ANTI-SOCIAL BEHAVIOUR AND THE CIVIL COURTS

JULY 2020

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SECTION 1 – Introduction

1. The Civil Justice Council (CJC), which was established under the Civil Procedure Act 1997, is an advisory non-departmental public body, sponsored by the Ministry of Justice, responsible for overseeing and co-ordinating the modernisation of the civil justice system.

2. It meets four times year to provide advice to the Lord Chancellor, the judiciary and the Civil Procedure Rule Committee on the effectiveness of aspects of the civil justice system, to discuss and agree formal responses to consultation papers and to make recommendations to test, review or conduct research into specific areas.

3. Issues/concerns were raised in a number of different quarters (including during Judicial College courses) in relation to the use and effectiveness of injunctions ("ASBIs")/committals under the Anti-Social Behaviour Crime and Policing Act 2014. As these were related to the administration of civil justice, the Council decided to investigate the extent to which there are real problems and, if appropriate, to make recommendations for potential change.

4. The Council arranged an initial fact-finding meeting at Bristol Civil Justice Centre on 11 April 2018, attended by 40 people invited from a variety of organisations across the spectrum of those involved with the types of anti-social behaviour that come before the courts.[1] A number of serious and significant concerns were raised about the way that the 2014 legislation was being used/applied on a daily basis across the country. The common overarching themes were the infrequent use of positive requirements; the variety of approaches to the making of injunction orders; the lack of relevant information before the court and inconsistencies in punishment for breach/es.

5. Having considered the information provided by the April 2018 meeting, the Council decided in July 2018 to set up a Working Party, with His Honour Judge Cotter QC as chair, to prepare a report upon anti-social behaviour and the civil courts.

6. Over two years, the Working Party met several times as a group[2] and members also had meetings with a wide range of bodies/organisations. It also undertook research through the obtaining of data and a review of penalties imposed.

7. The Working Party was as follows:

    1. HHJ Cotter QC (Judiciary) — Chair
    2. HHJ Robinson (Judiciary)
    3. DJ Pema (Judiciary)
    4. Jo Hickman (Civil Justice Council)

[1] It was an invitation-only meeting.
[2] Meetings were held on 11 April 2018, 3 July 2018, 17 September 2018, 22 November 2018, 16 December 2018, 18 February 2019, 4 March 2019, 3 April 2019, 1 May 2019, 14 June 2019, 29 November 2019, 5 March 2020, 12 March 2020, 9 June 2020 and 9 July 2020.

5. Rebecca Bryant OBE (Resolve ASB)
6. Jo Grimshaw (Surrey Police)
7. Sara Duckett (Manchester City Council)
8. Dr Judy Laing (Academic)
9. James Stark (Barrister)
10. Jonathan Manning (Barrister)
11. Christina Marriott (Chief Executive, Revolving Doors Agency)
12. Matthew Hanbridge (National Probation Service)
13. Mike Ward (Alcohol Change UK)
14. Craig Keenan (Community Law Partnership)
15. Simon Foster (Community Law Partnership)
16. Sian Evans (Solicitor; member of Law Society Housing Committee)
17. Phil Bowen (Centre for Justice Innovation)
18. Sam Allan (Civil Justice Council)
19. Leigh Shelmerdine (Civil Justice Council)

8. And also, in relation to the imposition of penalties for breach of orders:

20. Mr Justice Goose (Judiciary)
21. HHJ Worster (Judiciary)
22. HHJ Backhouse (Judiciary)
23. DJ Hennessy (Judiciary)
24. Ruth Pope (Sentencing Council)
25. Lisa Frost (Sentencing Council)

9. Co-opted:

Jane Pawsey (HMCTS)
David Godfrey (Legal advisor, magistrates' court)
Owen Daniel (Judicial Office)
Daisy Sproull (Post-graduate research student)

10. The Working Party approached its analysis by considering seven subjects/issues, specifically:

a. Whether a protocol is needed to ensure an appropriate prior assessment by the party/body seeking an injunction under the 2014 Act of the individual(s) said to be engaged in anti-social behaviour and (if known) of the underlying cause(s) of the behaviour. Also, how the court could be provided with adequate evidence as to the background of the application and what steps had been taken to address the problems/behaviour short of applying for an order such as a community protection notice.[3]

[3] Under section 43 there is a power for an authorised person (such as the police or a local authority) to issue a community protection notice to an individual if satisfied on reasonable grounds that—(a) the conduct of the individual or body is having a detrimental effect, of a persistent or continuing nature, on the quality of life of those in the locality, and (b) the conduct is unreasonable. The notice can be appealed in the magistrates' court within 21 days. Failure to comply is an offence and may result in a fine or a fixed penalty notice.

b. Whether the powers under the 2014 Act are being used consistently and if not, why not? At the April 2018 meeting it was discovered that orders were regularly being sought against those engaged in street begging in Bristol but never sought in respect of the same problem in Sheffield; also, that orders were sought against sex workers in some cities but not others. Further, the forms of order made varied across the country.
c. What are the difficulties in obtaining legal advice and representation (given most injunction orders are made against unrepresented people)?
d. Procedural issues: whether orders should be made in the absence of respondents, the listing of hearings and whether powers of arrest are being properly ordered.
e. Why are positive requirements so rarely included within orders (the injunction may require the respondent to do anything described[4] such as attend for drug/alcohol/mental health treatment) contrary to the intention behind the Act?
f. Are courts provided with adequate assistance in relation to concerns about a respondent's mental health issues and other vulnerabilities?
g. The need for increased/clear guidance on the imposition of penalties to improve consistency across the judiciary and nationally (including as to the use of positive requirements).

11. After gathering evidence, the Working Party worked towards recommendations covering four broad stages:

    a. Pre-application: devising a protocol for practice and procedure pre-application.
    b. Hearings before the court: ensuring adequate information is available, consistency and fairness
    c. Making, monitoring and supervising positive requirements.
    d. Action in relation to breaches of orders: ensuring judicial consistency including through dedicated guidelines covering the imposition of penalties for contempt.

12. The Working Party was of the view that some issues (such as the provision of accommodation for the homeless and whether short custodial penalties "work" (and/or are cost effective), although obviously relevant to the overarching issue of how anti-social behaviour is addressed, were beyond its remit.

13. The report of the Working Party and its detailed recommendations were considered and approved by the full Civil Justice Council. The Council believes current practices are clearly unsatisfactory and require immediate and significant redress and hopes that the relevant bodies will carefully consider this report and implement/act upon its recommendations.

[4] Section 3 provides that an injunction that includes a requirement must specify the person who is to be responsible for supervising compliance with the requirement. The person may be an individual or an organisation. Further, before including a requirement, the court must receive evidence about its suitability and enforceability from (a) the individual to be specified, if an individual is to be specified or (b) an individual representing the organisation to be specified if an organisation is to be specified.

SECTION 2 – Executive summary

14. Anti-social behaviour remains a significant and national problem. In the year ending March 2019, the Crime Survey for England and Wales[5] estimated that 37.9% of those who had responded to the survey had experienced or witnessed anti-social behaviour in their local area (defined as within 15 minutes of a person's home). This followed on from the period up to December 2018, which had the highest percentage recorded since this data was first collected[6] at 37%.

15. On 23 March 2015, Part 1 of the Anti-Social Behaviour Crime and Policing Act 2014 came into force and introduced new powers for the police and the courts, including the imposition of a civil injunction, now commonly referred to as an "ASBI", to prohibit anti-social behaviour and also to impose positive requirements to get an individual to deal with the underlying cause of their behaviour. The 2014 Act changed the landscape in relation to the tackling of anti-social behaviour. It repealed and replaced earlier legislation[7] and very significantly, removed much of the work of dealing with such behaviour from the criminal courts and introduced significant changes to the powers of the civil courts.

16. Prior to 2014, legislation in relation to anti-social behaviour meant that there was a clear division between housing related (almost always relating to social housing) and non-housing related conduct (very often linked to substance abuse, mental health issues, homelessness and begging). Issues which surrounded housing were usually dealt with in the civil courts; almost always the county court, using powers under the Housing Act 1996, sections 153A to 158 of which gave a power to grant injunctions to relevant landlords (usually registered social landlords) to allow their staff, tenants and service providers to peaceably enjoy lawful activities free from housing related anti-social behaviour.[8] Non-housing related anti-social behaviour was dealt with in the magistrates' court, with the assistance of the resources available in the criminal jurisdiction and using the wide range of criminal sentencing powers.

17. The pre-2014 division of the work of addressing anti-social behaviour between the criminal and civil jurisdictions reflected the differing aims and resources of those applying for the injunctions, and the likely reactions of those against whom an order was sought, depending upon whether the anti-social behaviour was linked to occupation of a residential property or not. In a property-related case, the civil courts had the power to make a possession order in relation to a defendant's social housing (albeit by separate possession order), thus bringing an end to the impact of anti-social behaviour upon those living in close proximity (although not tackling the underlying cause/s). In cases in which

[5] Office for National Statistics.

[6] See generally Baroness Newlove's report, *Anti-Social Behaviour: Living a Nightmare,* Report of Victim's Commissioner for England and Wales, published 30 April 2019, at https://s3-eu-west-2.amazonaws.com/victcomm2-prod-storage-119w3o4kq2z48/uploads/2019/04/ASB-report.pdf.

[7] The new powers replaced Anti-Social Behaviour Injunctions (ASBIs) and Anti-Social Behaviour Orders (ASBOs), and several other tools designed to deal with anti-social individuals including: Drinking Banning Orders (DBO), Intervention Orders, and, Individual Support Orders.

[8] The relevant parts of the 1996 Act were repealed with effect from 23 March 2015 (subject to the saving provisions of s.21 of the 2014 Act; existing orders were unaffected as were orders applied for before the coming into force of the new Act).

the relevant behaviour was not linked to a property (e.g. aggressive begging or relating to substance abuse) it was often far more difficult for the criminal courts to stop it on a sustainable basis, short of removing the defendant from the community through a prison sentence.

18. The view was taken by the Home Office that the legal tools and powers were not working sufficiently well and that:

> *"Local professionals need fast and effective powers to address individuals who persistently behave anti-socially, causing harm to both victims and communities. The Anti-Social Behaviour Order (ASBO) isn't working: breach rates are high and the number issued has been steadily declining since 2005. The two new powers replacing the ASBO will be faster and more effective, both stopping the anti-social behaviour before it escalates and working with individuals to tackle the root causes of their behaviour."*[9]

19. Data revealed that of the 24,323 ASBOs issued between 1 June 2000 and 31 December 2013, 58% (14,157) had been breached at least once. Of those breached, 75% (10,651) were breached more than once; if an ASBO was breached, on average it was breached five times. There does not appear to have been an analysis of why breach rates in the criminal courts were high or why the criminal courts were issuing fewer ASBOs. Insofar as there was a view that the civil courts were more successful in tackling anti-social behaviour there does not appear to have been any analysis of the fact that they were dealing with a differently-defined cohort of defendants i.e. those whose anti-social behaviour was linked to a property which (usually) ultimately, they could be removed from by possession order.

20. After the 2014 Act the county court now deals with the full range of anti-social behaviour i.e. housing and non-housing related conduct. Advice to "frontline professionals"[10] is that:

> *"The injunction can be used to deal with a wide range of behaviours, many of which can cause serious harm to victims and communities in both housing-related and non-housing related situations. This includes vandalism, public drunkenness, aggressive begging, irresponsible dog ownership, noisy or abusive behaviour towards neighbours, or bullying. Injunctions should not be used to stop reasonable, trivial or benign behaviour that has not caused, or is not likely to cause, anti-social behaviour to victims or communities, and potential applicants are encouraged to make reasonable and proportionate judgements about the appropriateness of the proposed response before making an application for an injunction***."**

21. Prior to the Act coming into force there does not appear to have been any detailed consideration given to the fact that the civil courts do not possess the equivalent "sentencing" powers or the third-

[9] *Home Office Fact Sheet: Anti-social Behaviour, Crime and Policing Bill: Replacing the ASBO (Parts 1 and 2);* October 2013.

[10] See *Anti-Social Behaviour, Crime and Policing Act 2014: Statutory Guidance for Frontline Professionals* [2014] amended in 2017 and 2019. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/823316/2019-08-05_ASB_Revised_Statutory_Guidance_V2.2.pdf.

party assistance, through the help of the Probation Service and others, available to the criminal courts. Further, representation through public funding was, and remains, far more difficult to obtain in the civil courts, leaving many defendants unrepresented. Put simply, the civil courts were significantly less well equipped than the criminal courts to deal with the full range of anti-social behaviour cases.

22. A central intention of the Act was that the party seeking an injunction to restrain inappropriate behaviour (the applicant) would supply the Court with details of positive requirements that could be included within an order and which were designed to address the root causes of the conduct. It was stated:

> *"By focusing on prohibitions and enforcement, the ASBO failed to change the behaviour of perpetrators, and therefore failed to stop breaches and provide long term protection to victims and communities."*

And:

> *"The new streamlined powers will be faster, more flexible and crucially will allow professionals to stop ASB and seek to change behaviour, one of the key failings of the ASBO."*

And:

> *"The injunction to prevent nuisance and annoyance and the criminal behaviour order (CBO) are two of the new powers that will be available to professionals to tackle anti-social behaviour (ASB). They are designed not only to provide effective respite for victims and communities, but also to stop future ASB by the offender. Through the inclusion of 'positive requirements', perpetrators may be required to address the underlying causes of their behaviour, for example, substance misuse, anger management or problem drinking."*[11]

23. The reality is that what has subsequently taken place on a wide scale in the civil courts has not matched the stated aims. Given the limited resources available to, and the practical difficulties (such as lack of access to medical and other records) faced by many bodies/organisations applying for an injunction in the civil courts, taken with the limited additional assistance available to the court, the large majority of orders had not contained "positive" requirements aimed at addressing underlying behaviour, only prohibitions, which are often then breached (as the underlying behaviour is not being addressed). At the fact-finding meeting in Bristol organised by the Civil Justice Council in April 2018, with 40 people attending from a variety of stakeholders, only one person had experience of a positive requirement being imposed. In Autumn 2017, Alcohol Concern and Alcohol Research UK led workshops attended by 72 stakeholders in three locations and also carried out seven interviews, and received written evidence from a further five sources. The authors record the stark and disappointing fact, (in line with the Working Party's research), that in respect of the use of positive requirements to

[11] Ibid.

address underlying alcohol dependency issues, *"None of our participants reported using civil injunctions in this context."*

24. This picture has to be contrasted with the criminal courts which frequently impose what are in effect positive requirements through sentencing: examples being rehabilitation, activity/prohibited activity, alcohol treatment, drug rehabilitation, mental health treatment, residence, unpaid work, curfew and exclusion.

25. The result has been that the vast majority of injunctions granted by the civil courts to date have failed to directly address the underlying causes of anti-social behaviour by using positive requirements. Over the two years that the Working Party has been undertaking research and holding meetings there have been some changes in practice in relation to the making of positive requirements, in part because of revised judicial training,[12] informed by the Working Party's ongoing work. However, the overall picture remains unsatisfactory and can be legitimately viewed as failing to achieve the 2014 Act's stated aims and to adequately assist victims, and perpetrators, of anti-social behaviour.

26. The powers introduced by the 2014 Act have been described as "deliberately local in nature".[13] The rationale being that those who work within and for local communities are best placed to understand what is driving the behaviour in question, the impact that it is having, and to determine the most appropriate response. However, the Working Party found that to a significant degree there is a "postcode lottery" in respect of the availability of suitable drug, alcohol and mental health services/courses upon which to base informal intervention or a positive requirement under a court order. Issues relating to the funding/provision of such services are beyond the remit of this report and it is recognised that some of the best practice recommendations within this report may be based on resources available in only some parts of the country.

27. There has also been a lack of adequate liaison between local bodies/groups involved in the assessment, control and rehabilitation of those engaged in anti-social behaviour; both between the bodies/groups themselves and also with the courts. There have been few adequate local plans directly designed to address such behaviour without redress to the civil courts and to set out what information should be provided to the court as to available options to address underlying behaviour, both before the making of an order or upon breach.

28. The Working Party believes that what is required is a national framework to ensure that local plans are in place, to draw together relevant bodies within a local structure designed to assess and address anti-social behaviour initially without resort to the courts. If an order under the 2014 Act is required, the local plan should ensure that the relevant bodies/groups work with the court to achieve the best

[12] See paragraph 438 of this document.

[13] See *Anti-Social Behaviour, Crime and Policing Act 2014: Statutory Guidance for Frontline Professionals* [2017], amended [2019], p. 1.

possible outcome for victims and perpetrators of anti-social behaviour, including through the increased use of positive requirements.

29. The Working Party believes that if the 2014 Act is to achieve its goals, there must be much greater use of positive requirements. There is convincing evidence that such orders can work, even where there are entrenched problems of alcohol and drug abuse. However, if more orders seeking to address underlying causes of anti-social behaviour are to be made, the condition precedent to the making of an order contained within the Act must be addressed first: the identification of a suitable positive requirement as delivered or supervised by a third party who is happy to engage with a court order. To date, the courts have rarely been in the position to make positive requirements as there has not been an adequate exploration or assessment of available options, and frequently inadequate information is provided as to underlying drivers of the behaviour. It is the view of the Working Party that a pre-action protocol should be in place to ensure that the relevant steps/elements within a local plan have been addressed and also that relevant information is provided to the court at the time an order is sought (and at the time of any subsequent breach).

30. Unlike the position faced by criminal courts, a lack of professional representation and of third party assistance (most obviously as provided to the criminal courts by the Probation Service and the NHS Liaison and Diversion service) has meant that the civil courts have often been denied the benefit of relevant information (unless available to the applicants), such as mental health problems or other matters causing the relevant behaviour. The Working Party has identified mental health and capacity issues of respondents as of particular concern as they underpin a significant proportion of anti-social behaviour and the civil courts lack the facilities, mechanisms and experience available in the criminal courts to address the underlying issues. Much of the content of Lord Bradley's 2009 report into people with mental health problems or learning difficulties in the criminal justice system, appears to have been overlooked when the 2014 Act was brought into force. No consideration appears to have been given as to how a body/person considering an application for an order, or judge being asked to make an order or to impose a penalty for a breach of an order, could access the NHS L&D service.

31. In effect there has been a failure to "join-up" the civil courts to the very important third-party assistance available in the criminal courts.

32. The Working Party believes that a protocol should ensure that the applicant has made all reasonable attempts to gain such information (after liaison as provided for within a local plan), but also that in order to ensure the proper delivery of justice, the civil courts have access to and assistance from the NHS L&D service before making an order under the 2014 Act or upon any breach.

33. The practical advantages that criminal courts have over civil courts when dealing with anti-social behaviour and also the restricted "sentencing options" on breach of an order (see below) provide support for the view that recalcitrant anti-social behaviour which amounts to criminal conduct may often be better addressed through prosecution before the magistrates' court than an application for an injunction in the county court.

34. The Working Party also discovered that unsatisfactory practices have developed in relation to the use of the 2014 Act, including that in a significant proportion of cases to date, the injunction order has been obtained "ex parte" (without the respondent knowing an order was being sought and so not being present) with the result that, not infrequently, the first time the respondent appears before the court is at a committal hearing for breach of the order. As most orders contain only prohibitions and not constructive elements, breaches of orders are common. One of the reasons for applicants seeking an order ex parte was the delay before the hearing date provided by the courts (exposing victims to continuing behaviour). A combination of a protocol and revised listing practices is required to ensure that defendants have the opportunity to attend first hearings of applications.

35. When first considering the regime introduced by the 2014 Act, the Working Party was immediately surprised by the lack of available data as to the use and efficacy of anti-social behaviour injunctions compared to what had previously been available in the criminal courts. It is clear that data underpinned the changes introduced by the 2014 Act. The Home Office 2013 Fact Sheet stated:

> *"During our consultation with front line professionals, they told us that securing an ASBO on application can be a slow, bureaucratic and expensive process, and that it often fails to change a perpetrator's behaviour. Statistics issued by the Ministry of Justice (MoJ) show that 57 per cent of ASBOs issued up to the end of 2011 have been breached at least once, and over 42 per cent have been breached more than once. The new powers will be faster, easier to use and more effective."*

36. Little, if any, thought appears to have been given as to how data should be recorded in the civil courts after the 2014 Act came into force so as to enable comparison between the pre- and post-2014 regimes. Relevant details have not been recorded in any systematic approach and as a result there can be no adequate empirical overview of how the legislation has "worked" or its "effectiveness". The Working Party considered this a very surprising and serious omission which must be immediately rectified.

37. The very limited data that the Working Party was able to compile/source has indicated that there are considerable regional variations in approaches to non-housing related anti-social behaviour: that in the region of 50% of orders made are not property related (i.e. of the type that, prior to the 2014 Act, would have been dealt with in the magistrates' court); that a high percentage of orders are made ex parte; and that a significant number of respondents are not represented, including at breach hearings. The data did not allow reliable estimation of the rate of breaches; however, such limited data as is available (which is in line with the consensus of judges attending at a Judicial College course) would indicate that at least half of all orders made are breached. If this is correct, it would mean that there has been no improvement on the "high" breach rates before the 2014 Act came into force.

38. When considering the appropriate penalty for breach of an order under the 2014 Act, a civil court does not have the range of options open to a criminal (magistrates') court when sentencing, e.g. it cannot impose a community order. Further, as a financial penalty is often inappropriate, judges

without the benefit of dedicated training (there being no mandatory training) or significant experience of the criminal courts, have often believed that the only options have been a custodial penalty (either suspended or immediate) or taking no action. As there has been no separate "sentencing" guidance solely for breaches of civil injunctions (the closest guidance being that for breaches of criminal behaviour orders[14]) it is perhaps unsurprising that there has been a very wide disparity of penalties imposed, with a significant number appearing to fail to bear an adequate relationship to the sentence which would have been given for the underlying behaviour had it been the subject of criminal charges. The Working Party heard concerns expressed from a number of bodies that the imposition of penalties for breaches of anti-social behaviour injunctions was very (and worryingly) inconsistent. The Working Party undertook a review of 50 reported penalties and found 38% were of immediate custody. There were examples of custodial penalties passed which gave rise to real concern as to familiarity with sentencing principles and the need for proportionality of punishment.

39. By way of example of a penalty which gave rise to concern, in *Festival Housing v Baker*[15] the unrepresented respondent, who was described as "vulnerable" and "a fragile individual [who] has difficulty reading and writing; difficulty in understanding", and "frankly, a pathetic individual who has not been able to stop herself" was given a three-month immediate custodial penalty for admitted breaches of an injunction preventing begging (equating to a four and a half month sentence before credit for a guilty plea).[16] Five months later she was back before the court in respect of breaches which involved her asking for 50p on two separate occasions from local authority "Street Rangers". The judge noted the "trivial" and non-aggressive nature of the breach but imposed a penalty of six months in custody.[17] The Working Party was very concerned to note that a vulnerable and "pathetic" individual was the subject, without legal representation on two occasions (within six months of each other), of the imposition of custodial penalties combining to effectively nine months. Equivalent sentences are normally reserved for serious criminality. There is no reference to an attempt at any stage to tackle the underlying cause of the behaviour by positive requirement or otherwise. Unsurprisingly, given that the respondent was unrepresented, there was no appeal.

40. In *Guinness Partnership v Louise Gardiner* the court was concerned with the first and single breach of an injunction prohibiting noise disturbance by the respondent in her own flat. She admitted the breach and the judge noted that she suffered from depression, and that excessive alcohol consumption had effectively resulted in and aggravated her shouting. The respondent, who stated that she was sorry and that this would not happen again, was given a four-week immediate custodial penalty, the equivalent to a six-week penalty for a first breach of an injunction solely concerning noise made within her own flat. The respondent had committed no criminal offence; there had been no violence (or even threatened violence) or harassment. It is difficult to reconcile this penalty with

[14] Which carry a much higher maximum sentence of five years as opposed to the two-year maximum for breaches in the civil courts.

[15] See paragraph 435 of this document.

[16] She had already received a 28-day custodial sentence on an earlier occasion.

[17] Less two weeks spent on remand.

custody being a last resort and reserved for the most serious cases within the criminal justice system. There does not appear to have been any investigation of whether alcohol abuse or mental health played any part in the anti-social behaviour.

41. Given the concerns as to the penalties being imposed, the Working Party mirrored as far as possible the approach of the Sentencing Council and produced a bespoke guideline. A requirement, through the Civil Procedure Rules or some other method, to have regard to the guideline together with mandatory judicial training are urgently needed to ensure a principled and proportionate approach to the imposition of penalties in respect of breaches of orders under the 2014 Act.

42. The Working Party heard a very worrying and consistent account from the judiciary (including through feedback from the Judicial College injunctions and committals module) as confirmed by the Legal Aid Practitioners Group and a review of 50 transcripts of judgments, that although legal aid may technically be available, there are areas of the country where no firm of solicitors will accept instructions to advise and represent in relation to injunction applications or committals under the 2014 Act: "advice deserts". This picture would be consistent with the Law Society's April 2019 analysis,[18] which showed that the availability of housing advice provision varies greatly across the country with 37% of the population living in a local authority area with no housing legal aid providers.

43. The Working Party believes it is likely that the existence of such "advice deserts" is having a seriously adverse effect upon the delivery of civil justice. In both the data it compiled/sourced and the review of penalties imposed, the Working Party found support for the proposition that in approximately half of cases before the courts, a respondent will not be present and represented at a breach hearing. The position contrasts sharply with the criminal courts where a person eligible for and seeking publicly-funded legal advice and representation, would not ordinarily face being deprived of their liberty without it being provided. Apart from concerns as to the inability to challenge the allegations presented, this means that the court is unlikely to receive effective mitigation or an explanation for the behaviour, or assistance as to a constrictive penalty option (as appears to have occurred in *Festival Housing v Baker* where no attempt seems to have been made to address the underlying behaviour of a vulnerable and "frankly pathetic" individual who, in the view of the judge, "could not help herself").

44. It is the view of the Working Party that an urgent review is required of the availability of publicly-funded legal advice and representation in respect of all hearings regarding orders sought or obtained under the 2014 Act. Further, specific consideration should be given to widening the scope of the civil legal aid duty advice scheme to cover advice/representation in respect of applications for injunctions (but not committals) under the 2014 Act, changing (or giving guidance in relation to) the current approach to the merit requirement for eligibility for legal aid, and to making "end to end", publicly-funded legal representation for cases brought under the 2014 Act easier and more financially viable for those who have civil legal aid contracts.

[18] https://www.lawsociety.org.uk/policy-campaigns/campaigns/access-to-justice/end-legal-aid-deserts/.

SECTION 3 – The 2014 Act

45. The Anti-Social Behaviour Crime and Policing Act 2014 provided new powers to the courts including the imposition of a civil injunction (commonly referred to as an ASBI) to prohibit anti-social behaviour and also to impose positive requirements to get an individual to deal with the underlying cause of their behaviour. The 2014 Act replaced a range of existing tools, including the ASBO. The view was taken that securing an ASBO on application could be a slow, bureaucratic and expensive process, and that it often failed to change a perpetrator's behaviour. The belief was that by focusing on prohibitions and enforcement, the ASBO failed to change the behaviour of perpetrators, and therefore failed to stop breaches and provide long-term protection to victims and communities.

46. The rationale behind the new injunction was that it could be used to tackle low-level ASB and *".. nip emerging problems in the bud*".[19]

47. Under the new regime, the most serious cases of anti-social behaviour, which resulted in a criminal conviction, could be addressed through the criminal court imposing a criminal behaviour order (CBO), breach of which would be a criminal offence with a sentence of up to five years' imprisonment for adults and up to a two-year detention and training order for under 18s.[20] A sentencing guideline covers this offence.[21]

48. The civil injunction was modelled on the anti-social behaviour injunction available under the Housing Act 1996. The injunction is available in the county court for adults and in the youth court (sitting in its civil capacity) for under 18s, and, importantly, rests on the civil standard of proof. There is no minimum or maximum term for an injunction for adults.[22]

49. The court may grant an injunction if two matters are proved: that the respondent has engaged or threatens to engage in anti-social behaviour, and that it is just and convenient for the purpose of preventing the respondent from engaging in anti-social behaviour. The order may (a) prohibit the respondent from doing anything described in the injunction or (b) require the respondent to do anything[23] described.[24] "Anti-social behaviour" is defined as:

[19] Home Office fact sheet.

[20] The CBO can be applied for on conviction for any criminal offence in any criminal court. An order can only be made on the application of the prosecutor (in most cases the Crown Prosecution Service, either at their own initiative or at the request of the police or local authority). In granting a CBO, the court must be satisfied that the offender has committed behaviour causing harassment, alarm and distress (the same test used for the injunction and that granting the order would help prevent future ASB. The CBO could relate to wider relevant behaviour than that proved through the criminal conviction. Hearsay evidence (which may not have been admissible in the criminal proceedings) is allowed in CBO proceedings.

[21] See paragraph 421 of this document.

[22] For under 18s, the maximum term is 12 months.

[23] e.g. attend alcohol awareness classes or dog training classes.

[24] Section 3 provides that an injunction that includes a requirement must specify the person who is to be responsible for supervising compliance with the requirement. The person may be an individual or an organisation. Further, before including a requirement, the court must receive evidence about its suitability and enforceability from (a) the individual to be specified, if an individual is to be specified or (b) an individual representing the organisation to be specified if an organisation is to be specified.

a. conduct that has caused, or is likely to cause, harassment, alarm or distress to any person,[25]
b. conduct capable of causing nuisance or annoyance to a person in relation to that person's occupation of residential premises,[26] or
c. conduct capable of causing housing-related[27] nuisance or annoyance to any person.

50. An application for an injunction can be made by:

a. a local authority,[28]
b. a housing provider,[29]
c. the chief officer of police for a police area,
d. the chief constable of the British Transport Police Force,
e. Transport for London,
f. the Environment Agency,
g. the Natural Resources Body for Wales,
h. the Secretary of State exercising security management functions, or a Special Health Authority exercising security management functions on the direction of the Secretary of State, or
i. the Welsh Ministers exercising security management functions, or a person or body exercising security management functions on the direction of the Welsh Ministers or under arrangements made between the Welsh Ministers and that person or body.

51. An order can be made on notice, or without notice, and can contain prohibitions or requirements. A power of arrest can be attached to all, or part, of the order if the court thinks that:

a. the anti-social behaviour in which the respondent has engaged or threatens to engage in consists of or includes the use or threatened use of violence against other persons, or
b. there is a significant risk of harm to other persons from the respondent.[30]

52. The injunction order can exclude an adult from his or her home but only in certain defined circumstances (essentially the same requirements as are necessary for a power of arrest to be attached).[31]

[25] "*Anti-social behaviour will by its very nature generally involve a course of conduct. It is often the cumulative effect of anti-social behaviour over a period of time, rather than the individual acts, which causes serious harm*" per Holdroyde J in *Birmingham City Council v Pardoe* [2016] EWHC 3119.
[26] Applies only where the injunction under section 1 is applied for by a housing provider, a local authority, or a chief officer of police.
[27] Means directly or indirectly relating to the housing management functions of a housing provider, or local authority.
[28] In *Leeds City Council v Persons Unknown* [2015] QBD, HHJ Saffman held that local authorities should not seek to use powers under s222 Local Government Act to obtain injunctions using the common law to restrain or prevent persistent behaviour that could be regarded as anti-social; rather they should use the statutory remedies set out in the 2014 Act; see also *Birmingham CC v Shafi* [2008] EWCA Civ 1186.
[29] A housing provider may make an application only if the application concerns anti-social behaviour that directly or indirectly relates to or affects its housing management functions; section 5(3). Available at https://www.legislation.gov.uk/ukpga/2014/12/part/1/enacted.
[30] Section 4(1). Available at https://www.legislation.gov.uk/ukpga/2014/12/part/1/enacted.
[31] See section 13. Available at https://www.legislation.gov.uk/ukpga/2014/12/section/13/enacted.

53. The Working Party heard that the county court makes ASBI orders or hearing committals each day. As set out above, the Working Party was very surprised to find that no data was being collected by HMCTS as to the granting of or breaches of orders under the 2014 Act.

Steps before formal action

54. The Home Office published statutory guidance in July 2014, *Anti-social Behaviour, Crime and Policing Act 2014: Anti-social behaviour powers Statutory guidance for frontline professionals*[32] ("the guidance"). It was updated in December 2017 and August 2019. The guidance has emphasised the importance of ensuring that the powers are used appropriately to provide a proportionate response to the specific behaviour that is causing harm or nuisance, without impacting adversely on behaviour that is neither unlawful nor anti-social. It recognises that an effective response to anti-social behaviour may require collaborative working between different agencies to determine the most appropriate solution. It stated:

> *"The powers allow the police, councils, social landlords*[33] *and others to deal quickly with issues as they arise, with agencies working together where appropriate to ensure the best results for victims. To assist joined-up working, an effective information-sharing protocol is essential. There is already a duty on some bodies (such as the police and councils) to work together and in respect of anti-social behaviour specifically, there is a specific duty on specified bodies to work together when the ASB Case Review/Community Trigger is activated, as set out earlier in this guidance."*

And:

> *"Applicants should also consider consulting the relevant local authority as they may hold information which is of relevance and/or which may need to be considered as part of the application. For example, a young person may be a child in need or on a child protection plan and additional safeguarding measures may be required. The local authority may also hold information which supports the application."*

And in relation to informal interventions:

> *"Such interventions may be included in local plans to deal with anti-social behaviour."*

[32] Stated to be "*the police, local councils and social landlords - who are able to make use of the powers to respond to instances of anti-social behaviour in their local areas."*

[33] The Homes and Communities Agency's Regulatory Framework, Neighbourhood and Community Standard, requires registered housing providers to (i) co-operate with relevant partners to help improve social, environmental and economic wellbeing in areas where they own properties; and (ii) work in partnership with other agencies to prevent and tackle anti-social behaviour in the neighbourhoods where they own homes.

55. However, the Working Party has discovered that nationally there is very variable and sometimes only limited information sharing and/or co-operation between agencies, and also between agencies and social landlords, in relation to individuals who appear to be engaging in anti-social behaviour. There is no national template or protocol in relation to liaison and there are differing types of local bodies who may possess relevant information, most obviously local authorities (including social services departments), the police, probation, the NHS (including general practitioners) and social housing providers. This has led to applications being made to the court for injunctions without full information e.g. about a respondent's mental health or criminal record.

56. The guidance anticipates (save in "emergency" situations or where there is very rapidly deteriorating behaviour) an escalating series of potential steps through informal interventions before recourse to the courts. It states in relation to housing related anti-social behaviour:

> *"Prevention and early intervention should be at the heart of all landlords' approaches to dealing with anti-social behaviour. Available evidence shows this is the case with over 82% of anti-social behaviour complaints resolved by social landlords through early intervention and informal routes without resorting to formal tools in 2015/16."*

57. However, as set out above, the very fact that it is a landlord taking informal action means that there is the potential sanction for failure to co-operate and persist in such conduct: loss of a right to occupy the relevant property. Even if the matter proceeds to a court hearing this remains a powerful driver to change behaviour; particularly given that a breach allows expedited possession proceedings with mandatory, as opposed to discretionary, possession orders. All available data evidences the success of early and informal intervention in housing related cases. However, there is no equivalent data for non-housing related cases.

58. The informal interventions set out in the guidance are as follows:

a. A verbal or written warning

The guidance states:

> *"Where appropriate, local agencies should alert each other when a warning has been given so that it can be effectively monitored."*

However, this does not appear to take place consistently as a matter of standard practice.

b. A community resolution

Community resolutions are a means of resolving less serious offences or instances of anti-social behaviour through informal agreement between the parties involved, as opposed to progression through the criminal or civil justice process. A community resolution may be used with both youth and adult perpetrators and allows the police to deal more proportionately with less serious crime and anti-social behaviour, taking account of the needs of the victim, perpetrator and wider community.

c. Mediation

In appropriate circumstances, mediation can be an effective way of resolving an issue by bringing all parties together. This can be effective in resolving neighbour disputes, family conflicts, lifestyle differences such as noise nuisance complaints, and similar situations. However, mediation is unlikely to work if forced on those involved and the Working Party found little evidence of mediation being used on a widespread basis.

d. Acceptable Behaviour Contracts/Agreements

An acceptable behaviour contract (ABC) is a written agreement between a perpetrator of anti-social behaviour and the relevant agency/body trying to prevent that behaviour. It is most often used in relation to housing related behaviour. Although the guidance states that:

> *"They provide an opportunity to include positive requirements as well as prohibitions to help support the person tackle any underlying issues which are driving their behaviour."*

59. It appears that in practice positive requirements are rarely added, mainly because of the general problems associated with setting up such requirements in the absence of positive co-operation from the individual concerned. There are no formal sanctions associated with refusing to agree to, or breach of, an ABC although they may be evidence that the individual is unwilling to address their behaviour (so relevant to the grant of an ASBI).

60. The guidance also refers to "support and counselling" stating:

> *"The anti-social behaviour powers allow professionals to respond to the underlying causes of anti-social behaviour, for example through positive requirements attached to a Civil Injunction or Criminal Behaviour Order. However, providing positive support does not have to wait for formal court action, and can be given as part of any informal intervention, for example by providing support around overcoming substance misuse or alcohol dependency that may be linked to the person's anti-social behaviour."*

61. However, problems with the (frequently) limited availability of third-party assistance for alcohol, drug and mental health problems, difficulties with confidentiality, limited funding and no systemic approach to inter-agency liaison, taken with the general difficulties of dealing with individuals with challenging behaviour and chaotic lives, means that many agencies/bodies have found it extremely difficult to provide positive support before the nature and extent of the behaviour means that court action is necessary.

Options other than an injunction

62. Obtaining an injunction in the civil courts is only one of a range of potential options which can be used to combat anti-social behaviour. It is necessary to briefly consider some of the other powers/legal routes available, specifically:

a. Community protection notices
b. Public spaces protection orders
c. Possession proceedings
d. Criminal proceedings

Community protection notices

63. Section 43 of the Act provides certain bodies with the power to issue community protection notices:

> *"43 Power to issue notices*
>
> *(1) An authorised person[34] may issue a community protection notice to an individual aged 16 or over, or a body, if satisfied on reasonable grounds that:*
> *(a) the conduct of the individual or body is having a detrimental effect, of a persistent or continuing nature, on the quality of life of those in the locality, and*
> *(b) the conduct is unreasonable.*
>
> *(2) In subsection (1) "authorised person" means a person on whom section 53 (or an enactment amended by that section) confers power to issue community protection notices.*
>
> *(3) A community protection notice is a notice that imposes any of the following requirements on the individual or body issued with it:*
> *(a) a requirement to stop doing specified things;*
> *(b) a requirement to do specified things;*
> *(c) a requirement to take reasonable steps to achieve specified results.*
>
> *(4) The only requirements that may be imposed are ones that are reasonable to impose in order:*
> *(a) to prevent the detrimental effect referred to in subsection (1) from continuing or recurring, or*
> *(b) to reduce that detrimental effect or to reduce the risk of its continuance or recurrence."[35]*

64. The community protection notice is designed to deal with ongoing problems and/or nuisances which are having a detrimental effect on the community's quality of life by targeting those responsible. The guidance for frontline professionals states:

> *"Local councils have traditionally taken the lead in dealing with the sort of issues that can be addressed through the use of Community Protection Notices, but the police are also able to issue these Notices, as are social landlords where they have been designated to do so by the relevant local authority, recognising their role in responding to anti-social behaviour in the dwellings they manage."*

[34] Section 53 sets out who can be "authorised persons": (a) a constable; (b) the relevant local authority (see subsections (2) and (3)) and (c) a person designated by the relevant local authority for the purposes of this section. Available at https://www.legislation.gov.uk/ukpga/2014/12/section/43/enacted.
[35] Anyone issued with a community protection notice has the opportunity to appeal it. Appeals are heard in a magistrates' court.

65. Failure to comply with a community protection notice is an offence. Section 48 states:

> *"(1) A person issued with a community protection notice who fails to comply with it commits an offence.*
>
> *(2) A person guilty of an offence under this section is liable on summary conviction;*
> *to a fine not exceeding level 4 on the standard scale, in the case of an individual;*
> *to a fine not exceeding £20,000, in the case of a body."*

66. Where an individual, (business or organisation) fails to comply with the terms of a community protection notice, a number of options are available for the issuing authority:

a. Fixed penalty notices:
   Depending on the behaviour in question, the issuing officer could decide that a fixed penalty notice would be the most appropriate sanction[36] (see section 52). This can be issued by a police officer, police community support officer, council officer or, if designated, a social landlord. Payment discharges any liability to conviction for the offence.
b. Remedial action:
   If an individual or body fails to comply with a community protection notice issued by the council, it may decide to take remedial action to address the issue (see section 47).
c. Proceedings before the magistrates' court:
   The court's powers on sentence are limited to a fine.

67. There is little guidance[37] on the interrelationship between the use of a CPN and seeking an injunction from the county court. A significant number of applications for injunctions in relation to non-housing related anti-social behaviour relate to conduct which would give grounds to issue a CPN, e.g. persistent begging or anti-social street drinking in a specific location. Indeed it would be possible for a court, when considering if it is just and convenient to grant an injunction for the purpose of preventing the respondent from engaging in anti-social behaviour,[38] to have to regard the failure to issue a CPN as a prior step. However, faced with anti-social behaviour which warrants a CPN and would also justify seeking an injunction, agencies frequently consider a CPN as likely to be of little practical effect given the penalties are financial, and view an injunction to be the better option.

[36] A fixed penalty notice should not be more than £100 and can specify two amounts, for instance, a lower payment if settled early, say within 14 days. In order to allow the individual time to pay, no other associated proceedings can be taken until at least 14 days after the issue.

