

ANTI-SOCIAL BEHAVIOUR: RECOVERY OF POSSESSION ON DWELLING HOUSES BASED ON ANTI-SOCIAL BEHAVIOUR

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A note on new possession grounds as introduced under Part 5 of the Anti-social Behaviour, Crime and Policing Act 2014.

This note covers the qualifying requirements for the new grounds and the circumstances in which they will apply.

Andrew Lane, Cornerstone Barristers and Practical Law Public Sector

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SCOPE OF THIS NOTE

This note covers the new absolute ground for possession under the Housing Act 1985 (HA 1985) and the Housing Act 1988 (HA 1988), an additional discretionary ground and an amended discretionary ground, introduced by the Anti-social Behaviour, Crime and Policing Act 2014 (ASBCPA 2014).

It covers the qualifying requirements for the absolute grounds that landlords can rely on and the procedural steps they must overcome to be able to seek possession on these grounds.

The amendments primarily impact on social landlords (such as local housing authorities and private

registered providers) as most private landlords will use the mandatory section 21 procedure to seek possession of property from their tenants (albeit they may have relevance during any fixed term period when, in the absence of any break notice, a section 21 notice would have little immediate effect, see *Standard document, Notice requiring possession under section 21 of the Housing Act 1988* (www.practicallaw.com/0-540-7527)).

This note does not cover all aspects of the ASBCPA 2014, just those relating to the new grounds for possession under Part 5, therefore the other Parts will not be covered.

For more information on the ASBCPA 2014 generally, see *Anti-social behaviour toolkit* (www.practicallaw.com/4-519-5627).



NEW GROUNDS FOR POSSESSION: PART V OF ASBCPA 2014

The government has published statutory guidance on the reforms introduced by the ASBCPA 2014 including the new possession grounds (see *Home Office: Anti-social Behaviour, Crime and Policing Act 2014: Reform of anti-social behaviour powers: statutory guidance for frontline professionals* (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/352562/ASB_Guidance_v8_July2014_final_2_.pdf)) (Reform of anti-social behaviour powers guidance).

REASON FOR NEW POSSESSION GROUNDS

Absolute ground for possession

The Reform of anti-social behaviour powers guidance explains that:

“The purpose of the new absolute ground for possession is to speed up the possession process in cases where anti-social behaviour or criminality has been already been proven by another court.” (At page 59.)

Previously when seeking possession in the case of anti-social behaviour, landlords had to rely on Ground 1 of Schedule 2 to the HA 1985 and Ground 12 of Schedule 2 to the HA 1988, that is, the tenant had breached the terms of their tenancy.

Ground for possession in case of riot

The riot change was a response to the country-wide riots in August 2011. The Department for Communities and Local Government’s 2013 response document stated:

“Many rioters chose to move out of the locality in which they lived in order to do damage in neighbouring areas. We are therefore taking action to enable landlords to impose housing sanctions on tenants and members of their household where they choose to wreck other people’s local communities as well as their own. Following consultation, we have included provisions in the Anti-Social Behaviour, Crime and Policing Bill to enable landlords to seek to evict tenants where they or members of their households are convicted of riot related offences, committed anywhere in the UK.” (*Government Response to the Riots*,

Communities and Victims Panel’s final report (July 2013) (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/211617/Govt_Response_to_the_Riots_-_Final_Report.pdf), at page 27.)

ABSOLUTE MANDATORY GROUND

The ASBCPA 2014 introduces a new mandatory ground for possession (therefore the landlord does not need to show that it is reasonable to make a possession order):

- In respect of secure tenancies under section 84A, HA 1985 (provided certain conditions are met).
- In respect of assured tenancies under Ground 7A, Schedule 2, HA 1988 (provided certain conditions are met).

Conditions

In order to be able to rely on an absolute ground for possession, the landlord must show that one of the following five conditions is met.

Condition 1

The tenant, or a person residing in or visiting the dwelling-house, has been convicted of a serious offence, and the serious offence was committed:

- Wholly or partly in, or in the locality of, the dwelling-house.
- Elsewhere against a person with a right (of whatever description) to reside in, or occupy housing accommodation in the locality of, the dwelling-house.
- Elsewhere against the landlord of the dwelling-house, or a person employed (whether or not by the landlord) in connection with the exercise of the landlord’s housing management functions, and directly or indirectly related to or affected those functions.

