority that the suitability of alternative remedies is an irrelevant consideration when deciding upon the reasonableness of a possession order. The issue arose most recently in *Newcastle City Council v Morrison*.¹⁹ Mrs. Morrison was a secure tenant of premises owned by the Council and lived in the premises with her three sons. The main ground for possession was Ground 2, under which the Council relied on a long history of anti-social behaviour on the part of her household. This offending conduct, which mainly involved her two eldest sons, had continued for almost five years and was described by the trial judge as a “reign of terror”. It involved assaults on neighbours using fists, shovel handles, metal bars and knives, witness intimidation, threats to kill, throwing bricks and stones, starting fires, verbal abuse and criminal damage. The allegations were not contested by Mrs. Morrison who effectively conceded the breaches of the tenancy agreement and the grounds for making a possession order.

Whilst the trial judge accepted that the behaviour of the defendant’s sons was “appalling”, he held that possession would be unreasonable. His reasons showed an appreciation of the limitations of eviction as a source of public protection. Eviction, he argued, would prove an ineffective remedy as the sons would inevitably remain in the neighbourhood. He suggested instead that in the particular circumstances alternative remedies, for example an injunction, would provide a preferable solution, enabling the matter to be dealt with *in situ*, and targeting the children specifically.

However, these considerations were judged irrelevant by the Court of Appeal. In doing so the Court relied on its earlier decision in *Sheffield City Council v Jepson*²⁰ in which Ralph Gibson LJ had held that, although the authority could have obtained an injunction to restrain persistent and deliberate breaches of the defendant’s tenancy agreement rather than seeking possession

¹⁹ [2000] L & TR 333.

²⁰ (1993) 25 HLR 299.

“he saw no reason why a council should be required or expected to take that course”.²¹ May LJ, providing the sole judgment in *Morrison*, concluded:

“[if] it was not reasonable to make a possession order because Allan would be able to continue his destructive and unlawful conduct nevertheless ... [t]hat would rightly be seen as a licence to continue the unacceptable conduct, as a failure to address the legitimate concerns of the neighbourhood, and a failure to give proper effect to the terms of the tenancy agreement and the Parliamentary intention underlying the Grounds of Schedule 2 relied upon”.²²

He held further that the availability of alternative remedies, better suited as a remedy for the community was irrelevant as “[i]t is in the public interest that necessary and reasonable conditions in tenancy agreements of occupiers of public housing should be enforced fairly and effectively”.²³

The reasons given by the Court of Appeal are questionable on a number of grounds. First, the reasoning of the Court of Appeal in *Jepson*, accepted in *Morrison*, that there was no reason why a landlord should be expected to use alternative remedies is at odds with contemporary developments in the management of anti-social behaviour. The government believes that eviction should remain a “last resort” in response to anti-social behaviour. Landlords now have a wealth of alternative remedies; demotion, injunctions and anti-social behaviour orders, with which to respond to anti-social behaviour without recourse to eviction. In particular, as we have seen, the government has a preference for injunctions and ASBOs.

Second, the reasoning of May LJ in *Morrison* is curious. This passage presents a number of concerns, none of which are particularly justified. It is unclear why refusal to grant possession when eviction would not provide a suitable remedy, in preference of an alternative sanction of greater efficacy, should be seen as a licence of that conduct and a failure to respond to the concerns of the council and the community. Nor is it clear why the judge believed that consideration of alternative measures would undermine respect

²¹ *Ibid.* at 305.

²² [2000] L & TR 333 at 344.

²³ *Ibid.*

for the tenancy agreement. An injunction or ASBO is itself a strong response to a breach of an anti-social behaviour term or the statutory nuisance grounds.

It can be argued further that the authority in *Morrison* is in conflict with the European Convention on Human Rights. The inefficacy of eviction in actually bringing an end to anti-social conduct, and the availability to social landlords of alternative, arguably less drastic and potentially more effective mechanisms with which to respond to anti-social behaviour are surely important in deciding whether possession is a necessary and proportionate way in which to prevent crime and disorder or protect the rights and freedoms of those affected under Article 8.²⁴ Indeed, in a Court of Appeal judgment not directly concerned with the use of alternative remedies but with the appropriateness of vicarious liability of a tenant for his or her household,²⁵ Lord Justice Sedley suggested explicitly that the proportionality of eviction under Article 8 does indeed involve an assessment of alternative and less drastic remedies available to a landlord.²⁶

On the other hand, there are two arguments evident in the decisions of the Court of Appeal, used to justify its refusal to allow assessment of the relative merits of alternative remedies. There is evidence first that the Court of Appeal is itself dubious as to the merits of injunctive powers relative to eviction in cases involving serious anti-social behaviour. It was held by Waller LJ in *Canterbury CC v Lowe*,²⁷ for example,²⁸ that in cases involving serious harassment an injunction may not itself be enough to alleviate the fear caused by the perpetrator. In such cases eviction is the only solution that could satisfy those residents affected by the conduct. Second, one must remember the pressure on the Court, raised by Robert Walker LJ in *West Kent HA v Davies*, to ensure certainty of outcome in possession applications for anti-social behaviour so that the public is effectively protected. Interfering with the complex decision-making involved in choosing from the range of possible responses to a

²⁴ *Lambeth BC v Howard* [2001] EWCA Civ 468.

²⁵ See below at section (d).

²⁶ *Gallagher v Castle Vale HAT* (2001) 33 HLR 72.

²⁷ (2001) 33 HLR 583.

²⁸ And confirmed by Potter LJ in *New Charter Housing v Ashcroft* [2004] EWCA Civ 310.

particular problem of anti-social behaviour would greatly increase the uncertainty experienced by social landlords.

Nevertheless, it should be noted finally that a compromise of sorts has been reached by the Court of Appeal. In *Canterbury City Council v Lowe*,²⁹ the Court held that whilst the availability of an injunction is an irrelevant consideration when deciding upon the reasonableness of a possession order, it is relevant when deciding whether to suspend that order. If an injunction has already been imposed upon the defendant or his or her household and the behaviour of the perpetrator has improved³⁰ or one could be imposed and the perpetrator would be likely to observe it, this could be grounds to suspend possession.³¹

(c) The potential impact of homelessness on vulnerable households

The effects of homelessness upon evicted households can be severe. Not only perpetrators of anti-social behaviour but entire households can suffer the consequences of a possession order. As we have seen, it can also lead to permanent exclusion from social housing and disqualification from rehousing. Further, evicted households are often those most in need of such accommodation. The consequences for a perpetrator and his or her household of a possession order have always been relevant considerations under the reasonableness ground.³² However, a number of appeals have concentrated specifically upon the trial judge's refusal of a possession order where the household has clear priority need status, after predicting that a future application for rehousing under the homelessness legislation will fail on grounds of a finding of intentional homelessness.³³ Because such a finding discharges the duty of a local housing authority to find settled accommodation for households in priority need, it will lead to homelessness for households that may be seriously affected by such an outcome.

²⁹ (2001) 33 HLR 583.

³⁰ As was the case in *Lowe* (2001) 33 HLR 583.

³¹ C.f. *New Charter Housing (North) v Ashcroft* [2004] EWCA Civ 310, in which an appeal by the RSL against a suspended possession order was allowed on grounds that the judge had no reason to suppose that Mrs. Ashcroft would take the opportunity provided by the suspended order to control her son.

³² *Cummings v Dawson* [1942] 2 All ER 653; *Darlington BC v Sterling* (1997) 29 HLR 309.

³³ *Bristol CC v Mousah* (1997) 30 HLR 32 (vulnerable person by reason of mental illness); *Darlington BC v Sterling* (1997) 29 HLR 309 (household containing children).

Once again, however, the Court of Appeal has stepped in and circumscribed this potential defence. It has been held that a court should not try, as the trial judges did in *Bristol CC v Mousah* and *Darlington BC v Sterling*, to second-guess the decisions of local authority homelessness officers: it is sufficient for the court to know that the applicant will be entitled to make an application as homeless, and that it will be dealt with properly. As Beldam LJ held in *Mousah*:

“whilst [the trial judge] was perfectly entitled to consider the effect which an order for possession would have, it was wrong for him to become so involved with the possible outcome of an application by the respondent under [homelessness legislation]. Evidence had been given by the appropriate housing officer that, if the respondent applied, his application would be dealt with on its merits. That, in my view, was all that the Judge could properly take into account”.³⁴

In addition, the Court of Appeal has rejected attempts by the lower courts in a number of cases to actively constrain the administration of the homelessness legislation by granting possession only on condition that the household is rehoused. In *Darlington BC v Sterling*, for example, the tenant’s 13 year-old son had been guilty of a range of serious anti-social behaviour including assaults and threats with knives. The Court of Appeal held, however, that even where the tenant has children this does not mean that it is unreasonable to order possession unless the court is satisfied that alternative accommodation will be provided. Nor does the county court have the power to require a local authority to provide rehousing proposals as part of the possession process.³⁵

The Court of Appeal justified this development in two ways. On the one hand it highlighted protectionist concerns, noting the difficulties inherent in an approach by which the more badly behaved a tenant is, the more likely it is to be unreasonable to evict him or her because of the increased chance that he or she will be rendered intentionally homeless.³⁶ However, it argued additionally

³⁴ (1997) 30 HLR 32 at 39.

³⁵ *Watford BC v Simpson* (2000) 32 HLR 901.