[37] The Secretary of State may issue guidance (see section 56) to chief officers of police about the exercise, by officers under their direction or control, of those officers' functions and also to local authorities about the exercise of their functions in relation to CPNs and those of persons designated under section 53(1)(c).

[38] Which could include consideration of whether it was proportionate, expeditious and fair to proceed straight to an injunction without first issuing a CPN.

Public spaces protection orders[39]

68. A relevant local authority[40] may make a public spaces protection order (PSPO) – see section 59.[41] These orders are intended to deal with a particular nuisance or problem in a specific area that is detrimental to the local community's quality of life,[42] by imposing prohibitions or requirements[43] on the use of that area which apply to everyone.[44] They are intended to help ensure that the law-abiding majority can use and enjoy public spaces, safe from anti-social behaviour. Before making a PSPO, the authority must consult with the police, the owner or occupier of the land and whatever community representatives they think appropriate.[45] The guidance states:

> *"It is strongly recommended that the council engages in an open and public consultation to give the users of the public space the opportunity to comment on whether the proposed restriction or restrictions are appropriate, proportionate or needed at all. The council should also ensure that specific groups likely to have a particular interest are consulted, such as a local residents' association, or regular users of a park or those involved in specific activities in the area, such as buskers and other street entertainers."*

69. Given the frequency with which alcohol fuels anti-social behaviour in public places, it is noteworthy that an order may prohibit the consumption of alcohol in a specified place (see section 62).

70. It is an offence to fail (without reasonable excuse) to comply with an order (see section 67) with a person liable on summary conviction to a fine not exceeding level 3 on the standard scale (£1,000) unless the failure to comply related to the consumption of alcohol (or to surrender up alcohol) in which case the fine shall not exceed level 2 on the standard scale (£500)**.** Alternatively a constable or an authorised person may issue a fixed penalty notice not exceeding £100 to anyone he or she has

[39] See Chapter 2 of the 2014 Act, sections 59-75.

[40] The guidance for frontline professionals states: *"Local councils are responsible for making Public Spaces Protection Orders: district councils should take the lead in England with county councils or unitary authorities undertaking the role where there is no district council. In London, borough councils are able to make Public Spaces Protection Orders, as is the Common Council of the City of London and the Council of the Isles of Scilly. In Wales, responsibility falls to county councils or county borough councils. Parish councils and town councils in England, and community councils in Wales are not able to make these Orders. In addition, section 71 of the Anti-social Behaviour, Crime and Policing Act 2014 allows bodies other than local authorities to make Public Spaces Protection Orders in certain circumstances by order of the Secretary of State. This power has been exercised by the Secretary of State to allow the City of London Corporation to manage a number of public spaces with the permission of, and on behalf of, local authorities."*

[41] An initial order may be made for up to three years.

[42] See *Dulgheriu and others v Ealing LBC and others* [2019] 8 WLUK 117 in which the Court of Appeal refused to quash a PSPO made around a women's health clinic. The judge had been entitled to find that the pro-life activists' activities had a detrimental effect on the quality of life of "those in the locality" within the meaning of s.59(2)(a), which included occasional visitors to the area such as women wanting to access the clinic's abortion procedures.

[43] Section 59(6) states that a prohibition or requirement may be framed—(a) so as to apply to all persons, or only to persons in specified categories, or to all persons except those in specified categories; (b) so as to apply at all times, or only at specified times, or at all times except those specified; (c)so as to apply in all circumstances, or only in specified circumstances, or in all circumstances except those specified.

[44] There is a right of appeal for "interested persons": see section 66.

[45] See section 72(4). Before the public spaces protection order is made, the council must publish the draft order in accordance with regulations published by the Secretary of State and ensure that the draft order is available on its website.

reason to believe has committed an offence under section 63 or 67 in relation to a public spaces protection order.

71. Again there is limited guidance concerning the inter-relationship between PSPO and injunctions.[46] However the guidance for frontline professionals sets out a very important overview in relation to homelessness:

> *"Public Spaces Protection Orders should not be used to target people based solely on the fact that someone is homeless or rough sleeping, as this in itself is unlikely to mean that such behaviour is having an unreasonably detrimental effect on the community's quality of life which justifies the restrictions imposed. Councils may receive complaints about homeless people, but they should consider whether the use of a Public Spaces Protection Order is the appropriate response. These Orders should be used only to address any specific behaviour that is causing a detrimental effect on the community's quality of life which is within the control of the person concerned.*
>
> *Councils should therefore consider carefully the nature of any potential Public Spaces Protection Order that may impact on homeless people and rough sleepers. It is recommended that any Order defines precisely the specific activity or behaviour that is having the detrimental impact on the community. Councils should also consider measures that tackle the root causes of the behaviour, such as the provision of public toilets.*
>
> *The council should also consider consulting with national or local homeless charities when considering restrictions or requirements which may impact on homeless people and rough sleepers."*

72. Although the guidance states that, despite any complaints, homelessness/rough sleeping per se should not warrant a PSPO (and therefore also not underpin an application for an injunction), many (but far from all) rough sleepers have alcohol and/or drug dependency issues and/or engage in begging (often "passive"[47]); such behaviour arguably having a detrimental effect on the quality of life of those in the locality, so justifying a PSPO and, subject to the specific criteria,[48] an application for an injunction. If the facts supported the approach, a court could take the view on an application for an injunction (e.g. seeking to exclude one or more individuals from an area) that the real concern was homelessness/rough sleeping and that, given the guidance on PSPOs, an injunction was not appropriate. Alternatively, a court hearing an injunction application could find that a local authority should have considered whether it was appropriate to first use a PSPO to prevent use of drugs, consumption of alcohol or begging in a specific area in which problems have arisen and appear persistent. However as with a CPN the penalty for a failure to comply is solely financial (often with limited prospects of recovery) and so a view is often taken that an order will not prevent recalcitrant individuals.

[46] Section 73 states that the Secretary of State may issue guidance.
[47] See paragraph 362 of this document.

[48] See paragraph 49 of this document.

Possession proceedings

73. A significant proportion of persistent housing related anti-social behaviour will be a breach of the terms of the tenancy forming a potential basis for an order for possession. So as an alternative to (or alongside) seeking an injunction to restrain the behaviour, a landlord may issue proceedings for possession. However, proceedings can be protracted (usually taking months to reach a hearing if contested) and costly[49] (requiring pleadings and witness statements etc[50]). Even if anti-social conduct is established, an outright possession order may not be made given the discretion afforded to the court. Given these factors, possession proceedings are (and in the past were) rarely seen as an attractive alternative to seeking an injunction. The 2014 Act has further altered the balance.

74. The 2014 Act (sections 94-100) introduced a new absolute ground for possession in secure and assured tenancies where anti-social behaviour or criminality has already been proved before a court. So local authorities and housing associations are able to obtain possession on an expedited basis[51] (subject only to procedural failure or any human rights defence[52]) if the tenant, a member of the tenant's household or a visitor to the property is convicted of a serious offence[53], or breaching a criminal behaviour order, or is found by a court to have breached a civil injunction. Unlike the discretionary grounds for possession, the landlord is not required to prove to the court that it is reasonable to grant possession.

75. The existence of the new mandatory ground provides an obvious incentive to seek an injunction to control anti-social behaviour rather than issue possession proceedings alleging conduct has been in breach of the terms of the tenancy. If the conduct is thought to be likely to continue, notwithstanding an order, then possession will be likely to be granted on an expedited basis, even though the underlying allegations supporting the grant of the injunction have not been proved at a hearing.

76. The guidance states:

> *"The absolute ground for possession is intended to be used in the most serious cases and landlords are encouraged to ensure that the ground is used selectively".*

77. The Working Party has not been able to obtain data to enable an overview as to the extent to which the guidance has been followed. It is an example of how the "data desert" prevents analysis of how the provisions of the 2014 Act are being used.

[49] *"It has… been a source of frustration for landlords and victims that in exceptional cases where anti-social behaviour (or criminality) persists and it becomes necessary to seek possession, the processes for evicting anti-social tenants can be lengthy and expensive, prolonging the suffering of victims, witnesses and the community."* per guidance.
[50] The defendant may be able to obtain representation through public funding.
[51] The court only has the discretion to suspend a possession order made under the absolute ground to a date no later than 14 days after the making of the order (unless it appears to the court that exceptional hardship would be caused, in which case it may be postponed to a date no later than six weeks after the making of the order).
[52] Local Authority tenants have a statutory right to request a review of the landlord's decision to seek possession under the absolute ground.
[53] Specified in Schedule 2A Housing Act 1985.

78. The Working Party has also received consistent reports that respondents who are tenants of properties, or members of a tenant's household or regular visitors to a property, are often not being warned/informed by judges of the risk of a possession order if the injunction is breached. Given the importance to most people of retaining their home the Working Party considers this a step which should always be taken.

Underlying criminal offences

79. Some anti-social behaviour, much of which is non-housing related, is also criminal in nature. Examples of less serious offences are:

    a. begging
    b. drunk and/or disorderly behaviour
    c. possession of controlled drugs
    d. prostitution
    e. public order offences.

80. It is necessary to briefly consider each in turn.

Begging

81. It is an offence to beg in a public place under section 4 of the Vagrancy Act 1824[54] (passive begging will suffice i.e. without any need to prove any form of aggression or coercion). However, police action through the criminal courts is, relatively speaking (understandably given limited resources etc), rarely taken, and a custodial sentence cannot be imposed. For obvious reasons a view is often taken that a financial penalty will not be paid or act as an effective deterrent.

82. A view is held by some applicants (and judges) that because begging is a crime it axiomatically causes harassment, alarm or distress i.e. amounts to anti-social behaviour without more. Others take the view that only "aggressive begging" can satisfy the criteria. The lack of consistency is undesirable and guidance is necessary.

Drunk and/or disorderly behaviour

83. It is an offence under section 91 of the Criminal Justice Act 1967[55] to be drunk and disorderly in a public place. The maximum penalty is a level three fine, currently £1000. Section 12 of the Licensing

[54] "*Persons committing certain offences to be deemed rogues and vagabonds….every person wandering abroad and lodging in any barn or outhouse, or in any deserted or unoccupied building, or in the open air, or under a tent, or in any cart or waggon, and not giving a good account of himself or herself; every person wandering abroad, and endeavouring by the exposure of wounds or deformities to obtain or gather alms; every person going about as a gatherer or collector of alms, or endeavouring to procure charitable contributions of any nature or kind, under any false or fraudulent pretence…*"

[55] "*Any person who in any public place is guilty, while drunk, of disorderly behaviour may be arrested without warrant by any person and shall be liable on summary conviction to a fine not exceeding… [level three*]".

Act 1872[56] also makes being drunk in public an offence: the maximum fine is £200. There is also an offence of disorderly conduct under section 5 of the Public Order Act 1986: using threatening, abusive or insulting words or behaviour within the hearing or sight of somebody likely to cause harassment, alarm or distress. An officer can impose an on-the-spot fine or a caution. It is a summary only offence and the court can impose a fine.

Possession of controlled drugs

84. It is illegal to possess, supply and produce controlled drugs. There are warning schemes in relation to possession of cannabis (and khat). Also, if a person is caught in possession of a small amount of any drug for personal use, a formal caution or on-the-spot fine (through a penalty notice for disorder) may be issued. Where a person is caught in possession of more than a minimal amount of Class B or Class C drugs, a prosecution will be the usual course of action. For possession of cannabis, the maximum sentence is 5 years. For possession of heroin or cocaine (Class A), the maximum sentence is 7 years. The sentencing guideline, *Drug Offences: Definitive Guideline* states in relation to possession offences:

> *"Where the defendant is dependent on or has a propensity to misuse drugs and there is sufficient prospect of success, a community order with a drug rehabilitation requirement under section 209 of the Criminal Justice Act 2003 can be a proper alternative to a short or moderate length custodial."*

85. As is considered in detail below[57] a court sentencing for the breach of an injunction under the 2014 Act cannot impose a community order.

Prostitution

86. Section 1(1) of the Street Offences Act 1959[58] makes it a summary-only offence for a person persistently to loiter or solicit in a street or public place for the purposes of offering services as a prostitute. Section 1(4) specifies that for the purposes of section 1, conduct is "persistent" if it takes place on two or more occasions in any period of three months. This offence is punishable by a fine not exceeding level two on the standard scale. For an offence committed after a previous conviction, this increases to a fine not exceeding level three on the standard scale. Section 17 of the Policing and Crime Act 2009 introduced orders requiring attendance at meetings as an alternative penalty to a fine for those convicted under section 1(1). The court may deal with a person convicted of this offence by making an order requiring the offender to attend three meetings with a supervisor specified in the order or with another person as the supervisor may direct. The purpose of the order

[56] *"Every person found drunk in any highway or other public place, whether a building or not, or on any licensed premises, shall be liable to a penalty not exceeding level 1 on the standard scale, and on a second conviction within a period of twelve months shall be liable to a penalty not exceeding level 1 on the standard scale, and on a third or subsequent conviction within such period of twelve months be liable to a penalty not exceeding level 1 on the standard scale."*

[57] See paragraph 387 of this document.

[58] As amended by section 16 of the Policing and Crime Act 2009.

is to assist the offender, through attendance at those meetings, to address the causes of prostitution and find ways to cease engaging in such conduct in the future.

Public order offences

87. Section 5 of the Public Order Act 1986 provides:

> *"5 Harassment, alarm or distress.*
>
> *(1) A person is guilty of an offence if he:*
> *uses threatening or abusive words or behaviour, or disorderly behaviour, or*
> *displays any writing, sign or other visible representation which is threatening or abusive,*
> *within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby.*
>
> *(2) An offence under this section may be committed in a public or a private place, except that no offence is committed where the words or behaviour are used, or the writing, sign or other visible representation is displayed, by a person inside a dwelling and the other person is also inside that or another dwelling…*
>
> *(6) A person guilty of an offence under this section is liable on summary conviction to a fine not exceeding level 3 on the standard scale."*

88. The analysis of these offences reveals that save for possession of drugs (and a potential order under section 17 of the Policing and Crime Act 2009) the penalty imposed by a criminal court for these non-violent (although potentially threatening) types of anti-social behaviour is solely financial. Such financial sentences may be viewed by potential claimants using the 2014 Act as an ineffective deterrent unlikely to amend future behaviour. However, if a person breaches an order made under the 2014 Act restraining the same (or similar) behaviour the court can (and regularly does) impose an immediate custodial sentence (of up to two years): so the making of a civil order exposes a respondent to a very different and much more serious sentence.

89. The criminal law and the 2014 Act share a normative aim: to prevent anti-social behaviour, and there should be some consistency of approach to the underlying conduct. The Working Party believes that some civil judges fail (including when considering the definitive guidelines for breach offences), perhaps through a lack of familiarity with the criminal courts, to appreciate, recognise and take into account the likely sentence that would be imposed by a criminal court for the anti-social behaviour in question (as opposed to a breach of a criminal behaviour order) when categorising behaviour as serious or minor criminal/anti-social behaviour. By comparison, a magistrates' court dealing with a breach of a criminal behaviour order will be very familiar with the likely approach in the same court to the underlying behaviour. The Working Party believes that this problem highlights the need for specific guidance in relation to penalties for breach of anti-social behaviour injunctions. This is covered in detail below.[59]

[59] See paragraph 440 of this document.

Criminal behaviour orders

90. Following a conviction, the 2014 Act provides a criminal court with a power to make an order in essentially the same terms as an order which can be made by a civil court, including the imposition of positive requirements.[60] Section 22 provides:

> *"(2) The court may make a criminal behaviour order against the offender if two conditions are met.*
>
> *(3) The first condition is that the court is satisfied, beyond reasonable doubt, that the offender has engaged in behaviour that caused or was likely to cause harassment, alarm or distress to any person.*
>
> *(4) The second condition is that the court considers that making the order will help in preventing the offender from engaging in such behaviour.*
>
> *(5) A criminal behaviour order is an order which, for the purpose of preventing the offender from engaging in such behaviour:*
> *(a) prohibits the offender from doing anything described in the order;*
> *(b) requires the offender to do anything described in the order.*
>
> *(6) The court may make a criminal behaviour order against the offender only if it is made in addition to:*
> *(a) a sentence imposed in respect of the offence, or*
> *(b) an order discharging the offender conditionally.*
>
> *(7) The court may make a criminal behaviour order against the offender only on the application of the prosecution."*

91. In *DPP v Bulmer*[61] the court discussed the power to make criminal behaviour orders and concluded that the fact an order was likely to fail by non-compliance was not a reason not to make it; Beatson LJ stated:

> *"The wording of section 22(4) of the 2014 Act does not, in my judgment, mean that, where an offender's problem, whether it is a disease, alcoholism or drug addiction, means that he or she is totally unresponsive to an Order and where it is not possible for the underlying cause of the behaviour to be tackled by a positive requirement, the condition in section 22(4) of the 2014 Act is not met. Such an interpretation would fundamentally narrow the scope of the protection given by the 2014 Act when compared to that given by the 1998 Act.*[62]*"*

And:

[60] See section 24 for the procedural requirements.

[61] [2015] EWHC 2323 (Admin).

[62] See also ***R v Boness*** [2005] EWCA Crim 2395 and *R v Kamran Khan* [2018] EWCA Crim 1472.

"Section 22(4) of the 2014 Act does not expressly impose any burden of proof upon the prosecution. While the court hearing an application for a Criminal Behaviour Order should proceed with a proper degree of caution and circumspection because such orders are not lightly to be imposed, satisfaction to the criminal standard is not required in what is an evaluative exercise."

92. So although not to be imposed as a matter of routine, where a positive requirement would address underlying behaviour, if the defendant co-operated and complied with the order, a criminal court has a wide power to impose it. In 2018, 904 criminal behaviour orders were issued across England and Wales.[63]

93. Significantly, breach of a criminal behaviour order carries a maximum sentence of five years, as opposed to the two years maximum for breach of a civil order.[64]

94. Faced with "serious" anti-social behaviour, a criminal prosecution for any underlying offence reflects the gravity of the conduct but also (as well the potential for some offences to have a community sentence imposed) allows an order to be imposed including with positive requirements, the breach of which carries a heavier penalty than breach of an equivalent civil order.

95. It is also important to note that the practical differences in respect of what is faced by defendants/respondents/respondents accused of anti-social behaviour (or breach of an order restraining such behaviour) between the criminal courts and the civil courts do not begin, or end, with the wider sentencing powers. The differences reveal why, in the eyes of some, recalcitrant anti-social behaviour which amounts to criminal conduct would often be better addressed through arrest with the potential of prosecution before the magistrates' court than an application for an order in the county court. It also reveals a failure to "join-up" the civil courts to the very important third-party assistance available in the criminal courts.

A comparison: The magistrates' court and the county court

96. It is instructive and illuminating to compare the practical experiences of defendants/respondents in criminal and civil jurisdictions through the differing journeys of a person accused of anti-social behaviour, which, if proved, amounts to commission of a crime.

97. If a person is arrested for criminal anti-social conduct e.g. a public order act offence or being drunk and disorderly, the first opportunity for third-party evaluation may come at the police station i.e. prior to any proceedings, with the involvement of the NHS Liaison and Diversion Service (L&D). Given the importance that the Working Party attaches to the work of this service, it is necessary to consider its provenance and role.

[63] Source: Home Office Statistics.
[64] See generally paragraph 392 of this document.

The NHS Liaison and Diversion Service (L&D)

98. The NHS L&D service identifies people with mental health, learning disability, substance misuse or other vulnerabilities when they first come into contact with the criminal justice system as suspects, defendants or offenders. It then provides assessment and assistance through diversion from the criminal courts, or during the court processes. The current system was the result of the implementation of the recommendations in the 2009 review by Lord Bradley on people with mental health problems or learning difficulties in the criminal justice system.[65] The Secretary of State for Justice asked Lord Bradley to undertake an independent review in December 2007, under the following terms of reference:

    a. to examine the extent to which offenders with mental health problems or learning disabilities could, in appropriate cases, be diverted from prison to other services and the barriers to such diversion; and
    b. to make recommendations to government, in particular on the organisation of effective court liaison and diversion arrangements and the services needed to support them.

99. Given the remit of this report it is significant to note that Lord Bradley noted the link that can exist between anti-social behaviour and mental health:

> *"I do not feel that this review is the right place to explore in any depth what the potential links might be between mental health and offending. This is an extremely complex issue, and within the broad context of my review there would not be sufficient time to do this issue justice. However, I feel that the following basic description, taken from a submission to the review from the Royal College of Psychiatrists,[66] of the types of relationship between mental disorder and criminal behaviour is extremely useful in trying to understand this population.*
>
> *-The anti-social behaviour is directly related to or driven by aspects of mental disorder. In this case, effective treatment of the mental disorder would be likely to reduce the risk of further anti-social behaviour.*
> *-The anti-social behaviour is indirectly related to mental disorder. Treatment would be likely to make a contribution to a reduction in offending but would not be sufficient in itself to tackle offending behaviour.*
> *-The anti-social behaviour and the mental disorder are related by some common antecedent, for example childhood abuse. Treatment of the mental disorder in itself would not be sufficient to tackle re-offending.*
> *-The anti-social behaviour and the mental disorder are coincidental.*
> *-The mental behaviour is at least partly secondary to the anti-social behaviour."*

[65] It was published in April 2009, so well before the changes brought about by the 2014 Act. https://webarchive.nationalarchives.gov.uk/20130105193845/http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/documents/digitalasset/dh_098698.pdf.

[66] Extract from the submission to the review by the Forensic Faculty, Royal College of Psychiatrists, 6 March 2008.

100. Lord Bradley recognised that the first involvement of the police with a relevant individual was very important:

> *"In most cases, the police are the first point of contact with the criminal justice system and there is an early opportunity through police intervention and liaison to engage services and potentially avoid future problems. I was surprised to discover that the police stage is currently the least developed in the offender pathway in terms of engagement with health and social services, as intervention generally occurs further along the pathway at the court and sentence stages. Therefore, as indicated, this point in the offender pathway provides the greatest opportunity to effect change. This includes improving access to services for offenders and potential offenders, improving safety for individuals and the public, supporting the police to fulfil their responsibilities and providing valuable information to agencies at the later stages of the criminal justice system."*

And (based on the law as it then was):

> *"Before an arrest is made or deemed appropriate, there are several options for a police officer while at street level:*
>
> *-Use discretion and take no further action.*[67]
> *-Impose a formal warning.*[68]
> *-When encountering a person who may appear to have a mental health problem, in the event of a petty crime, such as shoplifting or minor damage, the police officer may still record the crime but choose to take no further action.*
> *'No further action' in this scenario should mean no further criminal justice action, but officers should signpost to or liaise with appropriate local health and social care services where a mental health or learning disability problem has been identified. This is clearly dependent on an officer's knowledge of local services, but anecdotal evidence from stakeholders suggests that in many cases this knowledge is far from comprehensive."*

And:

> *"The potential interventions undertaken by a liaison and diversion service at the police station could provide significant benefits by: - identifying and assessing mental health or learning disability needs swiftly and effectively after arrest; - ensuring that the police can make a fully informed risk assessment of the offender; - identifying the need for the attendance of an Appropriate Adult; - ensuring that those arrestees with serious mental health problems can be referred to mental health facilities before reaching court, which may have necessitated a period*

[67] Post-2014, all police and crime commissioners, and the Mayor's Office for Policing and Crime in London, must have a Community Remedy document in place to set out how victims of less serious crime and anti-social behaviour can have a say in the punishment of perpetrators who receive an 'out of court' disposal; that is, a community resolution, conditional caution or youth conditional caution. Where a conditional caution or youth conditional caution is given, the Community Remedy provides a means of consulting the victim about possible conditions to be attached to the caution.
[68] Now a caution; see generally https://www.gov.uk/government/publications/code-of-practice-for-adult-conditional-cautions.

spent in custody on remand; - providing information for the police and CPS on charging and prosecution; - providing information and advice for solicitors at the police station; - ensuring that people with mental health problems who would not necessarily progress to court stage are signposted to mental health services rather than just dropping out of the system; and – providing information for court services about individuals' mental health or learning disabilities. This will help to inform decisions about the need for psychiatric reports at an earlier stage, about where an offender should be remanded and about sentencing."

101. Lord Bradley recommended that:

"(i) All police custody suites should have access to liaison and diversion services. These services would include improved screening and identification of individuals with mental health problems or learning disabilities, providing information to police and prosecutors to facilitate the earliest possible diversion of offenders with mental disorders from the criminal justice system, and signposting to local health and social care services as appropriate.

(ii) Liaison and diversion services should also provide information and advice services to all relevant staff including solicitors and appropriate adults. – Mental health awareness and learning disabilities should be a key component in the police training programme."

102. Lord Bradley also specifically considered approaches then used in respect of anti-social behaviour including anti-social behaviour orders:

"Penalty Notices and Anti-Social Behaviour Orders

The majority of Penalty Notices for Disorder (PNDs) are issued for alcohol abuse, exhibiting distress or alarming behaviour, any one of which can also be indicative of mental health crises. If these Penalty Notices remain unpaid, the amount can be increased and converted to a fine. If the fine is not paid, this can lead to enforcement through the court. Anti-Social Behaviour Orders (ASBOs) are aimed at targeting behaviour by an individual that "caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself". The behaviour that prompts the issue of an ASBO can often be indicative of a mental health problem and, in addition, the conditions of an ASBO can be difficult to keep for people with mental health or learning disability problems. Participants in the review have told me that neighbourhood policing teams are being encouraged to use ASBOs and PNDs, and they can have the perverse effect of accelerating vulnerable people into the criminal justice system, rather than to appropriate services, if they are not complied with. Although guidance has been issued to sentencers urging more careful consideration when proposing ASBOs for people with mental health problems, a Home Office review of ASBOs found that for 60% of those issued with an ASBO there was a mitigating factor such as mental distress, addiction or learning difficulties.

ASBOs can also be equally problematic for people with learning disabilities. Research into ASBOs found, for example, that people with learning disabilities or autistic spectrum disorders often did not understand the terms of the order or why it was imposed. This makes compliance with

such community-based penalties highly unlikely, which in turn increases the likelihood of eventual custody."

103. His recommendation was:

"Information on an individual's mental health or learning disability needs should be obtained prior to an Anti-Social Behaviour Order or Penalty Notice for Disorder being issued, or for the pre-sentence report if these penalties are breached."

104. At the time of Lord Bradley's review, liaison and diversion services were already in existence: the idea of court liaison and diversion having been first promoted by the Home Office as long ago as 1990. The idea was further supported by the 1992 Reed Report which recommended the following:

"There should be nationwide provision of properly resourced court assessment and diversion schemes and the further development of bail information schemes. ...The longer-term future of many schemes is not yet assured but experience increasingly suggests that, where diversion schemes became established, these come to provide a broader multi-agency focus which, of itself, can make effective disposals easier."

105. Lord Bradley noted that the absence of a centralised strategy over the intervening years had meant that schemes had developed at different rates, or not at all, with many pilot schemes being set up with insecure funding arrangements which were not embedded into the health service or criminal justice infrastructure. He made detailed recommendations as to how the system should be improved.[69]

106. It is the view of the Working Party that much of the content of Lord Bradley's report appears to have been overlooked when the 2014 Act, with its new powers, specifically in relation to the civil courts, was brought into force. Put simply, no consideration was given as to how the civil courts could implement the report's recommendations or how a third party considering an application for an order, or a judge being asked to make an order or to impose a penalty for a breach of an order, could access the NHS L&D service. The Working Party has found that in many cases, if the police have taken no action upon any complaint (leaving the tackling of the anti-social behaviour to a local authority, landlord or other body) there will be no liaison with the L&D service. Also, bodies such as local authorities or landlords do not have set systems for referral to the L&D service. The civil courts have no link with the service at all (despite some civil courts being in multi-jurisdiction court centres where the criminal courts have regular and ongoing liaison with L&D professionals). The Working Party considers the lack of liaison between the civil courts and the L&D service to be a very serious deficiency. The Working Party recommends that the Home Office, Ministry of Justice, HMCTS and the L&D service meet as a matter of urgency to consider how the L&D service should liaise and work with

[69] See generally report Chapter 5. Available at https://webarchive.nationalarchives.gov.uk/20130105193845/http:/www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/documents/digitalasset/dh_098698.pdf.

local agencies (to be set out within local plans) and how the civil courts can gain assistance from/refer to the L&D service.

107. This picture in the civil courts contrasts unfavourably with the criminal justice system. Criminal justice agencies working at the police and courts stages of the pathway are trained to recognise possible signs of vulnerability in people when they first meet them. They can (and should) then alert their local L&D service about the person. An L&D practitioner has immediate access to medical records so can advise of any diagnosed condition or medication. Once someone is identified as having a potential vulnerability, the L&D practitioner can go through screening questions to identify the need, level of risk and urgency presented. It also helps determine whether further assessment is required.

108. After an assessment, an L&D practitioner may refer the identified individual to appropriate mainstream health and social care services or other relevant intervention and support services that can help. A person is also supported to attend their first appointment with any new services and the outcomes of referrals are recorded. L&D services provide a route to treatment for people whose offending behaviour is linked to their illness or vulnerability. The referral of a person for appropriate health or social care can enable them to be diverted away from the criminal justice system into a more appropriate treatment plan/setting. The aim is always to address the underlying cause of the relevant conduct/behaviour.

109. Importantly, the practitioner can share, with consent, information gained from assessments with criminal justice agencies and the judiciary, so that they can make more informed and timely decisions about out-of-court disposals, case management and sentencing.

110. The L&D service also provides outreach support. Multi-disciplinary teams, including support, time and recovery workers, and peer support workers, work with people in community settings during the currency of any criminal proceedings, including addressing issues such as housing and financial advice. As a result, the L&D service is able to provide updated information to any court reviewing a sentence or order.

111. The current L&D website[70] provides an explanation about the need for the service:

> *"Why are L&D services needed?*
>
> *There are well-documented high levels of health and care needs within youth and adult offender populations, with the prevalence higher than in the general population:*
> - *31% of young people (aged 13-18) who offended (including young people in custody and in the community) were identified as having a mental health need.*
> - *The prevalence rates for personality disorder, psychosis, attention disorders, post-traumatic stress disorder and self-harm are notably higher than in the general population.*

[70] https://www.england.nhs.uk/commissioning/health-just/liaison-and-diversion/ld-faqs/#q1

- *Learning disability is more common in young people in custody; a prevalence of 23-32%, compared to 2-4% of the general population. A study by Harrington & Bailey (2005), Chitsabesan et al. (2006) found that 20% of young offenders had a learning disability, with a further 31% assessed as 'borderline' regarding intellectual functioning as measured via the Wechsler Abbreviated Scale of Intelligence.*
- *Almost 50% of adult prisoners suffer from anxiety and/or depression compared with 15% of the general population.*
- *An analysis of data drawn from over 120,000 Offender Assessment System ('OASys') Assessments found that nearly half (47%) had misused alcohol in the past, 32% had violent behaviour related to their alcohol use and 38% were found to have a criminogenic need relating to alcohol misuse, potentially linked to their risk of reconviction.*
- *Evidence from an Office of National Statistics survey (1997) of psychiatric morbidity among prisoners found that the prevalence of any personality disorder was 78% for male remand prisoners, 64% for male sentenced and 50% for all female sentenced prisoners.*
- *People in contact with the criminal justice system are also known to be one of the groups of people known to be at higher risk of suicide than the general population.*
- *Certain groups that have protected characteristics under the Equalities Act (2010) are over-represented in within the criminal justice system. For example, over one-quarter of the prison population whose ethnicity was recorded were from a minority ethnic group. Among British nationals 21% of the population were from a minority ethnic group, 62% of foreign national prisoners were from a minority ethnic group (2012).*
- *The offender population also experience higher socio-economic disadvantage and related health inequalities (generally and those health needs that relate to certain protected characteristics).*

  By addressing people's mental health, learning disability and/or substance misuse vulnerabilities when they first come into contact with the youth and adult justice systems, it is expected that offending behaviours will be addressed, contributing to reductions in future arrests and in the use of police and court time."

112. The national service specification for the L&D service was updated in September 2019. It outlines how services can provide a consistent and high-quality approach across England. The aim was for 100% coverage across England by March 2020 and the plan is to extend the service to the Crown Court.

113. Not only does the lack of involvement of the L&D service in many cases which end up before the civil courts prevent "diversion" away from proceedings (including at the earliest stages), it means that a civil court does not have the information ordinarily available to a criminal court.

114. If the L&D service has not become involved after referral by the police when a person appears at the magistrates' court, he/she will ordinarily be asked if they have legal representation. If they do not have a solicitor, they will be entitled to see the duty solicitor (who can act on one occasion but can

apply for legal aid or further representation). If the solicitor or the court had any concerns over mental health they can refer the person to the L&D service. When the matter first comes before the court, if the bench/judge has any concern then the defendant can be referred to the L&D service (there are practitioners based at many of the larger court centres).

115. So before a court considers an allegation of the commission of a criminal offence, there should have been an assessment at the police station, as to whether there should be referral to the L&D service, advice from a solicitor (who can also consider referral) and the court will have had an opportunity to consider referral.

116. This is in sharp contrast to the county court where the person who faces an application for an injunction will frequently not have any legal assistance (and there is usually no duty solicitor). It is also highly unlikely that there will have been a referral to the L&D service. This means that the court is in a particularly difficult position if it has concerns over capacity and/or the person's ability to comply with the terms of an injunction, as it can often be very difficult to gain any reliable relevant information or expert advice as to mental health issues or indeed as to the defendant's background generally.

National Probation Service

117. In the criminal courts, if a person is found or pleads guilty, a pre-sentence report (PSR) will usually be obtained from the National Probation Service.[71] The purpose of a PSR is to provide information to the sentencing court about the offender and the offence committed and to help the court decide on a suitable sentence. This report will describe the circumstances of the crime, the factors involved and the risk the offender poses to the public. The report will propose a sentence, but it is the court that makes the final decision. Typically, the production of a PSR involves interviewing the offender, reading court papers and making an assessment of the likelihood of reconviction and risk, which may include use of an offender assessment system (OASys). There are three national formats of report:

    a. Oral report: Orally presented and most frequently delivered on the day that the report is requested. These are designed to provide advice on offenders who are lower risk or of lower complexity, and where a court may have a specific sentence in mind.
    b. Short Format Report (SFR): A written report most frequently delivered after a short adjournment, but can be delivered to court on the day that the report is requested. These are designed to provide advice for offenders with more complex circumstances, or where more specific enquiries need to be made with other agencies.
    c. Standard Delivery Report (SDR): A longer written report, delivered to court within 15 working days following request. These are designed to provide a comprehensive assessment for offenders with highly complex circumstances, and whose offending is serious and higher risk.

[71] Reports are not mandatory; whether a PSR is ordered is a matter of judicial discretion; see section 156 of CJA 2003.

118. Depending on the possible sentences,[72] the author of the report can recommend a range of requirements and interventions which may be part of a community order or suspended sentence order[73] (e.g. rehabilitation activity requirement, alcohol treatment and drug rehabilitation courses). As an alternative, or in addition, to any sentence imposed, the court can make a criminal behaviour order.[74] Sentencing guidelines (including as to breach of any criminal behaviour order) are available for the vast majority of offences and must be considered. Importantly, the probation services will manage most community sentences for adults that require statutory oversight and report to the court if necessary.

119. Again, the contrast with the civil courts is sharp. A civil judge has no ability to call on the services of the Probation Service. There is no professionally-prepared report upon the respondent (and any underlying causes of anti-social behaviour) and the judge has to work with information provided by the applicant and such information as the defendant is able and willing to give. There is no independent agency to recommend and then supervise a community order.

Conclusion on the comparison

120. In the civil courts, if a defendant is alleged to have breached an order made under the 2014 Act, the matter proceeds to a committal hearing. As committal proceedings are deemed "quasi-criminal", legal aid is available, but it may still be difficult to obtain representation.[75] There will be no PSR, and, most likely, no assistance from probation or the L&D service. Further, as set out above,[76] civil judges will often have much less experience of the sentencing appropriate for the underlying criminal conduct than that possessed by criminal courts.

121. This brief comparison reveals why many judges and practitioners feel that civil courts are, relative to the criminal courts, ill-equipped to deal with anti-social behaviour consisting of or including substantive criminal offences.

122. The Working Party recognises that the obvious attractions for a claimant of seeking an injunction under the 2014 Act for conduct which amounts to criminal offences, as opposed to involving the police/criminal proceedings, are the lower standard of proof, that (at least initially) hearsay evidence can be used and that proceedings are likely to progress more quickly. However, given the very real disadvantages a civil court faces when dealing with a defendant, specifically the lack of opportunity for assessment (and, where appropriate, diversion), and/or adequate information about any underlying mental health (or other relevant condition), careful consideration should be given to addressing these issues before an order is sought. If possible there should be liaison between the various agencies who could be engaged in combatting the behaviour, including the L&D service, to ensure that the most effective (and proportionate) path is taken. As set out below, the Working Party

[72] Some offences may only carry a financial penalty; see paragraphs 79-88 of this document.
[73] Reports do not directly propose suspended sentence orders but will set out the options.
[74] See paragraph 84 of this document.
[75] See generally the picture in relation to the availability of publicly-funded advice/representation at paragraphs 162-177 of this document.
[76] See paragraph 381 of this document.

believes both local plans and a national protocol are necessary to ensure liaison and a consistent approach to actions before any proceedings.

123. When considering an application for an injunction under the 2014 Act,[77] given that there is a duty under section 14 of the Act upon a person applying for an injunction[78] (in respect of a person over 18 years[79]) to "*inform any other body or individual the applicant thinks appropriate of the application*", the court may, and when appropriate, should, require confirmation that (including as required by any protocol) there has been liaison with the police (particularly given that a breach may involve what the courts would view as a "serious" criminal act[80] and given the practical considerations and limited sentencing powers of a civil court[81]), the L&D service, the Probation Service or any relevant provider of support/treatment. Further, conformation could be sought that any local, multi-agency plan devised to ensure consideration of the best approaches to tackling anti-social behaviour of various types within a region had been followed.[82]

124. The Working Party has heard that some agencies (particularly some local authorities and social housing providers) already have comprehensive internal protocols and regularly liaise with other agencies in an attempt to address underlying behaviour before seeking an order from the court. However, the Working Party has also been made aware of cases where appropriate liaison has not taken place and a result believes that a national protocol is required.[83] However, a natural precursor to liaison required by a protocol is a local plan for co-operation/liaison between relevant agencies. One agency which does not currently usually feature prior to or during the civil court process, but which may be able[84] to provide very considerable assistance prior to the step of issuing court proceedings through liaison with other agencies, is the Probation Service.

[77] Unless made without notice.

[78] This subsection does not apply to a without-notice application.

[79] There is a mandatory requirement to consult with the Youth Offending Team in respect of any person under 18 at the time the application is made: section 14 (1)(a).

[80] E.g. threats to kill contrary to section 16 of the Offences against the Person Act 1861 which carry a maximum sentence of 10 years.

[81] See paragraphs 379-418 of this document.

[82] See paragraphs 135-145 of this document.

[83] See paragraphs 146-150 of this document.

[84] Subject to limitations upon information sharing with certain bodies.

SECTION 4 – Statutory guidance, liaison and consultation

125. As set out in the statutory guidance:[85]

> *"The powers introduced by the 2014 Act are deliberately local in nature. Those who work within and for local communities will be best placed to understand what is driving the behaviour in question, the impact that it is having, and to determine the most appropriate response."*

126. Save for section 14, which requires an applicant to inform any other body or individual which the applicant thinks appropriate of the application, the 2014 Act itself contains no statutory duty upon an applicant for an injunction to consult with any agency in respect of a proposed defendant who is over 18 years old (there is a statutory duty to consult the Youth Offending Team for a person under 18 years).

127. The statutory guidance states:

> *"The response to anti-social behaviour may require collaborative working between different agencies to determine the most appropriate solution. Where a report or complaint is made to one agency, that lead agency should consider the potential role of others in providing a solution if they are not themselves able to take action. This will help to ensure that reports of anti-social behaviour are not inadvertently lost between the different reporting arrangements of different agencies. It may also help to provide a mechanism for considering the potential for engaging the wider community in finding solutions to specific anti-social behaviour issues."*

And:

> *"The powers for dealing with anti-social behaviour provided by the Anti-social Behaviour, Crime and Policing Act 2014 are deliberately flexible to allow professionals to use them to protect the public from different forms of anti-social behaviour.*
>
> *Working together and sharing information*
>
> *The powers allow the police, councils, social landlords and others to deal quickly with issues as they arise, with agencies working together where appropriate to ensure the best results for victims. To assist joined-up working, an effective information-sharing protocol is essential. There is already a duty on some bodies (such as the police and councils) to work together and in respect of anti-social behaviour specifically, there is a specific duty on specified bodies to work together when the ASB Case Review/Community Trigger is activated."*

[85] *Anti-social Behaviour, Crime and Policing Act 2014: Anti-social behaviour powers: Statutory guidance for frontline professionals* (revised August 2019) available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/823316/2019-08-05_ASB_Revised_Statutory_Guidance_V2.2.pdf.

128. The statutory guidance requires that relevant bodies in a local area (the district council, unitary authority or relevant London borough council for the area, the police, clinical commissioning groups in England and local health boards in Wales and registered providers of social housing who are co-opted into this group[86]) must agree on, and publish, their Case Review/Community Trigger procedures.

