



Antisocial Behaviour etc. (Scotland) Act 2004
Part 7 – Antisocial Behaviour Notices
Guidance for Local Authorities

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Who this guidance is for

1. This guidance deals with an additional power available to local authorities attempting to deal with cases of antisocial behaviour. It is available where the antisocial person lives in or is visiting a house which is let from a private landlord.
2. The guidance is primarily directed towards antisocial behaviour teams in local authorities. But another option for action in these circumstances may be to use powers linked to the registration of private landlords so registration lead officers should also be aware of the nature of the power dealt with in this guidance.
3. Depending on local arrangements, the antisocial behaviour team may wish to share this guidance with other partners.

Powers for addressing antisocial behaviour

4. Part 7 of the Antisocial Behaviour etc. (Scotland) Act 2004 (“the 2004 Act”) provides powers for a local authority to act against a private landlord in connection with antisocial behaviour by the tenant of a house let by the landlord or by another occupant or visitor to the house. The key power is the issue of an antisocial behaviour notice (ASBN) requiring the landlord to take specified management actions in relation to the tenancy. The power becomes available from 30 April 2006.
5. The local authority’s prime focus is the behaviour of the antisocial person. The ASBN is intended to be another ‘tool’ for addressing that antisocial behaviour by bringing the proper influence of the landlord to bear on the tenant’s behaviour or, through the tenant, on an occupant’s or visitor’s behaviour. It is in addition to other action that the authority takes to challenge the antisocial person’s behaviour directly, whether through an antisocial behaviour order (ASBO) or other means.
6. The powers are separate from but sit alongside the registration provisions in Part 8 of the 2004 Act. In some situations the use of either power could be equally effective. It is for the local authority to decide the more appropriate route in a given case, in consultation as necessary with other partners such as the police.

Antisocial behaviour in relation to houses

7. Antisocial behaviour often takes place in or around the antisocial person’s home, affecting neighbours and local community. Part 7 relates to this type of behaviour rather than antisocial behaviour in, say shopping areas, parks or pubs. The definition of antisocial behaviour for this purpose is therefore slightly different from the general definition of antisocial behaviour in the 2004 Act. It is:

“a person engages in antisocial behaviour if the person-

- (a) acts in a manner that causes or is likely to cause alarm, distress, nuisance or annoyance; or

(b) pursues a course of conduct that causes or is likely to cause alarm, distress, nuisance or annoyance, to a person residing in, visiting or otherwise engaging in lawful activity at, or in the locality of, a relevant house.”

8. If this type of behaviour occurs in relation to an owner-occupied house, direct action against the antisocial behaviour may be appropriate, including the use of ASBO or closure powers by the local authority or the seeking of an interdict by a private individual.

9. If such behaviour occurs in relation to a house that is tenanted, the landlord also has a role. The landlord is letting the house, and like an owner-occupier has responsibilities to other owners and the community. That responsibility includes managing how the house is let and used, through the contract with the tenant and the powers available to the landlord to enforce the contract and to take action under statute.

10. Public sector landlords manage their houses on the basis of standards which are subject to an inspection regime and to general public accountability. Private sector landlords should also meet acceptable management standards, in connection with the tenant’s behaviour as with other matters. The definition of antisocial behaviour quoted in paragraph 7 above corresponds to the ground for possession that applies to an assured tenancy or short assured tenancy under the Housing (Scotland) Act 1988. This is an important point as it shows the link between the expectations of landlords under Part 7 of the 2004 Act and the powers available to the landlord in private sector tenancies.

11. Where the failure of a private sector landlord to meet acceptable management standards has a bearing on a problem of antisocial behaviour, the public authorities may need to intervene so that appropriate management actions are taken. That is the purpose of the Part 7 provisions.

Private sector landlord

12. A house (including a flat) falls within the scope of Part 7 of the 2004 Act unless it is subject to any of the following arrangements:

- owned by a local authority or registered social landlord¹
- properties used by religious orders²
- accommodation regulated by the Care Commission because it is being use for the provision of care
- holiday accommodation

13. A landlord who lets such property may be subject to an ASBN. The let may be a formal lease or a less formal occupancy arrangement. Where houses share toilet, washing or cooking facilities they are treated as one house. The “landlord” is the person who permits the occupation of the house – in other words is a party to the occupant’s lease or occupancy arrangement. The landlord is held responsible for managing the tenancy or occupancy arrangement. If the landlord engages an agent to manage the house, it remains the landlord’s

¹ Registered with Communities Scotland

² Where person adopts the lifestyle and discipline of the order, for example monasteries and convents

responsibility; if the agent fails to manage antisocial behaviour properly the landlord has a responsibility to ensure that the agent improves the management arrangements or is changed.

