

***A Medical Lens and a Moral Filter:  
Social Landlords and their Control of  
Antisocial Behaviour Perpetrated by  
Occupants with Mental Impairments***

---

Volume One of two volumes

Leigh Estell Roberts

Doctor of Philosophy

University of York

Law

July 2018

## **Abstract**

This thesis explores social landlords' management of antisocial behaviour (ASB) perpetrated by people with known or suspected mental impairments. That landlords do not always have knowledge of individual perpetrators' impairments is a fundamental premise of this thesis. It argues that social landlords nevertheless sit at a crossroads of policy agendas, having responsibility to house people with such impairments and control ASB. This policy conflict is exacerbated by the broad definition of ASB and the availability of disability-related challenges to ASB proceedings.

There is a gap in the literature empirically examining disability-related challenges to social landlords' use of ASB proceedings. Thus, this thesis seeks to address that gap by exploring housing officers' decision-making in the control of ASB at this juncture of policy. In examining these issues, it asks whether policy and housing management practice approximate to a social or medical model of disability and what influence housing officers' understandings of risk and housing professionalism have on decision-making. Examining understandings of risk, ASB and disability justified a social constructionist approach. Qualitative methods were used with four housing associations in which their policies were analysed followed by interviews with managers and vignette-led focus groups; case files were analysed followed by interviews with officers. The data was thematically analysed.

The findings are examined to reveal that officers' use of interventions in ASB control is affected by professional issues and risk. They are also informed by both medical and moral understandings of perpetrators and disability resulting in differential outcomes.

The importance of the study relates to constructions of disability and their consequences: officers' minimal compliance with equality law or extraordinary treatment may correspondingly result in social exclusion or inclusion. The recommendations for policy are reform of equalities legislation, better support for individual perpetrators and measures to improve relations between social landlords and medico-welfare agencies.

# **Contents**

<b><u>VOLUME 1</u></b>	<b>Page</b>
<b>Lists of Tables, Figures and Illustrations</b>	<b>10</b>
<b>Cases</b>	<b>11</b>
<b>Legislation</b>	<b>14</b>
<b>Glossary of Abbreviations and Terminology</b>	<b>16</b>
<b>Acknowledgments</b>	<b>17</b>
<b>Declaration</b>	<b>18</b>
<b>Introduction and Overview</b>	<b>20</b>
<b>What are the Aims of the Thesis?</b>	<b>23</b>
<b>Why is there a Need for this Thesis?</b>	<b>25</b>
<b>How will the Research Questions be answered?</b>	<b>27</b>
<b>The Models of Disability</b>	<b>31</b>
<b>The Concept of Risk in this Thesis</b>	<b>41</b>
<b>Structure of the Thesis</b>	<b>43</b>
<b>CHAPTER 1      Social Housing, Antisocial Behaviour,                             Responsibility and Risk</b>	<b>48</b>
<b><u>Introduction</u></b>	<b><u>49</u></b>
<b><u>1.1             Social Housing: a History of Decline</u></b>	<b><u>51</u></b>
<b>1.1.1          Social Housing: an Overview of the Tenure and                     Access to it</b>	<b>51</b>
<b>1.1.2          Residualisation ASB and the Discourse of Risk</b>	<b>56</b>
<b><u>1.2             ASB Controls: Conditionality, Responsibilisation and                     Identity</u></b>	<b><u>61</u></b>
<b>1.2.1          Responsibilisation and the Governance of ASB</b>	<b>61</b>
<b>1.2.2          The Broad and Common-sense Definition of ASB</b>	<b>63</b>

1.2.3	Interventions Used in ASB Control	67
1.2.4	Housing Officers and Governance: the Effects of an Uncertain Professional Identity	76
1.2.5	Occupants and Self-Regulation	80
<b>1.3</b>	<b>Risk</b>	<b>84</b>
1.3.1	The Social Construction of Risk in ASB	84
1.3.2	Risk and Accountability	87
1.3.3	Risk, Knowledge and Governance	91
<b>Conclusion</b>		<b>94</b>

<b>CHAPTER 2</b>	<b>Defences and Challenges to Antisocial Behaviour Proceedings</b>	<b>98</b>
<b>Introduction</b>		<b>100</b>
<b>2.1</b>	<b>The Housing Law Defences</b>	<b>102</b>
2.1.1	Reasonableness	102
2.1.2	Structured Discretion	103
2.2	Challenges at Public Law	104
2.2.1	Policies and their relationship with Public Law Defences	104
2.2.2	The Meaning of Proportionality in Public Law	105
<b>2.3</b>	<b>Challenges relating to Disability and Discrimination and their Limitations</b>	<b>106</b>
2.3.1	The Drafting of Legislation and the Models of Disability	107
2.3.2	Discrimination Arguments: The DDA 1995 and its Early Social Model Success: <i>North Devon Homes Ltd v Brazier</i> <sup>1</sup>	108

<sup>1</sup> *North Devon Homes Ltd v Brazier* [2003] EWHC 574 (QB), [2003] HLR 905

<b>2.3.3</b>	<b>Discrimination Arguments: the Limitations Posed by Risk Considerations</b>	<b>110</b>
<b>2.3.4</b>	<b>Discrimination Arguments: the Limitations Posed by Comparators</b>	<b>115</b>
<b>2.3.5</b>	<b>Litigation Risk: Challenges and Proportionality</b>	<b>118</b>
<b>2.3.6</b>	<b>Discrimination Arguments: the Limitations Posed by Causation</b>	<b>124</b>
<b>2.3.7</b>	<b>Other Disability Related Challenges and Remedies</b>	<b>127</b>
	<b><u>Conclusion</u></b>	<b><u>135</u></b>

<b>CHAPTER 3</b>	<b>Evidence and the Social Construction of Disability in the Context of ASB</b>	<b>138</b>
------------------	---	------------

	<b><u>Introduction</u></b>	<b><u>139</u></b>
--	----------------------------	-------------------

<b>3.1</b>	<b><u>Identity as a Problem of the Social Model</u></b>	<b><u>141</u></b>
------------	---	-------------------

<b>3.1.1</b>	<b>Problems with Evidence of Disability: Occupants' Problems with Identity and Landlords' Problems with Knowledge</b>	<b>141</b>
--------------	---	------------

<b>3.1.2</b>	<b>The Construction of Perpetrators' Impairments by Housing Officers and Other Professionals</b>	<b>144</b>
--------------	--	------------

<b>3.2</b>	<b><u>Discrimination and Evidence</u></b>	<b><u>149</u></b>
------------	---	-------------------