129. In relation to consultation before applications for civil injunctions sought against persons who are over 18 years, the statutory guidance states:

> *"Applicants should also consider consulting the relevant local authority as they may hold information which is of relevance and/or which may need to be considered as part of the application. For example, a young person may be a child in need or on a child protection plan and additional safeguarding measures may be required. The local authority may also hold information which supports the application."*

130. The same guidance document states in relation to consultation before seeking a criminal behaviour order:

> *"The legislation has deliberately kept formal consultation requirements to a minimum to enable agencies to act quickly where needed to protect victims and communities. However, in most cases it is likely that the police or local council will wish to consult with other agencies. This could include local organisations that have come into contact with the individual, such as schools and colleges of further education, providers of probation services, social services, mental health services, housing providers or others. Their views should be considered before the decision is made to ask the CPS to consider applying for a CBO. This will ensure that an order is the proper course of action in each case and that the terms of the order are appropriate."*

131. It is difficult to understand why such guidance should not equally relate to the seeking of a civil injunction.

132. The Working Party believes that in every case in which a civil injunction is sought the applicant should consider liaison with any agency/body who may have (and is able to share) relevant information in respect of the proposed respondent, including as to any risk posed by an individual. When applying for a sexual risk order[87] (a civil order obtained when an individual has not been

[86] The statutory guidance states: "*The legislation allows for providers of social housing to be co-opted into local arrangements but it does not specify which housing providers should be co-opted. The recommended approach is to co-opt larger housing providers for the purposes of developing and reviewing the local procedures and setting the local threshold, with smaller providers involved where there are specific cases concerning their tenants."*

[87] An SRO may be applied for on free standing application to the magistrates' court by the chief officer of police or the Director General of the National Crime Agency.

convicted of a sexual offence but is nevertheless thought to pose a risk of harm[88]) a risk assessment is required which requires liaison. Home Office guidance[89] states:

> *"The assessment process to be undertaken by the police will need to consider the degree of risk that the individual poses at that time. It is suggested that, where appropriate, the assessment should be carried out in consultation with other relevant agencies, such as the national probation service, social services and other child protection agencies. However, because an SRO may be sought in relation to a person without a previous criminal conviction (unlike the Sexual Harm Prevention Order), consideration may need to be given to using an external independent risk assessor."*

133. The Working Party believes that it should be considered good practice for any applicant or an injunction under the 2014 Act to undertake a risk assessment within its analysis, after consultation with appropriate bodies.

134. The Working Party appreciates that some applicants for civil injunctions (such as smaller social housing providers) may not know how to undertake consultation/liaison with all relevant agencies, or indeed who they are[90] (and so be able to satisfy a judge that such consultation has taken place). The Working Party believes that consideration should be given by the Home Office to guidance which ensures that the relevant bodies in a local area[91] agree on, and publish, a local plan in relation to the addressing of anti-social behaviour.[92] A national protocol could then refer to such plans.

A local plan

135. As well as Community Safety Partnerships[93] (CSP) which consider local strategy in relation to crime (including anti-social behaviour) at a generic level, there may also be more focused liaison between relevant agencies at a local level in relation to anti-social behaviour, the nature and extent of which varies (there appears to be a degree of "postcode lottery"). Whilst in some areas there are bodies, the purpose of which is to facilitate inter-agency consideration of how to risk assess and address the anti-social behaviour of specific individuals (as opposed to generic issues), in other areas no such bodies/meetings exist.

[88] An SRO may be made in respect of an individual who has done an act of a sexual nature, and as a result of which, there is reasonable cause to believe that it is necessary to make an order to protect the public from harm. The order cannot require the offender to comply with conditions requiring positive action, although it does have the effect of requiring the individual to notify the police of their name and address while the order has effect. The minimum duration for a full order is two years.

[89] Guidance on Part 2 of the Sexual Offences Act 2013 (September 2018).

[90] Or relevant points of contact.

[91] A district council, unitary authority or relevant London borough council for the area, the police, clinical commissioning groups in England and local health boards in Wales and registered providers of social housing who are co-opted into this group

[92] The consultation process should be two way. As the statutory guidance points out in relation to the new absolute ground for possession under the Act, "*close working relationships with the police, local councils and other local agencies are important to ensure that the landlord is always aware when one or more of the triggers for the absolute ground has occurred*".

[93] Set up as a result of the Crime and Disorder Act 1998 sections 5-7. A CSP is made up of representatives from the police, local authorities, fire and rescue authorities, and health and probation services (the "responsible authorities").

136. The different forms of local bodies, which may consider relevant individuals who are believed to be engaged in (or are the victims of) anti-social behaviour, include:

a. Multi-Agency Risk Assessment Conferences[94] (MARACs).

A MARAC is a victim-focused information sharing and risk management meeting attended by key agencies, where high-risk cases are discussed. The role of the MARAC is to facilitate, monitor and evaluate effective information sharing to enable appropriate actions to be taken to increase public safety. MARACs are not a statutory construct, so there is no formal obligation for MARACs to exist in every area.

In the Metropolitan Police area there are Community Multi-Agency Risk Assessment Conferences (CMARACs), which are multi-agency hubs for safeguarding and anti-social behaviour:

> *"Across London CMARACs are attended by local authorities, police, mental health services, housing practitioners, safeguarding advisors but also organisations like Fire and Rescue Service, London Ambulance Service, GPs and specialists from statutory and voluntary sectors on an as required basis. This is innovative and creative problem solving and not only is cost effective but captures the full benefits of partnership working allowing each member to bring their piece of the puzzle to the table and maximise opportunities for collaboration and early intervention. The CMARAC is gaining momentum and currently over 50% of London's boroughs have adopted the process. Most are managed and co-ordinated by the local council Community Safety Team and police. A number of boroughs have received external funding from either MOPAC or Public Health to introduce the CMARAC co-ordinator role."*[95]

b. Multi-agency Safeguarding Hubs (MASH).[96]
c. Specific local initiatives. By way of examples:

(i) In Surrey, "Community Harm and Risk Management Meetings" (CHaRMM) assess and try to manage high impact, anti-social offenders including high impact drinkers.
(ii) In South Devon and Torbay, the "Turning Corners Project" was created to identify, divert and safeguard young people who are under 18 and at risk of criminal exploitation or currently engaged in violence or disorder outside the home. The project is overseen by a monitoring board with localised implementation panels within Torbay in South Devon. Each locality has a panel with a pre-agreed and fixed membership. Key partners include the police, the Community Safety Partnership, education, health, youth services and targeted outreach services. The idea is to formulate an action plan.

[94] The idea of a MARAC started in Cardiff in 2001.
[95] "*Anti-social behaviour effective practice guide";* Humberside police 2018.
[96] See generally https://www.gov.uk/government/news/working-together-to-safeguard-children-multi-agency-safeguarding-hubs.

d. In some parts of the country, Alcohol Change UK has set up a specific 'Blue Light' multi-agency group to manage the highest impact drinkers. Alcohol Change UK is the new charity formed by the merger of Alcohol Research UK and Alcohol Concern.
e. Multi-agency networks have been established as part of the Making Every Adult Matter (MEAM) initiative.[97]

137. It is the view of the Working Party that the Home Office should consider issuing guidance to ensure such local groups/bodies can work together to provide assessment of, and assistance/guidance/treatment to, individuals thought to be engaged in anti-social behaviour prior to/instead of an application to the court for an order under the 2014 Act.

138. The Working Party believes that there should be a local plan in existence for each designated area of England and Wales ("an area"), which identifies the relevant local agencies/bodies engaged in the (risk) assessment and prevention of anti-social behaviour (including the courts) and also the provision of assistance, support and treatment to those who are believed to be engaging in such behaviour. It should also address how these bodies/agencies are to liaise.

139. An area could be the region covered by a Designated Civil Judge, a Police and Crime Commissioner, a local authority or group of local authorities. The Working Party believes that this is a matter for liaison between the Home Office and the Ministry of Housing, Communities and Local Government, the Police and Crime Commissioners and the Ministry of Justice.[98]

140. A central aim of the local plan should be to facilitate inter-agency consideration of individual cases before any application is made for an injunction under the 2014 Act, and at all times the key consideration should be how any underlying causes of the behaviour can be addressed/tackled[99] so that the conduct ceases. If bodies, who it is expected/hoped will deliver assistance or treatment, have had a chance to input into a local plan, and in particular how individuals can be "signposted"/encouraged to communicate with them, then it is possible that there could be early intervention. Failure to voluntarily co-operate/engage with such bodies/agencies would be an

[97] Making Every Adult Matter (MEAM) is a coalition of Clinks, Homeless Link and Mind formed to improve policy and services for people facing multiple needs. Together the charities represent over 1,300 frontline organisations and have an interest in the criminal justice, substance misuse, homelessness and mental health sectors.

[98] Not the least of the reasons for which is that there are potentially funding implications.

[99] As the Alcohol Concern Report states, *"An injunction should be a late, if not final, stage of a process that attempts to reduce the antisocial behaviour by other means. Alcohol services should be part of that process from the earliest possible point. This might involve:*

- *Community outreach alongside police officers, PCSOs and neighbourhood wardens to engage someone into treatment or to help work to reduce the harm and impact involved.*
- *Being recommended as a route in warning letters and Acceptable Behaviour Contracts and offering a very speedy, even proactive, response to those individuals.*
- *Offering attendance at a service as a means of reducing the cost of a Fixed Penalty Notice.*
- *Attending meetings with the client where the behaviour is discussed.*

Community safety staff and public health commissioners may also discuss whether local alcohol services can do more to prevent the need for CBOs. Services which offer assertive outreach, which work with people in their homes or on the streets and are willing to work with people who are ambivalent about, or reluctant to, change will be helpful in targeting those who are on the journey towards a CBO or civil injunction."

important factor for a court to consider in any subsequent application for an order under the 2014 Act.

141. A local plan should also address data sharing between agencies/bodies/groups. It is beyond the remit of the Working Party to give detailed consideration to the legality and practicalities of information sharing. As a basic overview, personal data held under duty of confidence may be disclosed if there is a compelling reason of overriding public interest or another overriding statutory justification which permits disclosure.[100] Public interest could include:

    i. the administration of justice
    ii. maintaining public safety
    iii. prevention of crime and disorder
    iv. protection of vulnerable members of the community.

142. Any disclosure would have to be proportionate to the intended aim. Further, disclosure would have to be necessary with no other equally effective means of achieving the same aim. When considering any disclosure, there would have to be consideration that it complies with Article 8 of the Human Rights Act 1998. Very importantly, details of any victim, witness or complainant should never be disclosed without written consent.

143. The local plan should therefore consider:

    a. The steps which should be taken by an applicant (and other agencies) prior to the commencement of court proceedings, including multi-agency risk assessment of relevant individuals and analysis of how underlying causes of the anti-social behaviour can be addressed and what options are available for an early intervention approach or alternative approach, assistance, support or treatment.
    b. How applicants are to liaise with the local authority, the L&D service and other agencies to secure relevant information about the respondent (including how and to what extent data can be shared).
    c. How applicants are to liaise with the police/CPS/Probation Service to ensure that, so far as practicable, the civil court has all relevant information in relation to any past or present criminal proceedings or sentences.
    d. Identifying lead individuals with agencies/organisations to facilitate better liaison.
    e. In respect of an application under the 2014 Act, how the court can be provided with an assessment of the underlying causes of the anti-social behaviour and what options are available for assistance, support or treatment to be the subject of a positive requirement or otherwise.
    f. Reporting and the local monitoring of positive requirements (and the success rates, to identify "what works").[101]

[100] See e.g. section 115 of the Crime and Disorder Act 1998: "*Any person who, apart from this subsection, would not have power to disclose information— (a)to a relevant authority; or (b)to a person acting on behalf of such an authority, shall have power to do so in any case where the disclosure is necessary or expedient for the purposes of any provision of this Act.*"
[101] See paragraph 376 of this document.

g. In respect of breaches:
    - How warrants are to be executed;
    - which are the "out of hours" courts and how contact is to be made with the court;
    - how the Court can be provided with any/any further assessment of the underlying causes of the anti-social behaviour and what options are available for assistance, support or treatment to be the subject of a positive requirement or otherwise.
h. How training should be delivered to promote better understanding of the role of relevant agencies and potential steps to combat anti-social behaviour.

144. The Working Party believes that within each area a nominated body should have responsibility for compiling and updating the local plan. It is suggested that a (non-exhaustive) list of those who should be invited to attend meetings to formulate/consider the plan for an area should be:

a. Relevant officers within the local authority (including the housing department, legal department and any outreach team)
b. Local social housing providers
c. The local chief constable
d. The police and crime commissioner
e. A representative of any local Out of Court Disposal Panel
f. A local representative of the National Probation Service
g. A local representative of the CPS
h. A local representative of the NHS L&D service
i. A representative of the local mental health trust
j. Local agencies providing support/assistance with drug and alcohol misuse
k. Local agencies providing assistance with homelessness
l. A member of the local Law Society/local legal aid solicitor
m. A representative of any local law centre/pro-bono legal advice provider
n. The Designated Civil Judge (DCJ)
o. An HMCTS manager with responsibility for the DCJ region

145. The Working Party also believes:

a. the local plan should be publicly available (for general transparency and reasons of practicality: some social housing providers have properties across the country and many in more than one local authority area);
b. the plan should be periodically reviewed.

A pre-action protocol

146. Pre-action protocols set out the steps the court would normally expect parties to take before commencing proceedings for particular types of civil claims.

147. Whilst there is currently no Home Office guidance as to a protocol or a formal court protocol (i.e. an annex to the civil procedure rules) in place, many local authorities and social housing providers will

have formal guidance in place as to the steps which should be taken before an application is made for a civil injunction. However, such local/individual procedures/protocols vary considerably and are rarely produced to the court. The Working Party has found significant support for a national protocol following and, where necessary, improving upon existing best practice. Confirmation of compliance with the protocol would give the Court reassurance that appropriate steps had been taken short of formal action and also that there had been appropriate liaison with other agencies/organisations and consideration given to potentially suitable positive requirements.

148. Any protocol would need to reflect the two different types of anti-social behaviour:

a. anti-social behaviour linked to use or occupation of a property;
b. other anti-social behaviour;

and also be in language which is easy for a proposed respondent (or advisor) to understand. Although the final wording would be for the Home Office or the Civil Procedure Rule Committee, the Working Party suggests a protocol could be as follows:

PRE-ACTION PROTOCOL IN RELATION TO APPLICATIONS FOR INJUNCTIONS UNDER THE ANTI-SOCIAL BEHAVIOUR, CRIME AND POLICING ACT 2014

PART 1: AIMS AND SCOPE OF THE PROTOCOL

1.1 This protocol applies to all applications for injunctions brought under Part 1, Anti-social Behaviour, Crime and Policing Act 2014 (ASBCPA 2014), whether pursued alone or in combination with another claim (e.g. for possession of a property).

1.2 It applies whenever an applicant within section 5, ASBCPA 2014 seeks an order pursuant to the powers under that Act. Insofar as any other protocol shall apply to a claim brought with the application (e.g. the pre-action protocol for possession claims by social landlords); that protocol shall continue to apply and nothing set out in this protocol shall override any of its content.

1.3 It recognises that applications made under ASBCPA 2014 are different to civil claims which solely involve the private rights and interest of the parties to the litigation as they are brought as part of the applicant's wider public protection functions.

1.4 Whilst the aims of the protocol are

(a) to encourage more pre-action contact and the exchange of information between applicants and other parties;
(b) to enable the parties to avoid litigation by agreeing a way forward if possible; and
(c) to enable court time to be used more effectively if proceedings are necessary;

it is recognised that the nature of proceedings of this kind is such that the claimant's wider responsibilities may, on occasion, limit the scope for pre-action contact and settlement.

1.5 The protocol is intended to be consistent, and to be read in conjunction, with relevant statutory guidance issued from time to time by central government or the Welsh Ministers. It does not replace such guidance, to which applicants are always required to have regard. Applicants should also comply

with their own relevant internal policies (which they should be prepared to share with the court) and any local plan in relation to consultation before commencing action in relation to anti-social behaviour.

1.6 Courts should take into account whether this protocol has been followed when considering whether to make an order, and, if so, its terms.

1.7 If the applicant is aware that the proposed respondent may have difficulty in reading or understanding information given or requests made, the applicant should take reasonable steps to ensure that the proposed respondent understands, and can respond to, any information given/request made. The applicant must set out the relevant details to the court and be able to demonstrate to the court that such reasonable steps have been taken.

1.8 If the applicant is aware that the proposed respondent is under 18, consultation in relation to the proposed application should take place with the Youth Offending Team at the earliest possible stage and in any event must take place before the application is made. Consideration should also be given at an early stage as to whether or not any issues arise under the Children Act 1989 and/or the Children Act 2004.

1.9 If the applicant is aware that the proposed respondent is aged 18-25 and is a care leaver, the applicant should take steps to ascertain whether the respondent has a personal advisor as provided for by section 3 of the Children & Social Work Act 2017 and if so, to consult with that advisor. If the respondent does not have a personal advisor, the applicant should advise the respondent as to his/her entitlement to have one.

1.10 If the applicant is aware that the proposed respondent is potentially vulnerable, and/or has mental health issues, consideration should take place at the earliest possible stage, and in any event must take place before the application, as to:

- *(a) whether or not the proposed respondent has the mental capacity to defend a claim for an injunction and, if not, after consultation with appropriate bodies, as to how to make arrangements for an application for the appointment of a litigation friend in accordance with CPR 21;*
- *(b) whether the proposed respondent should be directed to the NHS Liaison and Diversion Service or other health professional;*
- *(c) whether or not any issues arise under the Equality Act 2010;*
- *(d) whether or not there is a need for a community case assessment in accordance with the Care Act 2014;*
- *(e) what steps can be taken to enable the proposed respondent to fully participate in the proceedings and (if they wish to do so) to give their best evidence.*

PART 2: CLAIMS BASED ON ANTI-SOCIAL BEHAVIOUR

2.1 Before deciding to bring a claim for an injunction, the applicant should:

(i) consider whether an early intervention approach or alternative approach (e.g. mediation or restorative justice) would be appropriate and, if so, pursue that approach;

(ii) comply with any statutory guidance and local plan.

2.2 If the applicant decides that an approach referred to at para.2.1(i) is not appropriate, it should explain that decision to the court in a witness statement.

2.3 The applicant should comply with this part of the protocol unless there is a good reason not to do so. Such reasons may include, but are not limited to, that the applicant:

(i) considers it appropriate to take action urgently;

(ii) considers it necessary to protect any person;

(iii) has been requested not to contact the proposed respondent by another agency, or agencies, and considers it appropriate to comply with that request;

(iv) has already done so in relation to previous complaints.

2.4 If the applicant considers there to be a good reason not to comply, that reason should be explained to the court in a witness statement.

2.5 At the earliest opportunity, the applicant should contact the person who is alleged to have engaged in antisocial behaviour and:

(i) provide full details of the allegations of anti-social behaviour so as to enable them to respond; and

(ii) set out the steps which may be taken to obtain legal representation or any other assistance in respect of potential action.

2.6 The applicant and the proposed respondent should discuss and try to agree the steps that can be taken to address any underlying causes of anti-social behaviour. To that end, the proposed respondent should, unless there is good reason:

(i) inform the applicant of any support/treatment needs he/she may have; and

(ii) provide written consent for the applicant to contact relevant agencies to obtain information about such needs/treatment.

2.7 Following any discussion, the applicant should set out clearly in writing (or communicate by such other means as are necessary to ensure that the proposed respondent has and understands the information):

(i) any steps that have been agreed and the timescales within which such steps must be taken; and

(ii) the circumstances in which legal action may nonetheless be taken; or

(iii) if no agreement could be reached, why this was so and the action that the applicant intends to take.

2.8 The applicant (as may be required by/under the relevant local plan) should take reasonable steps to establish effective ongoing liaison with appropriate support services and, where appropriate, with the proposed respondent's consent, make direct contact with appropriate services before taking any decision as to enforcement action.

2.9 Before commencing proceedings, (as may be required by/under the relevant local plan) the applicant must consider whether the order to be sought should include any positive requirements for the purpose of preventing the proposed respondent from engaging in anti-social behaviour, and if so, should identify such requirement(s) and the person(s) who should be responsible for supervising compliance. The applicant should set out in a witness statement for the court details of its consideration of the need/potential for positive requirements.

PART 3: PROCEDURE

3.1 Any application for an injunction ASBCPA 2014 should be accompanied by evidence upon the following matters:

(a) What steps have been taken to address any anti-social behaviour before seeking an order under the Act whether by an early intervention approach or alternative approach (e.g. mediation or restorative justice) or otherwise.

(b) Confirmation that there has been compliance with the applicant's relevant internal policies (if any) and any local plan in relation to consultation before commencing action in relation to anti-social behaviour.

(c) Grounds for any belief that the respondent is, or may be, vulnerable and/or has mental health issues.

(d) Details of any difficulty the respondent may have in reading or understanding information and what steps have been taken in light of such difficulty.

(e) Details of the steps taken to advise the respondent as to how to obtain legal representation or any other assistance in respect of potential action.

(f) Details of consideration of the need/potential for positive requirements within the order.

(g) If the applicant seeks a power of arrest to any proposed term, an explanation of the basis by which the statutory test under section 4 is met.

(h) If the application is made without notice, the reasons why notice has not been given (see CPR 25.3(3)).

3.2 If the applicant unreasonably fails to comply with the terms of this protocol, the court may impose one or more of the following sanctions:

(i) an order for costs;

(ii) adjournment, strike out or dismissal of the claim.

3.3 If the respondent fails to comply with the terms of this protocol, the court may take such failure into account when considering whether or not to grant an injunction and if so, its terms.

149. The Working Party recognises that applications for an injunction may be accompanied by claims by social landlords for possession on: (a) Grounds 1 and 2, Schedule 2, Housing Act 1985; (b) section 84A, Housing Act 1985; (c) Ground 7A, Schedule 1, Housing Act 1988; (d) Grounds 12 and 14, Schedule 2, Housing Act 1988; (e) Section 128 Housing Act 1996, if based on anti-social behaviour; (f) Section 21 Housing Act 1988, if based on anti-social behaviour. However, there is already a pre-action protocol and other guidance in existence in relation to such claims for possession and as a result it is better to confine the protocol to matters applicable to all applications under the 2014 Act.

150. As for the method of bringing a protocol into force, the content of formal pre-action protocols is considered by the Civil Procedure Rule Committee and approved by the Master of the Rolls (protocols are annexed to the Civil Procedure Rules). An alternative would be for the Home Office to set out a protocol within amended or further statutory guidance.

151. The Working Party recommends that the Home Office, Ministry of Justice and the Civil Procedure Rule Committee should consider how a pre-action protocol should best be brought into force.

SECTION 5 – Procedure

Commencing proceedings

152. An application for a civil injunction pursuant to the powers in the 2014 Act is made under Part 8 of the Civil Procedure Rules (CPR) as mandated (and modified) by Part 65.43(1). It may be made at any county court hearing centre and must be supported by a witness statement filed with the claim form. The claim form must state the terms of the injunction applied for: CPR 65.43(3)(a).

153. The general rule is that notice of an application should be given. The rules require service of the application notice and witness statement no less than two days before the hearing: see CPR 65.43(6)(a). However, section 6 of the 2014 Act provides that applications for an injunction under section 1 may be made without notice to the respondent ("without notice").[102] The Working Party has learned that it has become increasingly common for injunctions under the 2014 Act to be applied for without notice. The statutory guidance states:

> *"Injunctions can be applied for 'without notice' being given to the perpetrator in exceptional cases to stop serious harm to victims. They should not be made routinely or in place of inadequate preparation for normal 'with notice' applications."*

154. An application without notice can be made at any county court hearing centre. CPR Part 65.43(4)(a) requires that the witness statement must state the reasons why notice has not been given. Valid reasons often given to the court for applying without notice are:

    a. Urgency given continuing/foreseeable behaviour with no time to give notice.
    b. That prior giving notice would be likely to cause further/worsening behaviour impacting upon the public/neighbours/ witnesses/housing officers before the first hearing.
    c. Difficulty finding the relevant individual.

155. However, the Working Party was repeatedly told that a material consideration in whether to make an application without notice was the likely delay in the court listing a first hearing (often several weeks). It was the extent of the anticipated delay in listing which the applicants believed would expose the public/neighbours/ witnesses/housing officers to continuing/further/worsening behaviour rather than a particularly urgent and immediate need for an order which was the driver behind the use of an extraordinary procedure. As a result, without notice applications were becoming routine in some courts (contrary to the statutory guidance).

156. Applicants (and the court) should recognise that a without notice application should only be made in exceptional circumstances.

[102] If the application has been made without notice the court has three options: (a) adjourn and grant an interim injunction under section 7 (note this cannot require participation in certain activities); (b) adjourn without granting the injunction; (c) dismiss the application.

157. In *Moat Housing Group v Harris* [2005] EWCA Civ 287 Lord Justice Brooke stated:[103]

> *"in our judgment it would be best if judges in the county court when deciding whether to exercise their discretion to make an ASBI without notice, followed the guidance given in section 45(2)(a) of the Family Law Act 1996. They should bear in mind*
>
> *That to make an order without notice is to depart from normal rules as to due process and warrants the existence of exceptional circumstances;*
> *That one such exception is that there is a significant risk of harm to some person or persons attributable to conduct of the defendant if the order is not made immediately;*
> *That the order must not be wider than is necessary and proportionate as a means of avoiding apprehended harm."*

158. In *Birmingham City Council v Afsar and others* [2019] EWHC 1560 (QB) Mr Justice Warby discharged injunctions under the 2014 Act obtained without notice and emphasised the duties upon an applicant seeking an injunction without notice to the respondent:

> *"If the applicant does make an application for an interim injunction without giving notice:*
>
> *a) the evidence in support of the application must state the reasons why notice has not been given": CPR 25.3(3);*
> *b) The applicant comes under a duty to make full and frank disclosure to the Court of all matters of fact and law that are material to the application: Civil Procedure 2019 n 25.3.5. This is a broader obligation than the one specified in PD25A para 3.3 ("the evidence must set out … all material facts of which the Court should be made aware").*
> *c) The applicant (including its Counsel and solicitors) has a duty to make a note of the hearing, including but not limited to a note of the Court's judgment, and to serve this on the respondent without delay: Civil Procedure 2019, n 25.3.10….*
>
> *It is worth expanding a little on some of these points, starting with the question of applications without notice. A series of authorities has emphasised how exceptional it is for the Court to grant an injunction or other order against an absent party, who has not had notice of the application and a chance to dispute it. The principle that the Court should hear both sides of the argument is an "elementary" rule of justice and "[a]s a matter of principle no order should be made in civil or family proceedings without notice to the other side unless there is very good reason for departing from the general rule that notice should be given": Moat Housing Group South Ltd v Harris [2005] EWCA Civ 287 [2006] QB 606 [63], [71-72] (a case of alleged anti-social behaviour by a tenant)."*

And:

[103] Paragraph 72.

"These are the principles relating to disclosure of facts. As to the law, the authorities are clear: there is a "high duty to make full, fair and accurate disclosure … and to draw the court's attention to significant ... legal and procedural aspects of the case": Memory Corp v Sidhu (No 2) [2001] 1 WLR 1443 (CA), 1459-60. The duty is owed by the lawyers also. "It is the particular duty of the advocate to see that … at the hearing the court's attention is drawn by him to … the applicable law and to the formalities and procedure to be observed": Memory Corp, ibid."

159. The Working Party is concerned that the procedural requirements for obtaining an order without notice are not being enforced with sufficient rigour by some judges. It is to a degree understandable given the position faced by a judge (who may be a relatively inexperienced deputy district judge). Even if the judge is unhappy that the order has been sought without notice there is pressure to grant an interim injunction given the delay that would result from adjourning or dismissing it.

160. Denying the court the ability to hear from the relevant individual before any order is made results in:

    a. the court having no opportunity to form its own view as to whether there are (or potentially are) capacity or vulnerability issues;
    b. the respondent being denied the opportunity to explain why an order should not be made and/or any relevant underlying issues that may explain the alleged behaviour;
    c. the court being unable to be sure that any order made is the minimum required and that the respondent understands its terms;
    d. an inability to impress upon the respondent how serious breach of a court order is (including the risk of accelerated possession).

161. The first that the respondent knows of an order is when it is served upon him/her (usually by an employee or agent of the applicant) sometimes without adequate explanation of what the order means and/or the repercussions of breaching it. This is particularly concerning if a power of arrest has been attached.

162. As a result of these factors, the first time many respondents who have had an order made against them without notice appear before the Court is as a result of arrest and/or at breach proceedings rather than at a return date for the injunction.

163. The Working Party believes that the practice of seeking orders without notice must be curtailed and limited to circumstances where, given the facts, it is appropriate to take this exceptional step, as justified with a full explanation within a witness statement. Potential applicants need more guidance on the issue and judges need to apply the civil procedure rules and principles outlined above consistently.

164. However, the Working Party also understands the dilemma faced by applicants given the reported excessive delays in listing hearings and recommends that this issue must be addressed. Given the nature of the injunction sought it should have priority listing (i.e. have precedence over other civil matters including hearings already listed) and applications for an injunction must be listed as a

matter of urgency, and in any event within fourteen days of the application/proceedings being filed.[104]

165. The Working Party has also heard concerns about the form of orders being sought and made without notice. Applicants should understand and reflect upon the need to only apply for the minimum necessary order in the absence of the respondent. It is often inappropriate to simply seek the same order at an interim hearing as will be sought at a hearing on notice. In *Murray v Chief Constable of Lancashire [*2015] EWCA Civ 1174 Lord Justice McCombe stated:

> *"However, once the 'threshold' for the grant of an interim injunction is crossed, obviously, the judge cannot simply impose, or continue unthinkingly, any injunction, without careful consideration of whether the orders applied for 'fit the bill'. He must apply his mind conscientiously to the statutory question of whether the precise injunctions are suitable in the particular case, having regard to the ultimate question of whether or not they will be shown to be 'necessary' when the case reaches its final hearing. The orders must not be punitive and must be confined by the relevant necessity in the case of each respondent. To this extent, I accept on a limited basis some of the points which Mr Stark seeks to derive from the recent judgment of Kerr J. The judge must obviously also consider the proportionality of the individual orders sought and must not be tempted to act merely upon a police 'template' of types of order sought and/or granted in other cases – a trend that is sometimes apparent, for example, in the Criminal Division of this court in relation to Sexual Offences Prevention Orders made under the Sexual Offences Act 2003. Equally, he must have regard to the length of time that the orders may be in place before the final hearing."*

166. In conclusion on this issue, an applicant should consider the following matters (which should be emphasised in any training courses)[105] before making an application without notice:

    a. Are there exceptional circumstances which justify making the application other than in the ordinary way?
    b. Have such circumstances/reasons for not giving notice been fully set out in a witness statement for the court?
    c. Has full and frank disclosure been given to the court of all matters of fact and law that are material to the application?
    d. Have the minimum terms been sought in the proposed without notice order (these will often be less restrictive than the terms which will be sought at the next hearing)?
    e. How will service of the order be effected (and how will the respondent be given an explanation of the terms and the potential sanctions for breach)?
    f. What advice can be given to the respondent about legal or other assistance?

[104] A fourteen-day period would allow time for service and to provide sufficient notice so that a defendant would have the opportunity to seek legal advice/assistance. However, an earlier listing within seven days may be appropriate in some cases and the court should make every effort to accommodate a request by a claimant for such a listing.
[105] See paragraph 234 of this document.

g. If exclusion is sought from a property what form of assistance/guidance will be available to the respondent in relation to accommodation? [106]

167. The judge should also carefully consider these issues at the hearing and ensure that if an order is granted a return date (further hearing) is given as soon as reasonably practicable (such listing to take precedence over other civil hearings). A return date after a without notice order has been made should not be more than 10 days after the hearing.

The first hearing

168. The Working Party has heard from numerous sources that when an order has been sought with notice, respondents regularly fail to engage with the court at the first hearing, either by not appearing or, sometimes due to an inability to understand the gravity of the situation and the powers of the court, failing to adequately explain their response/views. Respondents who attend at first hearings are usually unrepresented. The main reason for this lack of representation is the inability to find a solicitor who has access to public funding to defend an application for an injunction (as opposed to a committal when criminal legal aid is available).

169. If faced with an unrepresented respondent, the court must proceed with caution, and carefully explain the relevant law and procedure, which takes time. That time should be made[107] and taken. The knock-on effects have been outlined by the appellate courts. In *Lindner v Rawlins* [2015] EWCA Civ 61, the Court of Appeal heard a case where an unrepresented husband had to deal with a refusal to order disclosure from the police in a defended divorce case. The wife neither appeared nor was represented and the court observed that the appeal was *"technical and unusual and that the husband could not be expected to have mastered the area of law to be able to present his appeal in a way which assisted the court".* The result, as Aikens LJ stated in paragraph 34, was that the court had to spend considerable time in going through the relevant documents and researching the applicable law. He continued:

> *"All this involves an expensive use of judicial time, which is in short supply as it is. Money may have been saved from the legal aid funds, but an equal amount of expense, if not more, has been incurred in terms of the cost of judges' and court time. The result is that there is, in fact, no economy at all. Worse, this way of dealing with cases runs the risk that a correct result will not be reached because the court does not have the legal assistance of counsel that it should have and the court has no other legal assistance available to it".*

170. The Working Party respectfully endorses this view.

[106] There are specific additional requirements for "ousters"; see section 13.

[107] Which can be extremely difficult if the hearing is within a busy list.

SECTION 6 – Practical issues

Legal aid

171. Legal aid to defend an application for an order under the 2014 Act is civil legal aid and, contrary to a commonly-held view amongst many respondents, practitioners and judges, can be obtained if a practitioner can be found with the appropriate contract with the Legal Aid Agency, who is willing to take on the work. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) was enacted in order to limit the grant of legal aid with a view to making savings in the cost to public funds. To that end a significant number of claims were taken out of scope and only qualified if the criteria set out in sections 10 and 11[108] were met. As a result, defendants in a range of civil matters face the difficulty of finding a solicitor willing to try to apply for legal aid given the difficulties in obtaining it and the applicable rates.[109]

172. In 2015 a consultation paper was published in respect of legal aid for anti-social behaviour cases under the 2014 Act, as it was recognised that legal aid providers holding a criminal contract would become ineligible to provide legal help or representation in proceedings relating to anti-social behaviour matters, except where this relates to the breach of an injunction (which are deemed "quasi-criminal"). In addition, providers holding a civil legal aid contract would only be eligible to undertake work on Part 1 injunctions in those matters currently covered by the contract, specifically those on housing related anti-social behaviour matters. Non-housing related matters would be outside the scope of the civil contract. This meant that there would be no civil legal aid services available for non-housing related applications and appeals of Part 1 injunctions.

173. As a result of the responses to the consultation the government acted and the current position (following the revision of the civil contract in 2018) as regards the availability of public funding is as follows:

    a. Civil legal aid is available for a person facing an application for an injunction under the 2014 Act (i.e. before the making of the order). LASPO was amended to bring Part 1: 2014 Act injunctions into scope for legal aid and, given the likely urgency of such proceedings, legal aid contracts were amended to give providers delegated functions to be able to grant certificates for emergency representation, without having to wait for a decision from the Legal Aid Agency.
    b. Legal aid is not limited to housing related anti-social behaviour injunctions: all Part 1 injunctions are in scope for legal aid. Legal aid providers who already hold a civil contract in a specific category can also advise in relation to injunction applications as miscellaneous work. Crime-only providers can also advise in relation to injunctions as associated civil work under their crime

[108] The Civil Legal Aid (Merits Criteria) Regulations 2013 (2013 no 104) as amended deal with the criteria to be applied pursuant to s.11(1)(b) of the Act.

[109] Legal aid payment rates have not only not been increased since 1998-99 but have been subjected to a 10% reduction from 3 October 2013 by The Community Legal Service (Funding) (Amendment No 2) Order 2011. There was a reduction of some 28% in the year 2013-14 in provisions of civil and family legal aid assistance and the Law Society has warned that *"the future sustainability of legal aid practice is in significant doubt"*. Sadly the impact of the lockdown due to Covid-19 upon the financial viability of some practices is likely to further reduce the number of practitioners able and willing to take on civil legal aid work (and/or work under criminal legal aid in respect of committals).

contract. All applications for civil legal aid in Part 1 injunction cases must be submitted through the Legal Aid Agency CCMS online system.

c. As a committal application has the character of criminal proceedings, committal proceedings are "crime-only work". Any committal application is treated as "quasi-criminal" by virtue of Regulation 9 of the Criminal Legal Aid (General) Regulations 2013 and remuneration is at criminal rates (lower than civil rates[110]). The current Civil Procedure Rules at PD 81 15.6 provide that in relation to committal hearings:

> *"The court will also have regard to the need for the respondent to be:*
> *(1)….*
> *(2) made aware of the possible availability of criminal legal aid and how to contact the Legal Aid Agency;*
> *(3) given the opportunity, if unrepresented, to obtain legal advice…"*

174. The Civil Procedure (Amendment No. 3) Rules 2020 set that the revised CPR 81 (in force from 1 October 2020) will require a contempt application to include a statement that

> *"(i) that the defendant has the right to be legally represented in the contempt proceedings;*
> *(j) that the defendant is entitled to a reasonable opportunity to obtain legal representation and to apply for legal aid which may be available without any means test."*

175. Failure to inform a respondent of the right to legal aid is likely to be viewed as a breach of common law principles of fairness and of ECHR art.6(3)(c).[111] There is specific guidance available (*Apply for Legal Aid in Civil Contempt-Committal Proceedings*).[112]

The availability of advice/representation

176. The Working Party heard a very worrying and consistent account from the Judiciary (including through feedback from the Judicial College injunctions and committals module[113]), supported by the very limited available data[114] and as confirmed by the Legal Aid Practitioners Group,[115] that although legal aid may technically be available, there are areas of the country where it is extremely difficult (if not impossible) to find solicitors who will accept instructions to advise and represent in relation to injunction applications or committals under the 2014 Act: "advice deserts".

[110] Since the change to the legal aid civil contract in 2018, section 4.3 allows a civil contract holder in a relevant category (i.e. housing) to provide representation in committal proceedings without applying for an individual case contract. It requires that civil providers use the same form as those holding a criminal contract CRM14 and being paid under the criminal contract scheme.
[111] per Jackson LJ in *Inplayer Limited & others v Thorogood* [2014] EWCA Civ 1511 at paragraph 49.
[112] See the MoJ website at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/435046/civil-contempt-guidance.pdf and https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/527945/laa-guidance-eForm-changes.pdf.
[113] See paragraph 438 of this document.
[114] See review of data at paragraph 316 of this document.

[115] There was no formal survey of members; but this was the consistent view of senior practitioners who were consulted.

177. This picture would be consistent with the Law Society's April 2019 analysis[116] which showed that the availability of housing advice provision varies greatly across the country. The survey revealed that 37% of the population live in a local authority area with no housing legal aid providers. Based on this evidence the Law Society called upon the government, as a matter of urgency to

    a. independently review the sustainability of the legal aid system
    b. make sure every area in England and Wales has an acceptable number of legal aid providers.

178. The Working Party believes the existence of advice deserts is likely to be having a seriously adverse effect upon the delivery of civil justice. By way of a stark and very worrying example of the problems faced by respondents, in *Festival Housing v Baker*,[117] the district judge, who went on to sentence a vulnerable respondent to a three-month immediate custodial sentence, stated:

> *"I am disturbed and concerned that Ms Baker attends before me today without the assistance of any public funding or a solicitor. I am particularly concerned about that because on any view, Ms Baker is a fragile individual; has difficulty reading and writing; difficulty in understanding, though I have no evidence or indication to indicate to me that she lacks capacity to deal with matters. She is, however, a fragile and vulnerable individual and that makes it all the more regrettable that she has not got legal assistance.*
>
> *I had to consider very carefully before I proceeded today, whether it would be right and proper to proceed when she wants to have a solicitor and has not got one. As I will explain in a minute, there has been a history to this case when she has had difficulty in getting solicitors before. I have to consider whether her human rights are irrevocably impinged, so that a fair trial cannot take place in this case, without her having legal advice. I have to say, I come very close to forming that conclusion, and I have explored that at the beginning of today's hearing.*
>
> *Ultimately, I have reached the conclusion that she can have a fair hearing, and that every opportunity has been afforded to her to prepare a case with assistance from a solicitor, but through no fault of her own, she has not been able to secure that. I am conscious that in earlier proceedings, particularly those before His Honour Judge Plunkett in September last year, when a Committal Order was made for, effectively, three months, that she did not have access to a solicitor at that stage.*
>
> *The present run of breaches, going back to November, first came before me in December. From that time forward, efforts had been made to try and secure a solicitor for Ms Baker, but all those efforts have failed. On the last occasion, the remand hearing a week ago, I specifically directed that the court must use every effort to try and contact local solicitors to see if they were prepared to take her on.*

[116] https://www.lawsociety.org.uk/policy-campaigns/campaigns/access-to-justice/end-legal-aid-deserts/
[117] https://www.bailii.org/ew/cases/Misc/2017/4.html

That followed difficulties over the Christmas period when the matter first came before me on 23rd December in the immediate run up to Christmas. There was no solicitor available to deal with the case for Ms Baker. I remanded the case on bail until 29th December, and with very considerable effort, a solicitor in Redditch was found who seemed prepared to take her on, but was unclear about his ability to get legal aid.

Three or four years ago, the President of the Family Division made it clear that legal aid in these sort of cases, though it is for a civil contempt, is criminal legal aid. That has caused some difficulty, because of the way legal aid works with solicitors getting fragmented franchises for dealing with specific types of work. This court has experienced, on more than one occasion, great difficulties in getting a solicitor who is prepared to deal with criminal legal aid for a committal in breach of Housing Act injunctions. It has proved somewhat difficult.