14. This is not a direct parallel to the arrangements for registration under Part 8 of the 2004 Act. There, it is the owner who is required to register as the person having ultimate control over the house, and is required to declare any agent. There will be situations where an intermediary in a chain of contractual relationships is a “landlord” for the purposes of Part 7 of the 2004 Act but does not appear in the register as he is neither the owner nor the agent dealing directly with the tenant. The arrangements differ in this way because Part 7 deals with specific instances of tenancy management whereas Part 8 deals with the overall arrangements established for letting the house and not with individual tenancies.

“In the locality”

15. The definition of antisocial behaviour in paragraph 7 includes such behaviour “in the locality” of the house. Concerns have been raised about the inclusion of antisocial behaviour that takes place “in the locality” of the house but not actually on the premises. Landlords may be worried that they would be expected to control the behaviour of their tenants, for example, at local shops or pubs. This is not the intention of the provision. The aim is to ensure that there is no artificial cut-off which could prevent antisocial behaviour being addressed if it occurs outwith the precise boundary of the premises.

16. For example, if a tenant was engaging in a campaign of harassment against a neighbour, it would be counter-productive to provide that an ASBN could deal with anything tenants did while standing in their own garden, but not when they stepped into the neighbour’s garden, or out onto the public road. Similarly, the antisocial behaviour might consist of repeatedly putting rubbish out in a way that blocks the pavement or creates litter. Local authorities should take care to ensure that issues covered by an ASBN are those which relate clearly to the tenant’s occupation of the house in question.

Management practice

17. At the core of the Part 7 provisions is the concept of appropriate management practice. The point about the ASBN power given to the local authority is that it can require the landlord to carry out “action for the purpose of dealing with the antisocial behaviour” – in other words, management action. It must therefore be able to decide and define that action and, if necessary, defend its decisions in court. The sheriff will not apply a penalty for non-compliance unless satisfied that “having regard to all the circumstances relating to the relevant house, it would be reasonable for the landlord to take that action.” So the ASBN should only specify actions which are appropriate and reasonable in the circumstances of the particular case.

18. The 2004 Act does not give precise definitions of appropriate management action. If it did, the local authority’s power to act would be severely hampered in many cases because the statutory definitions could not possibly anticipate each circumstance that might arise. The types of action that were referred to in the development and scrutiny of the legislation include:

- Enforcing terms of the tenancy agreement
- Setting clear standards
- Advising tenants (for example, on reducing noise nuisance)

- Investigating complaints
- Requesting the local authority to initiate an Antisocial Behaviour Order
- Providing information in support of ASBO proceedings
- Seeking an interdict
- Seeking possession at the end of the term of the tenancy
- Seeking possession on the grounds of antisocial behaviour

The Housing (Scotland) Act 2006 removes a barrier to the last of these in the case of assured and short assured tenancies. Whether or not a landlord engages an agent to manage the property on his behalf, the landlord still remains responsible for these actions.

19. This is a guide to thinking but is not an exclusive or exhaustive list. Other guidance as to what is commonly accepted good practice can be found in, for example, sections 1,2 and 4 of the good practice guidance published by Communities Scotland³, the Executive's Better Renting website⁴, which provides links to various other sources, and the Executive's antisocial behaviour website⁵. Other appropriate advice is available from organisations such as SAL or ARLA and other support services in the local authority area may be in a position to assist with suitable information.

20. As not all landlords will have internet access, authorities should consider providing hard copy extracts of guidance to applicants. The Scottish Executive also publishes housing information and rights guides for private landlords and tenants, copies of which can be obtained from the Scottish Executive Private Sector Housing Team (0131 244 5571) or by download⁶.

21. We recommend that, when considering whether to require a landlord to take management action, the local authority officer should consider the following key questions:

- What action, if taken by the landlord, is likely to make a difference to the antisocial behaviour that has been identified?
- Is it feasible for the landlord to take that action in the particular circumstances?
- Is it reasonable to expect the landlord to take that action?
- Are there other suitable options that would be less costly for the landlord?
- Could your decision on these matters be defended in court if necessary?

22. The answers to these questions will need to take account of the particular situation. Relevant factors are likely to include:

- the contract between the landlord and the tenant;
- the landlord's statutory rights;
- the tenant's circumstances (for example, his or her mental health); and
- the landlord's circumstances.

If there are actions that a landlord would normally take but the particular landlord feels unable to take them, for example because of frailty, then the landlord should take steps to ensure that these actions can be taken. An appropriate step might be for the landlord to engage an agent to act for him or her. Or it may be that the local authority can offer practical

³http://www.homepoint.communitiesscotland.gov.uk/stellent/groups/public/documents/webpages/cs_006210.pdf

⁴<http://www.betterrentingscotland.com>

⁵<http://www.antisocialbehaviourscotland.com>

⁶<http://www.scotland.gov.uk/Topics/Housing/Housing/16193/PrivateRenting/leafletsforms>

assistance that will resolve the matter satisfactorily without imposing a requirement on the landlord.