³⁶ C.f. *Barnet BC v Derek Lincoln* [2004] EWCA Civ 823 in which the Court of Appeal did not deem as irrelevant an assessment by the trial judge that it was likely that the defendant would be found intentionally homeless. However, in that case the appeal was against a decision to order immediate

that in any case it would be inappropriate to allow the judicial function to incur upon the administrative function of local authorities in deciding future homelessness applications.³⁷

Yet there is still considerable uncertainty in this area of the law as certain Court of Appeal judges remain unpersuaded by the restriction on their discretion. In particular, Lord Justice Evans stated in *Croydon BC v Moody*:

“I, for my part, remain unconvinced that the judge should, as a matter of law, disregard the fact that the tenant, if he is evicted, will be liable to be treated as intentionally homeless and, secondly, what his fate in fact will be, whether a cardboard box (as my Lord has called it) or otherwise. The headnote in *City of Bristol v Mousah* reads: “The court should not, however, attempt to predetermine the possible outcome of any application which may be made by the defendant to the local authority as a homeless person in the event of an order being made: ...”. Whether it follows from that that the court should disregard altogether the question whether there will be a roof over the tenant's head is another matter.”³⁸

The reasoning of Evans LJ in *Moody* clearly illustrates the difficulty inherent in avoiding consideration of future homelessness applications. It highlights the restrictiveness in differentiating the effect of possession upon a household (which can be considered) from the result of an application to be rehoused by the local authority (which cannot). Without an assessment of the latter, the former is emptied of real meaning, limited perhaps to the impact of the process of eviction upon the household.

However, in the case of *Lewisham BC v Akinsola*,³⁹ Sedley LJ argued that in certain circumstances the outcome of a homelessness application will be so self-evident that it can be considered by the court. As he held:

“I am content to accept that if the case is at one of the two poles that I have described (that is to say cases in which an application for rehousing as homeless will manifestly succeed or not succeed) then there is no reason why the judge should not take that fact, because fact it will be, into account as part of the balance of factors by which he assesses the reasonableness of

possession for persistent nuisance behaviour. Thus the Court was not intent upon undermining the original decision as in the other cases.

³⁷ See Otton LJ in *Mousah* (1997) 30 HLR 32 at 40, who wished to avoid a situation in which courts might find themselves “eliding the judicial and administrative function”.

³⁸ (1999) 31 HLR 738.

³⁹ (2000) 32 HLR 414.

the possession order. But if all that the evidence shows is that there would be, on a fresh application, an issue for the local authority to decide, then this court has no power to make a pre-emptive or prefigurative decision for the purpose of gauging whether it is reasonable for it to make a possession order.”⁴⁰

Sedley LJ’s approach seeks to limit the extent to which consideration of a homelessness application can be carried out. However, it is questionable whether it is ever possible for a court to conclude with certainty that an application for rehousing will “manifestly succeed or not succeed”. The only situation in which this might be the case would be the no fault grounds for eviction. Under both the nuisance and breach of agreement grounds it would be impossible to argue that there was no chance that an individual would be deemed unintentionally homeless given the value-laden nature of the concept. Further, this conclusion suggests that courts must still engage in an assessment of the outcome of a hypothetical homelessness application at the possession stage in order to isolate whether that application will ‘manifestly succeed’. Thus it must still pre-empt the decision-making of the local authority.

Further support for a return to consideration of the outcome of an application for rehousing can be found in the recent case of *Gallagher v Castle Vale HAT*,⁴¹ in which Sedley LJ confirmed that following the judgment of the European Convention in *Chapman v UK*,⁴² “the impact of an eviction order on the tenant’s individual circumstances is necessarily a relevant consideration” with respect to the proportionality of possession under Article 8.⁴³ The question of rehousing under the homelessness legislation is clearly relevant to the “impact” of an order. Thus the refusal of the Court of Appeal to consider the outcome of an application arguably sits in tension with the jurisprudence of the Strasbourg Court.

In conclusion, the Court of Appeal was not only keenly aware of the consequences for effective public protection of consideration of future applications for rehousing, but the illegitimacy of judicial intrusion upon the administrative decision-making systems of local authorities. However, how can

⁴⁰ *Ibid.*

⁴¹ (2001) 33 HLR 72.

⁴² (2001) 33 EHRR 18.

⁴³ [2001] EWCA Civ 944 at [49].

a judge constructively take into account the future housing situation of a tenant without making some kind of assessment of the outcome of an application to the local housing authority? The Court of Appeal it seems has emptied consideration of the impact of homelessness on vulnerable households of any real meaning. Evans LJ's suggestion that the *Mousah* ruling still enables consideration of the future housing status of the household is dubious. However, with respect to Sedley LJ's judgment in *Akinsola*, too, any attempt to identify whether a particular set of facts means that a future application will 'manifestly succeed or not succeed' is still engaging in inappropriate administrative decision-making.

(d) Tenants' liability for the bad behaviour of their household

Since the modifications of the nuisance grounds for eviction enacted by the Housing Act 1996, possession proceedings may be brought against a tenant of social housing not only for their own bad behaviour but that of others residing in or visiting the premises. This legislative structure simultaneously promotes both protectionist objectives set out in Chapter 2. First, the extension of vicarious liability can be seen as an attempt to "responsibilize" social tenants and utilise their informal control over other members of their household, promoting management through discipline beyond the state.⁴⁴ Additionally, however, it seeks to ensure that a landlord is able to exclude a household and consequently provide relief for an affected community, even when the perpetrator of bad behaviour is not the tenant. If only the anti-social behaviour of an individual in a contractual relationship with the landlord could give rise to a right to possession, the community affected by the conduct of a dependent or associate operating from the home would be unable to effectively protect the victims through eviction.

Resort to vicarious liability of tenants in possession proceedings is associated in practice with one particular category of householder. Both the cases that have come before the Court of Appeal and academic research illustrate that such proceedings are disproportionately brought against

⁴⁴ D Garland, *The Culture of Control* (Oxford: OUP, 2001).

households headed by a single female whose dependent children or partners are the perpetrators of the anti-social behaviour.⁴⁵ This form of liability can therefore be seen as a component of the increasing responsibility expected of parents for their children by the state.⁴⁶

Whilst this form of vicarious liability has the potential to intensify the power of eviction as a tool of social control, it has also proved an area of controversy before the courts. Concern has arisen in particular when possession proceedings are brought against a tenant for the behaviour of a dependent that she is clearly incapable of controlling. In three important appellate cases such defendants have argued that possession should always be refused in such a situation because the tenant is not personally at fault for the anti-social behaviour. In *Kensington & Chelsea Royal BC v Simmonds*⁴⁷ Mrs. Simmonds, a single parent living in a council maisonette, appealed against a decision to grant the local authority a suspended possession order in respect of her flat after her teenaged son was found to have caused annoyance and offence to neighbours amounting to a breach of the tenancy agreement. In *Portsmouth CC v Bryant*⁴⁸ an elderly tenant living with her teenage grandchildren was the subject of possession proceedings for their serious anti-social behaviour. And in *Gallagher v Castle Vale HAT*,⁴⁹ Mrs. Gallagher had been left by her husband to look after her errant daughter, who had engaged in serious nuisance behaviour around the Castle Vale estate with her boyfriend.

In each case, it was argued that the tenant had not acquiesced in the offending conduct. Indeed, Mrs. Simmonds had tried and failed to control her sons, whilst Mrs. Bryant and Mrs. Gallagher were also clearly incapable of taking action to restrain the behaviour of their respective children. However, the appeals were all refused by the Court of Appeal. It pointed out, rightfully, that Ground 2 made absolutely no reference to the need for fault on the part of the tenant. More importantly, however, it held that to interpret the statute in

⁴⁵ J Nixon and C Hunter, 'Taking the blame and losing the home: women and anti-social behaviour' (2001) 23(4) *JSWFL* 395.

⁴⁶ See for example the criminal liability of a parent for a child's failure to attend school (Education Act 1996, s444), or the development of parenting orders and contracts (e.g. Anti-social Behaviour Act 2003, Part 3).

⁴⁷ (1997) 29 HLR 507.

⁴⁸ (2000) 32 HLR 906.

⁴⁹ [2001] EWCA Civ 944.

this way would undermine the effective protection of the community. As Simon Brown LJ said in *Bryant*:

“As to the justice of the position, it must be remembered that not only are the interests of the tenant and her family here at stake; so too are the interests of their neighbours. It would in my judgment be quite intolerable if they were to be held necessarily deprived of all possibility of relief in these cases, merely because some ineffectual tenant next door was incapable of controlling his or her household.”⁵⁰

Thus the Court made clear that effective public protection demanded in such circumstances that even those tenants without personal involvement in offending conduct should not be excluded from liability. Although the personal blame of the tenant was a relevant consideration as to the reasonableness of a possession order, it was not decisive of an application for relief.⁵¹ Simon Brown LJ held that to decide otherwise would be contrary to all common sense and justice. This authority, establishing the blamelessness of a tenant as merely a relevant consideration when assessing reasonableness, has done little to prevent the eviction of such households. Every one of the Court of Appeal decisions upheld or imposed possession orders on these women-headed households. It appears, therefore, that the protectionist concerns of the Court have consistently trumped the lack of personal responsibility for the behaviour of the perpetrators on the part of the tenant.

What is particularly interesting, however, is that the judgments of the Court of Appeal also support the earlier contention of this thesis that public protection through punitive sanctions has been justified through resort to moralistic assessments of targeted individuals.⁵² In this case, Nixon and Hunter point out that the Court of Appeal appears to have further justified its approach by passing judgement upon the women subject to proceedings: operating as a result of a convergence between the moral discourse associated with both anti-social behaviour and the stigmatisation of ‘lone mothers’ blamed for delinquency amongst young people.⁵³ The Court of Appeal too appears to have

⁵⁰ (2000) 32 HLR 906 at 912.

⁵¹ *Newcastle CC v Morrison* [2000] L & TR 333 at 342 *per* May LJ.

⁵² See Chapter 5.

⁵³ Nixon and Hunter, above 45.

adopted a punitive tone. In particular, Simon Brown LJ referred in *Bryant* to the need to ensure that a remedy for the community through possession is not precluded because “a cowardly and ineffectual wife or mother cannot prevent her husband or family from intimidating the neighbourhood and making their neighbours’ lives a misery”.⁵⁴

Yet whilst there is evidence that the Court of Appeal has passed moral judgement on some of these women, blaming them for their inability to control their household, in other cases there has been explicit recognition of the difficulties faced by the tenant. In *Newcastle CC v Morrison*, for example, the judge reminded the court that the defendant “is a single parent with a small son to house and provide for and one sympathises at a personal level with a mother who is unable to control one or both of two rampaging, destructive, intimidating and, at times, dangerous teenage sons”.⁵⁵ However, the judge still went on to order possession of the property, to ensure relief for those affected by the anti-social behaviour. On balance then, it is submitted that whilst there are signs that moral judgements have shaped the decisions of the court, the ultimate objective is not punishment but the securing of protection for the community through eviction, which will always outweigh other considerations irrespective of the degree of perceived fault of the tenant.