For these purposes, a serious offence is an offence which satisfies all of the following:

- It was committed on or after 20 October 2014.
- It is specified, or falls within a description specified, in Schedule 2A of the HA 1985 (that is, murder, manslaughter, threats to kill, malicious wounding

and burglary) at the time the offence was committed and at the time the court is considering the matter.

- It is not an offence that is triable only summarily by virtue of section 22 of the Magistrates' Courts Act 1980 (either-way offences where value involved is small).

(Section 94(9), ASBCPA 2014.)

Condition 2

A court has found in "relevant proceedings" (that is, proceedings for contempt of court) that:

- The tenant, or a person residing in or visiting the dwelling-house, has breached a provision of an injunction under section 1 of the ASBCPA 2014, other than a provision requiring a person to participate in a particular activity.
- The breach occurred in, or in the locality of, the dwelling-house, or the breach occurred elsewhere and the provision breached was a provision intended to prevent conduct that is capable of causing nuisance or annoyance to:
 - a person with a right (of whatever description) to reside in, or occupy housing accommodation in the locality of, the dwelling-house; or
 - the landlord of the dwelling-house, or a person employed (whether or not by the landlord) in connection with the exercise of the landlord's housing management functions, and that is directly or indirectly related to or affects those functions.

This provision may discourage some landlords from agreeing or seeking undertakings in anti-social behaviour cases because breach of an undertaking does not fall within Condition 2 (conversely it has been argued that this fact would also lead to some judges being reluctant to grant section 1 injunctions because of the potential repercussions if such an order is breached and such a breach is proven at committal proceedings).

Condition 3

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

- A breach that occurred in, or in the locality of, the dwelling-house.
- A breach that occurred elsewhere of a provision intended to prevent behaviour that causes or is likely to cause harassment, alarm or distress to:
 - a person with a right (of whatever description) to reside in, or occupy housing accommodation in the locality of, the dwelling-house; or
 - the landlord of the dwelling-house, or a person employed (whether or not by the landlord) in connection with the exercise of the landlord's housing management functions, and that is directly or indirectly related to or affects those functions.

Condition 4

The dwelling-house is or has been subject to a closure order under section 80 of the ASBCPA 2014, and access to the dwelling-house has been prohibited (under the closure order or under a closure notice issued under section 76 for a continuous period of more than 48 hours).

Condition 5

The tenant, or a person residing in or visiting the dwelling-house, has been convicted of one of the following offences:

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

Appealing the conditions

None of the conditions are met if either of the following apply:

- There is an appeal against the conviction, finding or order concerned which has not been finally determined, abandoned or withdrawn.

- The final determination of the appeal results in the conviction, finding or order being overturned.

Notices seeking possession

Secure tenancies

For secure tenancies a particular notice of seeking possession (NoSP) must be served before the issue of possession proceedings when seeking to rely on the new mandatory ground.

The NoSP must:

- State that the court will be asked to make an order under section 84A of the HA 1985 for the possession of the dwelling-house.
- Set out the reasons for the landlord's decision to apply for the possession order (including the condition or conditions in section 84A on which the landlord proposes to rely, see *Conditions* above). Note that it is not sufficient to just mention the relevant ground; detailed and full reasons must also be given.
- Inform the tenant of any right that they may have under section 85ZA to request a review of the landlord's decision, and of the time within which the request must be made (see *Review* below).
- Specify the date after which proceedings for the possession of the dwelling-house may start (at least the same period as would be given by a notice to quit; that is, a minimum of 28 days for a weekly periodic tenancy or one month for a monthly periodic tenancy, or with a fixed-term tenancy one month (see *Standard document, Notice to quit: residential dwelling (www.practicallaw.com/9-571-3607))*)).
- Inform the tenant that, if they need help or advice about the notice and what to do about it, they should take it immediately to a Citizens' Advice Bureau, a housing aid centre, a law centre or a solicitor.