Provision of information to landlords and agents

23. In order to encourage or require a landlord to address a specific problem of antisocial behaviour the local authority will clearly need to give the landlord enough of any information it holds about the behaviour to allow the landlord to take reasonable steps. This may include information about the person concerned which is not directly about the behaviour but is relevant to deciding the best steps to take. The local authority will have to consider carefully what information it can provide without on the one hand breaching its obligations under data protection legislation or on the other hand putting the landlord in a dangerous or difficult situation through lack of knowledge.

24. It may on occasion be appropriate for the local authority to give advice to the landlord on action to take without specifically revealing the information on which its advice is based. If so it should explain to the landlord why it is not providing full information. In such a situation a successful outcome is most likely if the local authority and the landlord both perceive the tenant's behaviour as a problem for them and are prepared to work together. Effort spent in building up such a relationship may allow a sustainable solution to the particular case and encourage a change of the landlord's attitude towards other cases.

Steps to an Antisocial Behaviour Notice

25. This section outlines steps in the use of ASBNs which reflect the legislation and the policy that underlies it. Whether developing its own more detailed policies or dealing with individual cases, an authority may need to go further in considering particular circumstances and the interpretation of the legal requirements as they apply to those circumstances. The local authority's actions should be informed by the Enforcement Concordat, adopted by all Scottish local authorities. Guidance on best practice in implementation of the Concordat can be found on the CoSLA website⁷.

26. The antisocial behaviour notice powers have been made available to assist local authorities to deal with particular cases of antisocial behaviour, and to help them to challenge, through individual cases, the general approach of some landlords. Whether and how the powers are used must be a matter for the authority's judgement, taking account of its other arrangements for dealing with antisocial behaviour and unacceptable landlords.

27. Local authority staff dealing with antisocial behaviour should be made aware that, if a private landlord's approach is a contributory factor in a case of antisocial behaviour that they are dealing with, there may be scope to take useful action under the Part 7 powers. They should know how such action would be taken – for example, whether they should consult with an identified person within the authority, or whether they should themselves proceed on the basis of guidance. Relevant staff in partner organisations such as the police should also be made aware of this scope for action.

28. Where a case arises, the antisocial behaviour concerned should be clearly identified and recorded, bearing in mind that the definition of antisocial behaviour in this context is as

⁷ <http://www.cosla.gov.uk/attachments/execgroups/es/esbestprac.pdf>

specified in paragraph 7 above. This is different from the definition on which other action (such as an ASBO) relating to the antisocial tenant may be founded.

29. The first step (alongside any concurrent action against an antisocial tenant, occupant or visitor) should be to approach the landlord to discuss the situation and his or her role in it. This approach may resolve the situation if, for example, it shows that allegations are unfounded or that the landlord has already taken action (such as the engagement of an agent) that will help the situation. Otherwise the approach to the landlord will provide further information about the situation. Any additional or revised aspects of the antisocial behaviour concerned should also be recorded.

30. If an initial approach does not resolve the situation, the authority should decide what would be appropriate action for the landlord to take in order to address the antisocial behaviour that has been identified and recorded in terms of paragraphs 28 and 29 above. It should also decide what advice and assistance it can reasonably provide to the landlord to help him or her to resolve the particular situation. Paragraph 29 above is relevant to deciding the appropriate action and assistance. In urgent cases it may be necessary to telescope the steps in this and the previous paragraph.

31. The next stage is that the local authority should tell the landlord that it is considering issuing an ASBN and the management action it considers the landlord should take. It should at the same time give the landlord advice and offer assistance about taking those steps. It is a legal requirement that this should precede any ASBN (paragraph 2 of the Antisocial Behaviour Notice (Advice and Assistance) (Scotland) Regulations 2005) and so the authority should ensure that it is done and recorded. The regulations require the local authority to provide:

- general advice in relation to antisocial behaviour notices;
- advice and assistance directly relevant to the management of the antisocial behaviour that the local authority has been identified; and
- advice in relation to the consequences of not managing the antisocial behaviour.

The Executive has produced and previously issued a document that local authorities can use for the general elements of the advice to be given. That document can be tailored to suit local circumstances, such as appropriate contact details and the availability of mediation services.

32. The regulations do not require any specific timescale or method for providing advice and assistance to the landlord, since circumstances can vary so widely. In particular, where there are cases of urgency, such requirements could be counter-productive. However, it should be clear to the landlord that this stage has been carried out and if necessary the local authority should be able to demonstrate in court that it has done so. Authorities will be familiar with enforcement processes in connection with a range of their functions, and staff may wish to seek advice from colleagues on how the authority deals with matters such as the recording of actions where urgency prevents the use of the recorded delivery of documents.

33. If after giving advice and assistance the local authority considers that the landlord has not taken appropriate management actions it can serve an ASBN. The decision to do this should be reasonable and should be in accordance with any policies or practices established by the authority in connection with enforcement. In particular, regard should be had to the Enforcement Concordat (see paragraph 25). It is advisable to keep a record of the consideration leading to the decision, as this will be helpful in the event of a reference to the Ombudsman or other challenge.