Possession proceedings are therefore currently stacked against the blameless tenant. However, it should be noted finally that although the majority may have consistently prioritised public protection in these cases, there has been a murmur of dissent from the bench. Statements by Lord Justice Sedley in the cases of *Bryant* and *Gallagher* have sought to argue that the ability of a court to evict in circumstances in which a tenant is entirely blameless is contrary to justice, particularly on human rights grounds. It is to this particular challenge to the structure of nuisance grounds that we now turn.

In *Bryant*, the earlier decision, Sedley LJ clearly placed considerable importance upon the negative impact on an innocent occupier of what he deemed a “penal provision”. As he pointed out: “The loss of one's home is after all not even something which a criminal court can impose by way of sentence,

⁵⁴ (2000) 32 HLR 906 at 910.

⁵⁵ [2000] L & TR 333 at 343.

let alone on a basis of strict liability.”⁵⁶ Further, he explicitly criticised the moral judgement of Court in *Simmonds* and *Bryant* that the tenants were in fact blameworthy *because* of their inability to effectively control their children: that the court was “acting as a moral censor of inadequate parenting”.⁵⁷ However, it is notable that his Lordship did not confront the primary argument of the majorities in the Court that in such circumstances the relief for the community through eviction of the household must be prioritised and as such did not justify his decision in the light of this issue.

He went on to point out that although the nuisance ground itself did not as a matter of statutory interpretation preclude the eviction of a blameless tenant, it would be quite possible to incorporate this rule into the reasonableness requirement, which he then went on to do. He stated:

The rigour of this provision, which in its second limb may be independent of any fault on the tenant's part, is mitigated by the requirement of section 84(2) that no possession order may be made unless the court considers it reasonable to do so. It may very well be unreasonable to make even a suspended order against somebody who will be powerless to rectify the situation and it will almost certainly be unreasonable to make an outright order against such a person.”⁵⁸

It should be noted that this passage does not completely preclude the eviction of a ‘blameless’ tenant without the capacity to control her household. What it does suggest is an extremely weighty presumption (that it would be ‘almost certainly unreasonable’ to order full possession) in favour of the tenant in such circumstances. This is of course a far more drastic conclusion than the majority’s belief that blamelessness would provide merely a ‘relevant consideration’ in favour of a refusal.

Lord Justice Sedley noted in *Bryant* that the provisions of Human Rights Act 1998 were not yet in force. However, he suggested that in a future case a decision in such circumstances might be further affected by the obligation imposed on courts by section 3 of the Human Rights Act 1998 to interpret legislation as far as possible with respect to human rights. As we have seen the

⁵⁶ (2000) 32 HLR 906 at 915.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

judgment in *Howard* has ensured that the requirement of proportionality adds little to judicial discretion here and, as such, the rights of the community would still be likely to take precedence. However, Sedley LJ got his opportunity to comment on the impact of the Human Rights Act 1998 upon the vicarious liability of a tenant in *Gallagher v Castle Vale HAT*.⁵⁹ He stated, once again obiter, as follows:

“It has not been necessary to address the question whether Ground 2 of Schedule 2 to the Housing Act 1985, by in some circumstances rendering a tenant liable to eviction because of a visitor's conduct, creates a strict liability incompatible with the Convention. It may be that the question need never arise so long as, in a case like the present, the reasonableness of making an order is conditioned by the extent to which the tenant has it within her power to stop or control the presence or activity of her visitors. If no order for possession, certainly no outright order, may be made without regard to the question of participation or acquiescence on the tenant's part, there will in practical reality be no strict liability to contend with.”⁶⁰

What is clear from this passage is that reasonableness should be assessed according to the extent to which the tenant is capable of controlling the behaviour: an apparently identical conclusion to that reached by the majority who argued that fault should form a ‘relevant consideration’. However, what is less obvious is whether ultimately Sedley LJ used the Human Rights Act here to go beyond his ‘weighty presumption’ in *Bryant* and guarantee a tenant full protection from eviction for the behaviour of their households if she could be found entirely blameless through lack of capacity to control the perpetrator. It is submitted that indeed this is what the passage seems to suggest. Only by precluding an outright order for possession in the absence of *any* ‘participation or acquiescence’ on the part of the tenant could a court avoid entirely the question of strict liability arising incompatibly with the European Convention, as envisaged by his Lordship.

Interestingly, Sedley LJ further supported his argument by emphasising in *Bryant* that in such circumstances the availability of alternative remedies may well affect the appropriateness of possession as they would impose a sanction

⁵⁹ [2001] EWCA Civ 944.

⁶⁰ *Ibid.*, at [52].

upon the perpetrator alone rather than an entire household indiscriminately, as was discussed above. He stated: “there are, after all, other legal expedients, not least under the Protection from Harassment Act 1997, by which those guilty of anti-social conduct can be directly punished or restrained”.⁶¹ Although Sedley LJ mentioned the Harassment Act specifically the individualized remedies currently available to executive agencies include ASBOs and housing injunctions in addition to criminal prosecution under the 1997 Act. He supported his conclusion with reference to Article 8 of the European Convention on Human Rights which had not yet come into force via the Human Rights Act 1998, suggesting that if the landlord is capable of using more targeted sanctions it may well not be proportionate to grant a possession order given the harm it would cause other members of the household, all of whom will suffer interference of their Article 8 rights on eviction.⁶²

Lord Justice Sedley clearly reached his dissenting opinion on grounds of legal principle. He was concerned to ensure that personal responsibility of a tenant should form the basis of a possession order because of his reluctance to countenance strict liability. However, his reasoning accords indirectly with the holistic approach to anti-social behaviour discussed in Chapter 5. The women in these cases arguably required support from the state not punishment, given their lack of capacity to control their errant household. As we saw eviction is unlikely to provide sustainable protection without tackling, in this case, the parenting skills of the tenant. The research does expose the reactive approach of landlords themselves. Shockingly, in two-thirds of the cases examined by Nixon and Hunter, the landlords did not visit the tenant prior to seeking possession of the home and in seven out of ten cases at no stage sought to bring support agencies into play to try and resolve their parenting difficulties.⁶³ However, the majority of the Court of Appeal failed to appreciate the limited value of possession in providing long term solutions for these troubled families. It is unclear whether the Court of Appeal will sanction Sedley LJ’s approach. Until

⁶¹ (2000) 32 HLR 906 at 919.

⁶² See *Lambeth LBC v Howard* (2001) 33 HLR 58.

⁶³ Nixon and Hunter, above 45.

then the Court of Appeal, and trial judges, will continue to be able to evict this particularly vulnerable class of household with worrying ease.

(e) The future: restructuring the appellate jurisdiction of the Court of Appeal

Whilst on the one hand continuing to emphasise that the decisions of trial judges in possession proceedings should rarely be interfered with, the Court of Appeal has in practice meddled considerably with the judicial decision-making process. This section has highlighted the extent to which it has overturned first instance decisions by excluding considerations relating to the welfare of the perpetrator or his household. However, it has also engaged in substantive scrutiny of the lower courts by deeming many original decisions ‘palpably wrong’ for failing to place enough weight upon the need for public protection.⁶⁴

There are signs that this substantive scrutiny may become more frequent in future cases. In *Castle Vale HAT v Gallagher* Sedley LJ held that it was open to him to exercise full discretion on the facts as established by the trial judge. He stated:

“Section 77(6) of the County Courts Act 1984 does not in its terms exclude the possibility of an appeal on the question of reasonableness. What are not appealable, by virtue of it, are the judge's findings on the primary facts relevant to that judgment. It seems to me that, taking the primary facts as found by the judge below, the intrinsic reasonableness of granting or withholding a possession order, or of suspending or not suspending such an order, and not merely its public law rationality, will be open to this court in a proper case. By a proper case I mean not a marginal case but an erroneous appraisal of reasonableness whether in favour of or against the granting of a possession order.”⁶⁵

Concern that trial judges have failed to grant possession orders in cases of serious anti-social behaviour appears to have encouraged the Court of Appeal to provide itself with greater power to reject decisions in favour of anti-social households. What constitutes an ‘erroneous appraisal of reasonableness’ as compared to a ‘marginal case’ is open to question, though it appears to countenance a lesser requirement than that the original decision is ‘palpably

⁶⁴ See *Bristol CC v Mousah* [1997] 30 HLR 32.

⁶⁵ [2001] EWCA Civ 944 at [39].

wrong'. It thus seems to pave the way for a more intrusive appellate jurisdiction.

2. Introductory and demoted tenancies

As we saw in Chapter 2, the introductory tenancy regime following the decision of the Court of Appeal in *McLellan* now enables possible challenges to a landlord's decision to evict under Article 8 of the European Convention to be made through judicial review on adjournment of possession proceedings. This process will inevitably extend also to the demoted tenancy. This opens up the decision-making of a council landlord, but not as yet an RSL, to an 'anxious scrutiny' of its decision to seek possession for anti-social behaviour by the High Court. Although this does not amount to a rehearing of the merits of that decision, and a defendant must gain permission from the county court before proceeding to judicial review, it may well provide an opportunity to challenge the decision as disproportionate given the effect eviction will have on the household.

3. Anti-social behaviour orders and injunctions

Both the anti-social behaviour order and injunction are discretionary forms of relief. If the statutory requirements are satisfied a court may, rather than must, grant either remedy. Arguably, this residual discretion provides potential scope for mitigating pleas enabling the court to refocus attention towards the needs of the perpetrator and refuse an order on grounds of the effect that it will have upon him. The role of this residual discretion in the context of a section 187B injunction to restrain planning breaches under the Town and Country Planning Act 1990 was recently considered by the House of Lords in the case of *South Bucks DC v Porter*,⁶⁶ and it is submitted that a number of important considerations can be drawn from that decision.