It proved an impossible position for Judge Plunkett last September and it has proved impossible now to secure a solicitor for Ms Baker, despite efforts taken by the claimant and by the court and Ms Baker's own efforts. It is wholly unsatisfactory that the system conspires against a vulnerable individual like this, so that she cannot get the legal aid and solicitor assistance that she really needs.

It is in that background that I have had to consider very carefully whether it was right to proceed, in potential breach of Ms Baker's human rights, with a fair and proper hearing. Particularly I had to bear in mind, that the nature of her defence, from questions I asked on previous occasion, appeared to fall into four categories. Firstly, she appeared to say that she had an alibi for both incidents. That she was elsewhere and can produce evidence in support of that. Secondly, she was arguing that this was a case of mistaken identity. Thirdly, she has been arguing that she thinks the police officer in this case, WPC Lane, has, to quote her words, 'got it in for her', and that, consequently, is an argument of potential police oppression. Fourthly, a suspicion that there might be some CCTV footage that, if obtained, would exonerate her.

All those matters potentially give rise to a line of defence which would better be explored by a solicitor assisting her. Knowing that, it is with great reservation that I have allowed the case to proceed today on the basis that it would be impossible to keep adjourning this case. I have taken the view that all those aspects of a potential defence could be explored satisfactorily, given the factual matrix of this case. So I have proceeded to deal with this committal and, as I have already said, I found the two breaches proved. Let me, however, put the matter in some context."

179. The respondent had therefore been sentenced on two separate occasions to three months immediate custody without the benefit of representation despite *"efforts taken by the claimant and by the court and Ms Baker's own efforts".*

180. The Working Party believes that this simply would not have occurred in the criminal courts. A person was deprived of their liberty without the representation despite being eligible for it and seeking it (and there were issues which could well have been raised on behalf of the respondent[118]). Although the civil contract has changed since *Baker*, so it is now somewhat easier for a civil contract holder to get public funding, the Working Party understands that it is still not common for civil practitioners to provide representation at a committal in respect of an order under the 2014 Act, unless they had been involved at an earlier stage of the proceedings (and hence undertaking work in the relevant court). It is likely that the lack of, and pressure of the workload upon, publicly-funded practitioners (given the lack of legal aid provision for 37% of the population[119]), issues of economic viability and the reduced (criminal) rate for work in relation to a committal are causative factors.

181. Given widespread concerns expressed about inconsistency in penalties for breaches under the 2014 Act, the Working Party decided to undertake a review of 50 cases and found a picture of lack of representation and/or imposition of a penalty in the absence of the defendant, which is broadly consistent[120] with the Law Society survey and with reports expressed by many judges attending the Judicial College[121]: that in certain areas of England and Wales respondents still face very significant difficulties in securing publicly-funded representation for committals. The position in relation to representation at the hearing when the injunction is sought would appear to be much worse, with only a relatively small percentage of defendants being represented. A lack of representation often has the effects as set out by Aikens LJ in *Lindner v Rawlins* [2015] EWCA Civ 61: an expensive use of judicial time, which is in short supply as it is (leading to no saving of public money overall) and the risk that the correct result will not be reached because the court does not have the legal assistance that it should have.

182. A telephone helpline, the Civil Legal Advice Service (CLA), provides specialist legal advice to people across England and Wales who qualify for legal aid. The website[122] refers, amongst other areas, to the provision of advice in respect of *"…housing, if you're homeless or at risk of being evicted".*

183. It does not refer to allegations of anti-social behaviour. The Ministry of Justice guide for practitioners[123] states that the CLA helps people with *"debt, education, discrimination, housing and family issues".* Reference is made under the heading of "Housing advice" to providing advice to a person *"defending an action against anti-social behaviour".*

[118] See paragraph 435 of this document.
[119] See the Law Society Survey, paragraph 177 above.

[120] c.f. the inability in the absence of express reference to ascertain the number of cases in which the defendant has faced difficulty in obtaining representation.
[121] See paragraph 438 of this document.

[122] https://www.gov.uk/civil-legal-advice
[123] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/395707/advice-practitioners-guidance.pdf

184. For unknown reasons no reference is made to providing advice in respect of defending applications under the 2014 Act which are not related to housing. The scope of the advice provided by the CLA (and information relating to it) should be reviewed and clarified.

185. When a person contacts the CLA (if they qualify for legal aid) they will be transferred to a specialist adviser to ascertain whether online or telephone advice is appropriate. Where face-to-face advice is considered necessary, or if representation in a court is needed, it is stated that the "*CLA will arrange this"*. The Working Party heard anecdotal (but not surprising) reports that there is often difficulty in arranging face-to-face advice or representation due to the lack of practitioners able to take on additional work.[124]

186. The Working Party believes that telephone advice alone will very rarely be adequate for a defendant facing an application for an order under the 2014 Act (housing or non-housing related) given the complexities involved in the obtaining of detailed instructions as to the allegations and potential evidence in response. Even if some anti-social behaviour is admitted, detailed advice would need to be given concerning the implications, and detailed content, of any order reflecting the minimum restrictions needed to provide protection and also as to how to address underlying behaviour, including, where appropriate, through agreeing to positive requirements. As a result, the CLA will need to locate a local legal aid practitioner, and it is the view of the Working Party that the CLA will not provide a solution to the need for advice (it cannot provide representation) in the large majority of cases.

187. It is the view of the Working Party that an urgent review is required of the availability of publicly-funded legal advice and representation in respect of all hearings regarding orders sought or obtained under the 2014 Act.

188. Without prejudice to the need for that review, the Working Party has identified a number of issues which require immediate attention.

189. Firstly, there is no available data as to the number and geographical spread of practitioners who are able (through a contract and through expertise) to provide publicly-funded advice and representation in respect of the 2014 Act. The number of contracts is known, but not how many practitioners can undertake the work within the firms which have contracts.[125]

190. Information as to the capacity/willingness to undertake work in respect of the 2014 Act should also be sought. Many legal aid practitioners, particularly those specialising in housing work already have more work than they can cope with (given the limited number of practitioners able and willing to

[124] The CLA would presumably be able to supply the relevant data.

[125] See *Impact of Legal Aid Changes*, Law Society (p. 30): *"There are now 1,578 organisations with civil legal aid contracts providing services from 3,568 offices, down from over 4,000 offices prior to the implementation of LASPO. The drop in the number of solicitors' firms undertaking legal aid work has been significant, but perhaps not as dramatic as might have been expected given the levels of fee and scope cuts. The impact has been masked to an extent as firms have tended to downsize departments and reduce the number of fee-earners undertaking legal aid work rather than withdrawing completely."*

work at present rates) and may not feel able to take on clients with cases relating to alleged anti-social behaviour (clients who face allegations of anti-social behaviour may have chaotic lifestyles and underlying issues which make them very demanding clients who cannot be dealt with using remote means when compared with many others seeking advice/representation who face other housing/debt issues). There are also increasing issues as to the economic viability of undertaking publicly-funded civil work and the fact that remuneration in respect of committals is at the lower criminal rate.

191. It is the number of available practitioners prepared to undertake the work within a region which dictates the ability to obtain advice. A survey of contract holders would provide this information and allow the identification of the extent of the available supply of relevant legal services and the nature and extent of advice deserts. The figure may show that a substantially higher number of people have no access to advice/representation in relation to hearings under the 2014 Act than the 37% of the population with no access to housing legal aid providers.

192. Consideration should be given to widening the scope of duty scheme to cover advice/representation in respect of applications for injunctions under the 2014 Act. The Working Party believes that whilst it may be very difficult for a solicitor advising a number of defendants within a housing list (and facing eviction) at a court to devote a large amount of time to the issues involved in an application for an injunction, they may be able to provide preliminary advice;[126] identify potential issues (such as issues as to capacity); and seek an adjournment to enable the defendant to gain advice/representation. Given the pressures of housing lists, such an extension could not be relied upon to provide assistance in relation to committals given the time that would be required (to the detriment of those needing urgent housing advice).

193. Consideration should be given to changing (or giving guidance in relation to) the current approach to the merit requirement for eligibility for legal aid[127] for defendants in relation to applications under the 2014 Act. The Working Party has heard of examples of legal aid being turned down because it was believed that the defendant should be giving undertakings. This approach ignores the potentially complex issues involved in the applications, including the detailed content of any order reflecting the minimum restrictions needed to provide protection,[128] potential Equality Act 2010 issues and also the aim of addressing underlying behaviour, including, where appropriate, through positive requirements. It is vitally important, even if there has been anti-social behaviour, that the correct order is made to ensure the behaviour is not repeated given the implications of any breach for the victim/s and the defendant.

194. Consideration should be given to making “end-to-end”, publicly-funded legal representation for cases brought under the 2014 Act easier to provide for those who have civil legal aid contracts. Specifically, consideration should be given to changing the contracts so as to extend the scope of

[126] By way of example, concern has been raised that many defendants who consent to an order do not appreciate that a breach provides a mandatory ground for possession.

[127] See the merits criteria in the regulations at http://www.legislation.gov.uk/uksi/2013/104/contents.

[128] Also bearing in mind that a breach provides a mandatory ground for possession.

work which can be undertaken under a civil contract to include advice/representation in relation to a committal for breach of the order at civil remuneration rates; there being no justification for a lower criminal rate, which acts as a positive disincentive to continue to act at any committal.

Provision of information

195. As set out above,[129] it is the view of the Working Party that a pre-action protocol should be in force which requires a potential applicant for an injunction under the 2014 Act to contact the potential respondent at the earliest opportunity and set out both:

    a. full details of the allegations of anti-social behaviour so as to enable them to respond; and
    b. steps which may be taken to obtain legal representation or any other assistance in respect of potential action.

    Such information should refer to the potential availability of legal aid to get advice/representation in relation to the potential application.

196. It is the view of the Working Party that consideration should also be given by the Civil Procedure Rule Committee to a change within the civil procedure rules to require judges to ensure that a respondent at a first hearing of an application for an injunction is aware of the potential availability of legal aid. The Working Party suggests that consideration be given to amending CPR 65 and/or PD 65 to replicate the requirements within PD81 15.6/the revised CPR 81.4 (as set out in the Civil Procedure (Amendment No. 3) Rules 2020), to make the respondent aware of the possibility of legal aid. The failure to obtain representation means that an opportunity to carefully consider not only the merits of the application, but the form of the proposed order and the causes of the underlying behaviour (and the suitability of a positive requirement), may be lost with a consequentially increased risk of breach and committal (when the requirement to notify of the availability of legal aid arises under PD81/CPR 81.4 as revised).

197. Further, the Working Party believes that individual courts should liaise with the Legal Aid Agency, the local office of the Law Society, local advice agencies and Support Through Court[130](if available) so as to identify local solicitors who are willing to represent respondents to injunction applications under the 2014 Act with the aim of making a fact sheet available to every respondent in relation to the ability to obtain legal aid. The fact sheet could also be provided by the claimant in compliance with the obligation under the pre-action protocol.[131]

Capacity issues

198. A respondent must have capacity and must be able to understand the proceedings and the implications of any order made.[132] An anti-social behaviour order should not be made where an individual's mental impairment means that he/she is truly incapable of complying with its conditions.

[129] See paragraph 146 of this document.
[130] Formerly known as the Personal Support Unit.
[131] See page 48, paragraph 2.5 of this document.
[132] As for capacity, see generally CPR 21.3 and 21.6.

Such an order is incapable of protecting the public and therefore it cannot be said to be necessary to protect the public; see generally *Wookey v Wookey* [1991] Fam 121; and surely would amount to an improper exercise of a court's discretion.[133]

199. Given the risk of a breach if the order is neither understood or likely to be breached, every judge should take a cautious approach when there is concern over capacity (bearing in mind that capacity may fluctuate).[134]

200. It must be recognised by judges and those with the duty to control anti-social behaviour, that mental health issues are at play in a significant proportion of cases concerning anti-social behaviour. Such issues may be complex and entrenched and present together with substance abuse issues (e.g. individuals with some serious mental health issues may use alcohol or drugs to self-medicate). Further, a lack of pre-existing medical intervention or therapeutic relationships cannot be taken to mean that an individual has capacity and/or does not have mental illness.

201. The Working Party believes that in the event of a concern about the capacity (or mental health) of an unrepresented (and/or absent) respondent, the county court should have an ability, as a first step, to liaise with and refer to the NHS L&D service. Currently the L&D service works only with the criminal jurisdiction and it is recognised that it will be necessary to consider changes to the service's practices and also some form of protocol which any civil judge can follow. Accordingly, as a first step, the Working Party believes that a pilot may be necessary.[135] See also the suggested requirements within a pre-action protocol set out above.[136]

202. Two cases, from two different regions, highlight how matters may go seriously wrong if capacity is not investigated at the outset of proceedings.

Capacity: Case examples

Case 1

203. The respondent had a history of serious anti-social behaviour in the vicinity of a flat in which her mother lived. She had made threats to neighbours, including that she would kill them and set fire to their flat (the neighbours suffered greatly as a result), often acted in a bizarre manner and was usually under the influence of alcohol. She was represented at one committal hearing, but refused representation thereafter. She was arrested and detained on several occasions and, after hearings in which she refused to engage, received short custodial penalties. Eventually, on a further breach, a circuit judge who had concerns about capacity remanded the respondent in custody and, with some

[133] Albeit as regards a criminal order; see *R(Cooke) v DPP* [2008] EWHC 2703 (Admin).

[134] In *Durkan v Madden* [2013] EWHC 4409 (Ch). Norris J held that when considering capacity, it was desirable not to generate satellite litigation, but to proceed in a pragmatic way, asking as to the consequences that would flow from the continuation of the litigation without the appointment of a litigation friend or the Official Solicitor. In that case, the sum at issue was modest, so the judge held that an adjournment to invite the Official Solicitor to consider the issue should be avoided if possible. The potential repercussions flowing from an order under the 2014 Act are usually serious and caution is required.

[135] See also paragraphs 98-116 of this document.

[136] See page 47, paragraph 1.10 of this document.

difficulty, obtained a court-funded psychiatric report (the judge had to personally liaise with the Crown Court to identify a consultant who would assist, and then with the court manager about funding). The psychiatrist diagnosed schizophrenia and that alcohol was used by the respondent to lessen her symptoms (voices etc), i.e. to self-medicate. On receipt of the report the prison acted, and the respondent was sectioned under the Mental Health Act. Had capacity been addressed at the outset then the respondent would have received treatment far earlier, the neighbours would have been saved from continuing serious anti-social behaviour, and the respondent would not have received several custodial penalties.

Case 2

204. The respondent, who was in his mid-seventies, began defecating in public in a city centre. When challenged he would make bizarre comments. An order was made (by a circuit judge) preventing this conduct with a power of arrest[137] in his absence. He continued with the conduct and was arrested (and detained overnight) twice.[138] A different judge persuaded a local criminal practitioner to represent the respondent, gain public funding and to obtain a psychiatric report as a matter of urgency so capacity could be assessed; immediately releasing the defendant (who was uncooperative during the hearing) on bail. Medical evidence subsequently revealed the respondent had advanced dementia. Far from being a person who was seen as behaving anti-socially, the respondent could have been recognised at the outset as a vulnerable adult (with consequential assistance provided by social services).

205. In both examples the respondents lacked capacity and had been detained in custody, and it eventually required proactive judicial action[139] to ensure that capacity was assessed.

206. It is a general perception of civil practitioners, and within the civil judiciary, that if there is any concern about capacity, and there is no prospect of a litigation friend, the only available course is to ensure that the Official Solicitor is contacted[140] (as opposed to the L&D service). However, Collins J pointed out the difficulties with this course in *IS (by the Official Solicitor v (1) Director of Legal Aid Casework (2) The Lord Chancellor* [2015] EWHC 1965 (Admin):

> *"The OS has particular concerns for patients, namely persons lacking mental capacity, and children who cannot engage in litigation without a litigation friend. He is a litigation friend of last resort in the sense that he will act only where no other litigation friend can be found. He will not, save in rare cases, himself conduct litigation and needs to have external funding. There is a powerful disincentive for a litigation friend to act since he or she undertakes not only to pay the protected persons costs but any costs that the court may order to be paid by the protected person. While the litigation friend will expect to recover from the protected person such costs, that is unlikely to be realistic when the protected person lacks means and so could be financially*

[137] The argument being that faeces on the pavement constituted a risk to health.

[138] The first time he was released as he was not brought before a judge within 24 hours.

[139] On both occasions it was a Designated Civil Judge: a specialist civil circuit judge.

[140] Official Solicitor; Victory House, 30-34 Kingsway , London WC2B 6EX; tel 02036812750; e-mail os_civil_litigation@offsol.gsi.gov.uk.

eligible for legal aid. Equally, a litigation friend is under a duty to act always in the protected person's best interests and those may not be in accordance with the protected person's views, albeit those views must always be put to the court. Thus in many cases it would be inappropriate for a family member (for example a parent of a child) to act as a litigation friend since there may be a need for objectivity which could not be met. Further, McKenzie friends cannot be used. It follows that in many cases involving impecunious children or adults who lack capacity there will be real difficulties in finding a litigation friend prepared to act having regard in particular to liability for costs. Thus the OS may have to act if approached. He will not normally be able to act for an impecunious individual, unless, absent a CFA or a costs undertaking from the opposing party, there is legal aid."

207. *In the Matter of D (A Child)* [2014] EWFC 39 Sir James Munby P stated:

"…The father has a learning disability. He is a 'protected party' within the meaning of Rule 2.3 of the Family Procedure Rules 2010. As a matter of law he is not able, as a protected party, to act without a litigation friend. Quite apart from that, the father's learning disability in any event requires him to have considerable support and assistance to be able to participate effectively in the proceedings. The Official Solicitor has agreed to act as his litigation friend. The Official Solicitor cannot be compelled to act as anyone's litigation friend. His practice is to agree to act only if there is funding for the protected party's litigation costs, because his own budget – the monies voted to him by Parliament – is not sufficient to enable him to fund the costs of litigation of the type the father is involved in. The Official Solicitor was willing to act here only because the father's solicitor and counsel have agreed to act, thus far, pro bono. But without the protection against an adverse costs order which the father (and derivatively the Official Solicitor) would enjoy if the father had legal aid, the Official Solicitor has a possible exposure to an adverse costs order – for instance, if the local authority was to obtain an order for costs against him –which, understandably, he is unwilling to assume. The consequence is that the Official Solicitor was not willing to act as the father's litigation friend unless [indemnified]."

208. Many practitioners and judges have expressed frustration over the inability to progress concerns over capacity when there is no obvious litigation friend. For obvious reasons it is often difficult for the applicant to suggest or provide a litigation friend for a person accused of anti-social behaviour. So if a respondent is unrepresented the only option appears to be for the court to contact, or direct someone to contact, the Official Solicitor. However, the problem of funding then arises as does a "catch-22" situation in which the Official Solicitor requires evidence of a potential lack of capacity, but there is often no person/body who can oversee the compilation and provision of medical evidence because the respondent appears to lack the capacity to engage. The Working Party believes that the L&D service can play an important role in the progression of matters with the Official Solicitor, further underlining the need for the civil courts to have access to this service.

209. The Office of the Official Solicitor expressed particular concern to the Working Party about individuals who had been detained in custody as a result of proceedings under the 2014 Act when there were "clear issues" about capacity. The Official Solicitor was also concerned about the number

of orders being made without notice[141] (a concern shared by the Working Party) thus denying the court an opportunity to assess capacity, the lack of available information for the court (with the court not being told of concerns or relevant information[142]) and also the use of powers of arrest when there was a concern over capacity.

210. The Official Solicitor also stated that current resources were insufficient to meet demand upon her office and that any significant change in practice or procedure which increased workload would need to be resourced. She advanced the following suggestions if an applicant or judge had concerns about capacity and evidence/investigation was required:

    a. a judge could require the respondent to meet with an approved Mental Health Social Worker and receive a report direct; or
    b. a judge could make a "provisional finding" that the respondent *may* lack litigation capacity which would usually be sufficient to mean that the Official Solicitor would investigate matters with any relevant health professional. However, treating a person as lacking capacity is an important interference with his/her civil rights and not a step to be taken lightly or without adequate grounds and/or evidence**.**

211. The Working Party believes that contact with the L&D service will usually be a more appropriate first step for the court to consider. It recommends that the Official Solicitor and the L&D service meet to agree a protocol regarding the assessment of capacity issues in relation to civil litigation.

212. However, the L&D service cannot assist with the funding of representation by the Official Solicitor. Some consultees raised one potential solution to the difficulties faced by the Official Solicitor: the applicant agreeing (or the court to order the applicant) to indemnify the Official Solicitor for the costs of investigation/representation. In *Bradbury v Paterson* [2014] EWHC 3992 (QB) Foskett J held:[143]

> *"the High Court would, in my view, have the power under its general case management provisions and/or the inherent jurisdiction of the court to direct that one or more of the parties to the litigation should fund the Official Solicitor's costs of instructing lawyers for Mr Paterson, the initial outlay to be recoverable as part of the costs of the litigation in due course."*

213. The Working Party notes that this solution (which was not the solution adopted by the court in that case) may be based in part upon the inherent powers of the High Court whereas applications under the 2014 Act are usually dealt with in the county court (which has no such inherent powers). The Working Party can also foresee some applicants being reluctant to raise possible capacity issues as it may lead to additional and significant expense. However, in some cases it may be appropriate for the applicant to consider indemnifying the Official Solicitor as otherwise it is difficult to see how the

[141] See paragraphs 153-159 of this document.
[142] See paragraph 160 of this document.

[143] At paragraph 46(c).

proceedings can progress. The Working Party recommends that the Ministry of Housing, Communities and Local Government considers providing guidance on this point.

214. The issue of capacity merges into vulnerability, which has been recently considered by the Civil Justice Council in its report *Vulnerable Witnesses and Parties within Civil Proceedings: Current Position and Recommendations for Change* (February 2020).[144] It is necessary to consider some of its content in detail. At the time of the compilation of this report it is not known how many of the report's recommendations will be implemented.

Vulnerability

215. Issues of vulnerability can arise in respect of the respondent and also witnesses for the applicant in respect of proceedings under the 2014 Act.

216. Since 1999,[145] the Civil Procedure Rules have contained many of the methods/forms of assistance and protection for vulnerable parties and witnesses used in the criminal and family courts. However, there are no specific provisions dealing with vulnerable parties or witnesses within the rules.[146] As a result they have been criticised as "passive"[147] and inadequate for the purpose of ensuring a sufficiently proactive and consistent approach to enabling the proper participation in civil litigation of those who are, or may become through involvement in the process, vulnerable. The Civil Justice Council's report made 18 recommendations for change directed to a range of bodies/groups.

217. Vulnerability may be endogenous or arise as a reaction to some step or factor within the litigation process; it may be general or situational, permanent or temporary (or a mixture). Some people have mental and/or physical conditions which render them vulnerable and hamper their access to justice and some are vulnerable by reason of the subject matter of the proceedings before the court. Many involved in anti-social behaviour cases (particularly concerning the occupation of property) or protection from harassment cases as "the victims", are fearful of reprisal and vulnerable to intimidation[148] (organisations supporting tenants of social housing[149] have long complained of the difficulty in persuading witnesses to attend in cases involving anti-social behaviour). Some claimants

[144] https://www.judiciary.uk/wpcontent/uploads/2020/02/VulnerableWitnessesandPartiesFINALFeb2020-1.pdf.
[145] The Civil Procedure Rules 1998 (SI 1998/3132) were made on 10 December 1998 and came into force on 26 April 1999.

[146] In civil proceedings in Scotland, children or adult witnesses whose evidence may be diminished in quality because of mental distress or because they are suffering fear or distress are eligible for special measures: see the Vulnerable Witnesses (Scotland) Act 2004. The 2004 Act abolishes any test for competence for all witnesses in civil proceedings. This effectively has the result that any witness can give evidence without his/her competence first being ascertained: the weight or significance of that evidence then has to be assessed by the judge.

[147] See generally the chapter " Vulnerable Witnesses and Parties in all civil proceedings – Dignity, respect and the Advocate's Gateway Toolkit 17"; Felicity Gerry Q.C. in *Addressing Vulnerability in Justice Systems* [Wildy, Simmonds and Hill].
[148] See generally *Personal, Situational and Incidental Vulnerabilities to ASB Harm* [2013] Universities' Police Science Institute; Dr Helen Innes and Professor Martin Innes. Available at https://orca.cf.ac.uk/52681/1/personal-situational-and-incidental-vulnerabilities-to-anti-social-behaviour-harm-a-follow-up-study.pdf.
[149] And Victim Support.

fear, or react adversely to the sight of, the defendant or other witnesses such that they cannot adequately participate in a hearing.

218. Many respondents may be vulnerable due to mental or physical health issues, learning difficulties and/or illiteracy.

Witnesses for the applicant

219. Whilst there is currently no specific provision in the Civil Procedure Rules for vulnerable parties/witnesses, those who have suffered anti-social behaviour and have complained and/or provided evidence to an applicant are the only group in civil litigation who have specific provision for their vulnerability. Section 16 of the Anti-social Behaviour, Crime and Policing Act 2014 applies sections 16-33 of the 1999 Act to anti-social behaviour injunctions in the civil courts:

> *"16 Special measures for witnesses*
> *(1) Chapter 1 of Part 2 of the Youth Justice and Criminal Evidence Act 1999 (special measures directions in the case of vulnerable and intimidated witnesses) applies to proceedings under this Part as it applies to criminal proceedings, but with:*
> *(a) the omission of the provisions of that Act mentioned in subsection (2) (which make provision appropriate only in the context of criminal proceedings), and*
> *(b) any other necessary modifications."*

220. The sections in the 1999 Act in relation to the prohibitions on cross-examination do not apply by virtue of this section.

221. There are a range of "special measures" in Chapter 1 of the YJCEA and some other specific prohibitions. Sections 16 and 17 set out the grounds of eligibility.[150]

222. Section 16 caters for witnesses eligible for assistance on grounds of age or incapacity as follows:

> *"(1) For the purposes of this Chapter a witness in criminal proceedings (other than the accused) is eligible for assistance by virtue of this section:*
> *(a) if under the age of 17 at the time of the hearing; or*
> *(b) if the court considers that the quality of evidence given by the witness is likely to be diminished by reason of any circumstances falling within subsection (2).*
>
> *(2) The circumstances falling within this subsection are:*
> *(a) that the witness:*
> *i. suffers from mental disorder within the meaning of the Mental Health Act 1983, or*
> *ii. otherwise has a significant impairment of intelligence and social functioning;*
> *(b) that the witness has a physical disability or is suffering from a physical disorder.*

[150] Anti-social Behaviour, Crime and Policing Act 2014 applies section 16-33 of the 1999 Act to anti-social behaviour injunctions in the civil courts. Available at http://www.legislation.gov.uk/ukpga/1999/23/contents.

(3) In subsection (1)(a) "the time of the hearing", in relation to a witness, means the time when it falls to the court to make a determination for the purposes of section 19(2) in relation to the witness.

(4) In determining whether a witness falls within subsection (1)(b) the court must consider any views expressed by the witness.

(5) In this Chapter references to the quality of a witness's evidence are to its quality in terms of completeness, coherence and accuracy; and for this purpose, "coherence" refers to a witness's ability in giving evidence to give answers which address the questions put to the witness and can be understood both individually and collectively."

223. Section 17 covers witnesses eligible for assistance on grounds of fear or distress about testifying as follows:

"(1) For the purposes of this Chapter a witness in criminal proceedings (other than the accused) is eligible for assistance by virtue of this subsection if the court is satisfied that the quality of evidence given by the witness is likely to be diminished by reason of fear or distress on the part of the witness in connection with testifying in the proceedings.

(2) In determining whether a witness falls within subsection (1) the court must take into account, in particular:
(a) the nature and alleged circumstances of the offence to which the proceedings relate;
(b) the age of the witness;
(c) such of the following matters as appear to the court to be relevant, namely:
i. the social and cultural background and ethnic origins of the witness,
ii. the domestic and employment circumstances of the witness, and
iii. any religious beliefs or political opinions of the witness;
(d) any behaviour towards the witness on the part of:
i. the accused,
ii. members of the family or associates of the accused, or
iii. any other person who is likely to be an accused or a witness in the proceedings.

(3) In determining that question the court must in addition consider any views expressed by the witness.

(4) Where the complainant in respect of a sexual offence is a witness in proceedings relating to that offence (or to that offence and any other offences), the witness is eligible for assistance in relation to those proceedings by virtue of this subsection unless the witness has informed the court of the witness's wish not to be so eligible by virtue of this subsection."

224. Where the court determines[151] that the witness is eligible for assistance by virtue of section 16 or 17 of the Youth Justice and Criminal Evidence Act 1999, the court **must** then consider a special measures direction. Section 19 sets out that the court shall:

[151] Either upon application or of its own motion.

"(a) determine whether any of the special measures available in relation to the witness (or any combination of them) would, in its opinion, be likely to improve the quality of evidence given by the witness; and
(b) if so:
i. determine which of those measures (or combination of them) would, in its opinion, be likely to maximise so far as practicable the quality of such evidence; and
ii. give a direction under this section providing for the measure or measures so determined to apply to evidence given by the witness.

(3) In determining for the purposes of this Chapter whether any special measure or measures would or would not be likely to improve, or to maximise so far as practicable, the quality of evidence given by the witness, the court must consider all the circumstances of the case, including in particular:
(a) any views expressed by the witness; and
(b) whether the measure or measures might tend to inhibit such evidence being effectively tested by a party to the proceedings."

225. The special measures available to the court are set out at sections 23–30 and are as follows:

a. Screening a witness[152] from the accused while giving evidence (section 23).
b. Allowing the witness to give evidence by live link[153] (section 24).
c. Allowing evidence to be given in private[154] (section 25[155]).
d. Requiring the removal of wigs[156] and gowns (section 26).
e. Pre-recorded evidence in chief (section 27).
f. Pre-recorded cross-examination or re-examination[157] (section 28[158]).

[152] Or "other arrangement" to prevent the witness from seeing the accused.
[153] "Live link" means a live television link or other arrangement whereby a witness, while absent from the courtroom (or other place where the proceedings are being held), is able to see and hear, and to be seen and heard by, persons in the courtroom. Live links can be particularly helpful for witnesses with health/mobility issues who do not qualify for live links under the "special measures" provisions and the court should take active steps to enable all witnesses to be able to give their best evidence.
[154] The persons who may be excluded do not include (a) the accused, (b) legal representatives acting in the proceedings, or (c) any interpreter or other person appointed (in pursuance of the direction or otherwise) to assist the witness.
[155] Section 25(4) sets out that a special measures direction may only provide for the exclusion of persons under this section where—(a) the proceedings relate to a sexual offence; or (b) it appears to the court that there are reasonable grounds for believing that any person other than the accused has sought, or will seek, to intimidate the witness in connection with testifying in the proceedings.
[156] Judges do not wear wigs when hearing civil cases; but they do robe and it its mandatory to do so for a committal hearing; see paragraphs 279-280 of this document.

[157] Such a recording must be made in the presence of such persons as Criminal Procedure Rules or the direction may provide and in the absence of the accused, but in circumstances in which— (a) the judge or justices (or both) and legal representatives acting in the proceedings are able to see and hear the examination of the witness and to communicate with the persons in whose presence the recording is being made, and (b) the accused is able to see and hear any such examination and to communicate with any legal representative acting for him/her.
[158]In 2018 the Ministry of Justice commenced a six-month pilot at three Crown Courts in relation to the pre-recorded cross-examination of child witnesses pursuant to section 28 of the Youth Justice and Criminal Evidence Act 1999. In *R v PMH* [2018] EWCA Crim 245, the Court of Appeal provided guidance regarding best practice for trial judges and advocates. Ordinarily a timetable is set at the pre-trial preparation hearing for the proposed questions to be asked in the pre-recorded cross-examination to be submitted. Thereafter a ground rules hearing takes place and following the rulings a hearing takes place at which the witness is cross-examined. See generally *R v Hampson* [2018] EWCA Crim.

g. Requiring the examination of witness through an intermediary[159] (section 29).
h. Providing aids to communication[160] (section 30).

226. So if the evidence of a witness to be called by the applicant is likely to be diminished by reason of fear or distress in connection with testifying in the proceedings, the court must consider special measures to assist them to give their evidence. In assessing whether the evidence is likely to be diminished, the court must consider the views of the witness and such other matters as appear relevant including the nature and alleged circumstances of the "offence" to which the proceedings relate and any behaviour towards the witness on the part of—(i) the accused, (ii) members of the family or associates of the accused.

227. If special measures are appropriate, they could involve the witness giving evidence by live link or screens. The Working Party believes a significant number of witnesses for applicants could potentially qualify for special measures and that many could benefit from giving evidence by live link. If the statutory tests are met, then the lack of facilities in a court must not prove a bar (and the witness's needs must be accommodated). The Working Party found that many applicants were unaware of section 16 of the 2014 Act and that vulnerable witnesses are entitled to protection (this is before any implementation of the recommendations of the Civil Justice Council in its report). The Working Party believes that, as a matter of good practice, in every case, an applicant should consider section 16 and the issue of vulnerability with every witness and (if appropriate) address it in the witness statement.

228. Further, in every case under the 2014 Act in which allegations are contested, and evidence has to be given by witnesses on behalf of the applicant, the court, of its own motion, should consider if section 16 may apply to any witness. The court may also consider the use of video link even if section 16 does not apply. CPR 32.3. states that "*The court may allow a witness to give evidence through a video link or by other means.*"[161]

[159] Examination of the witness (however and wherever conducted) through an interpreter or other person approved by the court for the purposes of this section ("an intermediary") .The function of an intermediary is to communicate—(a)to the witness, questions put to the witness, and (b) to any person asking such questions, the answers given by the witness in reply to them, and to explain such questions or answers so far as necessary to enable them to be understood by the witness or person in question. A person may not act as an intermediary in a particular case except after making a declaration, in such form as may be prescribed by Criminal Procedure Rules, that he/she will faithfully perform his/her function as intermediary. Section 1 of the Perjury Act 1911 (perjury) shall apply in relation to a person acting as an intermediary as it applies in relation to a person lawfully sworn as an interpreter in a judicial proceeding. The *Equal Treatment Bench Book* provides that assessment by an intermediary should be considered if the person seems unlikely to be able to recognise a problematic question or, even if able to do so, may be reluctant to say so to a questioner in a position of authority. Studies suggest that the majority of young witnesses, across all ages, fall into one or other or both categories (Chapter 2, Paragraph 97, *Equal Treatment Bench Book* 2018). For an overview of the law see *R v Biddle* [2019] EWCA Crim 86.

[160] A special measures direction may provide for the witness, while giving evidence (whether by testimony in court or otherwise), to be provided with such device as the court considers appropriate with a view to enabling questions or answers to be communicated to or by the witness despite any disability or disorder or other impairment which the witness has or suffers from.

[161] Guidance on the use of video conferencing in the civil courts is set out in Annex 3 to Practice Direction 32. Available at https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part32/pd_part32#annex3. See also Chancery Guide, Ch.21, para.21.100. Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/827377/chancery-guide-eng.pdf; Queen's Bench Guide, Ch.2, para.2.9.6. Available at

229. CPR PD 32 paragraph 29 states, "*Guidance on the use of video conferencing in the civil courts is set out at Annex 3 to this practice direction. A list of the sites which are available for video conferencing can be found on Her Majesty's Courts and Tribunals Service website*."

230. As a result of the reform programme, there is now a drive to explore the greater use of video link and "fully-video" hearings[162] have taken place as part of a pilot.[163]

231. As for respondents in 2010, extensive research[164] carried out on behalf of the Ministry of Justice[165]showed that court users, in both criminal and civil proceedings, with mental health conditions and learning disabilities experienced various difficulties when giving evidence in court. Many court users involved in the study found that legal language and terminology were barriers to their understanding of the court process, whilst a number stated that they experienced problems in understanding questions which they were asked in court. The report concluded that this lack of understanding resulted in confusion for the court users which negatively affected their demeanour in court. Those involved in the study reported that difficulties with understanding were improved by awareness of their particular mental health issue or learning disability amongst legal representatives and the judge, as this allowed the court to take steps to ensure that the proceedings were clearly explained. This approach led to the court user feeling more respected and listened to. However, if this awareness was lacking, court users experienced a sense of exclusion from the proceedings, which the research found to be more acute in civil and family cases.

232. In its report, the Civil Justice Council has recommended that consideration should be given to amending the overriding objective in the Civil Procedure Rules to reflect the need to ensure that all parties can fully participate in proceedings (and that all witnesses can give their best evidence). Further, that there should be a new Practice Direction directly addressing vulnerability, in a way that

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/760087/the-queens-bench-guide-20180906.pdf; Admiralty and Commercial Courts Guide, Section H3. Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/672422/The_Commercial_Court_Guide_new_10th_Edition_07.09.17.pdf; and Technology and Construction Court Guide, Section 4, para.4.6. Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/819807/technology-and-construction-court-guide.pdf.

[162] With fully-video hearings, all parties appear by video. It may be of assistance in future when respondents are in custody and facilities are available.

[163] See "Video hearings tested in domestic abuse cases": Press release; HMCTS/MoJ; 9 May 2019, in relation to a pilot at Manchester Civil Justice Centre (reference to six domestic injunction cases already having used this procedure). The release states: *"Fully-video hearings are being tested in a small number of cases involving civil or family law at Manchester and Birmingham Civil Justice Centres. In civil law, one type of case involved is set-aside judgements. In family law, we are testing first-direction appointments. Those involved need to be legally represented. Two law firms are involved in the testing in Manchester, all of which is done using their own equipment; no special kit is needed."* Available at https://www.gov.uk/government/news/video-hearings-tested-in-domestic-abuse-cases.

[164] Rosie McLeod, Cassie Philpin, Anna Sweeting, Lucy Joyce and Roger Evans, *Court Experience of adults with mental health conditions, learning disabilities and limited mental capacity*, Ministry of Justice Research Series (London: Ministry of Justice, July 2010) Available at https://www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research/court-experience-adults-1.pdf.

[165] It was commissioned to explore the assertion made by the mental health charity MIND in 2007 that people with mental health conditions and learning disabilities experience greater difficulties accessing justice than others and possibly also experience greater discrimination and disadvantage.

gives assistance to litigants in person and representatives with the identification of circumstances, in which a court may consider a party (or witness) to be vulnerable and some of the steps/measures which can be taken to give assistance.

233. The Council recommended that training in respect of vulnerability should be a mandatory part of the training of all new, and a requirement of all existing, civil judiciary within a three-year cycle. Also, that all relevant regulatory and training bodies should consider the adequacy of, and requirements of members to undertake, available training in relation to vulnerability, and in particular the questioning of vulnerable witnesses.

234. The Working Party has heard concerns, expressed in particular by judges and those providing legal advice/assistance to respondents, about housing officers presenting some applications for injunctions under the 2014 Act and a lack of familiarity with the rules of court and legal principles (including when an ex-parte application is appropriate and the contents of draft orders e.g. when to seek a power of arrest), and the duty to assist the court, including the heightened responsibility when a respondent is unrepresented. The Working Party believes that housing officers should receive training in all aspects of the making of an application under the 2014 Act, including vulnerability. A judge should consider asking any housing officer who seeks to present an application about the nature and extent of their experience and training.[166]

235. Also, the Council noted that the court should expect all advocates who may undertake questioning of vulnerable witnesses to have had some relevant training. The report also made recommendations in relation to court protocols and the provision of information for court users.

236. If implemented, the Council's recommendations will assist in the detection of vulnerability and the provision of suitable assistance (and guidance). However, these steps will only arise when a case has come before the court. As set out above,[167] an applicant needs to consider whether a respondent may be vulnerable, and/or has mental health issues prior to the issue of proceedings and, if concerns arise, to take appropriate steps. Further, an applicant should consider what steps can be taken to enable a proposed vulnerable respondent to fully participate in the proceedings and (if they wish to do so) to give their best evidence, before coming to court.

Parallel criminal proceedings

237. It is important before, or at, the first hearing, for an applicant to ascertain whether criminal proceedings are going to result from any alleged anti-social behaviour and also whether the respondent has outstanding criminal cases (and any bail conditions) or extant sentences with community or other requirements which may impact on the potential orders the court may make. Section 1 (5) states:

[166] Resolve and other organisations provide specific training on the 2014 Act.
[167] See paragraph 215 of this document.

"(5) Prohibitions and requirements in an injunction under this section must, so far as practicable, be such as to avoid—
(a)…
(b) any conflict with the requirements of any other court order or injunction to which the respondent may be subject."

This is another reason why consultation and liaison between agencies (and in particular with the police, CPS and Probation Service) is so important.

The terms of an order

238. Sometimes a respondent, if unrepresented, will recognise that their behaviour has been sufficiently anti-social to justify an injunction application, and/or be overwhelmed by the court process, and consent to the making of an order.

239. However, the court must still be satisfied that all the terms of order are necessary and appropriate. Given the significance of breach, it is very important that appropriate scrutiny is given to the terms imposed and an applicant's draft should not just be "rubber stamped". An order should not be made solely on the basis of the respondent's consent: see *R(T) v Manchester Crown Court* [2005] EWHC 1396 (Admin).

240. It is also vitally important that the order is clear and capable of being easily understood. In *R v Kamaran Khan,*[168] a case concerning a criminal behaviour order, Bean LJ stated:

"14. As with any order of a criminal court which has characteristics of an injunction, it is essential that the guidance given by this court in R v Boness [2005] EWCA Crim 2395 at paragraphs 19-23 in relation to anti-social behaviour orders should be borne in mind. The terms of the order must be precise and capable of being understood by the offender. The findings of fact giving rise to the making of the order must be recorded. The order must be explained to the offender. The exact terms of the order must be pronounced in open court and the written order must accurately reflect the order as pronounced. (These four requirements were derived from the previous decision of this court in R v P (Shane Tony) [2004] EWCA Crim 287.)