(Section 83ZA, HA 1985.)

There are a series of further requirements depending on the nature and exact basis of the possession claim, as follows:

- Where possession is also sought on one or more of the grounds for possession (for example, Ground 1

in respect of rent arrears, see *Practice note, Grounds for possession: secure tenancies (www.practicallaw.com/2-523-9769)*) set out in Schedule 2 of the HA 1985, the NoSP must also:

- specify the ground on which the court will be asked to make the order; and
- give particulars of that ground.
- A NoSP which states that the landlord proposes to rely on either condition 1, 3 or 5 in section 84A must:
 - state the conviction on which the landlord proposes to rely; and
 - be served on the tenant within the period of 12 months beginning with the day of the conviction or, if there is an appeal against the conviction, the period of 12 months beginning with the day on which the appeal is finally determined or abandoned.
- A NoSP which states that the landlord proposes to rely on condition 2 in section 84A must:
 - state the finding on which the landlord proposes to rely; and
 - be served on the tenant within the period of 12 months beginning with the day on which the court has made the finding or, if there is an appeal against the finding, the period of 12 months beginning with the day on which the appeal is finally determined, abandoned or withdrawn.
- A NoSP which states that the landlord proposes to rely on condition 4 in section 84A must:
 - state the closure order concerned; and
 - be served on the tenant within the period of three months beginning with the day on which the closure order was made or, if there is an appeal against the making of the order, the period of three months beginning with the day on which the appeal is finally determined, abandoned or withdrawn.

Assured tenancies

The absence of a statutory review procedure for assured tenancies means that the changes are less significant though section 8(3A) of the HA 1988 provides, as

with secure tenancies, that proceedings cannot be commenced for at least 28 days for a weekly periodic tenancy or one month for a monthly periodic tenancy (that is, the period a notice to quit would give) or a month for fixed term tenancies.

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

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

- Where the landlord proposes to rely on condition 1, 3 or 5 in Ground 7A, the NoSP must be served on the tenant within:
 - the period of 12 months beginning with the day of the conviction; or
 - if there is an appeal against the conviction, the period of 12 months beginning with the day on which the appeal is finally determined or abandoned.
- Where the landlord proposes to rely on condition 2 in Ground 7A, the NoSP must be served on the tenant within:
 - the period of 12 months beginning with the day on which the court has made the finding; or
 - if there is an appeal against the finding, the period of 12 months beginning with the day on which the appeal is finally determined, abandoned or withdrawn.
- Where the landlord proposes to rely on condition 4 in Ground 7A, the NoSP must be served on the tenant within:
 - the period of three months beginning with the day on which the closure order was made; or
 - if there is an appeal against the making of the order, the period of three months beginning with the day on which the appeal is finally determined, abandoned or withdrawn.

A court cannot dispense with the NoSP requirements unless the NoSP is deficient and as such nullified (*section 8(5), HA 1988*).

Service of NoSPs and expiry: secure and assured tenancies

If a secure or assured tenancy agreement incorporates section 196 of the Law of Property Act 1925, then service can be effected by delivery. Hand delivery may be the best option in this case to ensure that the NoSP has been served.

In the case of a secure tenancy, a NoSP ceases to have effect 12 months after the earliest time proceedings could be instituted. It should also be recognised that the court's power to dispense with the requirement for a notice seeking possession (*section 83(1)(b), HA 1985*) does not apply where an absolute ground is relied on.

Review process: secure tenancies

A secure tenant may request a review of a landlord's decision to seek possession in reliance on an absolute ground if the landlord is a local housing authority or housing action trust (*section 96, ASBCPA 2014*). There is no statutory right of review for assured tenants (as is the case with demoted tenancies). However, the likelihood is that regardless of the lack of a statutory review mechanism for assured tenancies, many private registered providers (PRPs) will in fact invoke a voluntary review process before the issuing of any proceedings. Indeed, the *Reform of anti-social behaviour powers guidance* (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/352562/ASB_Guidance_v8_July2014_final_2_.pdf) suggests that PRPs ought to adopt a review process similar to that required for local housing authorities.