In *Porter* the House of Lords refused primarily to accept the argument of the claimant local authorities that in order not to impinge upon their administrative planning role the residual discretion of the court could only be

⁶⁶ [2003] UKHL 26.

exercised if the decision to apply for the injunction was *Wednesbury* reasonable. Instead, they concluded that the jurisdiction of the court, “inherent in the concept of an injunction”, was an ‘original’ rather than ‘supervisory’ jurisdiction and therefore the court “may but need not grant [it], depending on its judgment of all the circumstances”.⁶⁷ However, this discretion was not unfettered and must be “exercised with due regard to the purpose for which the power was conferred”. This does appear to provide the necessary scope for the court to assess the interests of the defendant as well as the primary purpose of an ASBO or injunction, which is of course to ensure the protection of the public through restraint of anti-social behaviour.

However, their Lordships then confirmed that in ordering an injunction a court does not contemplate that it will be disobeyed: “apprehension that a party may disobey an order should not deter the court from making an order otherwise appropriate: there is not one law for the law-abiding and another for the lawless and truculent”.⁶⁸ This principle problematically limits the use that a defendant to an application for an injunction or ASBO might make of the residual discretion of the court. The most likely plea is that the effect of a potential punishment on breach, particularly criminal punishment, may be unjustifiably severe. However, this is apparently a consideration that the court is unable to take into account. Furthermore, this refusal to acknowledge the consequences of a potential breach also limits the opportunity for a defendant to argue that alternative methods of tackling anti-social behaviour would be more appropriate than an injunction or ASBO. If the court is unable to consider the impact of breach, a defendant cannot logically argue that an injunction or ASBO is a worse approach to take than any other more holistic approach which does not place the defendant at risk of punishment on breach.

However, the anti-social behaviour order provides a defendant with another route, beyond residual discretion, by which he might argue for consideration of alternative remedies. A judge may only grant an order if he is satisfied that it is “necessary” to protect others from further anti-social conduct. Further, judges may only impose restrictions upon the defendant which they

⁶⁷ *Ibid.* at [28].

⁶⁸ *Ibid.* at [32].

are satisfied are also necessary to achieve this objective. It is arguable that the concept of necessity might be harnessed to support the use of an ASBO as a last resort. The dictionary definition of necessity is 'absolutely essential'. This suggests the absence of any other alternative means by which to bring the conduct to an end. As Reid argues, "how can an order be necessary if every other method to prevent the behaviour has not been exhausted?"⁶⁹ Thus, one might expect that it would be open to defence counsel to argue that a social landlord seeking the remedy should first show that it had attempted to use other less drastic measures to resolve the problem. However, this approach does not accord with the government's own guidance on the use of the orders which makes clear that social landlords should not rely on ASBOs as a last resort, but are free to use them to nip problems in the bud.⁷⁰ Indeed, Reid goes on to suggest that in practice the courts will adopt a "reasonableness" test to avoid such a strict threshold.⁷¹

4. Conclusions

Chapter 5 assessed the legal tools available to social landlords to manage anti-social behaviour against the backdrop of the welfarist critique of this punitive approach to the problem. The critique highlighted the limited capacity of disciplinary and exclusionary techniques of social control in ensuring sustainable protection of the residents of vulnerable neighbourhoods and the long term exacerbation of social exclusion it threatens. This chapter, however, changed the perspective from politics to law, and asked: to what extent can the welfare of a perpetrator of anti-social behaviour provide a defence in applications for a particular form of relief?

Though the reasonableness requirement in proceedings for possession of an assured or secure tenancy has the capacity to incorporate such considerations, it has been narrowed considerably through successive decisions by the Court of Appeal. As such, whilst the protection of the public has been

⁶⁹ M Reid, 'Anti-social behaviour orders: some current issues' (2002) 24(2) *JSWFL* 205.

⁷⁰ See Chapter 5.

⁷¹ Although drawing on European jurisprudence he suggests that necessity under the ECHR does not mean 'indispensable' but is more strict than 'reasonable': *Handyside v UK* (1976) 1 EHRR 737 at [48] and *Olsson v Sweden* (1989) 11 EHRR 259 at 286.

emphasised formally through the new structured discretion introduced by the Anti-social Behaviour Act 2003, a judge was already able to refuse possession in 'exceptional circumstances' in cases involving serious conduct under the *Mousah* presumption; was preventing from considering alternative remedies and could not engage in any assessment of the outcome of future applications to the council for rehousing. Although subject to the criticism of Sedley LJ, there is also no defence if a tenant is not at fault for the behaviour of his or her household.

There has not been the same amount of litigation over the operation of judicial discretion in the case of the introductory and demoted tenancies and injunctive powers. However, this thesis has made a few preliminary observations. The *Cochrane/McLellan* procedure has now opened the door to assessments of the compliance of a particular decision to evict an introductory tenant with the European Convention, and although not a rehearing on the merits and subject to considerable procedural hurdles it may provide a setting within which a defendant can put forward mitigating arguments. There are other difficulties with ASBOs and injunctions. The impact on a defendant of a future breach, particularly criminal liability under an ASBO, cannot be considered as part of the residual discretion afforded to a court. What is less clear is whether this discretion will be used by the court to assess the appropriateness of alternative remedies, although this is unlikely to be supported by the Court of Appeal which recognises the need for certainty of outcome for social landlords when bringing legal proceedings. However, one possible route for welfarist considerations is the necessity requirement underpinning an application for an ASBO, which arguably demands that an order is granted only after consideration of other, less drastic solutions.

Chapter 7

CONSIDERING THE WELFARE OF THE PERPETRATOR (3): THE INTERFACE WITH “WELFARIST” LEGAL INSTRUMENTS

The previous chapter assessed generally the extent to which the legal infrastructure regulating possession proceedings, injunctions and ASBOs enables the courts to accept the mitigating circumstances of defendants, thereby tempering the protectionist objectives of the tools. This chapter, however, examines the interface between these tools and other legal instruments designed to secure the welfare of certain categories of particularly vulnerable individual. It explores in particular important recent conflicts that have arisen in the courts between public protection and duties owed towards, first, the mentally ill and, second, children.

1. Public protection and the mentally-ill

In May 2003 the Social Exclusion Unit engaged in a major consultation on Mental Health and Social Exclusion.¹ Its subsequent report sought to establish reasons for, and solutions to, the particular exclusion experienced by the mentally impaired. Centrally, the report emphasises the stigma and discrimination experienced by people with mental health problems and the difficulties they face in accessing basic services, often exacerbating their symptoms.

Housing problems are highlighted as a fundamental issue in the document, under the heading ‘Getting the basics right’. Those with ‘serious and enduring’ mental health problems are now predominantly housed in mainstream accommodation following the closure of long-stay psychiatric hospitals. They are one and a half times more likely to find themselves living in rented accommodation and around nine per cent are accepted by local housing authorities in England as being in priority need under homelessness legislation;

¹ SEU, *Mental health and social exclusion: consultation document* (London: ODPM, 2003); SEU, *Mental health and social exclusion: Social Exclusion Unit report* (London: ODPM, 2004).

a figure that has continued to increase since 1997.² The mentally ill are therefore a clear concern for social housing managers.

The report's overall housing policy is to ensure that renters are helped to secure appropriate accommodation and supported in sustaining their tenancies: "decent and stable housing is critical to providing a sense of security".³ The Action Plan appended to the report advocates greater provision of support for the mentally ill within the Choice-based Lettings programme to allow them to make appropriate choices of accommodation. In the case of stability, it focuses entirely upon the instability arising from the risk of eviction for non-payment of rent experienced by the one in four mentally ill tenants, given that rent arrears are behind 90 per cent of possession cases.

However, it is interesting to note that at no point in the report is mention made of the conflict between supporting the mentally-ill and the government's anti-social behaviour agenda. Yet this was a central issue for certain consultees,⁴ concerned that the prevalence of mental illness and other mitigating factors amongst those targeted with legal sanctions for their anti-social behaviour might exacerbate the social exclusion of these groups. In particular the increased use of eviction could lead to even greater homelessness amongst those already highly susceptible to this problem. There was also concern that the government's punitive, moralistic rhetoric, and associated advocacy of blame and censure, could lead to further stigmatisation of mental impairment. Indeed, as was established above, the role of mental illness as a causal factor of anti-social behaviour illustrates the clear limitations of the Labour government's thesis that mere disrespect alone is to blame for anti-social behaviour.

Social housing managers face serious dilemmas in balancing the needs of the mentally ill with those living around them who are potentially affected by their behaviour. Whilst it is obviously vital that they avoid acting upon the mere prejudice of other residents, conduct engaged in by an individual because of a mental disability can seriously impact upon the quality of life of others

² *Ibid*, Chapter 8, para 5.

³ *Ibid.*, Chapter 8, para 1.

⁴ Mind, *Mental Health and Social Exclusion: the Mind response* (Mind, September 2003).

regardless as to whether blame can be attached to that person. Nonetheless, the application of the legal tools available to social landlords to the mentally ill starkly illustrates the proposition that a punitive approach is of limited potential in securing public protection and can exacerbate their social exclusion. Eviction may remove a tenant from the local area and thus alleviate the effects on his neighbours, but the consequent upheaval could increase his anti-social symptoms and pass on more difficult problems to both other agencies and other neighbourhoods. Injunctions and ASBOs, on the other hand, rely upon the rational evaluation of, and response to, the serious consequences on breach. Yet rational choice theory, whilst understandable in the context of simple disrespect, is of questionable value when trying to change the behaviour of those labouring under mental health problems.

The following sections take a closer look at consideration of mental illness by the courts. Although involving a judicial development rather than an interface with welfarist legislation, first is an assessment of the extent to which expert witness statements in defence of possession proceedings have been accepted by the courts. Second, however, the unexpected impact of the Disability Discrimination Act 1995 on the control by landlords of the behaviour of their tenants is explored.

(a) The role of 'care and control' professionals in *Moody*

It appears that welfare considerations have had some effect on the operation of reasonableness in possession proceedings involving mentally ill defendants, as can be seen in the case of *Croydon LBC v Moody*.⁵ The claimant council sought to evict the defendant, Mr. Moody, from his secure tenancy for breach of covenants prohibiting him from causing nuisance, annoyance or offence to his neighbours. During the course of the trial, evidence was presented to the judge in the form of a psychiatrist's report and oral evidence that the defendant was suffering from a complex personality disorder. The psychiatrist had noted that possession could result in the exacerbation of the illness, which was itself likely to be susceptible to treatment.