15. Because an order must be precise and capable of being understood by the offender, a court should ask itself before making an order "are the terms of this order clear so that the offender will know precisely what it is that he is prohibited from doing?" Prohibitions should be reasonable and proportionate; realistic and practical; and be in terms which make it easy to determine and prosecute a breach. Exclusion zones should be clearly delineated (generally with the use of clearly marked maps, although we do not consider that there is a problem of definition in an order extending to Greater Manchester) and individuals whom the defendant is prohibited from contacting or associating with should be clearly identified. In the case of a foreign national, consideration should be given for the need for the order to be translated."

[168] [2018] EWCA Crim 1472.

241. As will be considered in greater detail, the large majority of orders do not contain positive requirements, which require additional matters to be considered; rather they solely contain prohibitions. Having considered a number of orders, and having heard from practitioners, the judiciary and other groups, the Working Party is concerned about the nature and extent of some of the prohibitions imposed and in particular geographical restrictions.

Geographical restrictions

242. Geographical restrictions are commonly applied for by applicants and granted by the court:
    a. In housing related anti-social behaviour cases to keep individuals away from a property or the vicinity of a property; or
    b. In non-housing related cases to prevent a respondent from being in an area used by him/her for behaviour such as begging and anti-social drink or drug related activity.

243. The problem with the latter category is that many aspects of a respondent's support network, such as friends or voluntary agencies, may ordinarily be in the relevant area. Some consultees have suggested that ordinarily an order should only prohibit the relevant activity (e.g. begging) rather than merely entering a defined area. They point to the number of breach applications that arise simply through presence in an area with no evidence of the relevant conduct that has underpinned the order. Further, that unless the underlying behaviour is addressed (through a positive requirement or otherwise) the respondent is likely to simply repeat it elsewhere. Others suggest that by breaching the geographical term the respondent has shown a clear and unambiguous unwillingness to comply with the order and also that it is frequently difficult to obtain evidence of the breach of a term prohibiting certain prescribed behaviour to satisfy a criminal standard, whereas it is relatively straightforward to establish that the respondent has entered a prohibited area (without more). This view found some favour with the court in *DPP v Bulmer,*[169] a case concerning criminal behaviour orders; Beatson LJ stating:

> *"39 It has to be recalled that the vast majority of the respondent's anti-social behaviour and breaches of the order took place in the centre of York. If the fact that she would simply move her anti-social activities to another location is seen as an important factor against making the order that was sought, the court would in effect be deciding not to protect those in her primary area of activity.*
>
> *40. One of the factors the courts have emphasised when considering exclusion areas in ASBOs is the clarity they provide as compared with prohibitions of certain sorts of behaviour. Such prohibitions are difficult to police and those subjected to them may find it difficult to assess whether they are breaching the order because of their disabilities or other problems, whether alcoholism, drug addiction or something else: see Boness at [18], [38] and [46] and Leeds City Council v Fawcett at [14] (quoting paragraph 7 of the judge in that case's decision), [24] and [27]. In Barclay Cranston J, delivering the judgment of the Court of Appeal Criminal Division,*

[169] [2015] EWHC 2323(Admin).

stated at [19] stated that the order 'must be precise and capable of being understood by the person subject to it'."

244. Beatson LJ went onto stress that the issue of whether a geographical restriction should be imposed is "*intensively fact sensitive*" and that:

> *"It must, however, be emphasised that the order must be tailored to the specific circumstances of the person on whom it is to be imposed."*[170]

And:

> *"Decisions on ASBOs show that an appellate court will, while giving due weight to the evaluation of the judge, be particularly concerned about the proportionality of an order. This is seen from the cases in which an appellate court has narrowed the area of an exclusion zone, as in Barclay [2011] EWCA Crim 32; [2011] 2 Cr App R (S) 67 where the court reduced the area from which the appellants were excluded to a smaller one bounded by specified roads. It is also seen where a particular restriction is removed or refined to ensure that the order is better tailored to the anti-social behaviour of the particular offender, as in Boness where the court targeted the order of two of the offenders more closely to football matches."*

245. What should not occur (but the Working Party believes frequently does) is that a geographical restriction is imposed which covers very large areas (e.g. a city) without adequate consideration of whether only a much smaller and more targeted restriction is actually necessary. As Sullivan J observed in *Samuda v DPP*:

> *"Given the relatively limited number of streets affected by the applicant's activities and their proximity to one another within the city centre, the geographical area suggested by the CPS is, on the face of it, disproportionately extensive and appears to have been dictated rather more by cartographical convenience than by any detailed assessment of whether there really was a need to protect the public from the applicant's activities over the whole of the city centre bounded by the Inner Ring Road."*[171]

246. The Working Party believes that the focus should always remain on preventing the anti-social behaviour, which means addressing the underlying behaviour. If all that happens as a result of an order is that a person stops begging in one defined area of a city and starts begging in another area of the same city or indeed another city, then the order has not achieved its primary aim.

247. Careful regard should be paid, before imposing a geographical restriction, to the respondent's ties/support mechanisms within the relevant area and whether, given the extent of these, an order would be setting the respondent up to fail. In any event, the scope of any restriction must be tailored

[170] Ibid; paragraph 43.
[171] *Samuda v DPP* [2008] EWHC 205 (Admin).

to the specific circumstances of the person on whom it is to be imposed and must be the minimum of what is necessary.

Powers of arrest

248. A court granting an injunction under section 1 of the 2014 Act may attach a power of arrest to a prohibition or requirement[172] of the injunction if, and only if, the court thinks that:
    a. the anti-social behaviour in which the respondent has engaged, or threatens to engage, consists of or includes the use or threatened use of violence against other persons, or
    b. there is a significant risk of harm to other persons from the respondent.

249. A power of arrest should not be attached in cases of non-violent anti-social behaviour the nature of which is of a persistent nuisance only (e.g. drunkenness and/or singing/shouting on a residential road) or when it is not proportionate to do so. Many applications will seek a power of arrest when it is inappropriate to do so and the court should be careful to scrutinize whether it is proper to attach one, given the potential serious repercussions of arrest and detention before a hearing. Many practitioners, and the Official Solicitor, were of the view that powers of arrest were being granted when the test was not met or it was not proportionate to impose one. The Working Party, which was shown examples of orders containing powers of arrest which were not justified,[173] believes that
    a. if the applicant seeks a power of arrest to any proposed term, a statement should identify on what basis the statutory test is met, and
    b. any judge should give the evidence close scrutiny against the statutory test before granting a power of arrest to any term of an order.

250. Significant harm in the second limb of the test includes psychological harm. However, this test should be applied in a suitably robust manner. Much anti-social behaviour causes differing degrees of distress or anxiety and the barrier for a power of arrest should not be set too low. Powers of arrest should be used in cases where there is the possibility of violence or a real threat of violence or of a significant risk of physical or psychological harm beyond mere distress.

251. The pre-action protocol should require an application for a power of arrest to specifically address the test in the 2014 Act.

[172] "Requirement" here does not include one that has the effect of requiring the respondent to participate in particular activities.
[173] See e.g. example 2 at paragraph 204 of this document.

SECTION 7 – Breaches of the order

252. A respondent may be arrested under a warrant issued by a judge after an application by the applicant under section 10 of the 2014 Act, or under a power of arrest in the order attaching to the term which it is alleged has been breached. It is possible to proceed by a committal application notice under CPR 23 (see CPR 81) without seeking a warrant for arrest, but given the express power provided by section 10 this is rarely the route taken by applicants.

Warrant for arrest

253. The Working Party has found that if a judge is satisfied on evidence presented by the applicant[174] that a warrant should be issued, detailed consideration is usually not given as to how it is to be executed i.e. how/when the respondent is to be arrested. For obvious reasons, it would often be difficult to be prescriptive. However, there is clear need for liaison between applicants, the police and the court concerning arrest on a warrant if extended/overnight detention is to be avoided. When the respondent is arrested, he/she will need to be taken to a secure court where a judge is available, and the applicant notified as quickly as possible. The Working Party has been told of examples where the liaison has been inadequate or broke down, leading to practical difficulties. A local plan should consider how the most effective liaison in relation to arrests on a warrant (and under a power of arrest: see below) can be achieved.

Execution of a power of arrest

254. Any individual who is arrested must be "brought before a judge" within 24 hours (section 9(3) of the 2014 Act). An arrest during the week should not ordinarily cause practical difficulties (although the Working Party heard of examples where there was a breakdown in liaison between the police, the applicant and the court and the arrested person was not brought before a judge in time; underlining the need for a local plan to address the practicalities of arrests).

255. Arrests made on Friday nights[175] (not an unusual occurrence given the nature of much non-housing related anti-social behaviour), have caused, and continue to cause, practical problems, as access to a court with the appropriate secure facilities is then required out of hours. Often the solution has been the use of a magistrates' court's sitting on a Saturday.[176]

256. The practice guidance issued in June 2015 (set out in full below) states:

[174] The revised CPR 81.2 (in force from 1 October 2020 through the provisions of the Civil Procedure (Amendment No. 3) Rules 2020) refers to "claimant" rather than "applicant" in relation to committal applications. For consistency purposes this paper will refer to applicant/respondent throughout given that proceedings are usually commenced by an application and the 2014 Act uses the term "respondent".

[175] Arrests on a Saturday are less problematic from the court's perspective as Sundays do not count for the calculation of the 24 hours.

[176] There are some advantages to sitting in the magistrates' court as practitioners may be more familiar with the legal aid process and the information may be more readily available concerning parallel criminal proceedings or relevant history before the criminal courts.

"Where no 'out of hours' court is open and available, the judge should consider whether the matter can properly be dealt with, at a location other than an open court, through exercise of the power to remand on bail or in custody, provided under section 43(5) and schedule 5 of the 2009 or section 9(5) and schedule 1 of the 2014 Act. Use of the remand power does not engage the notification requirements of paragraphs 5, 6, 13 or 15 of the Committal PD. Those requirements will be met when the matter comes back before the court as specified below."[177]

257. The Working Party believes that it is highly desirable that committal hearings take place in a court as:

i. It is necessary to have open access to the public to comply with the principle of open justice (which is particularly important when liberty is at stake).
ii. A police station (which in some centres will be close to the magistrates' court) will often not have the necessary facilities easily available (specifically an appropriate room and recording facilities).
iii. The options for a judge conducting "a hearing" other than in a court will be likely to be limited to remanding or giving bail i.e. it would inappropriate to hear any evidence.
iv. It is likely to be difficult to obtain background detail/paperwork (e.g. by accessing details on the court's case information system[178]) or indeed an investigation of outstanding criminal matters.[179]
v. It is difficult to list the necessary subsequent hearing effectively (e.g. before a judge who has dealt with a previous breach).

258. It is hoped that in the future video-link/skype/CVP[180] facilities will be available to connect with a police station which may assist with compliance with the 24-hour requirement**.** However, at the present the subject of arrests and "out of hours" courts should be covered in the local plan.

Committals

259. CPR 81 currently sets out the procedural requirements in relation to applications and proceedings in relation to contempt of court in both the High Court and the county court. CPR 81.10 states:

"(1) A committal application is made by an application notice under Part 23 in the proceedings in which the judgment or order was made or the undertaking was given….

(3) The application notice must:

a. set out in full the grounds on which the committal application is made and must identify, separately and numerically, each alleged act of contempt including, if known, the date of each of the alleged acts; and
b. be supported by one or more affidavits containing all the evidence relied upon."

[177] The Working Party could not envisage circumstances when it would be appropriate for an order to be made by a judge over the phone.
[178] At the least this *should* be all hearing notices and orders made; including any previous orders on committal.

[179] See paragraph 237 of this document.
[180] Cloud Video Platform, a video conferencing system used by the court.

260. From 1 October 2020, a substantially revised CPR 81 will be in force. CPR 81.4 will state:

> *"81.4.—(1) Unless and to the extent that the court directs otherwise, every contempt application must be supported by written evidence given by affidavit or affirmation."*

261. An affidavit must comply with the requirements set out in Practice Direction 32.[181] Given that proceedings for contempt of court may be brought against a person if he/she makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth,[182] and the practical difficulties faced in obtaining an affidavit from a witness (as opposed to a statement, particularly from a police officer), local authorities and other bodies who are regularly involved in committals have questioned why a statement should not be sufficient for the purposes of a contempt application under the 2014 Act (the act itself has no requirement that evidence be by way of affidavit).

262. Unlike other forms of contempt procedure covered by Part 81, it is usually, if not invariably, the case that when a person has been arrested and produced to the court under section 9 of the 2014 Act (i.e. without application) the court will have only statements from the relevant police officers (and others) and not affidavits. So, currently the process is often commenced (indeed sometimes determined under CPR 65.47(2)) without affidavit evidence. Given this state of affairs (and the prescribed list of potential claimants), the Working Party believes that it is difficult to justify the requirement CPR 81.10 and what will be CPR 81.4 in relation to committal applications under the 2014 Act. In practice the requirement merely delays matters and adds to (usually unrecoverable) costs. The Civil Procedure Rule Committee should consider whether the requirement for evidence upon application under CPR 81.4 in relation to a committal under the 2014 Act to be by affidavits should be removed, either by amendment to CPR 65.47 and/or PD 65 and/or CPR 81.

263. District judges had the jurisdiction to deal with committals in respect of breaches of injunctions under the Housing Act 1996 arising from anti-social behavior. After the 2014 Act came into force some confusion arose as to whether district judges had the jurisdiction to make committal orders in respect of breaches of the 2014 Act. In 2018 the matter was settled, and the jurisdiction was confirmed, by amendments to Practice Direction 2B and CPR 65.47(5). The Working Party has heard that the large majority of first committal hearings following arrests in respect of alleged breaches of 2014 orders are heard by district judges/deputy district judges. CPR 65 provides a power to deal with the contempt at this hearing or within 28 days without a formal committal application, or thereafter by committal application, as follows:

> *"CPR 65.47*
> *(1) This rule applies where a person is arrested pursuant to –*
> *(a) a power of arrest attached to a provision of an injunction; or*

[181] CPR 32.16; but see also *Haederle v Thomas* [2016] EWHC 3498 in which Nugee J held that a document which sets out a witness's evidence which the witness has sworn to be his evidence is, in technical terms, an affidavit.

[182] CPR 32.14.

(b) a warrant of arrest.

(2) The judge before whom a person is brought following his arrest may –
(a) deal with the matter; or
(b) adjourn the proceedings.

(3) If proceedings under section 43 or 44 of the 2009 Act or section 9 or 10 of the 2014 Act are adjourned and the arrested person is released –
(a) the matter must be dealt with (whether by the same or another judge) within 28 days of the date on which the arrested person appears in court; and
(b) the arrested person must be given not less than 2 days' notice of the hearing.

(4) An application notice seeking the committal for contempt of court of the arrested person may be issued even if the arrested person is not dealt with within the period in subparagraph (3)(a).

(5) Sections 2 and 8 of Part 81 apply where an application is made in the County Court to commit a person for breach of an injunction as if references in those Sections to the judge include references to a district judge."

264. The Civil Procedure (Amendment No. 3) Rules 2020, relevant parts of which come into effect on 1 October 2020, substantially revise CPR 81. CPR 81.3 will state:

"(1) A contempt application made in existing High Court or county court proceedings is made by an application under Part 23 in those proceedings, whether or not the application is made against a party to those proceedings.

(2) If the application is made in the High Court, it shall be determined by a High Court judge of the Division in which the case is proceeding. If it is made in the county court, it shall be determined by a Circuit Judge sitting in the county court."

265. This rule removes the current jurisdiction of district judges (and deputy district judges) to hear committal applications in respect of breaches of orders under the 2014 Act. The Working Party is unaware of the reasoning behind this decision, or of any suggestions from the judiciary, practitioners or other bodies that it should be removed. The Working Party is very concerned that the change will lead to unsatisfactory delay and complications in the determination of committal applications under the 2014 Act (particularly given the need to adjourn first hearings to enable the respondent to seek legal advice/representation and also the fact that many court centres do not have a resident civil circuit judge).

266. Further, given that CPR 81.3 is limited to formal applications, it does not expressly remove the jurisdiction of a district judge under CPR 65.47 to deal with a committal without an application within 28 days of arrest. This creates unsatisfactory distinctions between the jurisdiction of a district judge before and after the expiry of 28 days and also within the 28-day period between committal proceedings without a formal application and ones where a formal application has been made in respect of the breaches for which the respondent was arrested and/or additional alleged breaches.

In the view of the Working Party, these distinctions are very difficult to justify and are likely to lead to uncertainty as to jurisdiction and delay.

267. It is the view of the Working Party that the CPRC should, as a matter of urgency, amend the revised CPR 81 and/or CPR 65 to restore the jurisdiction of district judges to deal with committal applications in respect of the breach of orders made under the 2014 Act.

268. The current CPR PD81 paragraph 15.6 and the revised CPR 81 paragraph 81.4 set out the court's duty to remind the respondent of possibility of legal aid and provide a reasonable opportunity to gain legal representation.

Remands in custody or on bail

269. If there has been an arrest without warrant and, as is usually the case, the matter is not disposed of at the first hearing,[183] the judge may remand the defendant in custody or on bail. Section 9(5) of the 2014 Act provides that:

> *"The judge before whom the person is brought under subsection 3(a) or (b) may remand the person if the matter is not disposed of straight away."*

270. If there is representation, a bail application is usually made orally at the hearing. However, bail must be considered in the absence of an application. Section 11 states that Schedule 1 (remands under sections 9 and 10) has effect and paragraphs 2–4 of that schedule state:

> *"2. (1) The judge or the court may remand the person:*
> *(a) in custody, or*
> *(b) on bail.*
> *But a person aged under 18 may not be remanded in custody unless paragraph 6 applies.*
>
> *(2) A reference in this Schedule to remanding a person in custody is a reference to committing the person to custody to be brought before the court at the end of the period of remand or at whatever earlier time the court may require.*
>
> *(3) The judge or the court may remand the person on bail—*
> *(a) by taking from the person a recognizance, with or without sureties, conditioned as provided in paragraph 3, or*
> *(b) by fixing the amount of the recognizances with a view to their being taken subsequently and, in the meantime, committing the person to custody as mentioned in sub-paragraph (2).*
>
> *(4) Where a person is brought before the court after remand, the court may further remand the person.*

[183] If the defendant is not brought before a judge in the 24-hour period referred to in section 3, the statutory power to remand does not arise, and the defendant must be released. There is no inherent power to remand in custody or on bail.

3. (1) Where a person is remanded on bail, the judge or the court may direct that the person's recognizance be conditioned for his or her appearance:
(a) before the court at the end of the period of remand, or
(b) at every time and place to which during the course of the proceedings the hearing may from time to time be adjourned.

(2) Where a recognizance is conditioned for a person's appearance as mentioned in sub-paragraph (1)(b), the fixing of a time for the person next to appear is to be treated as a remand.
(3) Nothing in this paragraph affects the power of the court at any subsequent hearing to remand the person afresh.

4. (1) The judge or the court may not remand a person for a period exceeding 8 clear days[184] *unless:*
(a) paragraph 5 or 6 applies, or
(b) the person is remanded on bail and both that person and the person who applied for the injunction consent to a longer period.
(2) Where the judge or the court has power to remand a person in custody, the person may be committed to the custody of a constable if the remand is for a period not exceeding 3 clear days.[185]

271. CPR 65.48 states:

"(1) Where, in accordance with paragraph 2(2)(b) of Schedule 5 to the 2009 Act or paragraph 2(3)(b) of Schedule 1 to the 2014 Act, the court fixes the amount of any recognizance with a view to it being taken subsequently, the recognizance may be taken by –
a judge;
a justice of the peace;
a justices' clerk;
a Police officer of the rank of inspector or above, or in charge of a Police station; or
where the arrested person is in custody, the governor or keeper of a prison with the same consequences as if it had been entered into before the court.

(2) The person having custody of an applicant for bail must release that person if satisfied that the required recognizances have been taken."

272. Confusion has arisen amongst practitioners and judges as neither the 2014 Act or the CPR expressly cover:

a. the relevant test to be applied in relation to the granting of bail;
b. whether conditions can be applied;
c. the effect of a breach of bail conditions (other than the potential withdrawal of bail at a subsequent hearing).

[184] The reference to "clear days" presumably means that you exclude the day you make the order and the day of the next hearing: see CPR Part 2.8(3).
[185] Section 4(2) is relevant when the arrest has been at a weekend.

273. The Working Party believes that, given the importance of the decision as to whether or not to grant bail, the Civil Procedure Rule Committee should consider providing clarification within PD 65.

274. Taking the three issues in turn, the Working Party believes (and it appears to be accepted by all consultees) that the relevant principles to be applied should be those derived from the Bail Act 1976. The starting point is that there is a general right to bail, but that in certain circumstances the court "need not" grant bail. Schedule 1 Part 1 provides that:

> *"The defendant need not be granted bail if the court is satisfied that there are substantial grounds for believing that the defendant, if released on bail (whether subject to conditions or not) would-*
>
> *(a) fail to surrender to custody; or*
> *(b) commit an offence on bail; or*
> *(c) interfere with witnesses or otherwise obstruct the course of justice …"*

275. Paragraph 9 provides that:

> *"In taking decisions required by paragraph 2 …. of this Part of this Schedule, the court shall have regard to such of the following considerations as appear to it to be relevant, that is to say-*
>
> *(a) the nature and seriousness of the offence or default (and the probable method of dealing with the defendant for it),*
> *(b) the character, antecedents, associations and community ties of the defendant,*
> *(c) the defendant's record as respects the fulfilment of his obligations under previous grants of bail in criminal proceedings,*
> *(d)… the strength of the evidence of his having committed the offence or having defaulted,*
>
> *…as well as to any others which appear to be relevant."*

276. As for the second and third issues, the 2014 Act does not permit the application of conditions to the grant of bail other than a recognizance. Further, there are no automatic sanctions for breach of bail granted under the 2014 Act (it is not an offence). If the court wishes to impose conditions with sanctions then it is necessary to vary the terms of the injunction, with, if appropriate, a power of arrest attached to the relevant terms. Again, the Civil Procedure Rule Committee should consider whether PD 65 should be amended to make these matters clear.

Medical reports

277. Sections 5 and 6 of Schedule 1 of the Act deal with remand for medical examination and report:

> *"5. (1) This paragraph applies where:*
> *(a) the judge or the court has reason to think that a medical report will be needed, and*
> *(b) the judge or the court remands the person in order to enable a medical examination to take place and a report to be made.*

(2) If (in the case of a person aged 18 or over) the person is remanded in custody, the adjournment may not be for more than 3 weeks at a time.

(3) If the person is remanded on bail, the adjournment may not be for more than 4 weeks at a time.

6. (1) If the judge or the court—
(a) is satisfied, on the written or oral evidence of a registered medical practitioner, that there is reason to suspect that the person is suffering from mental disorder, and
(b) is of the opinion that it would be impracticable for a report on the person's mental condition to be made if he or she were remanded on bail,
the judge or the court may remand the person to a hospital or registered establishment specified by the judge or the court for such a report to be made.

(2) In sub-paragraph (1)—
"hospital" has the meaning given by section 145(1) of the Mental Health Act 1983;
"mental disorder" has the meaning given by section 1 of that Act (reading subsection (2B) of that section as if it included a reference to sub-paragraph (1) above);
"registered establishment" has the meaning given by 34(1) of that Act.

(3) Subsections (4) to (10) of section 35 of the Mental Health Act 1983 apply for the purposes of sub-paragraph (1) with any necessary modifications (in particular, with references to the accused person being read as references to the person mentioned in that sub-paragraph, and references to the court being read as references to the judge or the court)."[186]

278. There are significant practical problems if the respondent is not represented and is unable or refuses to co-operate.[187] Assistance from the Liaison and Diversion service would greatly reduce these difficulties (in part because the service has direct access to NHS records, so can quickly ascertain if there has already been a diagnosis or treatment in the past and can advise as to assessment options). This further underlines the need for immediate assessment of how the court can gain access to and assistance from the L&D service (see paragraph 98 et seq of this document).

The Practice Direction

279. The Lord Chief Justice issued a Practice Direction (PD) on 26 March 2015 in respect of committals for contempt of court.[188] It applies to all proceedings for committal for contempt of court, including contempt in the face of the court, whether arising under any statutory or inherent jurisdiction, and supplements the provisions relating to contempt of court in the Civil Procedure Rules 1998.[189]

[186] A problem arises if the person is unrepresented and/or does not wish to have a medical examination. The court can remand and order a report be compiled by the prison or that the court itself finance a report by a specified individual.
[187] See case example 1 at paragraph 203 of this document.
[188] It applies in all courts in England and Wales, including the Court of Protection, and supersedes the *Practice Guidance: Committal for Contempt* [2013] 1 WLR 1326, dated 3 May 2013; *Practice Guidance (Committal Proceedings: Open Court) (No. 2)* [2013] 1 WLR 1753, dated 4 June 2013; and *President's Circular: Committals* Family Court Practice 2024 at 2976, dated 2 August 2013.
[189] The PD was clarified in a further Practice Note of 24 June 2015.

280. Practitioners and members of the judiciary have raised the issue that the PD requires that advocates and the judge (except judges and justices of the peace in the magistrates' courts) *"shall be robed for all committal hearings"*. This has produced significant practical difficulties (and sometimes delay) in relation to urgent hearings (particularly) at weekends for advocates and judges. The requirement has now been included within the revised CPR 81:

> *"81.8(2) Hearings and judgments in contempt proceedings*
> *(2) Advocates and the judge shall appear robed in all hearings of contempt proceedings, whether or not the court sits in public."*

281. The Working Party suggests that consideration should be given by the Lord Chief Justice and also the CRPC to the rule being relaxed for urgent committal hearings covered by CPR 65.47.

282. The 2015 Practice Direction also requires that in any case where a committal decision (either an order for committal or a suspended committal order) has been made:

> *"...the court shall, in respect of all committal decisions, also either produce a written judgment setting out its reasons or ensure that any oral judgment is transcribed, such transcription to be ordered the same day as the judgment is given and prepared on an expedited basis. It shall do so irrespective of its practice prior to this Practice Direction coming into force and irrespective of whether or not anyone has requested this.*
> *Copies of the written judgment or transcript of judgment shall then be provided to the parties and the national media via the CopyDirect service. Copies shall also be supplied to BAILII and to the Judicial Office at judicialwebupdates@judiciary.gsi.gov.uk for publication on their websites as soon as reasonably practicable."*[190]

283. The revised CPR 81.8(8) now provides:

> *"(8) The court shall be responsible for ensuring that judgments in contempt proceedings are transcribed and published on the website of the judiciary of England and Wales."*

284. The Working Party heard from the judiciary (including through feedback at Judicial College training[191]) that compliance with the requirement to order (almost invariably at public expense), and forward, on a transcript, was variable depending on the judge/court centre.[192] There were a number of reasons for this including a lack of judicial familiarity with the requirement, requests not being actioned or chased and staff not knowing what to do with transcripts when obtained. Given the lack of any data[193] in relation to committal hearings it is not possible to ascertain what percentage of committal decisions are the subject of judgments/transcripts which are then circulated as required

[190] PD Paragraphs 14 and 15.
[191] See paragraph 438 of this document.

[192] Written judgments were very rarely produced.
[193] See generally paragraphs 304-319 of this document.

by the Practice Direction. In a review of 50 penalties imposed for breach of orders under the 2014 Act using BAILII and the judicial intranet, 17 out of the 50 (34%) reported cases were from just three Courts: Bristol, Gloucester and Walsall, and many large court centres do not appear to have reported judgments.[194] The revised CPR 81 does not mention providing transcripts to either the national media via the CopyDirect service or BAILII and the Working Party is uncertain if these requirements have now fallen away. Given that the Practice Direction is now past its fifth anniversary and the lack of elision between the Practice Direction and the new CPR 81, the Working Party suggests that a review is undertaken of the requirements to obtain and then circulate a judgment after committal hearings in respect of breaches of orders under the 2014 Act. It is further suggested that the limited requirement in the revised CPR 81 is adequate and should also either be relaxed to noteworthy judgments or properly policed (with appropriate reminders to staff and on any revised N79[195]).

Criminal proceedings

285. The alleged breach/es of an order under the 2014 Act may have been criminal in nature[196] and resulted in criminal charges. The issue then arises as to who should proceed to hear the allegations and/or sentence first.

286. In *Gill v Birmingham City Council* [2016] EWCA Civ 608[197] the court re-affirmed the principle that the first court should not anticipate or allow for a likely future sentence/penalty, but should ensure that the basis of its sentence/penalty was clear and that a transcript was made available.[198] It was for the second court, which should be fully informed, to sentence/punish in the light of the first so as to ensure that there was no double punishment for the same act. As proceedings in the criminal courts were likely to require more preparation and take longer, an application to commit should be issued promptly and contempt punished before sentence in parallel criminal proceedings.[199]

287. This principle ignores the practical advantages of proceedings in a criminal court as opposed to a civil court[200] and the greater range of sentencing options available to the criminal court. Further, if there are issues such as breach of an existing community order and/or a suspended sentence it is obviously necessary to consider whether the criminal court may have relevant information not available to the civil court.

[194] See paragraph 428 of this document.
[195] See the suggested revised N79 at Annex 2 of this report.
[196] See generally paragraph 79 of this document.

[197] See also *Lomas v Parle* [2003] EWCA Civ 1804, [2004] 1 W.L.R. 1642, supplementing *Hale v Tanner* [2000] 1 W.L.R. 2377 and *Slade v Slade* [2009] EWCA Civ 748, [2010] 1 W.L.R. 1262.
[198] It may be necessary to ensure that the transcript required to be prepared as per the Practice Direction is obtained on an expedited basis.

[199] A civil court also faces the difficulty that no transcript will be available of any hearing in the magistrates' court.

[200] See paragraphs 120-124 of this document.

288. As, save in the most serious breaches (e.g. assault causing very significant harm), the likelihood is that the civil court will proceed first, it is important that a local plan ensures that there is liaison between the claimant and the CPS/Probation Service to ensure that, so far as practicable, the civil court has all the relevant information in relation to any past or present criminal proceedings.

The order

289. The N79 form (entitled *Committal or Other Order upon Proof of Disobedience of a Court Order or Breach of an Undertaking*) must be filled in correctly and initialled by the judge (who has a responsibility to ensure that it is properly filled in). It must then be retained on the court file. There is also a separate remand form. The Working Party heard, and agrees with, complaints that the form is difficult to understand and out of date. It should be amended so that it is in easily understandable language, up to date, easy to use and allows for entries in relation to remand.

290. The form should record the fact that the judge has referred to the right to seek to purge contempt and also the right to appeal without permission, time limits, and the route of appeal.[201] A suggested revised N79 form is at Annex 2.

Young people

291. If the proposed respondent to an application for an injunction under section 1 of the 2014 Act is under 18, section 14 of the Act provides that an applicant must consult the local Youth Offending Team about the application. If an application is made, it must be made to a youth court. The Working Party is pleased to report that it believes that the practice and procedure in relation to injunctions sought (or potentially sought) against young people is far more satisfactory and successful than that in relation to those 18 and over. In part this is because of the surrounding structure of third-party assistance.

292. Each local authority has a Youth Justice Service (YJS) which oversees the Youth Offending Team (YOT[202]). The YJS is a multi-agency partnership with a statutory responsibility for providing intervention, challenge and support for young people and their families with the primary aim of preventing anti-social behaviour, offending and re-offending by young people aged 10–17 years. There is no equivalent body for adults.

293. Also, many young people who have been involved in anti-social behaviour over an extended period will have had some interaction with a social worker.

294. The number of injunctions sought against young people is far smaller than the number sought against a comparative adult population. The most recent figures available are as follows:

[201] See paragraph 461 of this document.
[202] Section 39 of the Crime and Disorder Act 1998 lays out the statutory requirements for YOTs. A YOT management board should be formed to provide strategic direction with the aim of preventing offending by children and to determine how the YOT is to be composed and funded.

a. 2017/18: 138 orders and 143 breaches.[203]
b. 2018/19: 137 orders and 208 breaches.

As with adult orders, there is regional variation. In Avon, Somerset and Gloucestershire only 10 orders have been made over the last 10 years and not one has been breached.

295. The relevant agencies make every effort to avoid having to seek an order. Further, when made, the orders, unlike the orders in made in the county court, usually contain positive requirements.

296. The key to successful intervention in respect of anti-social behaviour by young people is multi-agency assessment and the production of (and resources to implement) an action plan in relation to the engagement with, and supervision of, an individual.

297. The *Standards for Children in the Youth Justice System: 2019*[204] define the minimum expectation of all relevant agencies in relation to young people involved in criminal behaviour. The standards were set by the Secretary of State on the advice of the Youth Justice Board (YJB):

> *"These standards for children in the youth justice system define the minimum expectation for all agencies that provide statutory services to ensure good outcomes for children in the youth justice system. They are set by the Secretary of State for Justice on the advice of the YJB. The aim of these standards is to:*
> *·Provide a framework for youth justice practice and ensure that quality is maintained*
> *·Encourage and support innovation and good practice to improve outcomes for children who commit crime*
> *·Ensure that every child lives a safe and crime-free life, and makes a positive contribution to society*
> *·Align with the YJB's child first, offender second principle.*
> *·Assist the YJB and inspectorates when they assess whether youth justice services are meeting their statutory requirements."*[205]

298. There are three standards:

a. Standard 1: out-of-court disposals
b. Standard 2: at court
c. Standard 3: in the community (court disposals)

299. Standard 1, which deals with out-of-court disposals, requires that the Youth Offending Team management boards have mechanisms in place which provide them with assurance that there is effective multi-agency partnership working arrangements; timely information sharing, planning,

[203] A particular respondent/defendant may have breached a particular order on a number of occasions.
[204] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/780504/Standards_for_children_in_youth_justice_services_2019.doc.pdf

[205] Ibid, Introduction, p. 3.

decision-making; and monitoring with key agencies. So, there is a clear aim of avoiding the need for a court hearing.

300. Under Standard 2; court proceedings are reserved for children who cannot be dealt with by less formal means. The Youth Offending Team management board must have mechanisms in place which provide them with assurance that magistrates and the judiciary have reports which provide them with the required range of recommendations to make informed decisions regarding sentencing. Individual reports should be prepared by the YOT which focus on the children's best interests, constructively promoting their potential and desistance from crime. These reports should be balanced and impartial, take account of the impact upon victims and promote fairness by making sure that diverse needs are met. So in sharp contrast to the position in relation to adults, if the matter proceeds as far as a hearing, the court is provided with a large degree of information about the respondent, and also constructive and realistic proposals to achieve cessation of the behaviour.

Statutory duty in respect of a care leaver

301. Although adult services usually cannot match the levels of intervention, assistance and supervision provided to young people, some adults will be receiving or will be entitled to support (e.g. in relation to housing). It is very important that the court knows of and/or enquires about such support. The Working Party believes it is sometimes overlooked that section 3 of the Children & Social Work Act 2017 introduced a new duty on local authorities, to provide Personal Adviser (PA) support to all care leavers (towards whom the local authority had duties under section 23C of the Children Act 1989[206]) up to age 25,[207] if they want this support. Under previous legislation, local authorities were required to provide care leavers with support from a PA only until they reached age 21,[208] with that support continuing up to age 25 if a care leaver was engaged in education or training. However, this support was not available to care leavers aged over 21 who were not in education, training or employment.

302. The duty means that the local authority continues to exercise functions in respect of care leavers to age 25 and should therefore apply the "corporate parenting principles" when exercising those functions. This will be particularly important for local authority departments whose services have a significant impact on care leavers' outcomes, such as housing services (housing difficulties, and as a consequence homelessness, often lie at the root of some forms of anti-social behaviour). The statutory guidance states:

[206] See the *Children Act 1989 guidance and regulations, Volume 3: planning transition to adulthood for care leavers statutory guidance,* which was revised and published in January 2015.
[207] See *Extending Personal Adviser support to all care leavers to age 25: Statutory guidance for local authorities,* February 2018; Department of Education, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/683701/Extending_Personal_Adviser_support_to_all_care_leavers_to_age_25.pdf.
[208] For care leavers aged 18 to 20, there is a proactive duty on the local authority to keep in touch with care leavers (section 23C (2) of the Children Act 1989), which does not apply to care leavers aged 21 or over (neither those who are already entitled to support because they are in education or training, nor those who will be covered by the new duty).

"The PA acts as a focal point for the young person, ensuring that they are provided with the practical and emotional support they need to make a successful transition to adulthood, either directly or through helping the young person to build a positive social network around them. All care leavers should know who their PA is and how to contact them. Throughout their transition to adulthood and independent life, care leavers should be able to rely on consistent support from their PA, who is the designated professional responsible for providing and/or co-ordinating the support that the young person needs. This includes taking responsibility for monitoring, reviewing and implementing the young person's pathway plan."

And:

"The level of support that each care leaver will need will differ depending on their circumstances. Some care leavers may face a number of continuing challenges and require support across a number of different aspects of their lives. Where that is the case, support will need to be provided in relation to each, or the majority, of the pathway plan 'domains' described in the Children Act 1989 Volume 3 statutory guidance. However, in other cases, care leavers may return for support due to a specific issue, for example:

- *Pregnancy or becoming a parent*
- *Release from custody*
- *Mental health issues*
- *Risk of homelessness*
- *Debt, including rent arrears*
- *For advice or guidance on commencing education or training*
- *For advice or support following experience of domestic or sexual violence/abuse 21.*

Where that is the case, the PA should provide support for as long as that issue remains and address any new issues if they arise. But if the young person does not want or require support on an ongoing basis, the case can remain inactive until the care leaver makes another request for support."[209]

303. Any applicant considering making an application against a person who is aged 18 to 25 should make every effort to ascertain if they are a care leaver and, if they are, to provide them with advice as to the assistance available.

[209] Ibid, paragraph 20.

SECTION 8 – Data

304. The county court through its hearing centres throughout England and Wales has been making (and continues to make) orders on applications for injunctions under the 2014 Act and also upon breach (committals) each day. However no specific data had been/is retained to allow assessment of how many orders are sought and/or breached, etc. As set out below, no data has been kept as to penalties imposed on breaches.[210]

305. As set out above, given a central driver behind the introduction of the changes brought about by the 2014 Act was that ASBOs were not thought to be "working" (breach rates were described as high and the number issued was steadily declining from 2005), at the outset of its work the Working Party sought data in relation to the use and effectiveness of injunctions under the 2014 Act. The Working Party wished to consider and compare data before and after the changes brought about by the 2014 Act and was very surprised to discover that no data had been, or was being, compiled: that there was a "data desert". This appeared to be a very significant oversight in planning the implementation of the new regime.[211] It was even more surprising given the 2006 report of the National Audit Office[212] stated:

> *"Local agencies would be better placed to target their interventions more effectively if the Home Office undertook formal evaluation of the success of different interventions and the impact of providing support services in conjunction with enforcement. International research suggests that preventive programmes, such as education, counselling and training can be a cost-effective way of addressing anti-social behaviour. The Home Office, together with other Departments, is taking this forward through the Respect Action Plan and the Government is also currently considering further legislation to address anti-social behaviour."*[213]

306. The last set of statistics, which were published by the Home Office before the Act came into force,[214] reveal the extent of the data collection that existed before the 2014 Act. Specifically, it was known that:

> *"1. ASBOs issued*

[210] The Working Party undertook its own limited review: see paragraph 428 of this document.
[211] The existence of the lacuna was acknowledged at a meeting of a new/streamlined strategic Anti-Social Behaviour group at the Home Office. Previously an expanded group had been meeting since 2015 to review the working of the 2014 Act.

[212] The study looked at the impact of three of the most commonly-used interventions: warning letters, Acceptable Behaviour Contracts and Anti-Social Behaviour Orders. The success rate for those receiving warning letters or Acceptable Behaviour Contracts were similar, with around two-thirds receiving just one form of intervention from the authorities. However, over half of those who received the strongest form of intervention – an Anti-Social Behaviour Order (ASBO) – breached the Order, and one-third did so on five or more occasions. Forty per cent of people who received an Anti-Social Behaviour Order had received an earlier anti-social behaviour intervention and 80 per cent had previous criminal convictions.

[213] National Audit Office report: *The Home Office: Tackling Anti-Social Behaviour December 2006*.
[214] https://www.gov.uk/government/publications/anti-social-behaviour-order-statistics-england-and-wales-2013/anti-social-behaviour-order-statistics-england-and-wales-2013-key-findings

- *in total, 24,427 ASBOs were issued between April 1999 and December 2013; the highest number of ASBOs issued annually was in 2005 (4,122); since then, there were year-on-year falls in the number issued between 2005 and 2012*
- *in 2013, 1,349 ASBOs were issued, a 2% increase from the 1,329 ASBOs issued in 2012*
- *in total since 1 June 2000, 86% of ASBOs have been issued to males; and 36% of ASBOs issued to juveniles*
- *a greater proportion of ASBOs (60%) have been issued following conviction for a criminal offence rather than following an application*
- *25% of ASBOs issued on application to juveniles in 2013 were accompanied with an Individual Support Order (ISO); this is an increase from 18% in 2012 and is just below the 2009 peak of 26%."*

307. As for ASBOs breached:

- *"of the 24,323 ASBOs issued between 1 June 2000 to 31 December 2013, 58% (14,157) had been breached at least once; of those breached, 75% (10,651) were breached more than once; if an ASBO is breached, on average it is breached five times*
- *in 2013, there were 862 ASBOs breached for the first time, a 3% decrease compared to 2012 and the lowest number of breaches since 2003*
- *juveniles have accounted for 42% of ASBOs breached; just over two-thirds of juveniles had breached their ASBOs at least once by the end of 2013, compared to just over half of adults*
- *on average, 29% of ASBOs were breached within the year they were issued; on annual basis, this 'in-year breach rate' has remained relatively stable since 2009 at around 30%."*

308. As regards "sentencing"[215] for ASBOs breached:

> *"of the 14,157 ASBOs breached at least once, 53% (7,503) resulted in courts imposing a sentence of immediate custody, with an average custodial sentence length (ACSL) of 5.0 months; a further 23% (3,200) resulted in a community sentence being imposed."*

309. This is to be compared with the post-2014 position, where no data has been systemically recorded/retained in relation to the making of or breaches of civil orders for/by adults.