A review request should be in writing and made within seven days of the service of the notice seeking possession (*Regulation 2, Absolute Ground for Possession for Anti-social Behaviour (Review Procedure) (England) Regulations 2014 (SI 2014/2554)*). If the landlord goes against the tenant (and they must complete their review before the first day on which possession proceedings can be commenced), then they must explain their reasons in writing. There is no set form for such a request.

The process is in broad terms similar to that provided for introductory and flexible tenancies under section 129 of the Housing Act 1996 and section 107E of the HA 1985 respectively.

Right to a hearing

The Absolute Ground for Possession for Anti-social Behaviour (Review Procedure) (England) Regulations

2014 (*SI 2014/2554*) set out further requirements, such as the applicant's right to an oral hearing (and how such a hearing should be conducted) and the procedure for reviews without a hearing.

The regulations allow for communications regarding the review to be sent by post (communication is deemed to have been received on the day it is given to the applicant in person or delivered by hand or the second business day after having been sent by first class post) or by email (communication is deemed to have been received by the applicant on the day on which it was sent) (*regulation 4*).

Oral hearing: procedure

Once a tenant has confirmed that the review should be by way of an oral hearing then the landlord must send a written notice to the tenant stating the date, time and place of the oral hearing. The hearing must be set at least five days after the day on which the notice is received by the applicant and the tenant may ask for the hearing to be postponed (*regulation 6*). Where a hearing is adjourned for more than one day, the relevant parties must be informed in writing of the revised hearing date (*regulation 9*).

An oral hearing must be conducted by a person appointed for that purpose by the landlord (they can be an officer or employee but must be senior to the original decision-maker and not have been involved in the original decision). In addition, the review decision must be made by the person who conducted the hearing (*regulation 10*).

The hearing should be conducted with the minimum amount of formality and in accordance with any directions given by the person conducting it. At the hearing, a tenant:

- Is able to make relevant oral or written representations.
- Can be accompanied or represented by another person (who does not need to be professionally qualified).
- Can call people to give evidence and put questions to them.

The original decision-maker is also able to attend the hearing and to do anything that the tenant is able to do.

If a tenant fails to attend a hearing, the person conducting the hearing is able to either proceed or

give such directions on how the review should proceed (*regulation 8*).

Reviews without a hearing: procedure

Where a tenant indicates that they wish a review to take place without an oral hearing, the landlord must send them a written notice informing them that they are able to make written representations in support of their application and specifying the date by which these representations must be received (this must not be less than five days after the day on which the notice is received). The person conducting the review must take into account any representations received (*regulation 5*).

An oral hearing must be conducted by a person appointed for that purpose by the landlord (they can be an officer or employee but must be senior to the original decision-maker and not have been involved in the original decision). In addition, the review decision must be made by the person who conducted the hearing.

Possession by landlord: CPR 55

If a NoSP has been properly served, proceedings issued at the right time, the review process (if applicable) correctly complied with and one of the five conditions satisfied, then absent any compelling Article 8 of the [European Convention on Human Rights \(www.practicallaw.com/1-107-6550\)](http://www.european-courts.org/eCHR/view_full_107_6550) (ECHR), Equality Act 2010 (see *Akerman-Livingstone v Aster Communities Ltd [2015] UKSC 15*) or other public law defence a court is bound to make the possession order sought.

Any order for possession should provide a date for possession no more than 14 days after the order, except in cases of "exceptional hardship" where the court can extend that time for a further period not exceeding 28 days (*section 89(1), Housing Act 1980*).

Defences: public law or proportionality and Article 8 compatibility

A defence under Article 8 of the ECHR still remains expressly available for secure tenancies (*section 84A(1), HA 1985*) and assured tenancies (*section 7(3), HA 1988*) (see *Practice note, Article 8 of the ECHR: right to respect for private and family life: Housing (www.practicallaw.com/0-500-6346)*). However, this remains a difficult challenge for any tenant and one susceptible to being dismissed summarily (*Thurrock Borough Council v West [2012] EWCA Civ 1435*, see *Legal update, Article 8 defence must be reasonably arguable (Court of Appeal) (www.practicallaw.com/7-522-4181)*).