⁵ [1998] EWCA Civ 1683.

However, the evidence was disregarded by the court. The trial judge found it unsatisfactory on the basis that the psychiatrist could not have formed an opinion of the defendant after only one meeting. The judge, further, remained personally unconvinced that the defendant was suffering from any form of mental illness. His judgment concluded:

“Whether the behaviour is deliberate – I have no reason to doubt that it is deliberate – and the intention behind the behaviour – the intention in my judgment is to get his own way in respect of anything which concerns him and the opinions and feelings of other people are irrelevant”.⁶

After noting that the defendant had “made life quite intolerable” for his neighbours and that they were entitled to protection, he granted a possession order on the grounds that it would not be unreasonable to do so.

The defendant appealed on the basis that the judge was wrong to disregard expert evidence relating to his mental health which could have explained his anti-social behaviour. Allowing the appeal and ordering a retrial on the issue of reasonableness, the Court of Appeal held that the judge had been wrong to disregard the evidence of the psychiatrist who had undoubtedly formed an opinion as to the defendant’s condition, and to conclude that there was no medical explanation for the defendant’s behaviour.⁷ In considering whether it was reasonable to grant an order to facilitate the eviction of the defendant, the judge should have had regard to evidence that the defendant’s condition was susceptible to treatment.

The decision in *Moody* secures the position of the professional expert in possession proceedings. It enables such a witness to provide the court with an assessment of the welfare needs of the mentally ill which in that particular case had been sidelined in favour of the judge’s own (moral) perceptions of the defendant’s character. As such, the place of ‘care and control’ discourses in possession proceedings has been affirmed: a development to be welcomed.

⁶ *Ibid* at [10].

⁷ Cf *Bristol CC v Mousah* (1997) 30 HLR 32 *per* Thorpe LJ. The trial judge, relying on expert evidence, refused to order possession on the ground, *inter alia*, that Mr. Mousah had schizophrenia which could be made worse by eviction. This evidence was rejected by the Court of Appeal on balance, given a statement by Mousah himself that he had suffered from schizophrenia *in the past* and doubt was cast also on the reliability of the witness’ oral testimony.

(b) Section 22 of the Disability Discrimination Act 1995: Brazier and Romano

The Disability Discrimination Act 1995 was enacted to provide disabled individuals with protection against discrimination on grounds of their condition; in particular, discrimination in employment and in accessing goods and services. Section 22(3)(c) of that Act states that it is unlawful for a person managing any premises to discriminate against a disabled person occupying those premises by evicting the disabled person, or subjecting him to any other detriment. By section 24(1) an individual discriminates against a disabled person if (a) for a reason which relates to the disabled person's disability, he treats him less favourably than he treats or would treat others to whom that reason does or would not apply; and (b) he cannot show that the treatment in question is justified. Treatment can be justified, however, if in the opinion of the manager of the premises the treatment, *inter alia*, is necessary in order not to endanger the health or safety of any person (which may include that of the disabled person) and it is reasonable, in all the circumstances of the case, for him to hold that opinion.⁸

Surprisingly it was not until March 2003, eight years after the passing of the 1995 Act, that the possible consequence of the provision for landlords seeking to evict a disabled tenant was considered by the courts. In *North Devon Homes Limited v Brazier*⁹ the High Court was required to reconcile the discretion to grant a possession order for anti-social behaviour with the protections afforded by the 1995 Act. Christine Brazier was found by the court to have caused considerable distress to her neighbours as a direct result of a chronic mental illness. It was accepted by both parties that she was clearly a disabled person for the purposes of the 1995 Act given the presence of a "mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities".¹⁰ It was therefore argued by the

⁸ ss 24(2) and 24(3)(a)

⁹ [2003] L&TR 26.

¹⁰ DDA 1995, s 1(1) and Schedule 1. See also Disability Discrimination (Meaning of Disability) Regulations 1996 and *Guidance on matters to be taken into account in determining questions relating to the definition of disability* issued by the Secretary of State pursuant to powers conferred by s 3, DDA 1995 and DRC, *Code of Practice on Rights of Access, Goods, Facilities, Services and Premises*, May 2002.

defendant that under section 22(3)(c) it was illegal to discriminate against her by evicting her from her home and, consequently, that it was unreasonable to evict her under the Housing Act 1988.

Although the trial judge found that the claimant's decision to evict was unlawful under the 1995 Act, he held that it was nonetheless reasonable to order possession of the property. The defendant appealed to the High Court. In arguing that the eviction complied with section 22(3)(c), North Devon Homes first contended that it had not treated the appellant less favourably than it would "others" without disability who behaved in the same way. The court held, following the leading decision of *Clark v Novacold Ltd.*,¹¹ that as Ms. Brazier's behaviour was caused by her disability it should not be counted as an attribute of others for the purpose of comparison. The defendant need only show that the unfavourable treatment of the landlord was a response to conduct resulting from the disability rather than the fact of the disability *per se*.

The landlord then sought to convince the court that eviction was in any case justified according to the grounds contained in sections 24(2) and 24(3)(a). It argued to this end that it was of the opinion that eviction was necessary in order not to endanger the health or safety of any person, and that it was reasonable given all the circumstances of the case to hold that opinion. Importantly, David Steel J suggested that to endanger health and safety Ms. Brazier would have to constitute an "actual physical risk" to her neighbours.¹² He concluded, however, that there was no indication that North Devon Homes were of the opinion that this was the case, nor that it reasonable to reach such a conclusion from the facts.

The landlord's conduct in bringing the application was thus unlawful by virtue of the 1995 Act. However, whilst the trial judge had accepted this fact, he further held that this did not in itself preclude the making of a possession order and that in the particular circumstances it was reasonable to do so, given the need to protect the tenants affected by Ms. Brazier's conduct. Ultimately, he concluded that the 1995 Act should not be allowed to override the discretion of the court under the Housing Act 1988. The High Court disagreed. It was indeed

¹¹ [1999] ICR 951.

¹² [2003] L&TR 26 at [21].

also unreasonable to grant a possession order which promoted an unlawful act by the claimants, unless that decision could be legitimated under section 24 of the 1995 Act: as David Steel J concluded in his judgment, “the 1995 Act furnishes its own code for justified eviction which requires a higher threshold”.¹³ It was this Act, rather than the Housing Act 1988, that established the necessary restrictions on interference with the defendant’s right to respect for her home under Article 8 and as such the 1988 Act must be read in accordance with it under section 3 of the Human Rights Act 1998.

The *Brazier* litigation came as a considerable shock to social landlords who had apparently failed to appreciate the impact of the Disability Discrimination Act 1995 on housing legislation before this point.¹⁴ However, the trial judge’s reluctance to allow the rights of a mentally ill tenant under discrimination law to trump the discretion of the court provided for by the Housing Acts illustrates the unwelcome tension this threshold has created with the contemporary protectionist approach to eviction. The Housing Acts provide broad discretion to the courts to balance the competing interests of landlords, tenants and those affected by anti-social behaviour taking into account all the circumstances of the case. The 1995 Act, which is not obviously designed to respond to situations of neighbour nuisance, appears instead to draw a bright line restricting the exercise of this discretion, requiring evidence supporting a reasonable belief in the necessity of eviction to protect others from an actual physical risk.

The interface between the Acts was scrutinised at greater length by the Court of Appeal in the dual cases of *Manchester City Council v Romano and Samari*.¹⁵ The council sought to evict tenants because of anti-social behaviour. In one case the problem was noise nuisance including children’s music and DIY at anti-social hours, in the other, harassment of neighbours including threats of violence. In each case the tenants again raised the 1995 Act as a defence. Each of the tenants was suffering from a disability by way of mental impairment, said

¹³ *Ibid.* at [24].

¹⁴ In the *Romano* case discussed below, Brooke LJ explained that the Court of Appeal were “told by very experienced leading counsel that it was the publicity given to [the *Brazier*] judgement in March 2003 which attracted general attention for the first time to the possible need for a court to take the 1995 Act into account when assessing the reasonableness of making a possession order”: [2004] EWCA Civ 834 at [19].

¹⁵ [2004] EWCA Civ 834.

to be causal of their behaviour. However, in both cases the Court of Appeal, whilst approving the construction of section 22 adopted in *Brazier*, held that the evictions were justified on the grounds of danger to health and safety to neighbours.

Of greater import, however, were the general conclusions drawn by the Court about the practical legitimacy of the Disability Discrimination Act in the context of housing management. The Court was clearly concerned that as “policy-driven modern legislation which has not been subjected to rigorous scrutiny”,¹⁶ the 1995 Act had the potential to create serious, unforeseen and unwarranted problems for landlords. It was concerned in particular that the Act extended not only to residential properties but to business tenancies; that a tenant could prevent possession for rent arrears if he could establish that non-payment was the consequence of his mental disability and that private landlords might be found guilty of causing detriment to a tenant even when seeking possession on a mandatory ground under the Housing Act 1988.¹⁷ The court also confirmed that a social landlord can be guilty of discrimination under the 1995 Act even if it is unaware that he or she is mentally ill. It concluded:

“Unless Parliament takes rapid remedial action...the courts may be confronted with a deluge of cases in which disabled tenants are resisting possession proceedings by these...means. ... Parliament ought to review this legislation at an early date. ...[I]t can lead to absurd and unfair consequences...”¹⁸

More importantly, the Court of Appeal specifically emphasised the particular difficulties faced by a social landlord seeking to tackle anti-social behaviour. It noted that local authorities and RSLs are now obliged to draw up policies in relation to ASB under 218A of the Housing Act 1996, and that courts are statutorily bound to have regard to the effect of anti-social behaviour on other residents. However, the demands imposed by the Act could prevent the effective protection of neighbours from the nuisance behaviour of mentally ill tenants in cases where the health and safety of others is not in danger.

¹⁶ *Ibid.*, at [67].