<b>3.2.1</b>	<b>Evidence, the Law and how it is Weighed by Professionals</b>	<b>149</b>
--------------	---	------------

<b>3.3</b>	<b><u>Evidence and the Evidential Gap</u></b>	<b><u>155</u></b>
------------	---	-------------------

<b>3.3.1</b>	<b>Evidence in the Absence of Disclosure: A Needle in a Haystack</b>	<b>155</b>
--------------	--	------------

<b>3.3.2</b>	<b>Knowledge and a Duty to Investigate?</b>	<b>157</b>
--------------	---	------------

<b>3.4</b>	<b>Disability as a Moral Issue</b>	<b>160</b>
<b>3.4.1</b>	<b>The Social Construction of Mental Impairment and Agency: Pop Psychology and Folk Psychiatry</b>	<b>160</b>
<b>3.4.2</b>	<b>Mental Impairment and Agency</b>	<b>163</b>
<b>3.4.3</b>	<b>Guilt and Responsibility: Morality in Judicial Discourse</b>	<b>166</b>
<b>Conclusion</b>		<b>175</b>
<b>CHAPTER 4</b>	<b>Methodology</b>	<b>177</b>
<b>Introduction</b>		<b>178</b>
<b>4.1</b>	<b>Epistemology</b>	<b>179</b>
<b>4.1.1</b>	<b>Research Aims, Questions and Hypotheses</b>	<b>180</b>
<b>4.2</b>	<b>Research Methods and Design Appropriateness</b>	<b>183</b>
<b>4.2.1</b>	<b>Research Stages</b>	<b>184</b>
<b>4.3</b>	<b>Trustworthiness (Dependability and Reliability) of Data</b>	<b>187</b>
<b>4.3.1</b>	<b>Sampling and Recruitment of Organisations</b>	<b>188</b>
<b>4.4</b>	<b>Ethics: Informed Consent and Confidentiality</b>	<b>196</b>
<b>4.4.1</b>	<b>Data Protection</b>	<b>196</b>
<b>4.4.2</b>	<b>Negotiating and Maintaining Access</b>	<b>197</b>
<b>4.5</b>	<b>Instrumentation</b>	<b>201</b>
<b>4.5.1</b>	<b>Piloting</b>	<b>201</b>
<b>4.5.2</b>	<b>Case File Analysis</b>	<b>202</b>
<b>4.5.3</b>	<b>Interviews</b>	<b>204</b>
<b>4.5.4</b>	<b>Focus Groups</b>	<b>209</b>
<b>4.6</b>	<b>Reflexivity</b>	<b>218</b>
<b>4.7</b>	<b>Data Analysis</b>	<b>221</b>
<b>Conclusion</b>		<b>233</b>

<b><u>VOLUME 2</u></b>	<b><u>Page</u></b>
<b>CHAPTER 5 The Medical Lens and the Moral Filter</b>	
<b><u>Introduction</u></b>	<b><u>4</u></b>
<b><u>5.1 Reflective Case-management Across the Four Organisations</u></b>	<b><u>7</u></b>
<b><u>5.2 Housing Officers: Constructions of Professional Roles and Case-management</u></b>	<b><u>9</u></b>
<b><u>5.3 The Medical Lens”: Evidence and the Evidential Gap</u></b>	<b><u>13</u></b>
5.3.1 Observation as a Method of Gathering Evidence	16
5.3.2 Inquiry as a Method of Gathering Evidence	18
5.3.3 “Common-sense”, Professional Intuition and Evidence	24
5.3.4 The Influence of Training on the Medical Lens	27
5.3.5 Folk Psychiatry as a Method of Gathering and Weighing Evidence	28
<b><u>5.4 The Moral Filter</u></b>	<b><u>35</u></b>
5.4.1 The Mental Element of the Moral Filter: Capacity, Intention and Malice	36
5.4.2 Respectability and the Moral Filter	44
5.4.3 Personal Responsibility: the Influence of Welfare Conditionality on the Moral Filter	48
5.4.4 Substance Misuse, Identity and Responsibility in the Moral Filter	51
5.4.5 Manipulation of “the System”: the Influence of Scepticism, Suspicion, and Cynicism in the Moral Filter	57
<b><u>Conclusion</u></b>	<b><u>70</u></b>

<b>CHAPTER 6</b>	<b>An Eye on the Endgame</b>	<b>74</b>
<b><u>Introduction</u></b>		<b>76</b>
<b><u>6.1</u></b>	<b><u>How Officers Construct the Risks of ASB</u></b>	<b><u>79</u></b>
6.1.1	Risk Assessment	79
6.1.2	Risks to the Stock: Hoarding and condition of Property Cases	87
6.1.3	Risks to Officers: Personal Safety	89
<b><u>6.2</u></b>	<b><u>The Impact of Case-Management on the Construction of Risk and Difficulties in Reaching Outcomes: Clashes of Lifestyles</u></b>	<b><u>90</u></b>
6.2.1	Difficulties in Determining Evidence between the Parties	92
6.2.2	Constructing the Behaviour Complained of as Trivial	94
6.2.3	The Risks of Inaction	96
<b><u>6.3</u></b>	<b><u>The Impact of Case-Management on the Construction of Risk and Difficulties in Reaching Outcomes: the Use of Various Adjustments</u></b>	<b><u>97</u></b>
6.3.1	Allocation as an Adjustment	98
6.3.2	Adjustments - Physical Adaptations and Auxiliary Aids	100
6.3.3	Supportive Interventions as Adjustments -	101
<b><u>6.4</u></b>	<b><u>The Risks of Outcomes and their Effect on Case-management</u></b>	<b><u>115</u></b>
6.4.1	Risks to Perpetrators, Tensions with Other Agencies	116
6.4.2	Risks to Landlords: Not Achieving the Desired Outcome	120



**Conclusion** **137**

---

**Conclusion** **139**

**Setting the Scene: Residualisation, Responsibility ASB** **140**

**Which model of disability best explains how relevant perpetrators are constructed in policy and social landlords' ASB management practice?** **141**

**How are housing officers affected by their professional role and their understanding of it and how does that affect their decision-making?** **142**

**The Medical Lens and the Moral Filter** **143**

**How do officers understand risk and how does this affect their decision-making?** **145**

**What are the outcomes of social landlords' ASB management practice and can they be explained by the models of disability, housing professionalism and risk or how officers construct these matters?** **146**