34. There is no laid down form for the notice but it must (section 68(3) of the 2004 Act):
- describe the antisocial behaviour that is to be addressed;
 - specify the actions that the landlord should take for the purpose of dealing with that behaviour and the timescale for doing so;
 - state the consequences of failing to take those actions in the time specified; and
 - inform the landlord of the right to request that the ASBN be reviewed.

Although in many cases the notice will simply formalise the behaviour and steps that have been identified in processes to this point, it would be sensible to take stock and check whether the situation has evolved and whether the behaviour and steps should be defined differently from the way in which they were defined at earlier stages.

35. The ASBN needs to be framed carefully. It fixes the relevant behaviour and action for the rest of the process. If the description of behaviour is inaccurate a penalty founded on the notice may be rejected on appeal. If the behaviour or action is defined too narrowly, further steps in the process may be compromised because the notice is no longer relevant to the changing situation. If the action required is too general and vague, the landlord may rightly claim that it is not clear what he or she must do and that the notice is therefore not competent. If the action required goes beyond what a reasonable landlord using recognised good management practice might expect to do in the circumstances, it is open to challenge. The person framing the notice must therefore try to anticipate likely developments and to steer between these dangers.

36. The timescale given for compliance with the instructions in the ASBN must be reasonable. The setting of timescales is a matter for the discretion of each local authority, and will vary depending on the actions to be undertaken and any considerations relevant to the particular case.

37. It will be possible for a local authority to serve an ASBN on the same landlord more than once. An example of when this situation might arise would be where a landlord took appropriate action to address a management related situation, that action was effective, but the situation has again declined as a result of a return to previous practices or neglect over time of the advice given by the local authority. Another example is where a landlord has problems of antisocial behaviour in more than one property and is failing to address them. Depending on the seriousness of the situation, local authorities may wish to consider previous ASBNs in determining whether more serious action may be required in respect of a particular landlord.

38. Details of serving ASBNs are given in *Annex 1*. An ASBN is not served on the tenant or other occupants.

Review

39. Local authorities must notify the applicant that there is a right to a review of the decision and the time within which a request for a review should be made. A request for a review should be made within 21 days of the service of the ASBN, or a longer period if the authority allows this.

40. The procedure for the review is set out in section 70 of the 2004 Act. The person who carries out the review should be senior to the person who made the decision that is under

review, and should also have had no involvement in the making of the decision. The options open to the reviewer are to:

- confirm the notice;
- vary any part of the notice;
- suspend the notice pending completion of the review – the reviewer should specify a period of suspension; or
- revoke the notice.

41. The authority must notify the applicant of the decision reached on review and the reasons for reaching the decision. Notice should be given in writing. Review notification letters should advise applicants of their right to go to the Scottish Public Services Ombudsman if they are dissatisfied with the way in which their application has been handled. There is no right to request a review of a decision reached on review.

42. Each local authority will wish to consider the most suitable review procedure for its circumstances, but it should incorporate the following features:

- it should be as speedy as is consistent with a full and fair consideration of the case;
- suitable training should be given to reviewers, who should be able to consider the merits of the case, and to substitute their own decision for the original one, or to carry out further investigations including seeking clarification or expansion of the basis of the landlord's request;
- reviewers should also be able to consider such matters as whether proper and unbiased procedures were followed, whether all relevant and no irrelevant factors were taken into account, and whether the decision was within the local authority's powers;
- the written notification of the review decision should include full and clear explanations of the reasons behind the decision and set out clearly which parts of the original notification are, and are not, being changed; and
- arrangements should be in place for ensuring that the implications of review decisions for decisions on, or the handling of, future applications are drawn to the attention of officers dealing with ASBNs and of senior officers.

43. Applicants unhappy with a decision may seek judicial review. In a judicial review the court cannot substitute its own opinion for that of the decision makers. However, it can strike down a decision on the grounds that the decision maker has exceeded or abused his powers, or failed to perform the duty delegated or entrusted to him, or exhibited bias. The court's decision may affect the particular case only, but it may also have wider implications for the local authority's policies and procedures. For example, it may call in question the legality of a current policy being applied, or indicate shortcomings in the local authority's procedures.

Monitoring compliance and applying sanctions

44. After making an ASBN the local authority will not be able to follow up formally on the notice until the period for complying with it has expired. This should not prevent it monitoring the situation and contacting the landlord to give further advice and assistance as appropriate.

45. If after the period specified in the ASBN the landlord has not taken the actions required by the notice, the local authority may choose to pursue sanctions. It may on its own initiative recover expenses from the landlord in connection with actions it has had to take as a

result of the landlord's inaction. It may apply to the sheriff for an order as to rent payable or for a management control order. It may refer the case to the Procurator Fiscal for prosecution since non-compliance is a criminal offence and may be subject to a fine up to level 5 on the standard scale (currently £5,000). Any combination of these sanctions can be pursued except that it would not be appropriate to apply for both a rent payable order and a management control order for the same breach.