¹⁷ *Ibid.*

¹⁸ *Ibid.*, at [68] and [121].

The Court of Appeal was also concerned that the Disability Discrimination Act 1995 has consequences, not simply for possession proceedings but other legal remedies available to social landlords to respond to anti-social tenants. Section 22(3)(c) actually states, in full, that “[i]t is unlawful for a person managing any premises to discriminate against a disabled person occupying those premises by evicting the disabled person, or *subjecting him to any other detriment.*” The Court noted that “other detriment” would likely include other tools available to a social landlord to tackle anti-social behaviour, including housing injunctions and ASBOs. Thus they may find their powers to deal with a mentally ill anti-social tenant further circumscribed.

The court suggested, in particular, that if a landlord obtains an injunction restraining a mentally disabled tenant from anti-social behaviour it will not be able to enforce that injunction by committal proceedings unless it can establish to the criminal standard of proof that it held an opinion on one of the matters specified in section 24(3) of the Act and that it was reasonable in all the circumstances of the case for it to hold that opinion. It is arguable that a housing injunction or an anti-social behaviour order, in itself, particularly involving exclusion from public spaces, would constitute ‘detriment’ to the tenant or a member of his or her household. Furthermore, one can easily foresee difficulties thrown up by the introductory tenancy regime. Subject to the completion of an internal appeal, the court is obliged to order possession of an introductory tenancy. Presumably, it would be left to the judicial review procedure established in *Cochrane* and *McLellan* to hold the landlord’s decision to evict illegal according to the 1995 Act.

However, the concerns of the Court have been effectively resolved in practice through an example of restrictive statutory interpretation. In *Brazier*, David Steel J held that in order for a social landlord to justify an application for possession as necessary in order to prevent the endangerment of the health and safety of others, it would have to satisfy itself that the tenant presented ‘an actual physical risk’ to members of the public. In *Romano*, Brooke LJ reconfigured this standard. Claiming to interpret the 1995 Act in compliance with the Article 8 rights of the defendants’ neighbours, he adopted instead the

World Health Organisation definition of health: 'A state of complete physical, mental and social well-being and not merely the absence of disease and infirmity'.¹⁹ By adopting such a low threshold, the Court of Appeal has considerably restricted the impact of the 1995 Act. Continuous tiredness from frequent loss of sleep, depression sufficient to require medical treatment, and stress on relationships, are all likely to entitle the landlord to conclude that eviction is justified (although trivial risks to health will have to be disregarded).

Thus, the Disability Discrimination Act 1995 has unexpectedly reconfigured the balance that a social landlord can strike between public protection and its welfare obligations towards the mentally ill. However, whilst *Brazier* incorporated into the crime control function of social landlords a far higher standard of care requiring threats of physical harm to others rather than the broad notion of nuisance instituted by the Housing Acts, the Court of Appeal in *Romano* has effectively neutralised the provision. Clearly the choice of the WHO definition was a deliberate attempt by the Court, dissatisfied by the 1995 Act as whole, to provide social landlords with maximum flexibility to decide on the most appropriate balance between the interests of a mentally ill tenant and those affected by his or her behaviour. In that respect it represents the priority of public protection over the welfare rights of the mentally-ill. Whether the decision should be treated as an unjustifiable rejection by the judiciary of the clear will of the legislature, or a necessary response to an over-inclusive and unworkable statute, is uncertain.

It should be noted nevertheless that the 1995 Act still places important demands on social landlords. Housing officers will need to adopt a more proactive approach to mental illness given that evidence of the requisite opinion to justification will need to be provided and, furthermore, that the landlord may still be acting unlawfully when unaware of the tenant's condition. Indeed, the Court did recognise that the need to ascertain whether the eviction is justified under the 1995 Act might have positive consequences for the practices of social landlords:

¹⁹ *Preamble to the Constitution of the World Health Organization* (1946).

“This judgment shows that landlords whose tenants hold secure or assured tenancies must consider the position carefully before they decide to serve a notice seeking possession or to embark on possession proceedings against a tenant who is or might be mentally impaired. This is likely to compel a local housing authority to liaise more closely with the local social services authority at an earlier stage of their consideration of a problem that might lead to an eviction than appears to be the case with many authorities, to judge from some of the papers the DRC [Disability Rights Commission] placed before the court. To remove someone from their home may be a traumatic thing to do in the case of many who are not mentally impaired. It may be even more traumatic for the mentally impaired.”²⁰

Draft guidance on the preparation of policies and procedures under the section 218A duty now explicitly warns social landlords of the need to take into consideration their obligations under the Disability Discrimination Act 1995.

2. Protection of children; protection *from* children?

Throughout the 20th century the law, typified by section 44(1) of the Children and Young Persons Act 1933 and section 1(1) of the Children Act 1989, has consistently prioritised the welfare of the child. It is an established approach underpinned by numerous international treaties. For example, Article 3 of the United Nations Convention on the Rights of the Child demands that all actions concerning a child should take account of his or her best interests. So too the European Union Charter of Fundamental Rights which provides that:

- (1) Children shall have the right to such protection and care as is necessary for their well-being.
- (2) In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.

Obligations are owed not only to the community affected by the behaviour of a child, but to the child herself.

This has clear consequences for the prioritisation by government of public protection. Children are a central focus of the fears and consequent initiatives associated with the problem of anti-social behaviour. The “feral” teenager

²⁰ [2004] EWCA Civ 834 at [117].

engaging in reigns of terror - joy-riding, graffiti and intimidation - has caught the imagination of both the public and the government itself. The effect, it is submitted, is a political development from a focus on the protection of children to protection *from* children. Revealingly, whilst the then Labour government in 1968 published a White Paper entitled *Children in Trouble*,²¹ the current government instead entitled its own policy document on the reform of youth justice *No More Excuses*.²² Furthermore, Section 37 of the Crime and Disorder Act 1998 states that '[i]t shall be the principal aim of the youth justice system to *prevent offending* by children and young persons'.²³

A swathe of powers are now employed to tackle anti-social behaviour by children: child curfews, the dispersal of groups from public spaces, the extension of Fixed Penalty Notices (FPNs) to sixteen to eighteen year olds, child safety orders and parenting orders are all directed to this aim. And of course, the anti-social behaviour order explicitly extends to any defendant over the age of ten, and predominantly targets young people. The National Children's Bureau has expressed concern that the government's approach to anti-social behaviour will further stigmatise children as trouble makers.²⁴ Indeed as noted in Chapter 5 more and more children targeted by ASBOs have been brought within the criminal justice system. Public protection has ultimately been prioritised over the welfare principle. Whilst the legal foundations of the law relating to children have, both internationally and domestically, focused upon the interests and well-being of young people, the government's crime and disorder agenda, in particular that concerning anti-social behaviour, has sought to refocus upon those affected by their conduct.

In recent months, however, challenges have been mounted to the operation of the anti-social behaviour order on the grounds that those seeking the remedy against children have failed to take into proper consideration the welfare of the youth defendant as well as that of the community. There are three aspects to this litigation: the need to pursue the 'best interests' of all

²¹ (1968) Cmnd 3601.

²² (1997) Cm 3809.

²³ My italics.

²⁴ "Children will lose out under anti-social behaviour proposals, says NCB", 12 March 2003 contained in House of Commons, *The Anti-social Behaviour Bill: Research Paper 03/34* (London: HMSO, 2003).

young defendants; the provision for anonymity of minors under the Children and Young Persons Act 1933 and the particular obligation of local authorities towards children under the Children Act 1989.

(a) The “best interests” of children

In *R (on the application of Kenny and M) v Leeds Magistrates’ Court*,²⁵ the defendant Luke Kenny and 65 others had been made subject to interim anti-social behaviour orders under section 1D of the Crime and Disorder Act 1998 as part of West Yorkshire Police’s blitz of drug-dealing in and around the Little London area of Leeds. Kenny was seven days from his 18th birthday when his order was granted by Leeds Magistrates Court. Section 1D requires that before granting an ASBO the court must be satisfied that it is “just” to make the order.

Kenny argued that in considering whether this was so, the court must have regard to the principle that the best interests of the child are a primary consideration. He relied upon the consideration of the duty on public bodies to have regard to the principles embodied in the United Nations Convention on the Rights of the Child and Article 24 of the European Union Charter of Fundamental Rights undertaken by Munby J in *R (Howard League for Penal Reform) v Secretary of State for the Home Department*²⁶ in the context of those under 18 detained in Young Offender Institutions. Munby J held in that case that whilst youth justice required the striking of a balance between the competing interests of the particular child and the community, the court must always have regard to the principle that the best interests of the child are a primary consideration in line with those international instruments. Owen J, in the *Kenny* case, accepted this reasoning and held that it applied to an application for an interim order.²⁷

Whether the priority of the best interests of child defendants must also apply when a court exercises its discretion in proceedings for a full ASBO is questionable. The concept of ‘justice’ incorporated into proceedings for an interim ASBO is broad enough to countenance consideration of the welfare of a

²⁵ [2003] EWHC 2963.

²⁶ [2002] EWHC 2497.

²⁷ [2003] EWHC 2963 at [42].

defendant. However, as we have seen the requirement that the order and its particular terms must be necessary to protect others seems to restrict consideration of the impact on the individual offender. Of course the court has a residual discretion to refuse an order even when all the requirements are fulfilled. However, it is unlikely that it will make use of this discretion in conflict with the explicit protectionist objectives of the ASBO, both in terms of political discourse and legal structure.

The judgment has implications for other legal tools employed by social landlords. The anti-social behaviour injunction does not have a necessity requirement, but rests entirely upon the residual discretion of the court. As such, it is open to the court to incorporate best interests considerations into its assessment of the suitability of the remedy in the particular circumstances. In the case of possession proceedings for nuisance conduct under the assured and secure regimes the best interests of a child in possession proceedings for nuisance conduct should figure as part of the reasonableness requirement.