310. The Working Party has learned that:

a. It is extremely difficult, if not impossible, to interrogate, ex post facto, existing records on the county court "Caseman" system to obtain useful statistics as to how many orders had been made under the 2014 Act; how many applications had been made without notice; how many orders had contained positive requirements; how many breaches of orders had been established and what penalties had been imposed for breaches of injunctions under the 2014 Act.

[215] Criminal courts carry out "sentencing", but it is the wrong term for a civil court imposing a penalty on committal for contempt through a breach of the 2014 c.f. the revised CPR 81 paragraph 8.2 (see the Civil Procedure (Amendment No3) Rules 2020.

b. There was no national protocol for local authorities in relation to the compilation of statistics on the use or effectiveness of injunctions under the 2014 Act. However, some individual authorities did retain some data.[216]
c. Statistics retained by the police in relation to action taken in respect of anti-social behaviour did not allow for analysis of the use (or effectiveness) of injunctions under the 2014 Act.

311. In October 2019, the Home Office National ASB Strategic Board[217] agreed that the availability of data on anti-social behaviour should be explored to develop understanding of the impact and effectiveness of the powers from the 2014 Act. This resulted in the creation of an "ASB data subgroup", which was to focus on exploring what data was currently available across relevant organisations and what data is collected more broadly on anti-social behaviour. It recognised that no data was collected or retained by HMCTS in respect of injunctions made under the 2014 Act or breaches of such injunctions.

312. Given the matters set out above, it was not possible to ascertain through data whether the 2014 ASBI injunctions regime was "working" any better than its predecessor.

313. The Working Party sought to set up a pilot in Bristol Civil Justice Centre to measure the data for 2019 with the assistance of Jane Pawsey (HMCTS) and Owen Daniel (Judicial Office). The aim was to capture details of all claims issued under the 2014 Act, including the nature of the claim (housing or non-housing), whether an order was sought or granted ex parte, if an order was made and if so whether a positive requirement was included. Further, a record was to be kept of all breach hearings noting if the respondent attended, whether the respondent was represented, if the breach was proved and whether a custodial penalty or suspended custodial penalty was imposed. Unfortunately, it became apparent that, as the Caseman system did not require such details and the court had such a large turnover of staff,[218] the records, beyond issue, were not being kept fully up to date[219] and were not reliable. Given that pilot was entirely reliant upon HMCTS staff devoting additional time, the decision was taken that in the absence of a national data requirement/collection system the Working Party could take the matter no further.

314. His Honour Judge Robinson kept a database of 15 cases referred to him during 2019 as the Designated Civil Judge for South Yorkshire (based at Sheffield).

315. The Working Party also sought data from Manchester as a representative local authority. There is currently no requirement upon (or funding for) a local authority to compile and retain data regarding the issuing of applications for injunctions under the 2014 Act.

[216] e.g. Manchester, see paragraph 315 of this document.
[217] The Home Office National ASB Strategic Board has met since the Act came into force. HHJ Cotter QC attended a meeting in 2019 to find out whether the Working Party was mistaken and whether any data was available in relation to injunctions/breaches of/under the 2014 Act.
[218] A 40% turnover of grade E staff in one year.
[219] And even this record may be an underestimate, as some staff may not have been able to identify that a claim should have been recorded as an application for an order under the 2014 Act.

Review of the data

316. The limited data which the Working Party was able to obtain can be summarised as follows:

    a. The data from Bristol for 2019 show that 88 applications were made at the Bristol Civil Justice Centre for injunctions under the 2014 Act.[220] The majority were made by Bristol City Council; none of the applications were made by the police. Of these applications 48 (54%) were not property related, 30% were property related and the balance had no data was inputted.
    b. A sample of 21 breach hearings showed that only 10 respondents were noted as represented.[221]
    c. The data from Manchester City Council, which has responsibility for the city centre but no social housing stock,[222] provided a more detailed representative picture of the non-housing related injunctions in one city (although this figure excludes any applications made by the police). It revealed that in 2018/19:
        i. 30 injunctions were applied for (3 youths) of which 24 were applied for without notice (80%).
        ii. Of the 24 without notice applications, 14 resulted in an order without notice (46% of orders sought).
        iii. There were 11 breach applications[223] (one in relation to a youth), resulting in 6 custodial penalties (54.5%).
    d. Of the 15 applications for an injunction under the 2014 Act which came before His Honour Judge Robinson, 8 were non-housing related (53%), with three claims have being brought by the police, and 7 housing related (47%). Of the 15 orders made, only 5 respondents were present at the hearing (30%) and 7 were subsequently breached (47%). At the breach hearings the respondents failed to appear on five occasions and no respondent was represented.

317. Although this data is very limited indeed, and no reliable conclusions can be taken from it, it is the only data currently available (save for the analysis of penalties imposed for breach/es set out below[224]). It provides some limited support for the following propositions:

    a. A significant proportion of the injunctions sought (in both comparative samples over 50%) are non-housing related.
    b. There are considerable regional variations of approach to non-housing related anti-social behaviour with Bristol making 60% more applications than Manchester (a larger city). Further, 30% of a sample in Sheffield were applications made by the police, whereas no applications were made by the police in Bristol.[225]
    c. A high percentage of orders are made either ex parte or in the absence of the respondent.[226]
    d. A significant proportion of respondents are not represented at breach hearings.

[220] This may be an underestimate.

[221] It is clear that some hearings were adjourned off to give the respondent a further opportunity to gain representation.

[222] Local social housing stock is managed by housing providers or by Arms Length Management Organisation.

[223] Not necessarily of the orders made that year, i.e. could be a breach of an order made the year before.

[224] See paragraph 428 of this document.

[225] It is not known how many (if any) applications by the police were made in Manchester.

[226] This ties in with the problems in relation to obtaining publicly-funded representation: see page 63 and Legal Aid above.

318. It is not possible to determine with any reliability from the data how many orders have been breached (or how frequently[227]). However, the small sample does broadly match the consensus of a group of 50 judges attending the Judicial College[228] i.e. that at least half of all orders (property related and non-property related) are breached. If this proves, on detailed analysis of retained data, to be an accurate assessment, then it means that as many orders under the 2014 Act are being breached annually as was the case before the legislation was in place and the Act will not have achieved one of its main aims.

319. It is clear that there is a need for the introduction by HMCTS of national data retention in relation to the use and effectiveness of injunctions under the 2014 Act. The Home Office National ASB Strategic Board should meet with HMCTS as soon as practicable to assess what data is required, how it can be retained and how it can be used so as to assess the use and efficacy of orders.

[227] Many orders are subject to more than one breach and also breaches on separate occasions.

[228] See paragraph 438 of this document.

SECTION 9 – Positive requirements

320. A key driver for the introduction of a new regime under the 2014 Act was that

> *"by focusing on prohibitions and enforcement, the ASBO failed to change the behaviour of perpetrators, and therefore failed to stop breaches and provide long term protection to victims and communities."*[229]

321. The intention of parliament appears clear: that through making positive requirements in orders under section 1(4)(b), rather than just setting out prohibitions, the root causes of the behaviour could be addressed and *"potentially reducing breach rates in the longer term"*[230] and that

> *"[the Injunction] will provide victims and communities with the respite they deserve, send a strong message to perpetrators that their behaviour is not acceptable and provide sufficient time for them to work with local agencies to address any underlying issues driving the behaviour."*

322. Neither the fact sheet or the guidance delve into detail as to the type of "local agency" it was envisaged would provide the relevant assistance.

323. Common underlying issues/problems underpinning anti-social behaviour are:
    a. alcohol abuse
    b. drugs/substance abuse
    c. mental health issues
    d. homelessness
    e. inability/unwillingness to consider the impact of behaviour on others (e.g. in tenancy related anti-social behaviour cases, disruptive or aggressive visitors or creating excessive noise, in non-tenancy cases violent or aggressive behaviour, failure to control dogs etc)
    f. youth-related issues (for those under 18).

324. The two case studies used in the Home Office fact sheet were as follows:

> ***"Case study – Accident and Emergency***
>
> *An individual is always drunk and abusive and repeatedly visits the A&E department of a local hospital demanding to be seen by doctors. He often threatens the staff and public when he is refused treatment. NHS Protect, the body responsible for protecting NHS staff, property and resources against crime and disorder, decide to apply directly to the court for an injunction to stop the offender's anti-social behaviour. The court agrees that the individual's behaviour is anti-social and an injunction is granted to provide immediate protection for staff, patients and members of the public. The injunction prohibits the offender from visiting A&E without a*

[229] Home Office fact sheet: see p. 8 footnote 9 of this document.
[230] per guidance.

legitimate reason and from causing anti-social behaviour. It also includes a positive requirement to get the offender to deal with the underlying cause of his behaviour, namely misuse of alcohol, by attending a local alcohol awareness session.

Case study – Drunk group

A group of drunk young men and women have targeted some elderly neighbours. In one incident, they dug up flowers from the garden and threw stones at one victim's house, breaking a window and causing criminal damage. Some of them are subsequently convicted of criminal damage. The prosecutor also produces evidence that the young people had persistently harassed and intimidated other people in the neighbourhood for a sustained period. The prosecutor successfully applied for a CBO to prevent future anti-social behaviour. The court also included positive requirements in the CBO against the convicted youths to require them to make good the damage to the victim's home and engage with a mentoring programme to address the reasons why they were persistently harassing people. The local authority also successfully applied for an injunction against other members of the group who were not charged but who had also committed anti-social behaviour against the elderly neighbours. The injunction included similar positive requirements to the CBO to get the young people to address the underlying causes of their behaviour. The YOTs were consulted in both the CBO and injunction proceedings."

325. However, the guidance for frontline professionals delves into little detail in relation to positive requirements:

> *"Agencies will have the discretion to tailor the positive requirements in each case to address the respondent's individual circumstances, behaviour and needs. There may be opportunities to work with voluntary sector organisations. Positive requirements might, for example, include the respondent:*
>
> - *attending alcohol awareness classes for alcohol-related problems;*
> - *attending dog training classes provided by animal welfare charities where the issue is to do with irresponsible dog ownership; or*
> - *attending mediation sessions with neighbours or victims."*

326. There is no guidance as to how to set up a positive requirement or ensure supervision or reporting of progress. The lack of any reference to either drug or mental health issues which are both common drivers of anti-social behaviour is notable.

327. Guidance for the police has also failed to emphasise the importance of positive requirements within injunctions or criminal behaviour orders. Guidance has given the following example:

"Example[231]

C who suffered from alcohol dependency would often attend the hospital and cause both unnecessary and unwanted problems for the staff. This caused distress not only for patients but also the broader public who visited the premises.

C's behaviour ranged from refusing to leave, threatening staff, to being abusive. The hospital had already taken their own steps in an attempt to exclude C from the premises using their 'red card' civil procedure which had proved ineffective. The subject had been arrested and prosecuted for offences such as public order / drunk and disorderly, both in hospital grounds and surrounding public places. Although accepted that C may require genuine treatment at some point action was with the head of security at the hospital. Full documentation of all the intervention work the National Health Service had attempted was completed. This was essential to show reasonable efforts had been made to amend his behaviour without the CBO and that as partners all other possibilities had been exhausted.

The Sunderland City Neighbourhood Policing Team recognising the need to intervene worked with the head of security at the hospital. The Neighbourhood Policing Team obtained an evidential statement covering the subjects general offending and highlighting those specific to the NHS and obtained a statement from the NHS head of security explaining the effect the subject had had on their employees, and the civil actions they had taken.

The main remedy to this problem would be to secure exclusions from specific areas."[232]

328. It is of concern that although it was accepted that the individual had alcohol dependency and "*may require genuine treatment*", there is no mention of consideration of liaison with relevant agencies (which would be known to a health trust given the need for medical treatment for alcohol dependency) with the aim of setting up a positive requirement under an order.

329. The Working Party found that positive requirements were not being included in orders as intended. At the fact-finding meeting on 11 April 2018,[233] there was only one out of the 40 attendees who had knowledge of a positive requirement being used successfully. Reasons why positive requirements were not being included in orders were stated at the meeting to be:

    a. difficulty in gaining information about the proposed respondent (so as to enable identification of suitable assistance/treatment);
    b. the lack of providers of drug and alcohol abuse courses/treatment;
    c. lack of mental health treatment/support facilities;
    d. that only local authorities fund and have access to many of the current third-party providers of treatment/support for drug and alcohol problems (so it is very difficult for a social housing provider to gain access to, and assistance from, these services);

[231] *Anti-social Behaviour Effective Practice Guide*, Humberside Police 2018.
[232] Interestingly a very similar example was used in Home Office guidance.
[233] See paragraph 4 of this document.

e. the difficulty in getting a provider of drug, alcohol abuse or mental health support services to become engaged in the provision of a course of treatment/assistance which is compulsory and/or that specifically requires the provider to report to a third party (such as a court) on a failure to comply, thereby interrupting trust and client confidentiality.[234]

330. It is the view of the Working Party that the issues at (b) and (c) are national resource issues beyond the remit of this report. Of course in the absence of a suitable provider of treatment/assistance/support the court cannot order a positive requirement and the underlying cause of the behaviour is unlikely to be addressed (with an increased likelihood that the order will not prevent the relevant conduct continuing).

331. In order to assess what positive requirements should be considered by a court, it is necessary to consider in more detail the core underlying causes of a very significant proportion of the anti-social behaviour identified above.

Alcohol abuse

332. In May 2018, Alcohol Concern and Alcohol Research UK produced a report titled *Tackling Alcohol-Related Anti-social Behaviour through Civil Injunctions and Criminal Behaviour Orders: A Missed Opportunity*.

333. The background to the preparation of the report was stated to be as follows:

> *"The Government estimates that alcohol misuse costs the criminal justice system £11bn every year, though this is liable to be lower than the actual cost. People with alcohol problems emerging from the criminal justice system may also place a burden on other health, housing and social care services.*
>
> *Alcohol Concern has created the Blue Light project, a national initiative to develop alternative approaches and care pathways for dependent drinkers. Through our work on the Blue Light project, we have found that many local authorities, police forces and housing providers are struggling to apply anti-social behaviour legislation to people with chronic alcohol problems. The 2014 Anti-social Behaviour, Crime and Policing Act offers a chance to address some of these challenges through the so-called 'positive requirements' in Criminal Behaviour Orders and Civil Injunctions. However, we have found that community safety and housing agencies are still struggling to make best use of these new orders.*
>
> *This research explores whether better use could be made of these new powers in order to have a positive and constructive impact on alcohol-related crime and anti-social behaviour. It looks at the experiences of people involved in applying and delivering these orders, and seeks to capture both their practical experiences and their views on what their potential strengths might be. It is not an evaluation of the orders, nor does it present a comprehensive analysis of the role of*

[234] See the requirements under section 3 of the 2014 Act.

'compelled treatment' in reducing antisocial behaviour…. Rather, it provides insights into how the powers are currently being applied, what challenges are being faced by those seeking to apply them, and what good practice examples are available."

334. In relation to the central issue of whether positive requirements can work to alter/deal with addiction/deeply entrenched behaviour, the report stated:

"Positive requirements under these powers may be viewed as a form of 'compelled treatment'. The international evidence on this subject reflects the fact that sustained recovery requires motivation, but nevertheless tends to find that enforced referrals can provide an important first step for people who may otherwise not engage with treatment. Positive requirements under Cis and CBIs therefore, have the potential to establish an initial contact with treatment services where individuals are not, at that stage, motivated to refer themselves."

335. Whilst there is an evidence base on this issue which supports a positive answer to this central question of whether compelled treatment can work, it must be noted that:

- the literature is heavily biased with regards to evidence about the use of orders with people with drug problems;
- the orders that have been evaluated are not civil injunctions (or criminal behaviour orders);
- Much of the evidence base is not British.

336. Nonetheless some key messages do emerge from the literature.

337. Anglin et al. (1998)[235] highlighted that legally referred clients do as well or better than voluntary clients in and after treatment, even if it is enforced. A number of other studies endorse this.[236] Anglin identified a number of features of a good intervention programme:

a. The period of intervention should be lengthy (3 to 9 months ideally), and the programme should provide a high level of structure but also be flexible.[237]
b. A separate review indicated that staff competence through good training and development is critical to implementing successful rehabilitation in criminal justice settings.[238]

338. It is significant to note that several countries now have powers, equivalent to domestic treatment orders, under the Mental Health Act, which allow for the compelled detention of some chronic

[235] M. Douglas Anglin et al., The Effectiveness of Coerced Treatment for Drug-Abusing Offenders. *Paper presented at the Office of National Drug Control Policy's Conference of Scholars and Policy Makers, Washington, D.C.,* March 23-25, 1998.

[236] See Anto Orešković et al., Coerced addiction treatment: How, when and whom? - *Alcoholism* 2013; *49*(2):107–114, Review Paper; also M. Young, *Coerced Drug Treatment* Sage Publications 2011, available at https://www.researchgate.net/publication/261697419.

[237] M. Douglas Anglin et al., The Effectiveness of Coerced Treatment for Drug-Abusing Offenders. *Paper presented at the Office of National Drug Control Policy's Conference of Scholars and Policy Makers, Washington, D.C.,* March 23-25, 1998.

[238] Findings Alcohol Treatment Matrix cell C5: Management/supervision: Safeguarding the community

substance misusers who are unable to manage themselves and are a danger to self or others.[239] The statutory powers to compel treatment in New South Wales in Australia have been identified as having a significant success rate.[240]

339. The nearest equivalent within the domestic criminal jurisdiction to positive requirements under the 2014 Act are the Alcohol Treatment Requirements (ATRs). These orders are a disposal under the Criminal Justice Act (2003) and have been able to be dispensed as part of a community sentence since 2005. ATRs deliver coercive treatment to predominantly "dependent" drinkers, specifically aiming to tackle levels of alcohol consumption and reduce alcohol-related crime. Reviews of the impact of ATRs have been undertaken in Cheshire, Leicester, Leicestershire and Rutland and Yorkshire. All three studies undertaken identified a positive impact from these orders.[241]

340. Returning to the May 2018 report, *Tackling alcohol-related anti-social behaviour through Civil Injunctions and Criminal Behaviour Orders: A missed opportunity,* the authors considered the use of positive requirements. Responding to increasing anecdotal evidence that civil injunctions and criminal behaviour orders were not being used effectively in relation to alcohol problems, a national consultation exercise was undertaken to capture experiences more formally. In Autumn 2017, workshops were run in Wigan, Bristol and London (attended by 72 stakeholders). The authors also carried out seven interviews and received written evidence from a further five sources. Participants attended from across England and Wales. The largest contingent were police officers, followed by community safety officers. Four representatives of the alcohol treatment sector also attended.

341. The authors record the stark and disappointing fact, (wholly consistent with the Working Party's own research[242]), that in respect of the use of positive requirements to address underlying alcohol dependency issues:

> *"None of our participants reported using Cis in this context."*

342. As a result, the primary focus of the report was criminal behaviour orders. Given the prevalence of anti-social behaviour (property and non-property related) linked to alcohol abuse, this finding further

[239] See M. Young, *Coerced Drug Treatment* Sage Publications 2011, available at https://www.researchgate.net/publication/261697419 and also http://www.emcdda.europa.eu/attachements.cfm/att_142550_EN_SE-NR2010.pdf http://www.namsdl.org/IssuesandEvents/NEW%20Involuntary%20Commitment%20for%20Individuals%20with%20a%20Substance%20Use%20Disorder%20or%20Alcoholism%20August%202016%2009092016.pdf http://www.youtube.com/watch?v=DA_3uou6nyQ&index=2&list=PLSEhy70YpU5tZyaoHxz5UTuOUyJokMdFD

[240] See the Substance Addiction (Compulsory Assessment and Treatment) Act 2017: http://www.legislation.govt.nz/act/public/2017/0004/latest/DLM6609057.html?search=ts_act%40bill%40regulation%40deemedreg_substance+addiction_resel_25_a&p=1

[241] See Corinne Harkins, Michela Morleo and Penny A Cook, *Evaluation of the use of Alcohol Treatment Requirements and Alcohol Activity Requirements for offenders in Cheshire*, Centre for Public Health Liverpool John Moores University, April 2011; Jo Ashby, Christine Horrocks, and Nancy Kelly, "Delivering the Alcohol Treatment Requirement: Assessing the outcomes and impact of coercive treatment for alcohol misuse", *Probation Journal 2011 Volume: 58* issue: 1, 52-67; T. McSweeney, and B. Bhardwa "The impact and delivery of alcohol treatment requirements in the Leicestershire and Rutland Probation Trust area." London: Institute for Criminal Policy Research, Birkbeck College, 2011.

[242] See paragraph 4 of this document.

and starkly evidences how the 2014 Act appears not to be "working" as intended, due to the fact that positive requirements are not being used to address underlying causes of anti-social behaviour.

343. Based on their research, the authors of the report identified the following difficulties faced with obtaining and implementing positive requirements in relation to alcohol issues:

a. The need for more information sharing about what works at the local level (with monitoring and assessment locally as well as nationally). This is yet a further echo of a consistent theme of the need for a better local plan and better local liaison.
b. The lack of support and "buy-in" from local alcohol services. It was stated to be a consistent finding of the research that many professionals in the alcohol treatment system are unaware of the powers under the 2014 Act. Again, this underlines the need for local providers to be involved in the design of a local plan with other agencies.[243]
c. Alcohol services are stretched and under resourced. As a result, they may resist taking on requirements and reporting needs without new investment. There is a need to ensure alcohol services are commissioned to support the delivery of positive requirements.[244]
d. Some alcohol service staff may feel that compelled interventions are inappropriate and be less cooperative as a result.
e. Alcohol services (especially health-based services) have placed a high value on client confidentiality, and this can make staff reluctant to share potentially sensitive information with other services. Substance misuse services have often prioritised a separation from law enforcement in order to build client trust. Services may feel uncomfortable giving information that leads to breach of confidentiality due to the impact on the therapeutic relationship.
f. The need for better guidance in structuring the content of positive requirements.

344. Each of these issues should be addressed/considered at the meeting to create a local plan (and, if appropriate, addressed within the plan). As for the commissioning of services, as local authorities are key to the setting up of a local group and thereafter the creation of a local plan, they will hear of the areas in most need of further investment. Further, national monitoring will be essential in establishing what is working and which areas require greater investment from national government.

[243] See paragraph 135 et seq of this document.
[244] The report states: *"The appropriate commissioning of alcohol services is vital to supporting the effective use of positive requirements. This aspect of alcohol services may not be well understood by police and community safety staff. Alcohol services are commissioned and contracted by the local authority. They work to an agreed service specification and will usually be struggling to meet the demand for their services. Therefore, asking alcohol services to take on a greater role in the management of clients on CI/CBOs may not meet with a positive response if it is not a specified task under their existing contract. It is likely that regular involvement in CI/CBOs will require an investment of time and resources. This will either require specific allocation of funds, or for commissioners to vary the service contract to allow more of this work to be taken on. Senior police officers, Police and Crime Commissioners and community safety managers should work with public health commissioners to ensure that contracts allow and encourage involvement in this area of work. This is a baseline necessity: without this, the positive requirements will be far less effective. Therefore, these discussions should take place in preparation for the future use of CBOs rather than at the point an order is being prepared."*

345. Participants in the workshops also identified the need for *"better support in securing orders and requirements from the relevant courts"*. As set out above this issue should be addressed within a local plan after input from the relevant Designated Civil Judge.[245]

346. The authors noted that participants/consultees were also keen to see the establishment of a national network for people managing positive requirements in orders, so that data and best practice can be shared along with the identification of problems encountered. The Working Party believes that the Home Office should liaise with Public Health England to see how this can be achieved.

Drug/substance abuse

347. The Working Party believes that the issues identified in relation to alcohol abuse will equally apply in relation to drug/substance abuse (including as to the success of compelled treatment). It is believed, albeit without "hard data" that, due to the impact of criminal offences linked to such abuse, the work of the Probation Service, the relative ease of drug testing, the workings of the criminal justice system and, importantly significant financial support, there should be a larger number of agencies/bodies available to assist with a relevant positive requirement. What is needed is greater/easier liaison/co-operation between applicants and such bodies/organisations (including steps to avoid the need for a court order).

Mental health

348. As an over-arching point, the behaviour of some respondents should be considered in light of the content of:

a. the Care Act 2014
b. the Mental Capacity Act 2005
c. the Mental Health Act 1983.

349. The potential applicability of powers under these Acts should be considered before proceedings and certainly at their outset.

350. In the criminal courts, Mental Health Treatment Requirements (MHTRs) attached to community orders or suspended sentence orders have been associated with significant reductions in reoffending compared with similar cases where they were not used. Over a one-year follow-up period, there was a reduction of around 3.5 percentage points in the incidence of reoffending where such requirements were used as part of a community order, and of around 5 percentage points when used as part of a suspended sentence order.[246]

[245] See paragraph 144 of this document.

[246] See https://www.gov.uk/government/publications/do-offender-characteristics-affect-the-impact-of-short-custodial-sentences-and-court-orders-on-reoffending.

351. There are two major issues which have impacted upon the ability of a civil court to make a positive requirement in relation to mental health issues:

    a. To date, it has often been very difficult for the applicant/relevant body/party who has to tackle anti-social behaviour (or the court) to identifying if the respondent has, or may have, a relevant mental health issue. Access to medical history and any professional opinion has been very difficult to obtain if the individual concerned has not co-operated and it has been very difficult to gain any practical assistance/guidance (see comments above in relation to the NHS Liaison and Diversion Service[247]).

    b. If a mental health issue (or potential mental health issue) is identified, it often does not meet the threshold to get ongoing treatment or support from the mental health services. The Working Party heard from several sources that, in some regions, mental health services cannot offer continued long-term support for those who are not at crisis point. Short-term support is available for those at crisis point but ends once the individual has begun to recover, albeit not fully. The availability of longer term (if not short term) mental health treatment/support was said to be a "postcode lottery".[248] As a result it is often very difficult to set up a positive requirement due to the lack of a provider of necessary assistance.

352. The Working Party believes that the answer to (a) lies in the setting up of a working relationship (including through a local plan) between potential applicants, the court and the L&D service. As for (b), this is an issue beyond the remit of this report. However, the L&D service can identify and assist with accessing such resources as are available.

Homelessness

353. The fact of being homeless (and/or sleeping rough/living on the streets) may increase the likelihood of some forms of anti-social behaviour such as aggressive begging that are linked to alcohol and drug abuse (which may be the cause of being homeless), however simply being homeless does not equate to being anti-social. It is very important that this is appreciated by the court when considering any application under the 2014 Act. As set out above[249] the Home Office guidance for frontline professionals states that public spaces protection orders should not be used

> *"…to target people based solely on the fact that someone is homeless or rough sleeping, as this, in itself, is unlikely to mean that such behaviour is having an unreasonably detrimental effect on the community's quality of life which justifies the restrictions imposed".*

[247] See paragraph 106 above.
[248] An NHS data analysis by MIND concluded that mental health services were *"a postcode lottery, with some areas spending almost half per person on mental health compared to other places":* per Geoff Heyes, Head of Health Policy.
[249] See paragraph 68 of this document.

354. However, if a person who is homeless has engaged in anti-social behaviour of some form then close consideration should be given to what can be achieved by the court, by positive requirement or otherwise, to address this underlying issue.

355. Since 3 April 2018, the Homelessness Reduction Act 2017 has placed new duties on councils[250] to prevent and relieve homelessness, including for single homeless people who are at greater risk of sleeping rough. Anyone who is homeless or at risk of homelessness will be able to access support, regardless of their priority need status. The principal duties are:

    a. provide free advisory services
    b. assess an applicant's case and agree a personalised housing plan
    c. make inquiries
    d. take reasonable steps to prevent homelessness
    e. provide interim accommodation
    f. take reasonable steps to secure accommodation (under prevention or relief duty)
    g. secure ongoing accommodation (main housing duty).

356. On 30 March 2018, the Communities Secretary set out a cross-government plan to significantly reduce the number of people sleeping rough as part of the government's ongoing work to halve rough sleeping by 2022 and eliminate it by 2027. Measures included:

    a. A new Rough Sleeping Team made up of rough sleeping and homelessness experts, drawn from, and funded by, government departments and agencies with specialist knowledge across a wide-range of areas from housing and mental health, to addiction.
    b. A £30 million fund for 2018 to 2019, with further funding agreed for 2019 to 2020, targeted at local authorities with high numbers of people sleeping rough; the Rough Sleeping Team will work with these areas to support them to develop tailored local interventions to reduce the number of people sleeping on the streets.
    c. £100,000 funding to support frontline Rough Sleeping Workers across the country to make sure they have the right skills and knowledge to work with vulnerable rough sleepers.

357. It was stated that the package of new measures will be supported by the following:

    a. Department of Health and Social Care – which will make available experts in mental health and drug treatment services to help support the new outreach teams, including in hostels.
    b. Ministry of Justice – which will focus on making sure prison and probation work with local authorities and outreach teams to identify prisoners and offenders serving community sentences who are at risk of sleeping rough.
    c. Home Office – will encourage the policing sector to work in partnership with local authorities on rough sleeping, including enforcement where appropriate, and to identify and share best practice.

[250] There are no specific duties on housing associations.

358. Two years later, on 17 March 2020 (immediately prior to the coronavirus lockdown) the Communities Secretary announced:

> *"Rough sleepers, or those at risk of rough sleeping will be supported by £3.2 million of initial emergency funding if they need to self-isolate to prevent the spread of coronavirus (COVID-19). The funding will be available to all local authorities in England and will reimburse them for the cost of providing accommodation and services to those sleeping on the streets to help them successfully self-isolate.*
>
> *It is in addition to the £492 million committed in 2020 to 2021 to support the government's ambition to end rough sleeping in this Parliament, a £124 million increase in funding from the previous year. This forms part of £643 million in funding announced at budget to tackle homelessness and rough sleeping over the next four years."*

359. To the extent that the funding/measures identified above have been put in/remain in place they should provide specialist assistance which could form the basis of positive requirements. Also, some local authorities already have outreach teams who encourage those who are homeless and/or have alcohol, drug or mental health issues to engage with services before formal enforcement action is taken. The Working Party believes that there should be a full assessment of how to assist /deal with homelessness in the local plan.

360. One aspect of anti-social behaviour which requires specific consideration and which can be linked to homelessness (although it is far from restricted to those who are actually homeless) is begging.

361. The threshold for the making of an order under section 1 of the 2014 Act is that a person has engaged or threatened to engage in anti-social behaviour which is defined at section 2(1) as

> *"conduct that has caused, or is likely to cause, harassment, alarm or distress to any person, or conduct capable of causing nuisance or annoyance to a person in relation to that person's occupation of residential premises".*

362. For an order to be made under the 2014 Act it needs to be established that begging has caused harassment, alarm or distress to a person/persons (assuming that it does not affect occupation of residential premises). There is a view which is increasingly widely held amongst people who regularly engage in begging that neither "passive begging" (e.g. just sitting on a pavement with a sign) or busking without a licence (even with an inability to play an instrument) cross the threshold to allow an order to be made. It is certainly arguable that "simple" begging per se may not satisfy the statutory definition of anti-social behaviour. In *Samuda v DPP* [2008] EWHC 205 (Admin), Sullivan J stated:

> *"While I readily accept the submission that begging does not necessarily cause or is not necessarily likely to cause harassment, alarm or distress, certain methods of begging may well do so."*

363. The Working Party would wish to emphasise that judges should be careful that in respect of begging the relevant test set out in the 2014 Act has been satisfied on the evidence before the court, before an order under the 2014 Act is made.

Inability/unwillingness to consider the impact of behaviour

364. As set out above, there is also an additional category: a wide spectrum of anti-social behaviour not readily linked to the four underlying causes set out above e.g. in tenancy related anti-social behaviour cases; disruptive or aggressive visitors or creating excessive noise; in non-tenancy cases violent or aggressive behaviour; failure to control dogs etc.

365. It may not be easy to identify a suitable positive requirement in such cases to work alongside prohibitions; principally because the respondent often has the ability to control the behaviour.

366. However, one form of anti-social behaviour which does warrant special mention is "cuckooing". This term refers to a situation in which (usually) drug dealers/users take over the home of a vulnerable person in order to use it as a base for drug dealing/use. Cuckooing has risen with the growth of "county lines" drug trading.[251] It is very important that any applicant and court recognises any vulnerability on the part of the respondent and assesses the extent to which he/she can control the anti-social behaviour of those using/visiting the property.

367. A positive requirement can be ordered that requires the respondent to attend at a victim awareness course.[252]

Youth-related issues

368. Given the range of statutory support/interventions for young people under 18, as set out above, the Working Party will not attempt to set out the specific range of issues affecting young people and leading to anti-social behaviour. Such issues should be identified well before any case reaches the youth court.

Procedural requirements

369. There are procedural requirements in relation to positive requirements, including upon any person/organisation/body providing/supervising a requirement in relation to its enforceability. The Working Party has discovered that the perception of demands imposed by these requirements has proved an obstacle to setting up positive requirements.

370. Section 3 states:

[251] See e.g. https://crimestoppers-uk.org/campaigns-media/news/2018/mar/let-s-stop-cuckooing.
[252] Provided by Victim support at a cost of £60. Suitable for minor ASB crimes. A course that challenges offenders to think about the impact of their criminal behaviour, and to understand the common reactions to crime including emotional behavioural, physical, social, financial and practical effects.

"An injunction under section 1 that includes a requirement must specify the person who is to be responsible for supervising compliance with the requirement.
The person may be an individual or an organisation.

(2) Before including a requirement, the court must receive evidence about its suitability and enforceability from:
(a) the individual to be specified under subsection (1), if an individual is to be specified;
(b) an individual representing the organisation to be specified under subsection (1), if an organisation is to be specified.

(3) Before including two or more requirements, the court must consider their compatibility with each other.

(4) It is the duty of a person specified under subsection (1)—
(a) to make any necessary arrangements in connection with the requirements for which the person has responsibility (the "relevant requirements");
(b) to promote the respondent's compliance with the relevant requirements;
(c) if the person considers that the respondent:
i. has complied with all the relevant requirements, or
ii. has failed to comply with a relevant requirement,
to inform the person who applied for the injunction and the appropriate Chief Officer of Police.

(5) In subsection (4)(c) "the appropriate Chief Officer of Police" means—
(a) the Chief Officer of Police for the Police area in which it appears to the person specified under subsection (1) that the respondent lives, or
(b) if it appears to that person that the respondent lives in more than one Police area, whichever of the relevant chief officers of Police that person thinks it most appropriate to inform.

(6) A respondent subject to a requirement included in an injunction under section 1 must—
(a) keep in touch with the person specified under subsection (1) in relation to that requirement, in accordance with any instructions given by that person from time to time;
(b) notify the person of any change of address.
These obligations have effect as requirements of the injunction."

371. The Working Party has learnt that some organisations providing assistance/support/guidance/treatment are unhappy with elements of the requirements, specifically the duty to notify the applicant and the police if it is thought that the respondent has failed to comply with the requirement (it is difficult to understand what the police are expected to do with this information[253]). It appears to the Working Party that this section is an attempt to fill the gap in supervision given that the Probation Service cannot assist as it would with any community service order (or condition attached to a suspended sentence order).

[253] Given that this is a civil order and the breach of a requirement is not a criminal act.

372. After much discussion of this difficult issue, which is an impediment to the availability of assistance/support etc. from some organisations, the Working Party believes that the following steps should be taken:

    a. All relevant agencies should be asked about the ability/willingness to comply with these requirements when a local plan is prepared (and at a time when input can be given by a Designated Civil Judge as to how the requirement is expected to work in practice).
    b. When a positive requirement is ordered, the court should automatically consider setting a review date. Such a review should be (at least for the first review) by way of short written report/e-mail to the supervising judge[254] (who should be the judge who made the order or his /her nominee) with an oral hearing if necessary. The purpose is to review whether there has been adequate compliance, and is achieved without the supervising person/body having to initiate the process by contacting the applicant and/or the police about what is considered to be a failure to comply with the order. It also means that when the order is made the respondent knows that there will have to be a report as to compliance in due course and also has the advantage of giving the court the chance to underline the importance of compliance if the respondent's commitment is beginning to waver i.e. action before the breach stage is reached. This procedure, a limited version of that formerly in place in the criminal courts in relation to drug rehabilitation requirements, would operate alongside the statutory requirement to notify, but could provide significant comfort to the third party/organisation that the working relationship with the respondent will not be seriously undermined by the reporting requirement.

373. The Working Party fully recognises that this places an additional burden on the court (and the third party/organisation) however, it considers that the more widespread and regular use of positive requirements is an essential step to addressing underlying causes of anti-social behaviour and as a result ending it for the benefit of all affected by it.

374. As for the wording of the order the positive requirement must be clearly worded and capable of being easily understood by all those involved, including in relation to the level of expected engagement and what will constitute a breach. Open textured phrases such as "positively engage", or "attend and participate" may be used but, whenever possible, should be clarified or augmented for each individual case (e.g. attend pre-arranged appointments, co-operate with testing). Periodical reviews by a judge will help if a gap is developing between the expectation of the court and/or agency and the understanding of the person under the positive requirement.

375. The frequency, expected level and means of reporting from the relevant agency to the court (including to a supervising judge, local authority, police other agencies) needs to be specified.[255]

[254] With a copy to the applicant. This procedure would have limited time/costs implications.

[255] With a single point of contact for reporting.

Conclusion

376. It is the Working Party's view that Public Health England,[256] (which has an alcohol, drugs, tobacco and justice (ADTJ) division[257]) should review the availability of treatment options for drug and alcohol addiction and mental health issues, and give national guidance as to which are suitable for positive requirements under the 2014 Act (whether by way of injunction or criminal behaviour order) and how such treatment should be supervised. There should then be liaison with the Home Office to establish a national network for people managing positive requirements in orders, so that data and best practice can be shared along with the identification of problems encountered.

377. The Working Party also believes that a local plan should be put in place to enable suitable liaison between agencies which may be able to assist with positive requirements, including the L&D service.[258]

378. There are obvious benefits to the court conducting reviews of orders with positive requirements.

[256] Since 2013, Public Health England has been an executive agency of the Department of Health and Social Care. Its formation came as a result of reorganisation of the National Health Service (NHS) in England, outlined in the Health and Social Care Act 2012. It took on the role of the Health Protection Agency, the National Treatment Agency for Substance Misuse and a number of other health bodies.

[257] Its stated aim is tackling harmful behaviours and addictions (alcohol, tobacco, drug use, gambling etc.) and supporting the health and social care needs of vulnerable populations (e.g. people in contact with the criminal justice system, homeless, travellers, migrants).

[258] See generally paragraph 98 of this document.

SECTION 10 – Penalties for contempt

379. Very early into its work, The Working Party discovered widespread and serious concern about the inconsistency of penalties imposed (which is the correct term as opposed to "sentencing" which occurs only in criminal courts) for breach of orders made under the 2014 Act. Concerns raised by practitioners ranged from judges not considering breaches to be sufficiently serious to warrant action (and thereby undermining the effectiveness of the injunction), through to excessive penalties out of line with what the approach would have been in a criminal court to the substantive conduct behaviour.

380. The Working Party heard that examples of inappropriate penalties had already led to the Judicial College creating a module upon injunctions and committals with a focus on orders under the 2014 Act.[259]

381. The Working Party learnt that many civil judges imposing punishment for breaches of orders under the 2014 Act had no experience of the criminal courts, either when in practice or as a judge. Further, legal representatives often gave no guidance to the court as to available guidelines and case law. Other than the Judicial College module (which was and is optional, so many judges have never attended it), the only guidance available to the judiciary is the *Breach Offences Definitive Guideline*.

382. Before considering these issues in detail, it is necessary to consider the relevant legal principles in relation to punishing for contempt.

Objectives

383. There are three objectives to be considered when dealing with the breach of an order under the 2014 Act: the first is punishment for breach of an order of the court; the second is to secure future compliance with the court's orders if possible; the third is rehabilitation, which is a natural companion to the second objective.[260]

384. A civil court's powers are severely limited when compared to the range of sentencing options which may be available in a criminal court.

385. Given that many respondents have very limited (if any) financial means (an obvious example being someone engaged in begging or with rent arrears), many judges have approached punishment to date on the basis that there were really only three options when faced with a breach: a custodial penalty, a suspended custodial penalty, or no order. Given that a suspended custodial penalty should

[259] An example which concerned the tutors who compiled the module was a 12-month immediate custodial sentence given to a homeless man for being drunk and shouting/singing in a street in breach of a geographical exclusion; the defendant had not been violent at any stage and had received a six-month suspended sentence for a previous breach which was activated in full with a further six months added. This was the basis of an example used in the course papers.