46. The primary aim is to stop the antisocial behaviour and the local authority's decision on whether and when to apply sanctions or give further advice and assistance should have that aim. It may also be an aim to change the landlord's approach to the letting, through the deterrent effect of sanctions, in order to prevent a recurrence of similar problems once the present one has been dealt with, or to help to improve the situation in relation to other lettings by the landlord.

47. The detailed arrangements for pursuing sanctions and their implications are set out in *Annex 2*. These should be considered carefully before deciding how to proceed in a particular case.

Use of an agent

48. Where a landlord is unable to cope with a management situation, the local authority should normally encourage the landlord to engage a reputable agent. The agent may act on behalf of the landlord in respect of the management responsibilities relating to the tenancy. However, the landlord will remain ultimately responsible if the expected standard of management is still not achieved or the actions detailed in the ASBN are not carried out.

49. The level of action which the agent will be able to take in relation to the antisocial behaviour will depend on the terms of the agreement between the landlord and the agent. Local authorities may wish to advise landlords on this when encouraging them to engage an agent. It would also be appropriate for officers to deal directly with the agent in providing advice and assistance in managing the antisocial behaviour where this function is part of the agreement between the landlord and agent. Contact with, and advice and assistance to, the landlord should however be continued in his or her capacity as the party legally responsible for the management of the tenancy.

50. It should be noted that an agent will not be guilty of any offence in failing to carry out the instructions of an ASBN or manage the tenancy to an acceptable standard – legal responsibility in this regard lies solely with the landlord.

Tenant's position

51. Where a local authority uses its antisocial behaviour notice powers, the tenant will have contributed to the situation either as the person who is behaving antisocially or by failing to control the behaviour of other occupants or visitors. This will clearly have an influence on the tenant's position and the local authority's view of it. However, it should be borne in mind that people can be caught up in events that are outwith their control and could potentially lose their home.

52. For example, a tenant may genuinely be unable to control a family member or visitors and may need help to handle the situation. This is likely to come to light in dealing with the

antisocial behaviour itself and may, for example, result in caseworker support for the family. In such a situation the use of an ASBN against the landlord may precipitate eviction for that tenant and other family members when perhaps more specific action against the antisocial person would resolve the situation without making the rest of the family homeless. This is just one hypothetical example but it emphasises the point made in paragraph 51 above that the use of an ASBN should be considered in context, consulting other relevant agencies both within and outside the authority.

53. Where an ASBN is issued and the landlord does not comply, the decision about appropriate penalties should also be considered carefully in the light of the tenant's position. In particular, where the tenant is paying rent (i.e. is not on full Housing Benefit) an application for a rent payable order might well be inappropriate because it could be seen as a direct reward to the tenant for being antisocial. But this may not always be the conclusion; it may be more important to stem a particular landlord's rent income in order to achieve a change. The financial effect of a rent payable order should be neutral for a tenant on full Housing Benefit so this issue should not arise in that situation.

Working with Housing Benefit colleagues

54. Where a rent payable order is made, Housing Benefit (HB) administrators within the authority need to know in order to be able to suspend any HB, since HB is not payable while the tenant has no legal liability for rent. HB colleagues should be told that an order is being sought and should be advised immediately when an order is made by the sheriff as that is the date when the order has effect. Good communication will minimise problems over the recovery of payments that are already in the system when the order is made.

55. When a rent payable order is suspended, HB colleagues should be similarly notified so that they can resume any HB with effect from the date that the tenant again becomes liable for rent.

56. If the landlord appeals against a rent payable order, that does not affect the operation of the order in the meantime. If the appeal is successful, the sheriff may order that the rent for the period since the order took effect should be paid, but only if the landlord notified the tenant of the appeal, allowing the tenant to make provision for payment of back-rent should the appeal be successful. If the tenant was in receipt of HB and back-rent is payable in this way, HB colleagues will make a back-payment.

57. If a Management Control Order is made, any HB continues to be paid but to the local authority instead of the landlord. DWP have made regulations which provide that the HB shall continue to be in the form of a rent allowance even though the local authority is carrying out the landlord role. This avoids complications that would ensue if the HB were treated as a rent rebate in the same way as HB payable for council houses.

58. DWP is issuing guidance to HB administrators on the impact of the landlord provisions in the 2004 Act and the effect of the regulations they have made. There may be other issues that arise in unusual circumstances which it is neither feasible nor sensible to anticipate in general regulations.