**So what? Where do we go from here?** **149**

**References** **153**

**Appendices** **169**

# **Lists of Tables, Figures and Illustrations**

## **VOLUME 1**

### **Lists of Tables Page**

Table 1.1 Published research linking disability with ASB	74
Table 4.1 Summary of Issues and hypotheses raised in the preceding chapters	181
Table 4.2 Factors Indicating Assessment of Perpetrators (“FIAPs” or “Factors”)	224
Table 4.3 Six-Stage Approach to Case-management	226
Table 4.4 Typology of ASB and Risk	227
Table 4.5 Initial grouping of Factors Indicating Assessment of Perpetrators	229

### **Lists of Figures**

Figure 4.1 Empirical Study – Background & Methodology	193
Figure 1.1 Trends across the three main tenures, 1980 - 2017-18	52

### **Lists of Illustrations**

Illustration 1.1 Illustration of ASB from Abertay Housing Association	65
Illustration 4.1 Richard Wallace	213

## **VOLUME 2**

### **Lists of Tables**

Table 5.1 Factors Influencing Assessments of Perpetrators	14
Table 5.2 Inquiry as a Method of Gathering Evidence	18
Table 5.3 The Moral Filter	72
Table 6.1 Risk and its Management in Cases of ASB	78

### **Lists of Figures**

Figure 5.1 Question 13 of a housing application form	20
Figure 6.1 The Risk Assessment Matrix	83
Figure 6.2 The Social Landlord Crime and Nuisance Group explanatory newsletter on the matrix	85
Figure 6.3 The Social Landlord Crime and Nuisance Group explanatory newsletter on the matrix	86

## Table of Cases

Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640

Accent Peerless Ltd (formerly Surrey Heath Housing Association Ltd) v Kingsdon [2007] EWCA Civ 1314, [2007] All ER (D) 174 (Dec)

Aderemi v London and South Eastern Railway Ltd (2012) UKEAT/0316/12/KN, [2013] ICR 591

Akerman-Livingstone v Aster Communities Limited (formerly Flourish Homes Limited) [2015] UKSC 15, [2015] AC 1399

Associated Provincial Picture Houses Ltd v Wednesbury Corp [1948] 1 KB 223

Barber v Croydon LBC [2010] EWCA Civ 51, [2010] 2 P & CR D25

Barnsley MBC v Norton & Ors [2011] EWCA Civ 834, [2011] HLR 729

Birmingham CC v Stephenson [2016] EWCA Civ 1029 [2016] HLR 776

Bristol CC v Mousah (1997) 30 HLR 32, CA

Bryant v Portsmouth CC [2000] 32 HLR 906, [2000] All ER (D) 729

City West Housing Trust v Massey; Manchester and District Housing Association v Roberts [2016] EWCA Civ 704, [2017] 1 WLR 129

Cooke v DPP [2008] EWHC 2703, (2008) 172 JP 596

Council of Civil Service Unions v Minister for Civil Service [1985] AC 374

Cresswell v Hodgson [1951] 2 KB 92

Crossley v City of Westminster [2006] EWCA Civ 140, [2006] All ER (D) 321 (Feb)

Croydon LBC v Moody (1999) 31 HLR 738

Cumming v Danson [1942] 2 All ER 653

Denton v Southwark LBC [2007] EWCA Civ 623, [2008] HLR 161

Gloucester CC v Simmonds [2006] EWCA Civ 254

Goodwin v Patent Office [1999] ICR 302

Griffiths v St Helens MBC, St Helens County Court HHJ Mackay 28 July 2004, reported Legal Action January (2005)

Hainsworth v Ministry of Defence [2014] EWCA Civ 763, [2014] 3 CMLR 1053.

Holley and another v LB of Hillingdon [2016] EWCA Civ 1052, [2017] HLR 24

Holmes Moorhouse v Richmond upon Thames LBC [2009] UKHL 7

Hotak (Appellant) v LB of Southwark (Respondent) Kanu (Appellant) v LB of Southwark (Respondent) Johnson (Appellant) v Solihull MBC (Respondent) [2015] UKSC 30, [2015] 2 WLR 1341

Hussain v Lancaster CC [2000] 1 QB 1  
Knowsley Housing Trust v McMullen [2006] EWCA Civ 539, [2006] 2 P & CR D45  
Lalli v Spirita Housing Ltd [2012] EWCA Civ 497, [2012] HLR 477  
Lewisham LBC v Malcolm and another [2007] EWCA Civ 763, [2008] Ch 129  
Liverpool City Council v Slavin (Liverpool County Court 29 April 2005)  
London and Quadrant Housing Trust v R (on the application of Weaver) [2009] EWCA Civ 587, [2010] 1 WLR 363  
Manchester CC v Pinnock [2010] UKSC 45, [2011] 2 AC 104  
Manchester CC v Romano, Manchester CC v Samari [2004] EWCA Civ 834, [2005] 1 WLR 2775  
Mayor and Burgesses of the LB of Lewisham v Malcolm [2008] UKHL 43, [2008] 1 AC 1399  
Minchin v Sheffield CC [2000] All ER (D) 471  
Mitchell and Another v Glasgow CC [2009] UKHL 11, [2009] AC 874  
Mowam v LB Wandsworth (2001) 33 HLR 56  
North Devon Homes Ltd v Brazier [2003] EWHC 574 (QB), [2003] HLR 905  
O'Connell v Viridian Housing [2012] EWHC 1389 (QB)  
Osmani v Camden LBC [2004] EWCA Civ 1706, [2004] All ER (D) 268 (Dec)  
P v Cheshire West and Chester Council; P and Q v Surrey County Council [2014] UKSC 19  
Philander v Leonard Cheshire Disability UKEAT/0275/17/DA  
Pieretti v Enfield LBC [2010] EWCA Civ 1104, [2011] 2 All ER 642  
Power v Panasonic UK Ltd (2002) EAT 747/01, [2003] IRLR 151  
R v Sefton MBC ex p Help the Aged [1997] 4 All ER 532  
R v Waveney DC Ex p. Bowers [1983] QB 238  
R v Camden LBC Ex p. Pereira (1998) 31 HLR 317  
Re AA [2012] EWHC 4378 (COP) (In Private)  
S v Floyd [2008] EWCA Civ 201, [2008] 1 WLR 1274,  
Sandwell MBC v Hensley [2007] EWCA Civ 1425, [2008] HLR 358  
Sedleigh-Denfield v O'Callaghan [1940] AC 880  
Octavia Hill Housing Trust v Brumby [2010] EWHC 1793 (QB), [2010] All ER (D) 165 (Jul)  
Sewell v Harlow DC [2000] EHLR 122  
Simms v LB of Islington [2008] EWCA Civ 1083, [2009] HLR 343