[260] The principles are now well established: see Hale LJ in *Hale v Tanner* [2000] 1 WLR @ 2380H approved by Lord Woolf CJ in *Robinson v Murray* [2005] EWCA Civ 935 and Pitchford LJ in *Solihull MBC v Willoughby* [2013] EWCA Civ 699 @ [20]. See also *Wolverhampton CC v Green* [2017] EWHC 96.

only be imposed when the custody threshold has been passed, this has led to a view that the issue on a breach is whether the conduct as proved or admitted passes the threshold; if so a custodial penalty is appropriate and consideration should be given to whether it should be suspended; if it does not pass the threshold, make no order. The Working Party considers this approach to be contrary to all three of the objectives set out above. The threshold should not be a dividing line with no action on one side and custody (potentially suspended) on the other. Even if the custody threshold is passed, it should not axiomatically follow that a custodial penalty is the result. As the definitive guideline applicable in the criminal courts states:

> *"Passing the custody threshold does not mean that a custodial sentence should be deemed inevitable. Custody should not be imposed where a community order could provide sufficient restriction on an offender's liberty (by way of punishment) while addressing the rehabilitation of the offender to prevent future crime."*

386. Also it should not be the case that a breach which does not pass the threshold, often a first or less serious breach, results in no order being made as the court is failing to mark or address the behaviour and risks sending out the wrong message (even if accompanied by a warning).

387. The Working Party immediately recognised that the main issue was, and is, that a civil court has no power to impose the equivalent of a community sentence. It is not known if this very significant lacuna was appreciated at the time the content of the 2014 Act was under consideration; however the availability of such orders in the criminal justice system is a vital part of the criminal sentencing regime, providing appropriate punishment[261] and rehabilitation, often targeted at the underlying issues that have led to the criminal conduct:

> *"Community orders can fulfil all of the purposes of sentencing. In particular, they can have the effect of restricting the offender's liberty while providing punishment in the community, rehabilitation for the offender, and/or ensuring that the offender engages in reparative activities."*[262]

388. Community orders can, amongst other options, contain the following requirements:[263]

    a. A curfew requirement (2–16 hours in any 24 hours; maximum term 12 months; must consider those likely to be affected).[264]

[261] Save in exceptional circumstances, at least one requirement under an order must be imposed for the purpose of punishment and/or a fine imposed in addition to the community order

[262] *Imposition of community and custodial sentences: Definitive Guideline*, p. 3. Available at https://www.sentencingcouncil.org.uk/wp-content/uploads/Imposition-definitive-guideline-Web.pdf.

[263] The guideline sets out: *"In many cases, a pre-sentence report will be pivotal in helping the court decide whether to impose a community order and, if so, whether particular requirements or combinations of requirements are suitable for an individual offender. Whenever the court reaches the provisional view that a community order may be appropriate, it should request a pre-sentence report (whether written or verbal) unless the court is of the opinion that a report is unnecessary in all the circumstances of the case."*

[264] Usually, but not always subject to electronic monitoring.

b. An exclusion requirement (from a specified place/places; maximum period two years; may be continuous or only during specified periods).
c. A residence requirement (to reside at a place specified, or as directed, by the responsible officer).
d. A programme requirement.
e. A mental health treatment requirement (may be residential/non-residential; must be by/under the direction of a registered medical practitioner or chartered psychologist. The court must be satisfied: (a) that the mental condition of the offender is such as requires, and may be susceptible to, treatment but is not such as to warrant the making of a hospital or guardianship order; (b) that arrangements for treatment have been made; (c) that the offender has expressed willingness to comply).
f. A rehabilitation activity requirement.
g. A drug rehabilitation requirement (the court must be satisfied that the offender is dependent on, or has a propensity to misuse drugs, which requires or is susceptible to treatment. The offender must consent to the order. Treatment can be residential or non-residential, and reviews must be attended by the offender (subject to application for amendment) at intervals of not less than a month (discretionary on requirements of up to 12 months, mandatory on requirements of over 12 months)).
h. An alcohol treatment requirement (residential or non-residential; must have offender's consent; court must be satisfied that the offender is dependent on alcohol, and that the dependency is susceptible to treatment).
i. An alcohol abstinence and monitoring requirement.

389. The Working Party recognised that the restrictive approach set out at paragraph 385 must be altered and a way found to try to replicate (to the extent that it is possible) the community service options/requirements set out above.

Options

390. The county court has five options when faced with a breach of an order under the 2014 Act; these are considered in detail below.

391. Additionally, on any civil committal it is possible to order a respondent's assets to be sequestrated.[265] However, sequestration is most commonly used where committal is not possible because the contemnor is a non-natural person, such as company or trade union (it is also useful for enforcing fines). The effect of sequestration is to place the respondent contemnor's property in the hands of sequestrators, who become responsible for managing the property and receiving any rents and profits. As sequestration is highly unlikely to be a consideration within a committal for breach of an order under the 2014 Act it will not be considered in any further detail. Rather focus will be upon other the five options for the court.

[265] There are rules in relation to seeking a writ of sequestration which is also used as a method of execution not linked to contempt: see e.g. current CPR 81.19 and 81.20; but not replicated in the revised CPR 81 which solely refers to *"confiscation of assets"*. Although rules have only ever been provided for the High Court, a county court can order sequestration by virtue of section 38 of the County Courts Act 1984: see *Rose v Laskington* [1990] 1 QB 562.

An immediate custodial penalty

392. The court can impose a fixed term with a maximum "... *on any occasion*" of 2 years: section 14 of the Contempt of Court Act 1981.[266] Importantly, this is not a maximum of 2 years per breach, but a maximum of 2 years on any occasion.[267] This is so even if an element of the penalty passed is the activation of a suspended custodial penalty passed on a previous occasion.

393. The defendant must be punished for each breach found proved (unless no order on the breach is appropriate), but the penalties passed may be concurrent or consecutive to each other. It is a basic principle of sentencing that consideration must be given to the totality of the penalties passed, simply adding up what may well be an entirely appropriate penalty for each individual breach may lead to an excessive total that is wrong in principle.

394. There is a specific sentencing guideline in relation to custodial sentences: *Imposition of community and custodial sentences*.[268]

395. There is no general definition of where the custody threshold lies. However:

> *"The clear intention of the threshold test is to reserve prison as a punishment for the most serious offences".*

And:

> *"A custodial sentence must not be imposed unless the offence or the combination of the offence and one or more offences associated with it was so serious that neither a fine alone nor a community sentence can be justified for the offence."*[269]

396. The guideline sets out that circumstances of the individual offence and the factors assessed by offence-specific guidelines will determine whether an offence is so serious that neither a fine alone nor a community sentence can be justified. Where no offence-specific guideline is available to determine seriousness, the harm caused by the offence, the culpability of the offender and any previous convictions will be relevant to the assessment.[270]

397. As for the length of a custodial sentence, as Pitchford LJ stated in *Willoughby v Solihull MBC* [2013] HLR 36:[271]

[266] County courts are treated as a superior court for the purposes of the section.
[267] The maximum of two years' imprisonment should be reserved for the worst cases: see *Turnbull v Middlesbrough* [2003] EWCA Civ 1327.
[268] https://www.sentencingcouncil.org.uk/wp-content/uploads/Imposition-definitive-guideline-Web.pdf
[269] Ibid.
[270] The Guideline states: *"Whenever the court reaches the provisional view that: •the custody threshold has been passed; and, if so the length of imprisonment which represents the shortest term commensurate with the seriousness of the offence; the court should obtain a pre-sentence report, whether verbal or written, unless the court considers a report to be unnecessary."*
[271] See paragraph 27 of the judgment.

"The appropriate period of custody is the least period which the seriousness of the offender's breaches can properly justify." [272]

A custodial penalty which is suspended

398. The power of a court to order that a committal order may be suspended is not statutory, but is derived from the court's inherent jurisdiction. CPR Part 81.29 provides:

"The court making the committal order may also order that its execution will be suspended for such period or on such terms or conditions as it may specify".

399. It is a cardinal principle of criminal sentencing that a suspended sentence must not be passed unless the custody threshold is passed.

400. So, when approaching punishment for contempt the first question is whether the custody threshold has been passed and only if the answer to that is in the affirmative, does the court consider whether a period of custody should be suspended. The *Imposition of Community and Custodial Sentence: Definitive Guideline* states:

"A suspended sentence is a custodial sentence. Sentencers should be clear that they would impose an immediate custodial sentence if the power to suspend were not available. If not, a non-custodial sentence should be imposed."[273]

401. The court should consider the appropriate length of the custodial penalty before considering if it is appropriate to suspend it. The length of the suspension need not be fixed in the same way that the custodial element is; the Court of Appeal has held that it is not unlawful to pass a fixed term custodial penalty suspended "*until the expiry of the current injunction or any further order"*[274] (the injunction in that case was an interim injunction which would come to an end at the trial. The requirement is certainty, and that was a sufficiently certain period). The period of suspension should not be disproportionate to the custodial penalty itself or to the gravity of the conduct[275] and it would not normally be appropriate to suspend beyond the life of the injunction.

402. The Working Party has heard that seminars at the Judicial College have revealed that some judges have used or have wished to use suspended custody more flexibly than in the criminal courts, specifically when the custody threshold has not been reached; effectively as a stage before a custodial penalty is imposed. The rationale given is that otherwise the court has no option between no order and custody, when the relevant breach comes close to, but does not meet, the custody

[272] See also Arlidge on Contempt, 5th edition paragraph 14-5.
[273] However whilst section 125(1) of the Coroners and Justice Act 2009 provides that when sentencing offences committed after 6 April 2010: "Every court –(a) must, in sentencing an offender, follow any sentencing guidelines which are relevant to the offender's case; the guidelines are not directly applicable to sentencing for contempt (breach of a civil order).
[274] See *Christie v Birmingham CC* [2016] EWCA Civ 1339.
[275] See *Loseby v Newman* [1995] 2 F.L.R 754; per As Balcombe LJ.

threshold. Whilst the Working Party recognises the problem; this approach is wrong in principle. Although it has been observed by the appellate courts that the most common reason for suspending a sentence is to give the respondent an opportunity to show that he/she has "learnt a lesson" and will not breach the injunction again:

> *"… often the first sentence for breaching an antisocial behaviour order when the custody threshold is passed is a suspended sentence."*[276]

403. This does not alter the principle that, for a suspended sentence to be an available option, the custodial sentence has to have been passed. The definitive guideline is clear:

> *"A suspended sentence MUST NOT be imposed as a more severe form of community order. A suspended sentence is a custodial sentence.*
>
> *Sentencers should be clear that they would impose an immediate custodial sentence if the power to suspend were not available. If not, a non-custodial sentence should be imposed."*[277]

404. In *Hale v Tanner* [2000] 1 WLR 2377, the Court of Appeal observed that there was a dearth of guidance in sentencing for contempt of court (in family cases). The court could not give guidance on the length of sentences appropriate to particular types of breach, but there were, however, a number of general considerations to be applied:

> *"(i) Cases had to come before the court on an application to commit. It was not surprising in those circumstances that the court directed its mind to whether committal was appropriate. But committal was not the automatic consequence of a contempt and although there were no principles that imprisonment was inappropriate upon a first breach (see Thorpe v Thorpe (1998) 2 FLR 127; Neale–v-Ryan [1998] 2 FLR 87), it was common practice to take some other course of action on the first occasion.*
> *(ii) The difficulty facing judges was that the alternatives were limited. Nevertheless the court could (a) do nothing, (b) adjourn (this might be appropriate in a case where the contemnor had not attended court), (c) levy a fine, (d) sequester assets, or (e) make mental health orders.*
> *(iii) If imprisonment was appropriate, the length of the committal should be considered without reference to whether or not the committal was to be suspended.*
> *(iv) The length of the committal depended on the two objectives in contempt proceedings, viz (a) marking the court's disapproval of disobedience to its orders, and (b) securing future compliance.*
> *(v) The length had to bear some relationship to the maximum of two years available.*
> *(vi) Suspension was available in a much wider range of circumstances than in the criminal justice system.*
> *(vii) The length of any suspension required a separate consideration though it would often be linked to continued compliance with the underlying order."*

[276] Per Toulson LJ; *Amicus Horizon Limited v Thorley* [2012] EWCA Civ 817.
[277] Guideline p. 7. https://www.sentencingcouncil.org.uk/wp-content/uploads/Imposition-definitive-guideline-Web.pdf.

405. Some judges have pointed to (iv) above as providing support for the ability to use a more flexible approach to suspended sentences. However, Hale LJ (as she then was) set out in *Hale* v *Tanner*, that the first question is to consider the length of the committal before giving any consideration to whether or not the term should be suspended. So she acknowledged (and endorsed) the need for a custody threshold to be passed.

406. The Working Party also believes that the adoption of a more flexible approach to the imposition of a suspended custodial penalty can lead (indeed has led) to very significant problems when there has been a further breach of the order. The Working Party has been made aware of examples where a judge appears to have imposed a suspended custodial penalty when the custody threshold has not been met, believing it to be a "stepping stone" to custody if the relevant behaviour is repeated and the respondent then having breached again, the next judge:

    a. following long established principle (as now enshrined in the *Imposition of Community and Custodial Sentences Definitive Guideline*), has considered himself/herself bound to activate the custodial penalty, unless it would be unjust in all the circumstances to do so;
    b. has taken the custodial element of the suspended penalty as a starting point for a further sentence;[278]

    with the result that the respondent has, on the first occasion that a breach has crossed the custody threshold, received a disproportionately long custodial penalty.

407. The Working Party believes that the civil courts should seek to adhere to the principles in the definitive guidelines and depart from them in terms of the imposition of suspended sentences, or action upon the breach of such a sentence, in an attempt to fill the gap caused by the unavailability of community orders.

408. As set out above, CPR Part 81.29 provides that when suspending execution of a committal order, the court may do so "*on such terms or conditions as it may specify*". The Working Party has found that few suspended penalties have a condition imposed (other than compliance with the existing order, which in effects adds nothing to the status quo). Whilst the Working Party believes that it would be wrong in principle to impose a condition (e.g. by way of a positive requirement without satisfying the procedural requirements set out under section 3 of the 2014 Act[279]), it considers that when passing a suspended penalty the court should consider whether "conditions" should be applied through amendment of the injunction (although this would need to follow "an application" by either the applicant or respondent).[280]

[278] Of itself, and without more, wrong in principle.
[279] See paragraph 370 of this document.
[280] See section 8 of the Act.

Adjourning punishment

409. The court does not have to immediately impose a penalty when a breach has been proved or admitted. A criminal court has the ability to defer sentence after conviction. Section 1 of the Powers of Criminal Courts (Sentencing) Act (PCCSA) 2000 states:

> *(1) The Crown Court or a magistrates' court may defer passing sentence on an offender for the purpose of enabling the court, or any other court to which it falls to deal with him, to have regard in dealing with him to—*
> *(a) his conduct after conviction (including, where appropriate, the making by him of reparation for his offence); or*
> *(b) any change in his circumstances.*

410. A criminal court is empowered to defer passing sentence for up to six months, and may impose any conditions during the period of deferment that it considers appropriate. These could be specific requirements as set out in the provisions for community sentences, restorative justice activities or requirements that are drawn more widely. The purpose of deferment is to enable the court to have regard to the offender's conduct after conviction or any change in his or her circumstances, including the extent to which the offender has complied with any requirements imposed by the court.

411. Three conditions must be satisfied before sentence can be deferred:

    a. the offender must consent (and, in the case of restorative justice activities the other participants must consent: PCCSA 2000, s.1ZA(3));
    b. the offender must undertake to comply with requirements imposed by the court; and
    c. the court must be satisfied that deferment is in the interests of justice.

412. When deferring sentence, the criminal court should give a clear indication of the type of sentence it would have imposed if it had decided not to defer and should also ensure that the offender understands the consequences of failure to comply with the court's wishes during the deferment period. If the offender fails to comply with any requirement imposed in connection with the deferment, or commits another offence, he or she can be brought back to court before the end of the deferment period and the court can proceed to sentence.

413. The Working Party believes that it should be possible to achieve the same end i.e. the deferring of punishing for a breach of a civil order to enable regard to be had to the respondent's future conduct and also, importantly, albeit only in part, to fill the gap in options as to penalty set out above, by adjourning the imposition of a punishment, if appropriate "on terms"; effected by changing/adding to the terms of the underlying injunction. The Court of Appeal has recognised that adjourning sentence in the case of civil contempt has the same effect as a deferred sentence in the criminal courts. In *George v George* [1986] 2 F.L.R 347, the judge had adjourned an application to commit

generally with liberty to restore, and the respondent committed further breaches of the order. Nourse LJ stated:[281]

> *There has been some debate before us today as to how we should view the order which Deputy Judge Myerson made in regard to this application for committal. For my part, I think it clear that what he was in effect doing was to say to Mr George that that matter would stand aside for the present: 'If you behave yourself in the future, the likelihood is that no action will be taken against you for any contempt which may have been committed.' It is true that the hearing was not adjourned until some specified date, but I can see good reason for that. In effect the deputy judge was saying: 'This will stand aside unless and until there is some further breach of the undertaking given to Judge Holroyd Pearce or any other material breach of an order.' In substance, the position was rather as if a sentence had been deferred in a criminal case, albeit, as I say, that no time limit was put upon the adjournment. I also think that, if there had been no further breach by Mr George no more would have been heard of Mrs George's first application for committal. If she had brought it again before the court without any further breach on Mr George's part, I would not have expected it to be given serious consideration.*

414. An adjournment may provide a valuable opportunity to effect change in underlying conduct (including through adding a positive requirement to take effect during the period of adjournment; subject to the procedural requirements for the ordering of a positive requirement[282] and variation of the injunction[283]). However, the Working Party believes that:

    a. The adjournment should be to a date fixed at the hearing, not normally in excess of 6 months (preferably before the same judge).[284]
    b. The court should give a clear indication of the penalty it would have imposed if it had decided not to adjourn and should also ensure that the offender clearly understands the consequences of failure to comply with the court's wishes and his/her assurances/promises (as to what will be done to address the underlying behaviour), which together have given rise to the adjournment. [285]
    c. Upon the application of the applicant (which should consider the need for an application prior to the hearing) or the respondent (which may follow an indication from the court), the court may vary the injunction to include new and positive requirements which seek to mirror the community requirements set out above.[286] Consideration should be given to setting up a review.[287]

[281] Page 349.
[282] Section 3 of the 2014 Act.
[283] Section 8 of the 2014 Act.
[284] i.e. unlike the order made at first instance in *George v George* [1986] 2 FLR 347 when the application to commit was adjourned generally with liberty to restore.

[285] Where the respondent agrees to undertake some treatment or attend a course which has the potential to address the underlying causes of the problem, e.g. for drug abuse, the very fact that the sentence is adjourned may be enough to secure attendance at and co-operation with the course.
[286] See paragraph 388 of this document.
[287] See paragraph 374 of this document.

An unlimited fine

415. The information available to the Working Party indicates that fines are rarely imposed, although the magistrates' courts regularly impose fines for breaking the anti-social behaviour laws.

416. A fine would need to take account of means, and many civil judges consider that the problems with enforcement render this option ineffective. Unlike the position in the magistrates' court, there is no ability to deduct from benefit payments.

417. If a fine would be the appropriate punishment it is wrong to impose a custodial sentence because the respondent is unable to pay a fine (see *Re M (Contact Order)* [2005] EWCA Civ 615 and *Crystalmews Ltd v Metterick* [2006] EWHC 3087).

No order

418. This may be appropriate where:

a. the breach is very minor or "technical", and the fact of the breach is all that needs to be recorded,
b. circumstances have changed e.g. the respondent has served a sentence imposed by a criminal court in respect of the breach, or
c. the respondent has been evicted from a property where the anti-social behaviour was property based (this being a significant "punishment" and bringing the specific property related behaviour to an end).

Current guidance

419. The following guidelines for use in the criminal courts are of assistance and relevance[288] to a civil judge faced with imposing a penalty for breach of an order under the 2014 Act:

a. *Breach Offences: Definitive Guideline* (operative from 1 October 2018)
b. *Imposition of Community and Custodial sentences: Definitive Guideline*
c. *Reduction in Sentence for a Guilty Plea: Definitive Guideline*
d. *Offences Taken Into Consideration and Totality: Definitive Guideline*

420. Other definitive guidelines, such as those in relation to assault and drugs, may be of relevance if the breach also consists of commission of a substantive offence.

421. The Court of Appeal has given guidance that in deciding whether breach of an order warrants custody, and (if so) what length of sentence to pass, the court should apply the relevant Sentencing Council guideline (see *Amicus Horizon Ltd v Thorley*[289]). For committals under the 2014 Act that

[288] However whilst section 125(1) of the Coroners and Justice Act 2009 provides that when sentencing offences committed after 6 April 2010: *"Every court –(a) must, in sentencing an offender, follow any sentencing guidelines which are relevant to the offender's case",* criminal guidelines are not directly applicable to sentencing for contempt (breach of a civil order).
[289] [2012] EWCA Civ 817.

means the *Breach Offences: Definitive Guideline*. The Sentencing Council issued the guidance in accordance with section 120 of the Coroners and Justice Act 2009 (it applies to all offenders aged 18). Section 125(1) of the Coroners and Justice Act 2009 provides that when sentencing offences committed after 6 April 2010:

> *"Every court –*
> *(a) must, in sentencing an offender, follow any sentencing guidelines which are relevant to the offender's case, and*
> *(b) must, in exercising any other function relating to the sentencing of offenders, follow any sentencing guidelines which are relevant to the exercise of the function, unless the court is satisfied that it would be contrary to the interests of justice to do so."*

422. This guidance has a category[290] of "Breach of a criminal behaviour order (also applicable to breach of an anti-social behaviour order[291]). Anti-Social Behaviour, Crime and Policing Act 2014 (section 30)". However, this was never intended to cover breaches of injunctions under the 2014 Act as can be seen by the offences being described as

> *"Triable either way Maximum: 5 years custody*
> *Offence range: Fine – 4 years' custody."*

423. As set out above the maximum custodial penalty a civil court can impose on any occasion is two years.[292]

424. The guideline does refer to "other breach offences"[293] e.g. failing to comply with a dispersal order or community protection notice, but these are also criminal offences and no reference is made to breach of an injunction.

425. In the view of the Working Party this guideline, drafted for use in the criminal courts for breach of a criminal behaviour order (CBO) gives only limited assistance when imposing a penalty for breach of an order made under the 2014 Act. The obvious differences between the guidance and the powers available in a civil court are:

    a. The maximum penalty for contempt is 2 years, whereas the maximum sentence for breach of a CBO is 5 years.[294]

[290] at pp. 27-31.

[291] Note: not an injunction under the 2014 Act. The repeal of ASBOs by the 2014 Act did not affect existing orders so the guideline had to make provision for them.

[292] See paragraph 392 of this document.

[293] See guideline, p. 56.

[294] Although the sentencing range in the guideline only goes up to 4 years.

b. The community orders referred to in the guideline cannot be imposed in a civil court (of the nine categories identified in the guideline, a community order is within the sentencing range for eight).

426. However, there is no doubt that the stepped process to arriving at a sentence set out in the guideline provides appropriate and valuable guidance as to the approach to be taken when considering punishment for contempt.

427. The first step is determining the offence category. That depends upon assessment of culpability and harm. That informs the "starting point" and "category range" which are provided for in a table at Step 2. The sentence is then adjusted to take account of other factors. The guideline has a non-exhaustive list of additional factual elements, some aggravating and some mitigating, which should be considered. Having identified the sentence, the next step is for a reduction to reflect a guilty plea. At this stage the *Reduction in Sentence for a Guilty Plea: Definitive Guideline* (effective from 1 June 2017) is relevant. The final step is the totality principle.[295] The *Offences Taken Into Consideration and Totality: Definitive Guideline* (effective from June 2012) provides assistance. The total sentence should reflect all the offending behaviour and be just and proportionate. There is guidance as to when concurrent and consecutive sentences are appropriate. However, the guidance does not expressly refer to the step of considering whether any custodial sentence should be suspended and the Working Party is concerned that a judge may fail to consider the other relevant guidelines in relation to the imposition of a custodial sentence.

An investigation into penalties imposed for breach/es

428. Given the widespread concerns expressed about inconsistency in punishing for breaches under the 2014 Act (and also to mirror the approach taken by the Sentencing Council when undertaking research before producing a guideline), the Working Party decided to undertake a preliminary review[296] of 50[297] reported penalties. [298]

429. The review revealed that:

i. In at least 27 cases there was no representation (or sentence in absence) (54%).
ii. Whilst 32 cases came before a district judge or deputy district judge (64%) 18 cases came before a circuit judge or recorder (36%).
iii. Reference is recorded of having been made to the sentencing guidelines in only 23 cases (46%).
iv. 19 immediate custodial penalties were passed (38%).

[295] Where dealing with more than one breach, a judge must not simply add up the penalties for each breach, rather he/she must look at the overall penalty and its effect.
[296] Carried out by Daisy Sproull, a postgraduate student at Manchester University.
[297] The Sentencing Council would consider many more sentences passed, but given the very limited information set out in some judgments the Working Party decided to take an initial sample of 50 cases.
[298] The Working Party does not know what percentage of penalties imposed are reported (notwithstanding the guidance); however it is believed it is a relatively low percentage. 17 out of the 50 (34%) reported cases were from three courts: Bristol, Gloucester and Walsall, and many large court centres do not appear to have reported judgments.

v. Immediate custodial penalties ranged from 2 weeks to 16 months. 11 of the penalties were in the bracket of 6-12 weeks (22% of all cases), 6 penalties were for 26 weeks or longer (12% of all cases).
vi. There was a consistent failure to give appropriate credit for any time spent on remand.

430. So, in the majority of cases, there was no representation/attendance and no reference is recorded as having been made to the guidelines. Penalties of immediate custody varied from 2 weeks (1 week to be served) through to 14 months and 23 days[299] (given time on remand), which given the guilty plea would have meant starting with the maximum possible penalty.

431. This very limited review evidences a lack of consistency of approach to the imposition of a penalty for breach/es. Whilst some judges obvious took the view that immediate custody should "be reserved for criminals unless there is simply no alternative",[300] others seemed to have interpreted the sentencing guidelines as calling for such a sentence without consideration of the fact that they were not sentencing for the breach of a criminal behaviour order (the imposition of which had followed a criminal conviction and in respect of which the maximum sentence is more than double that available for a breach of an injunction under the 2014 Act).

432. The review also revealed judges expressing dismay at the lack of ASBI specific guidelines and/or the content of the existing guidelines[301] and the limits to their powers to give out *"non-custodial sentences".*[302] In *Birmingham City Council v Nicholas Pearmain,* the judge commented that:

> *"if the option of making a community order was open to the County Court in a case such as this, then this is one of those cases where plainly the court would have welcomed that option. But it is not, and that, it seems to me, is gap in the sentencing provisions."*

433. In *Birmingham City Council v Michael Thornton* the judge commented:

> *"this is a case, if there ever was one, in which it would have been of assistance to everyone…if the court had more than the blunt instrument of imprisonment."*

And:

> *"an obvious order would be a requirement to attend on courses about alcohol. But the county court has no power to make such an order."*

[299] Reduced on appeal to twelve months.
[300] *Walsall Housing Group v William Robinson and Lindsay Robinson.*
[301] The judge in *Birmingham City Council v Graham Thomas Fellows* considered the ASBO sentencing guidelines and stated that *"in a case like this they are not of great assistance, for the seriousness of the breach is in the repetition of it."*

[302] Judges have commented that the fact that the civil courts cannot make community orders is a significant limitation to their sentencing powers; in many cases the breaches are not serious enough to warrant a custodial sentence, but that is the only option the judge has other than to leave the breach unpunished. An example of a judge choosing not to pass any sentence is *Birmingham City Council v Terrance John Phillips* where the respondent was found inside the injunction's exclusion zone twice. No sentence was passed, and the case was adjourned on the basis that the breaches will be returned to the list and considered if there are any further breaches.

434. Within this limited sample were cases of obvious concern given the nature of the breaches (and what a criminal court may pass by way of sentence for the underlying conduct).

435. In *Festival Housing v Baker*[303] the unrepresented respondent, who was described as *"vulnerable"* and "*a fragile individual (who) has difficulty reading and writing; difficulty in understanding*", and "*frankly, a pathetic individual who has not been able to stop herself*" was given a 3-month immediate custodial penalty for admitted breaches of an injunction preventing begging (equating to a four and a half month sentence before credit for a guilty plea).[304] Five months later, she was back before the court in respect of breaches which involved her asking for 50p on two separate occasions from local authority "Street Rangers". The judge noted the *"trivial"* nature of the breach: *"It has not been in an aggressive way. She has been told 'no' and she has not persisted"* but added that the seriousness was found in the repeat offending. The penalty imposed was six months in custody.[305] The Working Party was very concerned to note that a vulnerable and "*pathetic*" individual was punished, without legal representation on two occasions (within six months of each other) by custodial penalties combining to effectively nine months. Such levels of sentence are normally reserved for serious criminality. There is no reference to any attempt at any stage to tackle the underlying cause of the behaviour by positive requirement or otherwise.

436. In *Guinness Partnership v Louise Gardiner,*[306] the court was concerned with the first and single breach of an injunction prohibiting noise disturbance. The defendant (who was drunk at the time) pleaded guilty. The judge noted that she suffered from depression and that

> *"She had drank eight cans of alcohol, presumably lager or some similar drink, and that this had effectively resulted in and aggravated her behaviour and argument. She had not realised she was shouting, she told me, because she had had drink. She told me that she was sorry and that this would not happen again."*

437. She was given a four-week immediate custodial penalty: the equivalent to six weeks of custody for a first breach of an injunction concerning noise made within her own flat. There does not appear to have been any investigation of whether alcohol abuse or mental health played any part in the anti-social behaviour. This case can be contrasted with *Southern Housing Group v Mark Wise*[307] which involved six breaches: two for playing loud music, three for using abusive language and one for threatening to shoot a resident and subsequently firing a shot that caused property damage. For each breach the defendant was given 28 days to run concurrently, suspended until the end of the injunction.

[303] https://www.bailii.org/ew/cases/Misc/2017/4.html
[304] She had already received a 28-day custodial sentence on an earlier occasion.

[305] Less two weeks spent on remand. The judge failed to double this period up: see paragraph 450 of this document.
[306] https://www.judiciary.uk/wp-content/uploads/2015/05/contempt-of-court-county-court-gloucester-and-cheltenham.pdf
[307] https://www.judiciary.uk/wp-content/uploads/2015/06/SOUTHERN-hsg-v-wise.pdf

438. Analysis from the Judicial College[308] also evidenced a lack of consistency of approach (and a lack of familiarity with principle and guidance) within judges attending the course, many of whom had already imposed penalties for breaches under the 2014 Act. Two members of the Working Party, HHJ Cotter QC and HHJ Robinson, recorded the "sentencing decisions"[309] of 50 delegates attending the injunctions and committals module run by the Judicial College. The two "sentencing exercises"[310] were based on breaches of injunctions under the 2014 Act. The ranges of the penalties were:

a. Four weeks' suspended sentence through to four months suspended sentence.
b. Twelve weeks' immediate custodial sentence through to nine months.
c. Twelve weeks' immediate custodial sentence through to eighteen months.

439. Given the matters set out above, the Working Party arrived at the conclusion that there should be a specific guideline for breaches of orders under the 2014 Act. Such guidance would enable judges (and practitioners) to achieve a consistent approach to sentencing.

A bespoke guideline

440. When undertaking initial research before compiling a guideline, the Sentencing Council will, as a starting point, in relation to any relevant offence:

a. Carefully analyse the data in respect of the various sentences which had been imposed.
b. Undertake a review of sentencing remarks in a representative sample of cases.

441. In seeking to mirror this approach, the Working Party faced the immediate difficulty that (as set out above and unlike the position in relation to the former anti-social behaviour orders, or the current criminal behaviour orders), no data has been kept of penalties for breaches on injunctions under the 2014 Act.[311]

442. As set out above, the Working Party conducted a review of a sample of 50 cases/judgments to establish the extent to which there was a consistent approach to punishment.

443. A specialist group within the Working Party (including members of the Sentencing Council and secretariat) met and considered what should be contained within a guideline.

444. It was recognised that a document was required which brought together the content of a number of existing sentencing guidelines for ease of reference, and which provided a clear and structured approach.

445. The Working Party agreed the content of the guideline document at Annex 1.

[308] Given the unusual circumstances, permission was given by the Judicial College for the disclosure of this limited overview.
[309] They were the judges' tutors. No record was kept of the judges who had imposed the penalties.
[310] The module was written by HHJ Cotter QC and HHJ Worster.
[311] See paragraphs 304-315 of this document.

446. There has never been a guideline in relation to penalties for contempt and civil proceedings are not within the remit of the Sentencing Council. The Working Party believes that the Home Office, the Ministry of Justice and the Civil Procedure Rule Committee should liaise in relation to the need for the suggested guidance at Annex 2 to this report being incorporated within a Practice Direction to accompany CPR 81 or 65, or advice being given to the Lord Chief Justice or Master of the Rolls in relation to the need for a freestanding Practice Direction of a similar nature to the Practice Direction dated 26 March 2015 in respect of committals for contempt of court.[312]

447. There should be a review of the guideline, including its operation in practice, three years after it is published.[313]

Remarks when imposing a penalty

448. The judge should clearly set out how he/she has arrived at any penalty imposed and any guidance/case law considered. The impact of the penalty should also be clearly explained, including in relation to time already spent on remand and early release.

449. Unlike the sentences imposed in the criminal courts, time spent on remand is not automatically deducted from a term of custody imposed on a committal for contempt of court (see *R (James) v HM Prison Birmingham*[314]*).* However, the Criminal Justice Act 2003 section 258 states that, where a contemnor has been given a term of imprisonment, then as soon as he/she has served one half of the term *"it shall be the duty of the Secretary of State to release him unconditionally".*[315]

450. The investigation into current practice further evidenced what had been revealed during the training courses run by the Judicial College;[316] that many judges failed to appreciate that when giving credit for time spend on remand, double the period should be deducted from the term which would have been imposed (as a term of 10 days will result in 5 days served; so a period of 5 days on remand is equivalent to 10 days off the term imposed).

451. When sentencing in the criminal courts, Criminal Justice Act 2003 section 174 requires a judge to explain the effect of the sentence to the offender in ordinary language. As a result, the judge will indicate the extent to which the sentence passed will result in/allows for early release. The Working Party has found that many civil judges fail to refer to release after half of the term of custody when passing a custodial sentence for contempt. The Working Party believes the correct approach is to

[312] It applies in all courts in England and Wales, including the Court of Protection, and supersedes the *Practice Guidance: Committal for Contempt* [2013] 1 WLR 1326, dated 3 May 2013; *Practice Guidance (Committal Proceedings: Open Court) (No. 2)* [2013] 1 WLR 1753, dated 4 June 2013; and *President's Circular: Committals* Family Court Practice 2024 at 2976, dated 2 August 2013.

[313] The specific sub-group of the Working Party who compiled the guideline could be reconvened for this purpose. However it is essential that data as to penalties is compiled to allow consideration of what is happening in the Courts to allow an effective review.

[314] [2015] EWCA Civ 58; see also *Korta-Haupt v Chief Constable of Essex* [2020] EWCA Civ 892.

[315] See *Wear Valley DC v Robson* [2008] EWCA Civ1470; per Laws LJ at paragraph 12: *"[This is] an important feature to be borne in mind"*.

[316] See paragraph 438 of this document.

meet the requirements of section 174 and give an explanation of how long will be served in prison. Also, the judge should explain two extra matters, which are far from straightforward or easy to understand: the right to apply to purge contempt and route of appeal.

Purging contempt

452. Any person sentenced for contempt of court, has the right, if he/she can establish genuine regret and a genuine promise as to future conduct, to make an application to the court which sentenced him/her to purge his/her contempt.[317] The procedural requirements for the discharge of a person in custody are currently set out at CPR r.81.31 and will be at CPR 81.10 as revised; which cross refers to CPR 23. It is important that the procedural requirements are followed.[318] Whereas CPR r81.31 currently requires that the application be served on the person at whose instance the warrant of committal was issued (the applicant) at least one day before the application is made, an application under CPR 23 must ordinarily be served three days before the court is to deal with the application. The Working Party is concerned at the potential impact of the additional two days given that the custodial penalty may be short and believes that the CRPC should consider if a shorter time limit should be specified in the rules or a Practice Direction.

453. The application should be heard by the judge who imposed the penalty if at all possible.[319]

454. The judge hearing the application has the discretion[320] to say "yes" (meaning immediate release), "no" or "not yet", but cannot suspend the remainder of the term: *Harris v Harris* [2001] EWCA Civ 1645. Guidance on how a judge should approach an application to purge contempt was given by the Court of Appeal in *CJ v Flintshire BC* [2010] EWCA Civ 393**.** The court noted the difference between the type of case where the aim of committal was punishment for the failure to obey the mandatory order (e.g. a requirement to do something, such as comply with a positive requirement) as opposed to attempting to enforce the "coercive effect" of the order. Sedley LJ stated:

> *"I agree too with the analysis made by Wilson LJ of the practical difference in this context between the purging of contempt where the offence is breach of a mandatory order and where, as here, this is a breach of a prohibitory order. In Harris v Harris's [2001] EWCA Civ 1645 at paragraph 21 Thorpe LJ accepted that "the application to purge is rooted in quasi religious concepts of purification, expiation and atonement". In such a context, while compliance with a mandatory order may be the kind of proof of contrition which a court can evaluate, contrition sufficient to purge a breach of a prohibitory order is much more elusive, and many people might think, not really business of the courts. The task is completed, subject to any appeal, at the moment of sentence. Yet the power to relieve a contempt post-sentence this exists in both classes of case."*

[317] see Hughes LJ in *Longhurst Homes Ltd v Killen* [2008] EWCA Civ 402@ [16].

[318] See *Swindon BC v Webb* [2016] EWCA Civ 152.

[319] There is a section for this on the N79.

[320] But not, as Sedley LJ observed in *CJ v Flintshire*, an unfettered one i.e. there has to be good reason established.

455. So an application to purge contempt following punishment for a breach of a prohibitory requirement contained in an order under the 2014 Act will ordinarily face an uphill battle in the absence of a material change in circumstances after the penalty was imposed.[321] It is not appropriate to allow early release simply through sympathy for the respondent[322] and it is necessary to consider what is said by him/her with appropriate caution. In *Swindon v Webb* [2016] EWCA Civ152, the court held that a Recorder had not given proper consideration to the question of whether the respondent had received sufficient punishment for his breaches or whether the interests of justice would best be served by permitting his early discharge. In the circumstances, the respondent's apology and promise of future compliance which the Recorder accepted, were devoid of content. It fell short of considered, spontaneous and reasoned contrition. However, in *Poole Borough Council v Hambridge* [2007] EWCA Civ 990 the court took the view that the judge was entitled to conclude that 14 days served in custody, taken with five days served previously, was sufficient to enable him to hold that the contempt had been purged as it was a sufficiently long period to persuade the respondent to behave himself in the future and to entitle the judge, using his discretion, to permit his release. The court stated that the judge had very considerable knowledge of the respondent who had appeared before him over many days, and was in the best position to assess the effect that the custody had had upon him, together with the significance of the statements made in the letter. The judge had also had regard to the material factors, including the interests of residents and the public interests.

456. Given that a respondent must demonstrate that he/she has received sufficient (or proportionate) punishment for the breach, and also compliance with the notice requirements, it is usually the case that at least a few days will have been spent in prison before a successful application.[323] As Mrs Justice Andrews stated in *Solicitor General v Dodd* [2014] EWHC 1285 (QB):

> *"... the focus really must be upon what has happened in the intervening period since he was committed to prison and the impact that imprisonment has had on him."*

457. In that case, the effect of the sentence was greater than anticipated. Forty-nine days in Pentonville was said to be:

[321] It was stated in *CJ v Flintshire* that in applications for early discharge, eight overlapping questions could be considered: (a) could the court conclude that the contemnor had suffered punishment proportionate to his contempt? (b) would the interest of the state be significantly prejudiced by early discharge? (c) how genuine was any expression of contrition? (d) had the contemnor demonstrated a resolve and ability not to commit a further breach? (e) had he done all he reasonably could to minimise the risk of his committing a further breach if discharged? (f) had any specific proposal been made to augment the protection of those the order was designed to protect against any further breach? (g) how long had been served in prison, taking account of the full term imposed and the term he would otherwise be required to serve prior to release pursuant to the Criminal Justice Act 2003 s.258(2)? (h) were there any special factors impinging on the exercise of discretion either way? It was stated that the success of an application for an order for early discharge did not depend on favourable answers to all those questions and the list was not intended to be prescriptive. Nevertheless, the first is a general question which as May LJ observed in *Enfield LBC v Mahoney* [1983] 2All E.R. 901, probably needs an affirmative answer before early discharge could be ordered. The second surely requires a negative answer. Wilson LJ stated that an affirmative answer to the third will usually (although not always) be necessary but may not be sufficient.

[322] See Sedley LJ in *CJ v Flintshire* at paragraph 37.

[323] Prisons sometimes prompt defendants to make an application when they arrive, with the result that the application is often made too soon.

"… probably a far harsher punishment than 3 months in an open prison would be."

458. In the absence of legal representation, unless the court indicates that it is open to the respondent to apply to purge the contempt, few contemnors are likely to be aware of this option (although the Working Party has heard that in some prisons it is regular practice to inform prisoners who have arrived under civil sentences of the right to apply to purge contempt). A balance has to be struck between the need to make contemnors aware of their rights and not encouraging misconceived applications.

459. As set out above, when sentencing in the criminal courts, the Criminal Justice Act 2003 section 174 requires that a judge must explain the effect of a custodial sentence. Subsection (3)(c) also requires that the judge explain to the offender in ordinary language:

"any power of the court to vary or review any order that forms part of the sentence".

460. The Working Party believes that reference should be made by a judge punishing for contempt in relation to an order under the 2014 Act, to the ability to apply to purge contempt and the general principles upon which an application may be based.