NEW DISCRETIONARY GROUND

Extension of existing ground: conduct causing nuisance to the landlord

The discretionary “nuisance and annoyance” ground for possession in respect of secure tenancies (*Ground 2, Schedule 2, HA 1985*) and assured tenancies (*Ground 14, Schedule 2, HA 1988*) has been amended to include a new paragraph (aa) (*section 98, ASBCPA 2014*). The ground now applies to a tenant or person residing in or visiting the dwelling-house who:

“Has been guilty of conduct causing or likely to cause a nuisance or annoyance to the landlord of the dwelling-house, or a person employed (whether or not by the landlord) in connection with the exercise of the landlord’s housing management functions, and that is directly or indirectly related to or affects those functions.”

Offences connected with riot

A new discretionary ground in relation to offences connected with riot was introduced under the ASBCPA 2014 in respect of secure tenancies (*Ground 2ZA, Schedule 2, HA 1985*) and assured tenancies (*Ground 14ZA, Schedule 2, HA 1988*) (*section 99, ASBCPA 2014*). The new ground applies to a tenant or an adult residing in the dwelling-house who has been convicted of an indictable offence which took place during, and at the scene of, a riot in the UK. The new ground applies only in relation to dwelling-houses in England.

Application of discretionary grounds

The law relating to the application of these grounds is no different to that for any discretionary ground for possession and this is reinforced by the complete omission of any mention of them in the *Reform of anti-social behaviour powers guidance* (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/352562/ASB_Guidance_v8_July2014_final_2_.pdf).

Questions as to whether it is reasonable (and proportionate if a human rights defence is raised) to make an order for possession, and whether (if so) such an order should be suspended or postponed on terms are no different than for any of the discretionary grounds. Section 84(2)(a) of the HA 1985 (secure tenancies) and section 7(4) of the HA 1988 apply to the amended and additional grounds, as with any discretionary ground.

Similarly, authorities such as *Manchester City Council v Higgins* [2005] EWCA Civ 1423 and *Birmingham City*

Council v Ashton [2012] EWCA Civ 1557 retain their relevance to the said questions facing the court (for more information on Ashton, see *Appealing on the facts: a practical view from the Bar* (www.practicallaw.com/9-522-8442)).

It is worth noting however:

- There is no requirement for the conduct referred to in the amended ground brought in by section 98 of the ASBCPA 2014 to have taken place within the locality of the tenant’s home. Some local authorities had sought to amend tenancy agreements in the aftermath of the 2011 riots in an attempt to be able to have a response to their tenants rioting elsewhere (and thereby get around the locality issue found in the nuisance and annoyance grounds of 2 (secure tenancy) and 14 (assured tenancy)) but this was fraught with difficulties and the new ground is a much clearer provision.
- Landlords can refuse a right to buy application where proceedings are underway using Ground 2 of Schedule 2 to the HA 1985 or the riot ground for possession: section 100 of the ASBCPA 2014 amending section 138 of the HA 1985 accordingly.
- It was never anticipated that the riot ground would be used often but rather that it would be relied upon exceptionally by landlords (*Hansard, House of Lords debates, 2 December 2013, at column 63-4*) (<http://www.publications.parliament.uk/pa/ld201314/ldhansrd/text/131202-0002.htm>).

ANTI-SOCIAL BEHAVIOUR POLICIES

Social landlords such as local housing authorities and private registered providers must have a policy in place in relation to anti-social behaviour and procedures for dealing with such occurrences (*section 218A(2)*).

To avoid a public law challenge based on a deficient policy, or one that has not been followed, it is important for such organisations to review their existing policies to ensure that the changes introduced by the ASBCPA 2014 are properly considered and reflected in the policy (for example, covering when the landlord will use a mandatory ground and which conditions will it rely on) (see *Barber v Croydon LBC* [2010] EWCA Civ 51 (see *Legal update, Court of Appeal sets aside Council’s possession order for failure to follow its own anti-social behaviour policy* (www.practicallaw.com/3-501-4929))).