Smith v Contour Homes (Manchester County Court, 12 May 2016)  
Smith v Scott [1973] Ch 314  
Southwark LBC v Tanner [2001] 1 AC 1  
Swan Housing Association Ltd v Gill [2013] EWCA Civ 1566, [2013] 1 WLR 1253  
Viridian Housing v O'Connell [2012] EWHC 1389 (QB)  
Wookey v Wookey; Re S (a child) (injunction) [1991] 3 WLR 135  
X v Hounslow LBC [2009] EWCA Civ 286, [2009] PTSR 1158

## **EU**

C-303/06 Coleman v Attridge Law [2008] IRLR 722 ECJ  
C-356/12 Wolfgang Glatzel v Freistaat Bayern [2014] All ER (EC) 1018

## **Table of Legislation**

### **Statutes**

Antisocial Behaviour Crime and Policing Act 2014  
Civil Evidence Act 1972  
County Courts Act 1984  
Crime and Disorder Act 1998  
Data Protection Act 1998  
Data Protection Act 2018  
Disability Discrimination Act 1995  
Equality Act 2010  
Housing Act 1980  
Housing Act 1985  
Housing Act 1988  
Housing Act 1996  
Housing and Planning Act 1986  
Housing and Regeneration Act 2008  
Housing Associations Act 1985  
Legal Aid, Sentencing and Punishment of Offenders Act 2012  
Mental Capacity Act 2005  
Mental Health Act 1983  
National Assistance Act 1948  
Vagrancy Act 1714

### **Statutory Instruments**

Civil Procedure Rules  
Disability Discrimination (Meaning of Disability) Regulations 1996, SI 1996/1455  
Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 SI 2013/1237  
Equality Act 2010 (Disability) Regulations 2010, SI 2010/2128

## **International**

Directive 2006/126/EC as amended by Commission Directive 2009/113/EC

European Convention on Human Rights

United Nations Convention on the Rights of Persons with Disabilities

## **Glossary of Abbreviations and Terminology**

ABC	= Acceptable Behaviour Contract
ASB	= Anti-social behaviour and neighbour nuisance which will be considered jointly throughout
ASBO	= Anti-social behaviour order
ASBI	= Anti-social behaviour injunction
CPR	= Civil Procedure Rules
DDA 1995	= Disability Discrimination Act 1995
DPA 1998	= Data Protection Act 1998
DPA 2018	= Data Protection Act 2018
EA 2010	= Equality Act 2010
ECHR	= European Convention on Human Rights
EHRC	= Equality and Human Rights Commission
HA 1985	= Housing Act 1985
HA 1988	= Housing Act 1988
HA 1996	= Housing Act 1996
HCA	= Homes and Communities Agency
MCA 2005	= Mental Capacity Act 2005
MHA 1983	= Mental Health Act 1983
PRP	= Private Registered Provider
PSED	= Public Sector Equality Duty
RTB	= Right to Buy
SPO	= Suspended Possession Order
UNCRC	= United Nations Convention on the Rights of Persons with Disabilities

The term “officers” will be used meaning housing officers. The literature considered in the first four chapters refers, for the most part, to such front-line officials. There is a difference between the two in Chapters 5 and 6 (analysis) and here they will be referred to as “officers” (who also included senior / specialist ASB officers) or “managers”. Collectively they are referred to as “housing professionals”.



## **Acknowledgements**

I am extremely grateful to all those who have supported me along the way in writing this thesis particularly my supervisors, Caroline Hunter and Charlotte O'Brien; past and present colleagues from LJMU and my family for their support. The thesis is dedicated to my children Abby and Zoe Steele and my dad, Paul Roberts.

## Declaration

This thesis is the sole work of the author and has not been submitted for examination at this or another institution for another award. All sources are acknowledged as references.

In line with the requirements of the thesis declaration at the University of York, findings or an overview of this work were presented at the following conferences/workshops. The author would like to thank the audiences for their input.

Seventh Annual International Graduate Legal Research Conference 8<sup>th</sup> April 2013, King's College, London. 'The Mentally Disordered and the Social Model of Disability: How Far Does Legislation Remove Barriers to Equality?'

Socio-Legal Studies Association conference, Robert Gordon University Law School, Aberdeen 10<sup>th</sup> April 2014. 'Heart Like a Swinging Brick: the Construction of Disability by Social Landlords in their Control of Anti-Social Behaviour.'

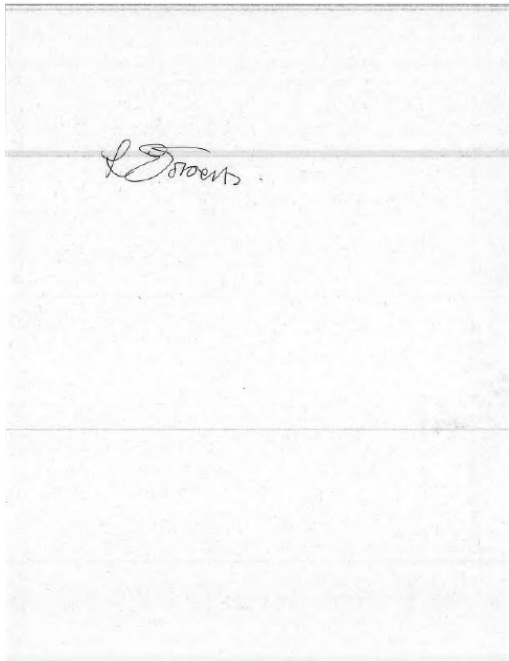
XXXVth International Congress on Law and Mental Health, Vienna, 15<sup>th</sup> July 2015 'Genuine Mental Illness = Lack of Capacity! The Construction of Disability by Social Landlords in their Control of Antisocial Behaviour.'

Socio-Legal Studies Association conference, Lancaster University 7<sup>th</sup> April 2016  
MENTAL HEALTH AND MENTAL CAPACITY LAW 'Professionals, Decision-Making and Barriers to Disability Equality'  
CHALLENGING OWNERSHIP 'Social Housing, Antisocial Behaviour and Disability: Decision-making of Housing Professionals at a Conflicted Intersection of Law and Policy'

Housing Law Research Network 3rd Annual Housing Law Symposium, Malmo University, Sweden: *Human Rights, Housing and Dispute Resolution* 23<sup>rd</sup> March 2017 'A Medical Lens and a Moral Filter'

XXXVth International Congress on Law and Mental Health, Prague, 12<sup>th</sup> July 2017

## Social Inclusion and Exclusion: The Role of Housing Law in Mental Health



Leigh Roberts 18<sup>th</sup> July 2018

# **Introduction and Overview**

This introduction aims to explain the inspiration for this thesis and address the essential why, what and how questions: why is there a need for it? What are its aims and how will they be addressed? It will provide a background to the models of disability and the concept of risk and explain their relevance to the thesis. Finally, it will provide an overview of the structure of the thesis.