The extension of the “best interests” principle to such proceedings suggests a clear movement away from protectionism. However, the impact in practice of the principle in these proceedings is likely to be negligible. Far from being determinative of an application, a primary consideration is a low standard, providing only additional weight to the impact of a remedy upon the minor.²⁸ Furthermore, as we continue to see the courts constantly seek to emphasise the importance of the rights of those affected by anti-social behaviour, often highlighting their own Article 8 rights.²⁹ The best interests of the child are *a* primary consideration rather than *the* primary consideration. It is therefore more than likely that although considered, the best interests of the child will be held to be outweighed by the equal primacy of the interests of the community affected by anti-social conduct.

(b) Anonymity of children and proceedings for anti-social behaviour orders

²⁸ Compare for example the demand that a child’s welfare is the “paramount consideration” in s 1(1)(a) of the Children Act 1989. The term has been defined by the courts as meaning that the welfare of the child is the *sole* consideration of the court. The interests of other adults and other children are not relevant if they are affected by anti-social behaviour, but only if they might affect the welfare of the child in question: *J v C* [1970] AC 668 and Lord Hobhouse in *Dawson v Wearmouth* [1999] 1 FLR 1167.

²⁹ See, for example, *McCann* [2002] UKHL 39 and *Howard* (2001) 33 HLR 58.

The Children and Young Persons Act 1933 seeks to protect the welfare of children in a variety of situations. As part of this objective it provides for the anonymity of those under eighteen involved in legal proceedings. Section 49 demands that child defendants in proceedings in youth courts enjoy automatic anonymity, although section 49(4A) provides a power to overturn this presumption in the public interest. However, this provision has been seen by the government as at odds with the effective use of anti-social behaviour orders. Government guidance on the order explicitly advocates the identification of the perpetrator as part of a post-application media strategy.³⁰ This approach is justified on two grounds. First, identification has practical surveillance benefits as the local population can police potential breaches of the order. Second, it reassures the public that something is being done about anti-social behaviour and deters future offending.

As such, the Anti-social Behaviour Act 2003 has revoked section 49 for the purpose of proceedings for a section 1C anti-social behaviour order brought in a youth court. Instead, all applications for anti-social behaviour orders are governed by section 39 of the CYPA 1933, which allows courts the power to prohibit the publication of identifying information in newspapers in certain circumstances.

In *T v St Albans Crown Court*,³¹ Elias J considered the principles a court should follow when deciding upon the appropriateness of a section 39 order with respect to proceedings for an anti-social behaviour order. Refusing to accept the argument of defence counsel that given the practical importance of identifying those young people subject to ASBOs there should be a presumption against a section 39 order, the judge held that a balance should be struck on a case-by-case basis between the following considerations drawn from the decision of Simon Brown LJ in *R v Worcester Crown Court ex parte B*:³²

- (i) whether there are good reasons for naming the defendant;
- (ii) the age of the offender and the potential damage of public identification of a young person as a criminal;

³⁰ Home Office, *Guidance on the use of ASBOs and anti-social behaviour contracts* (London: HMSO, 2004), p 50.

³¹ [2002] EWHC 1129.

³² [2000] 1 Cr App R 11.

- (iii) the duty on the court to have regard to the welfare of the child or young person by virtue of section 44 of the 1933 Act;
- (iv) the deterrent effect in naming the defendant in the context of his punishment;
- (v) the “strong public interest” in open justice;
- (vi) that each factor may be given different weight at various stages of proceedings and that, in particular, there may be greater justification for naming a defendant that has actually been found guilty and punished;
- (vii) that an appeal has been made may be a material consideration.

Thus the court is expected to weigh the public interest in disclosure against the welfare implications for the defendant as it sees fit. However, Elias J added that the fact that the remedy sought is an anti-social behaviour order “reinforces, and in some cases may strongly reinforce” the importance of disclosure in the public interest. In doing so he noted, first, the relevance of the information to effective policing of the order and, second, that the public has a particular interest in knowing details of a mechanism designed specifically to protect them.

The High Court in *R (on the application of Keating) v Knowsley MBC*³³ has recently revisited section 39 orders in the context of applications for interim ASBOs.³⁴ This time, defence counsel argued that a presumption should be made in favour of a section 39 order. Given that the interim proceedings do not constitute a conclusive finding of guilt, the presumption of innocence required the applicant to show “good and compelling reasons” why it should not be made in order to prevent the disclosure of as yet unproved allegations. However, Harrison J dismissed this argument too. Whilst noting that the sixth principle in *T v St. Albans Crown Court* put weight upon whether offences had been proved, the absence of such proof was simply a ‘very important consideration’ to balance against the public interest in publicising anti-social behaviour orders.

The conclusion of the court in *Keating* is difficult to square not only with the structure of the interim order but the reasoning of the Court of Appeal when assessing its compatibility with the Human Rights Act 1998 in *M*. The

³³ [2004] EWHC 1933.

³⁴ [2004] EWHC 1933.

interim order was found not to entail the determination of a defendant's civil rights and obligations and as such did not engage the right to a fair trial provided by Article 6 because it did not constitute a full hearing on the merits of the decision, even though a defendant can still be prosecuted for breach. Furthermore, if he is a minor he will probably find his name and picture circulated by the police and media without yet having enjoyed a full hearing before a court and, in the case of an interim order without notice, having had any warning that proceedings were being taken against him.

The two objectives put forward by the government and Elias J in *T* as justification for the lifting of anonymity are questionable in such circumstances. Reassurance of the public that action has been taken seems of low importance when a successful result in the subsequent full hearing will ensure ultimately that the public is informed. It is submitted that this consideration should be entirely ignored in assessing whether anonymity is required. On the other hand, the practical role of the public in policing the ASBO is potentially important. However, one can agree with defence counsel in *Keating* that the agency bringing the application for interim relief must clearly show why it is unable to provide the necessary policing capacity to effectively enforce the order. Rather than simply balancing this consideration in the abstract, as Elias J seems to suggest, 'clear and compelling reasons' should be required.

(c) Duties in conflict: children in local authority care and use of the ASBO

The crime control function of local government, once informal and negligible, has increased exponentially in recent years. Early legal powers were limited to its housing management function, but under the Crime and Disorder Act 1998 authorities have gained formal parity with the police within Crime and Reduction Strategic Partnerships, and the power to impose a raft of legal sanctions upon both recalcitrant tenants and non-tenants far beyond those available to social landlords. The prioritisation of crime control now expected of authorities is made clear by section 17 of the Crime and Disorder Act 1998 which imposes a duty on every council "to exercise its various functions with

due regard to the likely effect of the exercise of those functions on, and the need to do all that it reasonably can to prevent, crime and disorder in its area”.

Yet with crime control now such an important local authority function, it seems inevitable that conflicts are set to arise between the protection of communities and the welfarist responsibilities of councils towards vulnerable perpetrators. We have noted that housing departments operate according to protectionist discourses. Further, they view the perpetrators of anti-social behaviour in simple moral terms. Administratively then, whilst many housing departments are intent on the effective protection of communities from anti-social conduct and seek to blame perpetrators, they can find themselves working in tension with the welfarist culture of social services which focuses upon the needs of the perpetrator. Indeed, in a recent report on the use of the anti-social behaviour order, Campbell noted that social services have tended to adopt an antagonistic position during consultation, seeking to prevent the use of eviction or other remedies at all costs. In particular, competing cultures are likely to exist within unitary authorities with responsibility for both housing and social services.³⁵

Once such administrative conflict was highlighted by Richards J in *R (AB & SB) v Nottingham City Council*.³⁶ SB was a child with severe behavioural and emotional problems. He was also a “child in need” for the purpose of section 17 of the Children Act 1989³⁷ and as such the council was under a general duty to “safeguard and promote the welfare” of the child by providing “a range and level of services appropriate to [his] needs”.³⁸ However, he had also engaged in offending behaviour including charges of robbery, theft and ABH and, as such, was additionally subject to proceedings for an anti-social behaviour order. It was contended by the claimants that the council had unjustifiably departed

³⁵ S Campbell, *A review of anti-social behaviour orders* (London: HMSO, 2002). Compare, however, the research of Hunter et al, *Neighbour Nuisance, Social Landlords and the Law* (London: CIH/JRF, 2000), which suggests that the instigation of possession proceedings is often the only way in which housing departments can gain the attention of social services.

³⁶ [2001] EWHC Admin 235.

³⁷ A child is in need if (a) he is unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard of health or development without the provision for him of services by a local authority; (b) his health or development is likely to be significantly impaired, or further impaired, without the provision for him of such services; or (c) he is disabled.

³⁸ See the important case of *R (on the application of G) v London Borough of Barnet* [2003] UKHL 57 for decision that section 17(1) constitutes a “target duty” rather than a specific duty enforceable in private law.

from the relevant guidance which had been issued pursuant to the Local Authority Social Services Act 1970 s. 7(1) in relation to the duty of a local authority to carry out a full and proper assessment of children in need and their families. Judicial review was granted by the High Court. As part of his judgment, Richards J added:

“I have to say that I am left with the impression that the defendant has concentrated unduly on the anti-social behaviour order proceedings and insufficiently on the discharge of its duty, in particular under section 17 of the Children Act, to assess SB’s needs and to make provision for them. No doubt that focus has been the result of SB’s very serious behavioural problems, but those problems cannot excuse failure to comply with the section 17 duty”.³⁹

The case illustrates the administrative conflicts that can arise in practice within local authorities between the public protection objectives of the anti-social behaviour order and their welfarist obligations towards children in need.

However, these concerns do not extend merely to administrative conflicts. The greater difficulty arises when legal duties arising from the welfarist role of councils towards perpetrators of anti-social behaviour conflict with their recently developed crime control functions, and threaten to preclude entirely the use of legal sanctions to protect others from the offending conduct. An example of such a situation recently identified in practice is that of an ASBO sought by a local authority to control the conduct of a child in its care. By virtue of section 31 of the Children Act 1989 a local authority can apply to the High Court for a care order in respect of children receiving inadequate care or even abuse from their parents.⁴⁰ When charged with the care of a child a local authority is given parental responsibility for the child and is under a general duty to safeguard and promote his or her welfare through the provision of services.⁴¹ Further, it is under additional duties including that under section 22(4), which requires the authority, before making any decision affecting the child, to ascertain the “wishes and feelings” of the child and any person who is

³⁹ [2001] EWHC Admin 235 at [48].