Annex 1: SERVING ANTISOCIAL BEHAVIOUR NOTICES

1. An ASBN is served on the landlord of a property. It should be noted that ‘landlord’ means the landlord in respect of the relevant lease or occupancy arrangement, and may not be the person who is entered in the local authority’s register as the owner of the property.
2. If the local authority is aware of any agent working on the landlord’s behalf, a copy of the Notice should also be sent to the agent. Where a property is joint owned and those joint owners are the immediate landlords of the tenancy in question, the Notice must be served on all joint owners. If the landlord listed in the lease is only one of the joint owners, the local authority may nonetheless wish to send a copy of the notice to all other joint owners as having a direct link to the tenancy, and the ability to take on management responsibility.
3. A landlord or agent may be an individual, a partner of a partnership, or a corporate ‘person’ such as a company, trust or other legal entity.
4. The key point to note is that a corporation is a ‘legal person’ that can only act or form an intention through its directors or employees. A corporation can commit offences. Where the landlord or agent is a corporate ‘person’, it should be served with the ASBN. In practice, there will normally be an individual who has responsibility for managing the tenancy on a day-to-day basis, whether that person is a director, an employee or an agent.
5. Similar considerations apply to trusts and charities, which again have the identity of a legal ‘person’.
6. It may arise that it is not possible to identify the landlord of a troublesome property. In this case, the Notice should be posted in two or more newspapers (local if possible).
7. If the landlord’s identity is known but it is not possible to establish his current address, the Notice may be served by addressing it to the landlord at the let property or to a previous address of the landlord.

Annex 2: SANCTIONS FOR NON-COMPLIANCE WITH AN ANTISOCIAL BEHAVIOUR NOTICE

1. Options

Where a landlord has failed to comply with an antisocial behaviour notice, the local authority can:

- apply to the sheriff for an order as to rental income (a rent penalty)
- apply to the sheriff for a Management Control Order
- take action to tackle the antisocial behaviour and pursue the landlord for expenditure incurred in consequence of the landlord's failure

The authority can also refer the matter to the Procurator Fiscal for prosecution of the offence of failure to comply.

More detail on each of the sanctions that the local authority can pursue is given in the following sections. Where the authority refers the matter for criminal prosecution it is for the Procurator Fiscal to decide whether to proceed. The local authority will wish to consider carefully which of the options to pursue and, indeed, whether there is scope to work constructively with the landlord to obtain compliance before embarking on that route.

The local authority would need to assess reasonableness at each stage and be able to demonstrate to the sheriff that the requirement on the landlord was reasonable. In the case of a Management Control Order, it would also have to demonstrate that the order was necessary to enable the antisocial behaviour to be dealt with.

2. Sanction: Orders as to Rent Payable

Issue

Local authorities may apply to the Sheriff for an Order as to Rent Payable to be made in respect in respect of a property on which an Antisocial Behaviour Notice has been served.

It is essential that an ASBN has already been served by the local authority on the landlord.

In deciding whether an Order should be sought, officers should give careful consideration to the details of the case. Care should be taken to ensure that serving an Order as to Rent Payable is not seen by the tenant as a reward for antisocial behaviour.

In reaching a decision, officers may find it helpful to consider the following:

- the nature of the anti-social behaviour
- the parties involved in the behaviour
- whether an Order as to Rent Payable is likely to secure an improvement in the situation
- any external factors which may have contributed to an aggravation of the situation

If the Sheriff is satisfied that the landlord has not acted as required by the ASBN within the required time period and it would have been reasonable for him to have done so, he has the discretion to:

- Make an order that no rent or other payment be due from any occupant of the property

- Make any other order which he may consider necessary

Where the Sheriff makes an order, the local authority should ensure that copies are given to:

- Anyone who occupies the property that the order relates to
- Anyone who acts for the landlord in relation to the property

Appeals

The landlord is entitled to appeal against an Order as to Rent Payable.

This can be done by lodging an appeal to the Sheriff Principal within 21 days of the decision having been made.

In the event of an appeal, the landlord is obliged to inform the tenant that an appeal is taking place. Local authorities should seek to ensure that landlords are sufficiently informed as to their duties and responsibilities to their tenants in such circumstances.

The decision of the Sheriff Principal is final, and no further appeal is possible.

Revocation and suspension

Both the local authority and landlord are entitled to apply to the Sheriff for the order to be revoked or suspended for a fixed period of time. The Sheriff may choose to act as requested if the landlord has acted as instructed by the ASBN or if it would be unreasonable for the order to remain in effect.

If the order is revoked or suspended by the Sheriff, this will **not** make the tenant liable for any rent that would have been due had the order not been in force. This is because the order continues to have been valid for the period of time for which it was in force. It has not been appealed and was valid until revoked or suspended.

In the event of the order being suspended or revoked, all parties who were informed of its coming in to force should be informed.

3. Sanctions: Management Control Orders

The Management Control Order is the tool of last resort for local authorities, where it is desirable for the authority to take over responsibility for the tenancy in order to deal with the antisocial behaviour which led to the ASBN.

On the application of the local authority, the Sheriff may make a Management Control Order which transfers to the local authority the rights and obligations of the landlord under the tenancy or occupancy arrangement existing at the time of the order. The Order has effect for 12 months or such shorter period as the Sheriff may specify when making the Order.