## **Why I wrote this Thesis and some Underpinning Assumptions**

When I was a practising housing solicitor, I frequently represented occupants of social housing in antisocial behaviour (ASB) proceedings. That experience led me to embark upon this thesis.

Policy reforms that took place early in my career in the 1990s brought to national attention the issue of ASB. These reforms bestowed power and responsibility for the control of this seemingly new phenomena on social landlords (i.e. not-for-profit landlords including local authorities and Private Registered Providers (PRP)<sup>1</sup> mostly housing associations).<sup>2</sup> Social landlords were now able to easily pursue possession proceedings on grounds of ASB and nuisance and also control ASB via the Antisocial Behaviour Order (ASBO),<sup>3</sup> and Antisocial Behaviour Injunction (ASBI).<sup>4</sup> These reforms entirely changed the work of solicitors representing social housing occupants. Some work either was or felt quasi-criminal. It seemed to me that a major change had taken place.

The most difficult of these cases were those where the occupant perpetrator appeared to have a mental health issue or learning difficulty (“mental impairment”). Case-law<sup>5</sup> reveals depression to be associated with non-payment of rent. In response to my

---

<sup>1</sup> Housing and Regeneration Act 2008, s 80

<sup>2</sup> Housing Associations Act, 1985 s 1

<sup>3</sup> Crime and Disorder Act 1998, s 1; 1.2.1

<sup>4</sup> Housing Act 1996, ss 153A – 153E and s 154

<sup>5</sup> For example *S v Floyd* [2008] EWCA Civ 201, [2008] 1 WLR 1274, *Liverpool City Council v Slavin* (Liverpool County Court 29 April 2005)

firms' questionnaires<sup>6</sup> that formed the basis of statements, most housing clients would readily disclose diagnoses of depression and anxiety to me. Disclosure seemed less common in ASB cases, yet medical evidence would necessarily aid these clients' challenges to legal proceedings on the basis that it would not be reasonable to order possession, that injunctions may not be enforceable,<sup>7</sup> or that taking the proceedings may amount to disability discrimination. 'Disability' is defined in the legislation as 'a physical or mental impairment'<sup>8</sup> the latter of which has been interpreted in case-law to include dyslexia<sup>9</sup> and depression<sup>10</sup> and in case-law relevant to ASB to include schizophrenia,<sup>11</sup> personality disorders,<sup>12</sup> mood disorders<sup>13</sup> 'short term memory and learning difficulties'<sup>14</sup> and low IQ.<sup>15</sup> The British Institute for Brain Injured Children reported a disproportionate number of children with 'learning disabilities and associated disorders, such as ADHD (attention deficit hyperactivity disorder) and Asperger's (a form of autism)' to be recipients of ASBOs.

As I suspected some of my clients might have mental impairments that either they did not want to disclose or which had not yet been diagnosed, I started wondering what had happened *before* the issue of proceedings: what had the housing officers thought about these cases and how had they handled them? I wondered whether officers handling ASB cases, being, just like me, laypersons in relation to health had the same suspicions, and if so, whether and how this altered their management of the case. Did they view perpetrators with physical or sensory impairments or learning difficulties differently to those with mental health issues and did this lead to different treatment? Had they tried to get social services or mental health services involved at an earlier stage i.e. before taking proceedings? Thus, I concluded that evidence or knowledge of disability must play an important role in the management of such cases.

---

<sup>6</sup> Based on Legal Services Commission file auditing criteria now found in [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/546014/housing-quality-guide.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/546014/housing-quality-guide.pdf) accessed 23 November 2017

<sup>7</sup> *Wookey v Wookey; Re S (a child) (injunction)* [1991] 3 WLR 135; 6.4.2.2

<sup>8</sup> EA 2010, s 6(1)(a)

<sup>9</sup> *Philander v Leonard Cheshire Disability* UKEAT/0275/17/DA

<sup>10</sup> *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] EWCA Civ 640

<sup>11</sup> *North Devon Homes Ltd v Brazier* [2003] EWHC 574 (QB), [2003] HLR 905

<sup>12</sup> *Croydon LBC v Moody* (1999) 31 HLR 738

<sup>13</sup> <sup>13</sup> *Barber v Croydon LBC* [2010] EWCA Civ 51, [2010] 2 P & CR D25 [2] (Patten LJ) the perpetrator also had 'learning difficulties and a personality disorder.'

<sup>14</sup> *Lalli v Spirita Housing Ltd* [2012] EWCA Civ 497, [2012] HLR 477; suffered from short term memory and learning difficulties

<sup>15</sup> *Knowsley Housing Trust v McMullen* [2006] EWCA Civ 539, [2006] 2 P & CR D45

Officers' use of knowledge relates to the degree of discretion they have in case-management and use of ASB policy.<sup>16</sup> While the Chartered Institute of Housing (CIH) online practice highlights as a performance indicator the degree of discretion officers have and their wisdom in its exercise,<sup>17</sup> the minimisation of individual discretion is only specified in relation to rent arrears.<sup>18</sup> Practitioners managing ASB cases therefore have wide discretion consequent upon the broad definition of ASB.<sup>19</sup> This degree of discretion typifies practitioners, especially front-line officers as street-level bureaucrats. Therefore, this thesis adopts the premise that they are

street-level bureaucrats per Lipsky<sup>20</sup> in that they are public service workers who interact with citizens in the course of their work and routinely make judgements as to whom is and is not entitled to limited public resources.<sup>21</sup>

Furthermore, 'they work in an environment that may be characterised as a space where law and alternative normative influences (i.e. financial management, performance audit, political pressure) coexist'<sup>22</sup> alongside 'challenges brought about by inadequate resources, few controls, indeterminate objectives and discouraging circumstances.'<sup>23</sup> These alternative influences may influence officers in the way they use their discretion.<sup>24</sup>

Yet Lipsky's is a sensitive, non-judgemental explanation of the stresses these officials encounter in their decision-making.<sup>25</sup> These difficulties, he explains, lead to their reliance on coping mechanisms including "common-sense", professional intuition<sup>26</sup> or 'gut instinct'<sup>27</sup> and stereotyping (i.e. reliance on 'widely held but fixed and