⁴⁰ See further Herring, *Family Law* (London: Longman, 2004).

⁴¹ Children Act 1989, s 33(3)(a) and s 22(3).

not a parent of his but who has parental responsibility for him and any other person whose wishes and feelings the authority consider to be relevant.

Given their problems these children are often likely to engage in anti-social behaviour. The tension between the duties of a local authority towards a child in care and the use of an ASBO to control the behaviour of that child has been considered in the High Court in *R (on the application of M) v Sheffield Magistrates' Court*.⁴² M, aged 15, was made subject in 1996 to a care order issued under section 31 of the Children Act 1989. Parental responsibility was from that point shared between his mother and Sheffield City Council. M subsequently engaged in a catalogue of criminal offences and lesser anti-social behaviour. In October 2003 the housing department of the council issued him with a summons for an anti-social behaviour order in response to a catalogue of serious offences. At the hearing for the order, the council further sought an interim order which was issued by the judge.

The social worker with parental responsibility for M was unconvinced that an ASBO was appropriate. However, the court heard evidence of a series of examples leading up to the issuing of summons of the ASBO panel and social services failing to maintain a professional distance. First, in February 2003 a case conference of the ASBO panel of the council took place to discuss whether to proceed with an ASBO against M. This meeting was attended by the social worker charged with parental responsibility for M under the care order. Second, the ASBO panel sought out a report from social services as to the appropriateness of an order. However, this was completed on a pro forma used by the panel. Third, at a meeting with M's solicitors, M's new social worker was represented by the in-house lawyer with responsibility for authority's ASBO application. The social worker refused at this point to act as a witness for M because his first responsibility was towards the local authority as applicant. Judicial review was sought for guidance as to how the interests of a child in care could be protected when the authority responsible for the child's care made an application for an anti-social behaviour order against that child and for a

⁴² [2004] EWHC 1830.

ruling as to whether it was appropriate to apply for an interim ASBO in the circumstances.

Newman J was clear that the provisions of section 1 of the Crime and Disorder Act 1998 and the duties of a local authority to a child in its care entailed an inherent conflict of interests. He also noted that guidance on the use of anti-social behaviour orders had failed to appreciate such a conflict. Whilst the purpose of the ASBO is to protect the community from repeated anti-social conduct, the 1989 Act focused entirely upon the welfare of the perpetrator. He suggested that the imposition of an order may well deter the defendant and to that extent benefit him or her. However, this "limited potential for symmetry" between the two statutory regimes was undermined by the fact that the practical implication for a child was the possibility of hefty criminal sanctions on breach of an order. As he stated: "[a]ny parent, whether natural or statutory, and no matter how determined to bring discipline to bear on a child, would hesitate to place their child at risk of detention in custody".⁴³

He concluded, however, that he was satisfied that the Children Act 1989 did not go so far as to preclude a local authority from making an application under the Crime and Disorder Act against a child in its care, though this was *obiter dicta* given that defence counsel chose not to pursue that line of reasoning. Instead he simply suggested that "to negative one statutory power in favour of another, whilst theoretically a legal possibility, would be a conclusion of last resort, where compatibility can be met by the adoption of appropriate measures and procedures".⁴⁴ Although conceding that the court was unable to provide detailed measures and procedures required to avoid such conflicts, he then went on to provide broad guidance by which a local authority might satisfy its duties under the 1989 Act.

Newman J first pointed out that the local authority had clearly failed to satisfy its duty under section 22(4). A decision to apply for an ASBO is a "decision" within the meaning of the section. To satisfy its requirements, a written report on the conclusions of the statutory consultation to which section 22(4) gives rise must be compiled independently by the social worker

⁴³ *Ibid* at [44].

⁴⁴ *Ibid* at [47].

responsible for discharging care duties for the child in question, and presented to the authority on behalf of the child. Those officers seeking the ASBO should then consider the material when considering whether it is necessary to apply for the order before proceeding to making an application to the court. If, having seen the full report the "lead" section decides to apply for an ASBO, that decision must be communicated to all concerned. The relevant social worker should not participate in the decision to apply for an ASBO to guarantee their independence.

Centrally, once the decision has been taken to apply for an ASBO there should be no contact on the issue between the ASBO team and the social services section without the consent of the child's solicitor. Finally, only in exceptional circumstances should a court make an order or an interim order against a child in care without someone present from social services, which should also provide witnesses if requested by the defence. However, Newman J felt unable to detail what procedures should be followed where social services, after detailed consideration with the child and relevant persons, actually wishes to support an ASBO application.

Newman J, whilst attempting to establish procedures to avoid such an eventuality, left the door open to a finding that the provisions of the Children Act 1989 were inherently incompatible with the imposition by a local authority of an anti-social behaviour order upon a child in its care. Indeed, he had made explicit his own difficulty envisaging those with parental responsibility for a child ever deeming it appropriate to place him or her under threat of serious criminal sanctions. The procedures he advocated seek only to craft a provisional 'chinese wall' between the department applying for an order (in this case, housing) and social services. As we have seen, social services in this particular case failed to maintain an appropriate professional distance from the ASBO application, and the guidance does go some way towards ensuring better administrative practice within local government. However, what it does not do is provide a solution to the possibility of an intrinsic legal conflict between section 1 of the Crime and Disorder Act 1998 and the Children Act 1989.

If the 1989 Act duty were to take precedence, what could a local authority do? In fact, as Newman J noted, section 22(6) of the Children Act provides the following solution:

“If it appears to a local authority that it is necessary, for the purposes of protecting members of the public from serious injury, to exercise their powers with respect to a child whom they are looking after in a manner which may not be consistent with their duties under this section they may do so”.

Given that the 1989 Act provides its own formal threshold at which a local authority may absolve itself of its duties towards a child in care, it may be found that in fact an authority is only legally able to engage in proceedings for an anti-social behaviour order for a child in its care in such circumstances. If so, the Children Act 1989 will have unexpectedly replaced the low standard of anti-social behaviour required for an ASBO under the Crime and Disorder Act 1998 with a far higher threshold: the risk of serious injury to a member of the public. As with section 22(1)(c) of the Disability Discrimination Act 1995, welfarist legislation may once again restrict the broad discretion originally afforded to a local authority to protect the public.

What form would a challenge under the Children Act 1989 take? It is submitted that as with a challenge to the decision to seek possession of an introductory tenancy a defendant will seek to present it as public law defence to the proceedings under the rule in *Winder v Wandsworth*.⁴⁵ In practice, if an application for an anti-social behaviour order with respect to a child in care is brought by the local authority, resolution of the conflict between section 1 of the Crime and Disorder Act 1998 and the Children Act 1989 may have to take place through a temporary stay of proceedings and referral to the High Court for judicial review of the authority's decision, given that neither the magistrates' court or the county court has the power to exercise judicial review.

Once again, this duty has implications for applications for other protectionist remedies by local housing authorities. For instance, a tenant may find themselves subject to possession proceedings for the conduct of a child in local authority care living with them. A child in care need not necessarily be

⁴⁵ [1985] AC 461.

accommodated by the local authority. The child in M, for example, was living with his grandmother at the time of the ASBO application. A tenant under a secure tenancy may well be able to argue that eviction of the child will be a breach of its duty under sections 33(3)(a) and 22(3) of the 1989 Act. Further, this could form the basis of a challenge in public law through the *Cochrane/McLellan* procedure under an introductory tenancy or the similar process under a demoted tenancy.

3. Conclusions

The greatest potential for welfarist discourses to permeate into court proceedings has been the interface with independent welfarist legal instruments. The potential effect of the Disability Discrimination Act 1995 on the power of a social landlord to evict mentally ill tenants sent shockwaves through the social housing sector when first identified in *Brazier*. However, section 22(1)(c) was quickly neutralised by the Court of Appeal in *Romano* in order to secure maximum flexibility for housing managers facing the difficult task of balancing the competing interests of such tenants and those affected by their behaviour. For children, a weak form of the welfare principle has been incorporated into judicial decision-making for an anti-social behaviour order, but the supposed key importance of identification of minors to ensure the effective policing of ASBOs has ensured that young people are increasingly susceptible to 'naming and shaming'. One important but unresolved question, finally, is the compatibility of a local authority's duty towards a child in its care and an application to impose an ASBO upon that child.

SOME FINAL CONCLUSIONS

The crime control function of social housing managers has evolved considerably over the last decade. Whilst originally developed at a local level by a relatively small number of local authority landlords, the entire social housing sector has now been harnessed by the present government as a formal component of its strategy to tackle anti-social behaviour. The presumed solution for the problems of the deprived neighbourhoods within which many of these landlords operate (and, incidentally, a likely vote-winner for the government) is increased punitivism through disciplinary and exclusionary techniques of social control. Public protection is now the dominant discourse of housing management and has shaped the expanding range of legal tools developed for that purpose. This thesis has sought to identify some of the conflicts and tensions the emphasis on protectionism has created.

First, the due process rights of defendants have been successively reduced. The development and expansion of the internal review procedure is an assault upon the hard-won security of tenure of social tenants. However, whilst expected to increase the speed and certainty of relief for victims and the protection of vulnerable witnesses, these objectives have been curbed somewhat by public law and human rights challenges. The ASBO, presented by government as its preferred response to anti-social behaviour, has caused considerable controversy for its unprincipled manipulation of the civil-criminal distinction, although a political alliance between the government and the House of Lords has ensured its survival.

Second, the combination of public protection and moral discourses currently dominant in housing policy has drawn attention away from the needs of often vulnerable perpetrators and their households. Without addressing the causal factors giving rise to anti-social behaviour it will be impossible to achieve sustainable solutions for affected neighbourhoods. At the "micro" level, the legal tools do not in themselves provide wide discretion to the courts to consider the mitigating circumstances of defendants. Indeed, the reasonableness standard for eviction from an assured or secure tenancy has been deliberately constricted by the Court of Appeal in pursuit of more

effective public protection. However, the interface of these tools with other “welfarist” legislation, most notably the Disability Discrimination Act 1995 and the Children Act 1989, has imposed some unexpected restrictions on the actions of social landlords.

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