Serving a Management Control Order

A Management Control Order may be granted by the Sheriff where:

- The landlord of a property has not acted as required by an ASBN within the given timescale
- It would have been reasonable for the landlord to have acted
- The order is necessary for the antisocial behaviour to be dealt with

When the Management Control Order is in force, the local authority has sole right to claim any rent or other income due on the property. Any sums paid to the landlord from whom management responsibility has been taken may be reclaimed from him by the local authority.

A Management Control Order is, in practice, an alternative to the rent penalty, as the authority would not want to take on the landlord role with no entitlement to receive rent. It demands a substantial resource input in terms of time and effort, and the local authority will not want to engage in this without some reasonable expectation that it will have the desired effect.

The focus of the Management Control Order is the landlord role in dealing with the antisocial behaviour identified in the antisocial behaviour notice. The local authority may take action in relation to that behaviour which is not dependent on having management control – for example, seeking an Antisocial Behaviour Order against the occupant concerned. The Management Control Order gives the opportunity, and the obligation, to take those other actions which the landlord should have taken but has not. The local authority should seek to coordinate the various types of action to maximise their combined effect.

Management responsibilities

The local authority's first priority under the Management Control Order should be to take management actions that reduce or eliminate the impact on the community of the antisocial behaviour specified in the notice. But it should also seek to change the situation so that the landlord will manage antisocial behaviour effectively when the property is returned to his control. Part of that change may lie in the action taken by the local authority in relation to the particular tenant. The authority should also act to ensure that the landlord has both the capacity to manage effectively - whether as a result of advice, training, or the engagement of an agent - and the intention to do so.

In taking on the role of the landlord in respect of a particular property, the local authority will be entitled to make use of all rights which would lie with the landlord under the tenancy or occupancy arrangement. These rights may include:

- To make necessary alterations, repairs or improvements to the property
- To legally terminate the tenancy
- To agree with the tenant to make amendments to the terms of the lease

The local authority may choose to have the property managed by an agent such as a registered social landlord (RSL) or reputable private sector agent. This may be an appropriate arrangement if the local authority no longer has housing stock and a housing management function or the house is in an area that is distant from local authority stock. The decision whether to use an agent is up to the local authority. The costs incurred are allowable costs, but they must be reasonable and necessary and relate to the delegation of the management functions.

The local authority does not have the right to re-let the house, although if the landlord does so while the Order is in force, the local authority's rights relate to the new tenancy as they did to the old. If the property which is the subject of the Order consists of more than one tenancy or occupancy arrangement and one of these ends during the period of the Order, the landlord may grant a new tenancy or occupancy arrangement only with the local authority's agreement. This affords protection to the other tenants or occupants. All rights and obligations in relation to this new arrangement will lie with the authority.

The local authority's management of the house is for the purpose of dealing with the antisocial behaviour described in the antisocial behaviour notice. Since an order can run for up to 12 months, the local authority should ensure that the tenant has acceptable living conditions meeting at least minimum standards, including the Tolerable Standard and the repairing standard. This is likely to involve expenditure on routine maintenance and may also involve expenditure on improvements necessary to meet those minimum standards.

However, the local authority's involvement with the property is essentially short-term and it should not use the opportunity of the Management Control Order to raise the standard of the property beyond the minimum necessary without the landlord's consent. For example, it would be unreasonable for the local authority to carry out capital improvements as part of a wider mixed-tenure programme at the landlord's expense but without the landlord's agreement.

It should be noted that the property does not become part of the authority's housing stock, and legislation relating to social rented housing and the Scottish Secure Tenancy do not apply.

Incurring expenditure

Any expenditure made as a result of the local authority's management control of a property must be 'necessary and reasonable' for the purposes of the operation of the management control order, in terms of the relevant regulations¹. The nature of the expenditure which can be validly incurred in the exercise of a Management Control Order is specified by those regulations.

Permitted expenditure is that which relates to:

- the management of the tenancy, including through the use of an agent
- the collection of rent or other required payment from the tenant under the tenancy
- any legal or other action necessary to recover costs relating to the management of the tenancy or collecting payments due from the tenant under the tenancy
- meeting the landlord's repair and maintenance obligations (these obligations may be contractual and legal)
- work necessary to ensure the property meets the 'tolerable standard'²
- any costs incurred with the consent of the landlord³ of the property

No other forms of expenditure can be incurred.

¹ The Antisocial Behaviour Notice (Management Control Orders)(Scotland) Regulations 2005

² Section 338 Housing (Scotland) Act 1987

³ the landlord is the 'relevant person' as defined in Part 7 of the 2004 Act – i.e. the party to the occupant's lease or occupancy arrangement

In the event that the local authority makes a surplus in managing a property under a Management Control Order or earns interest on any sums held as a result of the Order, this should be repaid to the landlord of the property. Accounts must be kept for the property for the period the Order is in force. The landlord should be given the opportunity to inspect the accounts, check them, and make any copies he requires.