---

<sup>16</sup> 1.2.3.5

<sup>17</sup> <https://practice-online.cih.org/hm/default.aspx?i=45594> accessed 23 October 2017

<sup>18</sup> <https://practice-online.cih.org/hm/default.aspx?i=43933&ht=discretion> accessed 23 October 2017

<sup>19</sup> 1.2.2

<sup>20</sup> Michael Lipsky. *Street-level Bureaucrats: Dilemmas of the Individual in Public Services* (Russel Sage Foundation 1980)

<sup>21</sup> Caroline Hunter and others, 'Reconfiguring Knowledge Hierarchies? The Weighting of Medical Evidence in Homelessness Assessments in England' (unpublished)

<sup>22</sup> Mike Rowe, 'Going Back to the Street: Revisiting Lipsky's Street-level Bureaucracy' (2012) 30 *Teaching Public Administration* 10, 14

<sup>23</sup> Simon Halliday and others, 'Street-Level Bureaucracy, Interprofessional Relations, and Coping Mechanisms: A Study of Criminal Justice Social Workers in the Sentencing Process' (2009) 31 *Law & Policy* 405, 406

<sup>24</sup> Mike Rowe, 'Going Back to the Street: Revisiting Lipsky's Street-level Bureaucracy' (2012) 30 *Teaching Public Administration* 10, 14

<sup>25</sup> Simon Halliday and others, 'Street-Level Bureaucracy, Interprofessional Relations, and Coping Mechanisms: A Study of Criminal Justice Social Workers in the Sentencing Process' (2009) 31 *Law & Policy* 405, 406

<sup>26</sup> Simon Halliday, 'Institutional Racism in Bureaucratic Decision-Making: A Case Study in the Administration of Homelessness Law' (2000) 27 *J.L.Soc'y* 449, 462

<sup>27</sup> Nicola Glover-Thomas, 'The Age of Risk: Risk Perception and Determination Following the Mental Health Act 2007' (2011) 19 *Med L Rev* 581, 599

oversimplified images or ideas of particular types of people or things')<sup>28</sup> in their decision-making as may be evident in the language that they use. In their exercise of discretion, officials have been criticised for appearing to bend rules, their decision-making seeming irrational at best, prejudiced or lacking the appearance of legitimacy at worst.<sup>29</sup>

The decision-making context of ASB may test officers' discretion and therefore their street-level bureaucratic coping mechanisms to the limit. Their employers, social landlords, are positioned at a juncture of conflicting policy agendas: having powers to control the imprecisely defined ASB<sup>30</sup> and consequently socially excluding occupant perpetrators and yet simultaneously occupying a longstanding and fundamental role in social inclusion in the provision of accommodation at submarket prices to vulnerable people.<sup>31</sup> Given, as Hunter and others argue,<sup>32</sup> the significant representation of disabled people living in social housing (which result from priorities accorded in the allocation of social housing), it seems likely that large numbers of them must be both victims and perpetrators of ASB.<sup>32</sup> Exacerbating the predicament of social landlords is the fact that disabled perpetrators and their lawyers may use the very fact of disability to challenge ASB proceedings with the aim of maintaining social inclusion. In addition to arguments about reasonableness or enforceability, housing lawyers eventually began to also use the Disability Discrimination Act 1995 (DDA 1995) and subsequently the Equality Act 2010 (EA 2010) arguing that proceedings were discriminatory. This thesis aims to answer questions arising at this conflicted intersection of policy.

## **What are the Aims of the Thesis?**

Officers' potential lack of knowledge of perpetrators' impairments leads to speculation on how they may view them and manage their cases; if perpetrators claim to have an

---

<sup>28</sup> <https://en.oxforddictionaries.com/definition/stereotype> accessed 21 February 2017

<sup>29</sup> Mike Rowe, 'Going Back to the Street: Revisiting Lipsky's Street-level Bureaucracy' (2012) 30 *Teaching Public Administration* 10, 14

<sup>30</sup> David Prior, 'The Problem of Anti-Social Behaviour and the Policy Knowledge Base: Analysing the Power/Knowledge Relationship' (2009) 29 *Critical Social Policy* 5

<sup>31</sup> 1.1.2

<sup>32</sup> Caroline Hunter and others, *Disabled People's Experiences of Anti-Social Behaviour and Harassment in Social Housing: A Critical Review* (Disability Rights Commission 2007)

impairment *in the face* of legal proceedings, are officers' eyebrows raised about previously undisclosed conditions?

This PhD aims to examine the general research question: how do social landlords manage ASB cases where occupant perpetrators have known or suspected mental impairments? Individual housing professionals (for the most part front-line officers) play a significant role in decision-making in the control of ASB contributing to the organisational approach. Their decision-making takes place at the conflicted policy juncture of social inclusion and exclusion and is the focus of questions raised in this thesis. It is important to address officers' constructions of disability because they may lead to discriminatory and exclusionary consequences which may be avoided if we can understand how and why they occur. To aid this understanding, the thesis employs three theoretical frameworks: the contrasting models of disability, risk and housing professionalism. These frameworks shape more specific research questions which this thesis seeks to answer:

- Which model of disability best explains how occupant perpetrators of ASB with known or suspected mental impairments ("relevant perpetrators") are constructed:
  - in policy and
  - by social landlords in their ASB case-management practice?
- How do the following affect officers in their day-to-day decision-making:
  - understandings of risk
  - their professional role and their understanding of it?
- What are the outcomes of social landlords' ASB case-management practice?
  - Can they be explained via a model of disability?
  - How are they affected by officers' constructions of perpetrators and risk?
  - How are they affected by officers' professional role and their understanding of it?



## **Why is there a Need for this Thesis? The Contribution to Knowledge**

While much has been written about social landlords and ASB, there has been markedly less examination of control of ASB perpetrated by those with mental impairments. Empirical examination of the disability-related challenges to social landlords' use of ASB proceedings have received even less attention.

Although Cobb considered moral questions arising from perpetrators' use of the DDA 1995 to challenge social landlords' control of ASB caused by 'mental disorder',<sup>33</sup> his argument is not supported by empirical evidence. Parr conducted empirical research into the role of housing officers in managing ASB cases concerning perpetrators 'with mental health problems (and learning difficulties)'.<sup>34</sup> While Parr and Cobb agree that housing officers are ill-equipped to make decisions about such perpetrators' culpability and the appropriateness of social landlords' responses, there is no literature examining officers' views of disability and evidence of same given the possibility of a disability challenge to ASB proceedings. Much has been written about the social construction of disability by disabled people<sup>35</sup> that in the present context would include perpetrators with mental impairments, yet there is none about officers' construction of such perpetrators when managing cases at this conflicted policy intersection. This thesis seeks to address that gap.