Appeals

461. Section 13 of the Administration of Justice Act 1960 states:

(1) Subject to the provisions of this section, an appeal shall lie under this section from any order or decision of a court in the exercise of jurisdiction to punish for contempt of court (including criminal contempt); and in relation to any such order or decision the provisions of this section shall have effect in substitution for any other enactment relating to appeals in civil or criminal proceedings.

(2) An appeal under this section shall lie in any case at the instance of the defendant and, in the case of an application for committal or attachment, at the instance of the applicant; and the appeal shall lie...

(b) from an order or decision of the county court or any other inferior court from which appeals generally lie to the Court of Appeal, and from an order or decision (other than a decision on an appeal under this section) of a single judge of the High Court, or of any court having the powers of the High Court or of a judge of that court, to the Court of Appeal…"

462. An appeal against a "committal order"; an order committing a contemnor to prison (including a suspended committal order) does not require permission to appeal: CPR 52.3(1)(i). Any other order

in contempt proceedings e.g. imposing a fine[324] or refusing to commit[325] or that the defendant pay the applicant's costs, is not "a committal order" and permission to appeal is required.[326]

463. Whilst permission may not be needed, the route of appeal is far from straightforward. In *Sherwin v Sherwin,*[327] Butler-Sloss LJ and Brooke LJ stated that when the liberty of the subject was at stake, practitioners should be aware of the principles set out in *Hurst v Barnet LBC*[328] (when the court reviewed the cases on appeals against committal orders decided after the introduction of the Civil Procedure Rules 1998). However, the Working Party understands that some confusion has arisen as a result of the Access to Justice Act 1999 (Destination of Appeals) Order 2016 and CPR PD 52A[329], which sets out that the route of appeal from any order of a district judge is to a circuit judge and any decision of a circuit judge is to a High Court judge (save in relation to a second appeal, which is to the Court of Appeal). The Working Party believes that it is important that routes of appeal are set out by a judge such that, in the event of an appeal, no time is lost.

464. The Working Party understands that the law is as follows:

a. An appeal in relation to a committal order made by a district judge may lie to either a circuit judge or the Court of Appeal under section 13(2).[330] An appellant should ordinarily, but not necessarily, follow the former (and the Court of Appeal secretariat will advise as such). A circuit judge faced with such an appeal can transfer the case to the Court of Appeal (CPR52.14) or determine it. If the circuit judge dismisses the appeal there is a right of appeal to the Court of Appeal under section 13(2); as this is a second appeal, permission is required.[331]
b. An appeal from a circuit judge lies to the Court of Appeal under section 13(2).[332] *Hurst* predated the Access to Justice Act 1999 (Destination of Appeals) Order 2016 and CPR PD 52A, so does not provide any authority for a route of appeal to a High Court judge (which would usually be quicker, easier and less costly to arrange than an appeal to the Court of Appeal, something which is of particular importance if dealing with short sentences).
c. An appeal from the youth court will lie to the Crown Court.

[324] The notes to the Civil Procedure White Book 3C-39 are incorrect when stating that no permission is required if the order was a fine and referring to *Shadrokh-Cigari v Shadrokh-Cigari* [2002] EWCA Civ 1009, [2010] EWCA Civ 21; see *Giles v Tarry* [2012] EWCA Civ 1886.
[325] see *JSC Bank v Ereshchenko* [2013] EWCA Civ 829).
[326] See *Government of Sierra Leone v Davenport* [2002] EWCA Civ230; *LB Barnet v Hurst* [2002] EWCA Civ1009; *Munib Masri v Consolidated Contractors* [2011] EWCA Civ 898; *Giles v Tarry* [2012] EWCA Civ 1886.
[327] [2003] EWCA Civ 1726.
[328] [2002] 4 ALL ER 457.
[329] And the HMCTS form 201 "Routes of Appeal".
[330] *"A first appeal from a committal order made by a district judge in the county court still has two alternative routes. Even if the case is in the multi-track it is not a "final decision" as defined in Article 1(2)(c) of the Access to Justice Act 1999 (Destination of Appeals) Order 2000 ("DO") so that it will ordinarily lie to a circuit judge in the county court. The application of King v Read and Slack and DO Article 3(2) produce the same result, and DO Article 4(a) does not apply. Alternatively, and exceptionally, it may lie to the Court of Appeal, either by the application of King v Read and Slack or through the transfer operation contained in CPR 52.4 (or section 57 of the Access to Justice Act 1999). Now that the CPR appellate regime is in force, it is the latter mechanism that should now be used, since the former is no longer needed. A first appeal from any order of a district judge in the county court in the exercise of jurisdiction to publish for contempt may follow the same alternative routes, except that permission to appeal will be required."* per Brooke LJ in *LB Barnet v Hurst* [2002] EWCA Civ1009.
[331] Ibid paragraph 30.
[332] By application of the principles set out by Brooke LJ in *LB Barnet v Hurst* [2002] EWCA Civ1009.

465. Given uncertainty with regard to (a) and (b) above, the Working Party believes that the Civil Procedure Rule Committee should clarify matters within the Appeal Practice Direction.

466. The revised CPR 81 (7) states:

> *"(7) The court shall inform the defendant of the right to appeal without permission, the time limit for appealing and the court before which any appeal must be brought."*

467. Drawing the matters set out above together it is the Working Party's view that when imposing a custodial penalty for contempt a judge should explain in plain language:

a. the effect of the penalty i.e. how long will actually be served in prison;
b. the right to apply to purge contempt;
c. that permission to appeal is not needed;
d. the time limit for and route of appeal.

468. There should also be a paragraph in the committal warrant or order (in plain and straightforward language) identifying the right to apply to purge the contempt (and how to do it and the need to give notice) and the route of appeal.

SECTION 11 – Judicial training

469. As set out above,[333] examples of inappropriate penalties for contempt led to the Judicial College creating a bespoke module covering injunctions and committals with a focus on the 2014 Act. Analysis from the Judicial College has evidenced a lack of familiarity with relevant legal principles and/or guidance amongst attendees. The Working Party's review[334] of penalties provides support for the view (as expressed by many consultees) that there is still a concerning lack of consistency of approach to the imposition of penalties. Given the seriousness of imposing a custodial penalty, attendance at a module to which covers committals should be a compulsory part of judicial training.

470. Apart from punishing for contempt, there are a number of other important issues, e.g. the use of ex parte applications; assessing the competency of housing officers to conduct cases; how to approach concerns over capacity; how to assess and address vulnerability (including if section 16 of the 2014 Act applies); the content of orders and the procedure to be followed at a committal; which should be addressed within training given that the imposition of an order, which could lead to a custodial sentence and the hearing of a committal application, are such serious steps.

471. In light of these matters, the Working Party is concerned that a Judicial College module covering civil injunctions and committals is not mandatory for district/deputy district judges and circuit judges/recorders who may hear applications and committals concerning the 2014 Act. In its report upon vulnerable witness/parties,[335] the Civil Justice Council made a recommendation that judicial training in respect of vulnerability (including consideration of the changes to be implemented under the reform programme) should be a mandatory part of the training of all new, and a requirement of all existing, civil judiciary within a three-year cycle. The Working Party believes that a similar requirement should apply to training in respect of injunctions under the 2014 Act and committals (at present this would require bespoke training for all newly-appointed judges and attendance at the Judicial College's injunctions and committals module once every set number of years).

[333] See paragraph 438 of this document.
[334] See paragraph 428 of this document.
[335] "Vulnerable Witnesses and Parties within civil proceedings; current position and recommendations for change": https://www.judiciary.uk/announcements/civil-justice-council-proposes-better-assistance-for-vulnerable-witnesses/.

SECTION 12 – Recommendations

472. The Working Party makes the following recommendations:

Recommendation 1: Local plans

473. A local plan should be prepared for each designated area of England and Wales ("an area"), which identifies the relevant local agencies/bodies (including the courts) engaged in the (risk) assessment and prevention of anti-social behaviour and also the provision of assistance, support and treatment to those who are believed to be engaging in such behaviour. It should also address how these bodies/agencies are to liaise before any application to the court for an injunction under the 2014 Act.

474. The Home Office, Ministry of Housing, Communities and Local Government, the Association of Police and Crime Commissioners and the Ministry of Justice should liaise as to how the areas are to be identified and identify the lead bodies with responsibility for the compilation and updating of the local plan.

475. A non-exhaustive list of those who should be invited to attend meetings to formulate/ consider the plan for each area is as follows:

a. Relevant officers within the local authority/authorities (including the housing department, legal department and any outreach team)
b. Local social housing providers
c. The chief constable
d. The police and crime commissioner
e. A representative of any local Out of Court Disposal Panel
f. A local representative of the National Probation Service
g. A local representative of the CPS
h. A local representative of the NHS L&D service
i. A representative of the local mental health trust
j. Local agencies providing support/assistance with drug and alcohol misuse
k. Local agencies providing assistance with homelessness
l. A member of the local Law Society/local legal aid solicitor
m. A representative of any local law centre/pro-bono legal advice provider
n. The Designated Civil Judge (DCJ)
o. An HMCTS manager with responsibility for the DCJ region

476. The local plan should consider:

a. The steps which should be taken by an applicant (and other agencies), prior to the commencement of court proceedings, including multi-agency risk assessment of relevant individuals and analysis of how underlying causes of the anti-social behaviour can be addressed and what options are available for an early intervention approach or alternative approach, assistance, support or treatment.

b. How applicants are to liaise with the local authority, the NHS L&D service and other agencies to secure relevant information about the respondent (including how and to what extent data can be shared).
c. How applicants are to liaise with the police/CPS/Probation Service to ensure that, so far as practicable, a civil court has all relevant information in relation to any past or present criminal proceedings or sentences.
d. Identifying lead individuals within agencies/organisations to facilitate better liaison.
e. When an application is made under the 2014 Act, how the court can be provided with an assessment of the underlying causes of the anti-social behaviour and what options are available for assistance, support or treatment to be the subject of a positive requirement or otherwise.
f. The ability/willingness of relevant agencies to comply with the procedural obligations in respect of a positive requirement (and at a time when input can be given by a Designated Civil Judge as to how the requirement is expected to work in practice).
g. The reporting and the local monitoring of positive requirements (and the success rates, to identify "what works").
h. In respect of breaches:
    (i) how warrants are to be executed;
    (ii) which are the "out of hours" courts and how contact is to be made with the court;
    (iii) how the court can be provided with any/any further assessment of the underlying causes of the anti-social behaviour and what options are available for assistance, support or treatment to be the subject of a positive requirement or otherwise.
i. How training should be delivered to promote better understanding of the role of relevant agencies and potential steps to combat anti-social behaviour before applying for an injunction.

477. A local plan should also specifically address data sharing between agencies/bodies/groups.

478. The local plan should be publicly available.

479. The plan should be periodically reviewed.

Recommendation 2: Risk assessments

480. It should be considered good practice for any person/body considering applying for an injunction under the 2014 Act, to undertake a risk assessment of the potential respondent after consultation with appropriate bodies in accordance with the local plan. A court should consider requesting sight of any risk assessment.

Recommendation 3: Care leavers

481. Any applicant considering making an application against a person who is aged 18 to 25 should make every effort to ascertain if they are a care leaver and, if they are, to provide them with advice as to the assistance available.

Recommendation 4: Positive requirements

482. Public Health England should review the availability of treatment options for drug and alcohol addiction and mental health issues and give national guidance as to which are suitable for positive requirements under the 2014 Act (whether by way of injunction or criminal behaviour order) and how such treatment should be supervised.

483. There should be liaison between Public Health England and the Home Office to establish a national network for people managing positive requirements in orders, so that data, best practice and "what works" can be shared along with the identification of problems encountered.

484. When a local plan is prepared (see above) all relevant agencies should be asked to confirm their ability/willingness to comply with the procedural obligations in respect of a positive requirement.

485. When a positive requirement is ordered, the court should automatically consider setting a review date. Such a review should be (at least for the first review) by way of a short, written report/e-mail to the supervising judge (if possible this should be the judge who made the order or his/her nominee) with an oral hearing only if necessary.

Recommendation 5: Liaison and Diversion Service

486. The Home Office, Ministry of Justice, HMCTS and the NHS L&D service should meet as a matter of urgency to consider how the NHS L&D service should liaise and work with local agencies (as set out within local plans) and how the civil courts can gain assistance from/refer to the L&D service. Currently, the L&D service works only with the criminal jurisdiction and it will be necessary to consider changes to the service's practices and to produce some form of protocol which any civil judge can follow.

487. In the event of a concern about the capacity (or mental health) of an unrepresented (and/or absent) respondent, a judge should have an ability, as a first step, to liaise with and refer to the NHS L&D service.

488. The Official Solicitor and the NHS L&D service should meet to agree a protocol in relation to the assessment of capacity issues in relation to civil litigation.

Recommendation 6: A pre-action protocol

489. The Home Office, Ministry of Justice and the Civil Procedure Rule Committee should liaise in relation to a national pre-action protocol and consider the suggested draft contained within this report.

490. The protocol should require that the local plan referred to above, devised to ensure consideration of the best approaches to tackling anti-social behaviour of various types within an area, has been followed.

Recommendation 7: Legal aid

491. The Legal Aid Agency should, as a matter of urgency, consider:

a. Reviewing and clarifying the scope of the advice provided by the CLA.
b. Undertaking a review of the availability of publicly-funded legal advice and representation in relation to all hearings in respect of orders sought or obtained under the 2014 Act. The review should include ascertaining, through a survey, the number and geographical spread of practitioners who are able and willing to provide publicly-funded advice and representation (as opposed to simply the number of contracts in existence).
c. Widening the scope of civil duty solicitor scheme to cover advice/representation in respect of applications for injunctions under the 2014 Act.
d. Changing (or giving guidance/training in relation to) the current approach to the merit requirement for eligibility for legal aid for respondents in relation to applications under the 2014 Act.
e. Considering making "end-to-end" publicly-funded legal representation for applications brought under the 2014 Act easier to provide for those who have civil legal aid contracts. Specifically, consideration should be given to changing the current contracts so as to extend the scope of work which can be undertaken to include advice/representation in relation to a committal for breach of the order at civil remuneration rates.

492. The Civil Procedure Rule Committee should consider amending the Civil Procedure Rules to require judges to ensure that a respondent, at a first hearing of an application for an injunction, is aware of the potential availability of legal aid by replicating the requirements set out in PD81 15.6 and the revised CPR 81.4 to make the respondent aware of the possibility of legal aid within CPR 65 and/or PD 65.

493. Individual courts should assist Designated Civil Judges to liaise with the Legal Aid Agency, the local office of the Law Society, local advice agencies and Support Through Court (if available), so as to identify local solicitors who are willing to represent respondents to 2014 Act injunction applications and committals, with the aim of making a fact sheet available to every respondent showing how to try and obtain legal advice/representation. Any such sheet produced should also be provided by the applicant in compliance with the obligation under the pre-action protocol.

Recommendation 8: Listing

494. Courts should ensure changes to listing procedures to guarantee an early hearing of 2014 Act applications for injunctions and avoid improper use of the without notice ("ex parte") procedure. Applications for an injunction should be listed as a matter of urgency and, in any event, within 14 days of the application/proceedings being filed.

495. A return date after a hearing at which a without notice order has been made should not be more than 10 days after the hearing.

496. Hearing centres should try and list first return hearings and committal applications on set ASBI/injunction days. This would allow local legal aid practitioners to cover more than one hearing and assist with levels of representation. It would also allow listing before experienced judges (who have undertaken training in relation to the injunctions and committals).

Recommendation 9: Hearings and orders

497. The practice of seeking orders without notice to the respondent ("ex parte") needs to be curtailed and limited to circumstances where, given the facts, it is appropriate to take this exceptional step. The justification for taking the step must be fully set out in a witness statement. This should be addressed in a protocol.

498. Every applicant should consider section 16 of the 2014 Act and the issue of vulnerability with each witness relied upon in support of the application and (if appropriate) ensure that it is addressed in the witness's statement. In every case in which allegations are contested, and evidence has to be given by witnesses the court should, if not raised by a party of its own motion, consider if section 16 may apply to any witness.

499. A judge should ask any housing officer who seeks to present an application about the nature and extent of their experience and training in respect of applications under the 2014 Act. If concerned about their ability to properly present the case the judge should require different representation.

500. Any advocate who proposes to undertake cross-examination of a vulnerable witness should have undertaken some relevant training.

501. When making an order which is related to a property with a tenancy, a judge should give a clear warning of the risk of a possession order if the injunction is breached.

502. A judge should be careful when considering allegations of street begging as anti-social behaviour that the relevant test set out in the 2014 Act has been satisfied on the evidence before the court.

503. When considering the terms of an order careful regard should be paid, before seeking/imposing a geographical restriction, to the respondent's ties/support mechanisms within the relevant area and whether, given the extent of these, the terms of the order would be setting the respondent up to fail. In any event, the scope of any restriction must be tailored to the specific circumstances of the person on whom it is to be imposed and must be the minimum necessary.

504. Powers of arrest should solely be used in cases where there is the possibility of violence or a real threat of violence or of a risk of physical or psychological harm, not just of some distress. If the applicant seeks a power of arrest to be attached to any proposed term a statement should identify on what basis the statutory test is met.

505. The wording of any positive requirement imposed by the court should be clear and capable of being easily understood by all those involved, including in relation to the level of expected engagement and what will constitute a breach. Open textured phrases such as “positively engage”, or “attend and participate” may be used, but whenever possible should be clarified or augmented for each individual case (e.g. attend pre-arranged appointments, co-operate with testing).

506. The frequency, expected level and means of reporting from the relevant agency to the court (including to a supervising judge, local authority, police, or other agency) should be specified.

507. When a positive requirement is ordered the court should automatically consider setting a review date.

508. Consideration should be given to the rule set out in the Lord Chief Justice’s Practice Direction on Committals about robing being relaxed for urgent hearings covered by CPR 65.47.

509. HMCTS should ensure the N79 and other associated forms are updated and produced with a user friendly/easily comprehensible content. There should also be a paragraph in the committal warrant or order (in plain and straightforward language) identifying the right to apply to purge the contempt (and how to do it and the need to give notice) and right to appeal without permission, the relevant time limit and the route of appeal. A suggested revised format for N79 is at Annex 2.

510. When a period of custody is the penalty for contempt, a judge should explain in plain language:

    a. the effect of the penalty i.e. how long will actually be served in prison;
    b. the right to apply to purge contempt;
    c. that permission to appeal is not needed;
    d. the time limit for, and route of, appeal.

511. A review should be undertaken of the differing requirements in the 2015 Practice Direction and revised CPR 81 to produce a written judgment/obtain a transcript in respect of any committal decision, and then circulate it, and whether the requirement(s) should be relaxed to cover only noteworthy judgments or properly policed (with appropriate reminders to judiciary and staff including on any revised N79).

Recommendation 10: Capacity and the Official Solicitor

512. In some cases it may be appropriate for the applicant (or in the case of a potentially vulnerable adult, a local authority) to consider indemnifying the Official Solicitor in respect of the costs incurred in investigating capacity and representing the respondent. The Ministry of Housing, Communities and Local Government should consider providing guidance to local authorities/frontline professionals on this issue.

513. As per paragraph 488, the Official Solicitor and the NHS L&D service should meet to agree a protocol in relation to the assessment of capacity issues in relation to civil litigation.

Recommendation 11: Data

514. The Home Office National ASB Strategic Board should, as a matter of urgency, meet with HMCTS as soon as practicable to assess what data in relation to the use of the 2014 Act is required, how it can be retained and how it can be used so as to assess the use and efficacy of orders (to include consideration of what data Local Authorities should be asked to compile and what data HMCTS can compile).

515. The data retained should include a record of penalties imposed for breaches of orders made under the 2014 Act so as to allow a review of guidance as to the imposition of penalties.

Recommendation 12: Rule changes

516. The Civil Procedure Rule Committee should consider:

a. The need for, and content of, a pre-action protocol.
b. Amending CPR 65 and/or PD 65 of the Civil Procedure Rules to require judges to ensure that a respondent at a first hearing of an application for an injunction under the 2014 Act is aware of the potential availability of legal aid (replicating the requirements set out in PD81 15.6, and the revised CPR 81.4 as set out in the Civil Procedure (Amendment No 3) Rules 2020, in respect of committals).
c. Providing guidance as to the principles to be adopted when considering bail.
d. Whether the requirement for evidence upon an application under the revised CPR 81.4 in relation to a committal under the 2014 Act to be by affidavit (as opposed to statement) should be removed either by amendment to CPR 65.47 and/or PD 65 and/or CPR 81.
e. As a matter of urgency, amending the revised CPR 81 and/or CPR 65 to restore the jurisdiction of district judges to deal with committal applications in respect of the breach of orders made under the 2014 Act.
f. As a matter of urgency, liaising with the Home Office and Ministry of Justice with regard to the provision of guidance as to penalties for contempt (see further below).
g. Providing guidance as to the route of appeal in respect of a committal order.
h. Whether, when the revised CPR 81 is in force, a shorter time limit than 3 days for the service of an application to discharge a committal order (purging contempt) should be specified in the rules or a Practice Direction.
i. Removing the requirement for robes to be worn for urgent committal hearings covered by CPR 65.47.

Recommendation 13: Penalties for contempt

517. The Home Office, Ministry of Justice and the Civil Procedure Rule Committee should, as a matter of urgency, liaise in relation to guidance as to penalties for contempt and consideration should be given to the suggested guidance at Annex 2 to this report being incorporated within a Practice Direction to accompany CPR 81 or 65 or advice being given to the Lord Chief Justice/Master of the Rolls in relation to the need for a freestanding Practice Direction.

518. There should be a review of the guideline, including its operation in practice, three years after it is published.

519. The lack of community order sentencing options available in the criminal jurisdiction should, in appropriate cases, be addressed by adjourning the determination of punishment for contempt "on terms"; effected by changing/adding to the terms of the underlying injunction. This may provide a valuable opportunity to effect change in underlying conduct through adding a positive requirement during the period of adjournment (subject to the procedural requirements for the ordering of a positive requirement and variation of the injunction).

520. When adjourning the determination of punishment, a judge should give a clear indication of the penalty which would have been imposed had decision to defer not been taken, and should also ensure that the respondent understands the consequences of failure to comply with the court's wishes during the deferment period.

521. When a positive requirement is ordered the court should consider setting a review date.

Recommendation 14: Training

522. Housing officers and other representatives should receive training on vulnerability and all aspects of the making of an application under the 2014 Act (and the matters identified in this report).

523. There should be mandatory training for judges in respect of injunctions under the 2014 Act and committals. This would require training of all newly-appointed-judges and a requirement that existing judges attend training once in a set number of years.

Recommendation 15: Guidance

524. The statutory guidance for frontline professionals published by the Home Office should be further updated in light of the recommendations in this report.

Annex 1: Guidance on penalties for contempt

GUIDANCE IN RELATION TO PENALTIES FOR CONTEMPT FOR BREACH OF ORDERS MADE UNDER PART 1 OF THE ANTI-SOCIAL BEHAVIOUR, CRIME AND POLICING ACT 2014

Introduction

This guideline is applicable for the imposition of penalties for breach of an order made under the Anti-social Behaviour, Crime and Policing Act 2014 ("the 2014 Act").
The exercise of punishing for contempt in the civil courts is different from sentencing within criminal proceedings. Having found that the contemnor is in contempt of court, a judge must then consider the question of a penalty, rather than sentencing for an offence. However, the core principles of criminal sentencing should be applied and the following definitive guidelines produced by the Sentencing Council for use in the criminal courts may also be relevant for a civil judge faced with a breach of an order under the 2014 Act:

- *Breach Offences: Definitive Guideline* (operative from 1 October 2018)[336]
- *Imposition of Community and Custodial sentences: Definitive Guideline*
- *Reduction in Sentence for a Guilty Plea: Definitive Guideline*
- *Offences Taken Into Consideration and Totality: Definitive Guideline*

Other definitive guidelines, such as those in relation to assault and drugs, may be of relevance if the breach also consists of commission of a substantive criminal offence.
This guideline applies only to a respondent aged 18 and older.
For more a more detailed analysis of penalties in respect of breaches under the 2014 Act see the Civil Justice Council Report.

The objective of a penalty

There are three objectives to be considered when dealing with the breach of an order under the 2014 Act:

- The first is punishment for breach of an order of the court.
- The second is to secure future compliance with the court's orders if possible.
- The third is rehabilitation, which is a natural companion to the second objective.

Penalty options

[336] It is important to note that this guideline is for criminal offences only and was not intended to cover sentencing at committals for a breach of an order made under the 2014 Act. See p. 27 for the sentences for the breach of a criminal behaviour order (which carries a maximum sentence of 5 years as opposed to the maximum of 2 years when sentencing for breaches of orders under the 2014 Act) and p. 56.

When dealing with a contemnor for a breach of an order under the 2014 Act the court has the following five options:

- An immediate order for committal to prison.
- A suspended order for committal to prison.
- Adjourning the consideration of a penalty, if appropriate with amendment of the injunction to include a positive requirement.
- A fine.
- No order.

Section 14 of the Contempt of Court Act 1981 sets out that the **maximum term** that can be imposed on any occasion is 2 years' imprisonment. Importantly this is not a maximum of 2 years per breach, but a maximum of 2 years on any occasion. This is so even if an element of the penalty imposed is the activation of a suspended order for committal passed on a previous occasion.

Custody must be reserved as a punishment for the most serious offences. A custodial penalty must not be imposed unless the breach or the combination of the breach and one or more breaches associated with it, was so serious that only a custodial penalty can be justified.[337]

A penalty must be considered for each breach found proved, and the terms of imprisonment may be concurrent or consecutive to each other. It is a basic principle of sentencing that consideration must be given to the **totality** of the penalties imposed, simply adding up what may well be entirely appropriate penalties for each individual breach may lead to an excessive total that is wrong in principle. **The appropriate period of custody must be the least period which the seriousness of the respondent's breaches can properly justify**.

One half of the custodial term will be served in prison before automatic release.[338] As a result particular consideration should be given to the practical effect of short custodial terms.[339]
Unlike the sentences imposed in the criminal courts, **time spent on remand is not automatically deducted from a term of imprisonment** imposed on a committal for contempt of court. When giving credit for time spend on remand, double the period should be deducted from the term which would have been imposed (as a custodial term of 10 days will result in 5 days served; so a period of 5 days on remand is equivalent to 10 days off the term).

The court can suspend an order for committal to prison. **For a suspended order to be an available option the custody threshold must have been passed,** i.e. a judge must be clear that an immediate custodial penalty would have been imposed had the power to suspend not been available. A suspended custodial order is not a step or stage before a custodial sentence is justified.

[337] There is a specific sentencing guideline in relation to custodial sentences: *Imposition of Community and Custodial Sentences: Definitive Guideline.*
[338] See the Criminal Justice Act 2003 section 258. As a result, if the custodial term is expressed in days it is desirable that it should be an even period of days.
[339] If a prisoner is due for release at a weekend, it will take place on the preceding Friday: prisons do not release at weekends.

The court should decide the appropriate length of the custodial term before considering if it is appropriate to suspend it. **The period of suspension (the operational period) must not be disproportionate to the term or to the gravity of the conduct**. It should ordinarily be for a fixed period (or until the expiry of the injunction if that is earlier than the period that would otherwise have been imposed).

The court has **no power to order the equivalent of a community sentence**.

A criminal court can defer passing sentence for up to six months and may impose any conditions during the period of deferment that it considers appropriate. The purpose of **deferment** is to enable the court to have regard to the offender's conduct after conviction or any change in his or her circumstances, including the extent to which the offender has complied with any requirements imposed by the court. **A civil court can achieve the same aims by adjourning the consideration of penalty** ("adjourned consideration") to enable regard to be had to the respondent's future conduct, including, if appropriate, on terms, effected by changing/adding to the terms of the underlying injunction (including through adding a positive requirement). Ordinarily the adjournment should be for a finite period and to a fixed hearing date (preferably before the same judge). Although there is no set time limit the adjournment should **not normally be in excess of 6 months**. The court should also give a clear indication of the penalty it would have imposed if it had decided not to adjourn and must ensure that the respondent clearly understands the consequences of failure to comply with terms of the order.

If either a suspended committal order or an adjourned consideration has a positive requirement forming part of an amended order consideration should be given to **ordering a review** after a suitable period to consider progress/compliance.

A stepped approach

To arrive at an appropriate penalty for the contempt a stepped approach is necessary.

The first step is determining the seriousness of the breach/es. That depends upon assessments of culpability and harm.
The second step is to use the table set out below to identify the "starting point" and "category range". The table assumes that breaches have been proved at a hearing.[340]
The penalty is then adjusted to take account of other factors. There is a non-exhaustive list of additional factual elements, some aggravating and some mitigating, which should be considered.
The third step is for a reduction to reflect any admission/s of the breach/es. At this stage the *Reduction in Sentence for a Guilty Plea: Definitive Guideline* (effective from 1 June 2017) is relevant.
The fourth step is the totality principle. The *Offences Taken Into Consideration and Totality: Definitive Guideline* (effective from June 2012) provides assistance. When imposing penalties for a

[340] Credit for admitting breaches is taken into consideration only at step four in the decision-making process, after the appropriate sentence has been identified.

number of breaches (or when there has been a breach of a suspended order for committal and further breaches) the total penalty should reflect all the offending behaviour and be just and proportionate. There is guidance for the criminal courts as to when concurrent and consecutive sentences are appropriate. The result at this stage should be the shortest period of custody which the seriousness of the offender's breaches can properly justify.
The **fifth step** is to consider whether any order for committal to prison should be suspended.
The **sixth step** is to take into account any time spent in custody on remand.
The **seventh step** is to give reasons for, and explain the effect of, the penalty imposed.
The **eighth** step is to consider, if a positive requirement has been imposed through variation of the order, if there should there be a review hearing to assess progress/compliance.

Step one

Determining the relevant categories of culpability and harm.
Culpability:
There are three levels:

A High culpability; very serious breach or persistent serious breaches
B Deliberate breach falling between A and C
C Lower culpability; Minor breach/es

Examples of category A may include, but are not limited to:

	Violence or threat of serious violence
	Significant degree of premeditation
	Intention to engage in more serious behaviour than actually achieved (e.g. where the respondent was arrested or disturbed before able to complete intended behaviour)

Examples of category C may include, but are not limited to:

	No intention to cause harm or distress and no harm or distress reasonably foreseeable from the breach
	Breach is incidental to some other lawful activity (e.g. entering a prohibited area to use a shortcut)
	Lack of premeditation or inadvertent breach

Harm:
The level of harm is determined by weighing up all the factors of the case to determine the harm that was caused or was at risk of being caused by the breach/es.
In assessing any risk of harm posed by the breach/es, consideration should be given to the facts or activity which led to the order being made.

Category 1 Breach causes very serious harm/distress
Category 2 Cases falling between categories 1 and 3
Category 3 Breach causes little or no harm/distress

Examples of category 1 may include, but are not limited to:

Injury or threat of serious injury
Significant damage to property
Elderly or vulnerable person affected by breach/es
Causes a resident to move home

Examples of category 3 may include, but are not limited to:

No person(s) actually inconvenienced
Breach comprises mere presence in unauthorised location other than in circumstances comprising greater harm

Step two

Having determined the categories at step one, the court should use the corresponding starting point to reach a preliminary penalty.

Harm	**Culpability**		
	A	**B**	**C**
Category 1	*Starting point:* 6 months *Category range:* 8 weeks to 18 months	*Starting point:* 3 months *Category range:* adjourned consideration to 6 months	*Starting point:* 1 month *Category range:* adjourned consideration to 3 months
Category 2	*Starting point:* 3 months *Category range:* adjourned consideration to 6 months	*Starting point:* 1 month *Category range:* adjourned consideration to 3 months	*Starting point:* adjourned consideration *Category range:* adjourned consideration to 1 month
Category 3	*Starting point:* 1 month *Category range:* adjourned consideration to 3 months	*Starting point:* adjourned consideration *Category range:* adjourned consideration to 1 month	*Starting point:* adjourned consideration *Category range:* No order/fine to two weeks

The preliminary penalty may then be adjusted to take account of any additional factual elements providing the context of the breach/es and factors relating to the respondent.

A non-exhaustive list of additional factual elements is set out below. Consideration must be given to whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point. Care must be taken not to "double count" factors i.e. factors should be ignored if already taken into account in arriving at the preliminary penalty. In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

Examples of factors increasing seriousness:

- history of disobedience of court orders
- breach committed shortly after the order was made
- targeting of a person the order was made to protect or a witness in the original proceedings
- victim, or protected subject of order breached, is particularly vulnerable due to age, disability, culture, religion, language, or other factors.

Examples of factors reducing seriousness or reflecting personal mitigation:

- breach committed after long period of compliance
- genuine remorse
- age and/or lack of maturity where it affects the responsibility of the respondent
- ill health, mental disorder or learning disability
- sole or primary carer for dependent relatives.

Step three

Reduction in the penalty for any admissions made. The court should take account of any reduction for admitting the breach/es in accordance with the *Reduction in Sentence for a Guilty Plea: Definitive Guideline.*

Step four

If penalties are being imposed for more than one breach, or where the respondent is in breach of a suspended committal order, [341] consideration must be given to whether the total penalty is just and proportionate to the breach/es in accordance with the *Offences Taken Into Consideration and Totality: Definitive Guideline.*

Step five

If the penalty is a custodial term, consideration must be given to whether it should be suspended. The following factors should be weighed in considering whether it is possible to suspend the committal order:

(a) Factors indicating that it would **not** be appropriate to suspend a custodial order:

- The respondent presents a risk/danger to others.
- Appropriate punishment can only be achieved by immediate custody.
- History of poor compliance with court orders.

[341] See breach guideline, p. 7 for the relevant principles to be applied.

(b) Factors indicating that it **may** be appropriate to suspend the committal order:

- Realistic prospect of rehabilitation/addressing the underlying causes of anti-social behaviour.
- Strong personal mitigation.
- Immediate custody will result in significant harmful impact upon others.

The period of suspension (the operational period) must not be disproportionate to the custodial term or to the gravity of the conduct. It should ordinarily be for a fixed period (or until the expiry of the injunction if that is earlier than the period that would otherwise have been imposed).

Steps/further steps to address underlying causes of the anti-social behaviour can be effected by changing/adding to the terms of the underlying injunction (including through adding a positive requirement[342]).

Step six

Consideration must be given to adjusting an immediate custodial term to reflect for time spent on remand. Unlike in the criminal courts, this will not happen automatically, so unless it is specifically addressed no account will be taken of any period on remand.

Step seven

Using plain language, reasons should be given for the penalty imposed, and also:

- the effect of the penalty i.e. how long will actually be served in prison
- the right to apply to purge contempt
- that permission to appeal is not needed
- the time limit for and route of appeal.

Step eight

If a positive requirement has been imposed through variation of the order, consideration should be given to ordering a review after a suitable period to assess compliance/progress.[343]

[342] Subject to the procedural requirements for the variation of the injunction and the ordering of a positive requirement set out in sections 3 and 8 of the 2014 Act.

[343] The review, which could be after a month or six weeks depending on the nature of the requirement, could consist of consideration of a report by the person supervising compliance with the requirement/s.

Annex 2: Revised N79

Case No.:

IN THE COUNTY COURT AT
SITTING AT [insert address]
ON [insert date]
BEFORE [insert name of judge]
BETWEEN

Insert name of claimant

and

Insert name of defendant

1. On [insert date] the court made injunction orders against the defendant under

   (a) the Anti-Social Behaviour Crime and Policing Act 2014
   (b) the Policing and Crime Act 2019
   (c) the Protection from Harassment Act 1997
   (delete as appropriate)

   [with powers of arrest attached to paragraphs…….]

   The order was modified and amended by orders on [insert dates] (*delete as applicable)*

2. On [insert date] the defendant was brought before the court further to [having been arrested under] [the power of arrest] [a warrant of arrest issued by the court on [insert date]] [served with an application notice for their committal to prison for contempt of court] (*delete as applicable*).
   for allegedly disobeying the order which provided that the defendant must not:

	Insert part of order allegedly breached
1.	
2.	

   and the court [heard the allegations] [listed the allegations for hearing] [and remanded the defendant on bail/ in custody] (*delete as applicable)* until [please insert date]

3. The defendant was informed of the entitlement to legal aid and how to try and find local practitioners who may undertake publicly-funded work.

4. The court also ordered *(delete or insert the terms of an order made)*

[Signed by the judge]

5. I [insert name of officer] gave a copy of this form to the respondent as soon as practicable after the hearing

   [Signed]

6. On [insert date] having heard the defendant /counsel for the defendant/ solicitor for the defendant *(delete as applicable)* and having considered

   (a) the following evidence

	Witness statement and/or oral evidence of
1.	
2.	

   [and/or]

   (b) admissions made by the defendant in open court

   (delete as applicable)

   the court found it was satisfied so that it was sure that the defendant had disobeyed the order by

	Insert breach
1.	
2.	

   and the court imposed the following sentence(s) for those breach(es)

	Insert sentence(s)
1.	
2.	

7. Accordingly it was ordered that

Insert name of defendant

   be committed for contempt to prison for a [total] period of [insert days] [suspended until [insert date] on condition that [i*nsert conditions*]] *(delete as applicable).*

8. The court made no order/ the following order as to costs *(delete and/or insert as appropriate)*

9. The defendant was informed of
(a) the effect of the sentence;[344]
(b) the right to apply to purge contempt;[345]
(c) the right[346] to appeal without permission, time limit[347] for and the route of appeal.

10. A written judgment was handed down/a transcript of the committal decision was ordered[348] to be prepared on an expedited basis *(delete as appropriate*).

Note to court staff

Copies of the written judgment/transcript of judgment shall be provided to the parties and the national media via the CopyDirect service. Copies shall also be supplied to BAILII and to the Judicial Office at judicialwebupdates@judiciary.gsi.gov.uk for publication on their websites as soon as reasonably practicable.[349]

[Signed by the judge]

11. I *(name of officer)* certify that I served the defendant with a copy of this order by:
(a) delivery by hand to the defendant before he/she was taken from the court building or other place of arrest to the place of detention
(b) delivery by hand to the defendant at [time] on [date] 20…. at [place]
(delete as appropriate).

[Signed]

A copy of this form:

(a) must be retained on the court file;
(b) is to be sent to the national media via the CopyDirect service at alerts.service@pressassociation.com and to the Judicial Office at

[344] Time on remand is not deducted from the sentence imposed unless the judge has specifically ordered that it should be. The respondent will ordinarily be released as soon as he/she has served one half of the sentence imposed.
[345] Any person sentenced for contempt of court, has the right, if he/she can establish genuine regret and a genuine promise as to future conduct, to make application to the court which sentenced him/her to purge the contempt. The procedural requirements for the discharge of a person in custody are set out in the CPR 81.10 and CPR 23 and should be followed.

[346] An appeal against a committal order (including a suspended committal order) does not require permission to appeal. Any other form of order in contempt proceedings e.g. a fine or an order that the respondent pay the applicant's costs is not "a committal order" and permission to appeal is required.
[347] An application to appeal must be filed at the Court of Appeal within 21 days after the decision unless the judge specifies a shorter or longer period.
[348] If either an order for committal or a suspended committal order has been made.

[349] See Practice Direction in respect of committals for contempt of court-open court: 26 March 2015 paragraphs 14 and 15; applies if either an order for committal or a suspended committal order has been made.

judicialwebupdates@judiciary.gsi.gov.uk for publication on the website of the Judiciary of England and Wales.

Annex 3: List of abbreviations

A&E	Accident and Emergency
ABC	Acceptable Behaviour Contract
ADTJ	Alcohol, Drugs, Tobacco and Justice
ASB	Anti-Social Behaviour
ASBCPA	Anti-Social Behaviour Crime and Policing Act
ASBI	Anti-Social Behaviour Injunctions
ASBO	Anti-Social Behaviour Order
ATRs	Alcohol Treatment Requirements
BAILII	British and Irish Legal Information Institute
CBO	Criminal Behaviour Order
CFA	Conditional Fee Arrangement
CHaRMM	Community Harm and Risk Management Meetings
CI	Criminal Injunction
CJC	Civil Justice Council
CLA	Civil Legal Advice Service
CMARACs	Community Multi-Agency Risk Assessment Conferences
CPN	Community Protection Notice
CPR	Civil Procedure Rules
CPRC	Civil Procedure Rule Committee
CPS	Crown Prosecution Service
CSP	Community Safety Partnerships
DCJ	Designated Civil Judge
ECHR	European Convention of Human Rights
EWCA Civ	England and Wales Court of Appeal (Civil division)
EWHC	England and Wales High Court
HMCTS	Her Majesty's Courts and Tribunals Services
LASPO	Legal Aid, Sentencing and Punishment of Offenders Act
L&D	NHS Liaison and Diversion Service
MARACs	Multi-Agency Risk Assessment Conferences
MASH	Multi-Agency Safeguarding Hubs

MEAM	Making Every Adult Matter
MHTRs	Mental Health Treatment Requirements
MoJ	Ministry of Justice
MOPAC	Mayor's Office for Policing and Crime
NHS	National Health Service
OASys	Offender Assessment System
OS	Official Solicitor
PA	Personal Adviser
PCCSA	Powers of Criminal Courts (Sentencing) Act
PD	Practice Direction
PND	Penalty Notices for Disorder
PSPO	Public Spaces Protection Order
PSR	Pre-Sentence Report
SDR	Standard Delivery Report
SFR	Short Format Report
SRO	Sexual Risk Order
YJB	Youth Justice Board
YJCEA	Youth Justice and Criminal Evidence Act
YJS	Youth Justice Service
YOT	Youth Offending Team