Recovering expenditure

The expenses incurred by the local authority in the exercise of the Order can only be reclaimed from the landlord if:

- the expenditure is greater than the income received from the let of the property
- the landlord has been given notice that the authority intends to recover the costs from him

The landlord of the property must be given notice in writing of the intention to recover the costs from him at least 14 days before the recovery process begins. This recovery of costs would follow the standard debt recovery process.

The local authority may recharge the cost of normal day-to-day management activities, whether it manages the house directly or through an agent. It should be able, if necessary, to demonstrate the reasonableness of such charges by reference, for example, to the management of its own houses, bearing in mind that the house which is the subject of the order is likely to involve a relatively high management input because of the antisocial behaviour.

In the event that the expenditure necessary in respect of the property exceeds the income received on it, the surplus costs should be recovered from the landlord as a debt. If necessary, the local authority should seek an inhibition on the property for the unpaid debt.

Notification

Where a Management Control Order is made, the local authority should inform:

- The person who was landlord of the property before the Order was made
- Anyone occupying the property
- Any known agent of the person who was landlord of the property prior to the making of the Order

If it is not possible for the local authority to notify these parties, it should be in a position to demonstrate that it was impracticable to do so.

Revocation or ending of Order

A Management Control Order may be revoked where either the relevant local authority or the person who was the landlord prior to the Order make an application to the Sheriff. The Order may be revoked where:

- the local authority or the landlord has taken the action required by the ASBN, or,
- it would be unreasonable for the Order to remain in effect

The landlord, tenant and any relevant agent of the property must be informed of the revocation of Management Control Order as soon as possible after the revocation.

Where the Order is revoked following an application to the Sheriff by the landlord, the landlord is under an obligation to inform the appropriate local authority officer and his tenant.

The landlord may have no wish to change but simply wait until the specific behaviour described in the ASBN has ceased, and then apply for the Management Control Order to be revoked. This may have implications for the way in which the local authority chooses to detail the behaviour and the actions required in the ASBN.

If the period specified in the Order ends without the Order having been revoked, the local authority's powers in relation to the house end and revert to the landlord. If there is good reason why the local authority needs further time to deal with the antisocial behaviour specified in the original ASBN it can apply to the Sheriff for a further Order.

The local authority may well decide to provide continuing support after the Management Control Order has ended, so that the improvement to the situation achieved by the intervention can be sustained in a positive way rather than simply by the threat of a further formal intervention.

4. Sanctions: Action by local authority at the landlord's expense

Where a landlord fails to comply with an antisocial behaviour notice, the local authority may take the steps that it deems necessary to deal with the antisocial behaviour described in the notice. They do not have to be the same steps as specified in the ASBN.

For example, if the landlord fails to provide information in support of an Antisocial Behaviour Order, the authority may have to employ a professional witness to gather the evidence instead.

Recovery of necessary local authority costs under an Antisocial Behaviour Notice

Local authorities may recover from the landlord expenditure on action that they consider is necessary to deal with the antisocial behaviour detailed in an ASBN served on a landlord, if the need for that action results from the landlord's failure to comply with the ASBN.

The relevant costs to the local authority may take the following forms:

- Staff costs
- Reasonable allocation of relevant overheads
- Other costs incurred by the local authority which are directly associated with dealing with the antisocial behaviour
- Payments for services provided by external providers

The landlord of a property will be liable for the local authority's expenditure, but only if the local authority has given written notice of the intention to take the steps concerned, both to the landlord and to any other person to whom a copy of the ASBN was given as required by the Act. The notice must contain:

- A statement that the local authority intends to recover expenditure from the landlord
- An estimate of the expenditure

The purpose of providing an estimate is to ensure that the landlord understands the implications of continued failure to comply with the ASBN, and to encourage a change of approach. The estimate is just that; it is not binding, although it should be made in good faith. Clearly, some actions may prove to be more or less costly than expected when they are put into effect. The amount recoverable from the landlord is the actual expenditure, not the estimate.

Local authorities should be aware that they may be required to demonstrate that the charges being made to the landlord are valid. This could be demonstrated through evidence that the expenditure would not have been required had it not been for the inaction of the landlord.

5. Sanctions: Criminal offence under Part 7 of the 2004 Act

It is an offence under Part 7 of the Antisocial Behaviour etc (Scotland) Act 2004⁴ for a landlord to fail to act as instructed by the terms of an ASBN served on him by the local authority.

It is recommended that local authority officers seek to engage closely with the Procurator Fiscal's Office in advance of any intention to prosecute on a particular case. A good relationship with the Fiscal's Office will allow for a good working process to be established, with a clear understanding of the requirements for prosecution, including, for example, the necessary level of evidence.

⁴ Section 79

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This guidance will be updated on an ongoing basis in response to feedback from users.

Updates will be accessible online from:

<http://www.scotland.gov.uk/Topics/Housing/Housing/16193/PrivateRenting/Introduction>



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