In addressing that gap, the models of disability are employed as they aid an understanding of not only disability but also how equality policy and its operation can challenge barriers to disability equality (fundamentally in this thesis, seen as facilitating social inclusion). This policy conflicts with ASB policies which impose responsibility on perpetrators to control their behaviour via interventions which operate on a conditional basis: failure to comply with conditions may lead to litigation and social exclusion. Officers' construction of perpetrators' is affected by evidence of their

---

<sup>33</sup> N Cobb, 'Patronising the Mentally Disordered? Social Landlords and the Control of Anti-social Behaviour under the Disability Discrimination Act 1995' (2006) 26 LS 238

<sup>34</sup> Sadie Parr, 'The Role of Social Housing in the 'Care' and 'Control' of Tenants with Mental Health Problems' (2010) 9 Social Policy and Society 111, 115; Caroline Hunter and others, *Disabled People's Experiences of Anti-Social Behaviour and Harassment in Social Housing: A Critical Review* (Disability Rights Commission 2007)

<sup>35</sup> Peter Beresford, Mary Nettle and Rebecca Perring, *Towards a Social Model of Madness and Distress: Exploring What Service Users Say* (Joseph Rowntree Foundation 2010) [www.jrf.org.uk](http://www.jrf.org.uk) accessed 1 July 2011

disabilities (in prospect of litigation) and perpetrators' responses to interventions including support (if litigation is to be avoided and social inclusion retained). Officers practice is also affected by their construction of professional roles and the pressures policy imposes on social landlords to control the risks the of ASB.

The thesis argues that officers' management of cases results from them seeing perpetrators they know or suspect to have mental impairments through a medical (model) lens and a "moral filter", a device developed in this thesis.<sup>36</sup> This moral filter is developed using welfare conditionality<sup>37</sup> and Haslam's<sup>38</sup> folk psychiatry. ASB case-management is a circuitous and reflective process. Perpetrators most favourably constructed during this process are referred to as making quick passage through the filter. Other perpetrators make slower progress yet are reframed in the filter because of their compliance with conditions. Others fail to pass or remain stuck in the filter and are consequently more vulnerable to social exclusion.

However, officers' constructions of the many risks of ASB means that even for those unfavourably constructed, considerable efforts are put into alternative means of resolution, mostly supportive interventions, before litigation is resorted to. This paradoxically prolongs the risks of ASB. Two types of hard cases i.e. those particularly difficult to manage with prolonged risks are hoarding and clashes of lifestyle. Consideration of these hard cases is intended to be a contribution to knowledge: existing literature<sup>39</sup> does not focus on social landlords' difficulties in managing these cases in the face of legal arguments concerning disability.

Thus, the contributions to knowledge made by this thesis is its use of empirical evidence to answer how social landlords manage ASB cases where occupant perpetrators have known or suspected mental impairments. Although considering how officers are affected in case-management in relation to housing professionalism and

---

<sup>36</sup> It is distinct from the "moral filter" that exists in Islamic economics which refers to the regulation of markets by minimising unnecessary claims on resources: M U Chapra, *Islam and the Economic Challenge* (International Institute of Islamic Thought 1992) in Gillian Rice, 'Islamic Ethics and the Implications for Business' (1999) 18 *Journal of Business Ethics* 345, 346

<sup>37</sup> 1.2.4

<sup>38</sup> Nick Haslam, 'Folk Psychiatry: Lay Thinking about Mental Disorder' (2003) 70 *Social Research* 621

<sup>39</sup> Michele Slatter, 'Treasures, Trash and Tenure: Hoarding and Housing Risk' (2007) 2 *People, Place & Policy Online* 28, 29 [http://extra.shu.ac.uk/ppp-online/issue\\_1\\_300108/documents/treasures\\_trash\\_tenure\\_hoarding\\_housing.pdf](http://extra.shu.ac.uk/ppp-online/issue_1_300108/documents/treasures_trash_tenure_hoarding_housing.pdf) accessed 21 July 2016; Suzie Scott & Hilary Parkey, 'Myths and Reality: Anti-social Behaviour in Scotland' (1998) 13 *Housing Studies* 325

risk, the frameworks also relate to the main argument: their decision-making is affected by seeing disabled perpetrators through a medical lens and in particular a “moral filter”. Additional contribution to knowledge is made by the particular backwash effect on case-management caused by the risk of litigation.

## **How will the Research Questions be answered?**

The thesis adopts what Fopp calls a “weak” social constructionist approach.<sup>40</sup> This section explains what this means and considers what is being socially constructed, by whom and how.

Social constructionism is a critical epistemology that challenges the idea that phenomena necessarily have inherent meaning. Meaning is instead constructed by individuals, “social actors”, who experience ‘an active process of interpretation of the external world’<sup>41</sup> in their interactions with it. Its focus is on what can be known about social reality rather than to ‘the objective reality of the natural world.’<sup>42</sup>

Its virtue is in challenging “common-sense” assumptions that social reality or social facts (which include issues and problems) are pre-existing givens, considering them to be ‘highly malleable’,<sup>43</sup> the product of conscious human agency, ‘contingent, contested and subject to considerable diversity of interpretation’<sup>44</sup> and reinterpretation.<sup>45</sup> However, rather than accepting the existence of multiple realities, none of which takes precedence over the other<sup>46</sup> weak social constructionism accepts the existence of social ‘reality’ This reality of the world is not contingent solely on our perception but that our access to it is mediated through language and discourse.<sup>47</sup> Social constructionism is useful because it provides a basis for enquiries seeking to interpret the subjective views and clarify concepts used by social actors (housing

---

<sup>40</sup> Rodney John Fopp, ‘From Weak Social Constructionism to Critical Realism in Housing Theory - Exploring Issues’ (3<sup>rd</sup> Annual Australasian Housing Researchers’ Conference 2009) 1, 1

<sup>41</sup> Keith Jacobs and Tony Manzi, ‘Evaluating the Social Constructionist Paradigm in Housing Research’ (2000) 17 Housing, Theory and Society 35, 36

<sup>42</sup> Tom Andrews, ‘What is Social Constructionism?’ (2012) 11 Grounded Theory Review <http://groundedtheoryreview.com/2012/06/01/what-is-social-constructionism/> accessed 28 May 2019

<sup>43</sup> KA Jacobs, Jim Kemeny, and Tony Manzi, *Social Constructionism in Housing Research* (Routledge 2004) 161-2

<sup>44</sup> KA Jacobs, Jim Kemeny, and Tony Manzi, *Social Constructionism in Housing Research* (Routledge 2004) 3

<sup>45</sup> Peter Berger and Thomas Luckmann, *The Social Construction of Reality* (Penguin 1966)

<sup>46</sup> Tom Andrews, ‘What is Social Constructionism?’ (2012) 11 Grounded Theory Review

<http://groundedtheoryreview.com/2012/06/01/what-is-social-constructionism/> accessed 28 May 2019

<sup>47</sup> KA Jacobs, Jim Kemeny, and Tony Manzi, *Social Constructionism in Housing Research* (Routledge 2004) 3

practitioners)<sup>48</sup> in the creation of social facts. The social model recognises that one such “fact”, disability, is socially constructed. However, disability is also socially constructed via the medical model. Here disabled people are seen through the medical lens, disability being conflated with impairment. ASB is also socially constructed and like disability is an object of policy. Policy responses to these objects may be both socially constructed and affected by the social constructions of these objects.

How policy and its objects are socially constructed may be understood by examining both the language of policy and what individuals who operate it say about it. Discourse analysis is a strand of social constructionist research.<sup>49</sup> Although discourse is ‘a complex and contested term’,<sup>50</sup> defining it ‘as “language use,” and its analysis ‘as the study of “talk and text in context”’<sup>51</sup> may enable understanding of its effect on policy and its development. This development can be the result of the dialectical relationship between the text of documents and interpretations in practice. “Discourses” may therefore both reflect and shape housing policy and practice.<sup>52</sup>

Housing practitioners are clearly involved in the production of discourse relevant to this thesis as they work within a policy framework at national (including legislation) and local (their organisation’s policies) operating both in practice.<sup>53</sup> National policy and the rules it contains are developed in case-law . Case-law and the judicial discourse within it, shapes ASB policy and the environment in which those rules operate. Thus, how ASB, risk and disabled people are constructed in policy may affect housing practice as evident in officers’ discourse. Case-law is analysed in this thesis on the assumption that judicial discourse may reveal similar themes to that of housing officers illuminating how they make their decisions. An understanding of discourses relevant to this thesis therefore requires analysis of the text of local and national policy, case-law and what housing practitioners say about policy.

---

<sup>48</sup> Keith Jacobs and Tony Manzi, ‘Evaluating the Social Constructionist Paradigm in Housing Research’ (2000) 17 *Housing, Theory and Society* 35, 41

<sup>49</sup> KA Jacobs, Jim Kemeny, and Tony Manzi, ‘Social Constructionism in Housing Research’ (Routledge 2004) 4

<sup>50</sup> Annette Hastings, ‘Discourse Analysis: What Does it Offer Housing Studies?’ (2000) 17 *Housing, Theory and Society* 131

<sup>51</sup> T Van Dijk, ‘The Study of Discourse’ in T van Dijk T (ed) *Discourse as Structure and Process* (Sage 1997) 3 in Annette Hastings, ‘Discourse Analysis: What Does it Offer Housing Studies?’ (2000) 17 *Housing, Theory and Society* 131, 132

<sup>52</sup> A Haworth and T Manzi, ‘Managing the ‘Underclass’: Interpreting the Moral Discourse of Housing Management’ (1999) 36 *Urban Studies* 153,155

<sup>53</sup> Rob Atkinson and others, ‘Theories of Discourse and Narrative. What Do They Mean for Governance and Policy?’ in Rob Atkinson and others (eds), *Sustainability in European Environmental Policy: Challenges of Governance and Knowledge* (Routledge 2010) 121

Examination of these discourses may reveal the dynamic and reproductive roles they may have in officers' social constructions and consequent practice that may become policy (referred to throughout as "policy as practice").

The need to examine relevant discourse justifies the analysis of policy in Chapters 1-3 and the qualitative methods explained in Chapter 4 to reveal how officers see or socially construct perpetrators, as analysed in Chapters 5 and 6.

## **Limitations**

The empirical analysis aims to provide in-depth understanding and insight from which analytic generalisations about policy and practice. The transferability of the findings may be criticised as limited by the small sample size used in the study. However, the richness of data generated, and the consistency of themes revealed counter this.

## **A Note on Language**

The objects of ASB control<sup>54</sup> referred to throughout are occupants rather than tenants to reflect the non-tenure specific ASB interventions and particularly because family members other than tenants may be targeted.

---

<sup>54</sup> 1.2.3

## **Cautions: the Examination of Morality and Comparisons Drawn with other Areas of Law**

The reference to “morality” in the title may excite some philosophical interest. So as not to mislead, it must be emphasised that this is an empirical and not a theoretical thesis. “Morality” was an emergent theme in the development of the thesis which has an important role in explaining officers reasoning in their day-to-day ASB case management. It is enabled by their broad discretion which relates to their position as street level bureaucrats and reliance on “common-sense”. How morality affects officers’ decision-making is explained via the moral filter, a device developed in this thesis. This device adapts Cobb’s reference to ‘moral adjudication [an] inherently subjective... constantly contested [process]... the outcome dependent upon the adjudicator, the particular subject and all the circumstances within which the judgement is made.’<sup>55</sup> He argues that the adjudicator is affected by their assessment of the perpetrator’s moral responsibility for their ASB i.e. their agency in relation to it or level of control over it.

While morality may be affected by the individual views and perceptions of the decision-maker, there are some common values that appear to guide the decision-makers studied in this thesis. This relates to the responsabilisation agenda of ASB policy and relatedly welfare compliance. Additionally, social class and apparent decency are related to perceived morality.

It should be noted that comparisons are sometimes drawn with other areas of law as appropriate e.g. employment law which is a rich source on discrimination and mental capacity wherein case-law illustrates judicial constructions of disability. Constructions are importantly illustrated via the models of disability and it is to these I turn next.

---

<sup>55</sup> N Cobb, ‘Patronising the Mentally Disordered? Social Landlords and the Control of Anti-social Behaviour under the Disability Discrimination Act 1995’ (2006) 26 LS 238, 251

## **The Models of Disability**

The models of disability aid an understanding of how disability is constructed.<sup>56</sup> For this thesis, I am going to focus on the two main categories of the models: the social and the medical. Oliver labels these as “social” and “individual”. This thesis adopts Oliver’s version of the medical model because of its focus on the individual. Yet refers to it as “medical” because, as will become clear, that is most appropriate to how housing officers construct perpetrators. Under this model, disability is a biological construct: impairment and disability are one and the same. Under the social model, disability is a social rather than biological construct; it is the interactions between people’s impairments and various barriers to equality that disable them<sup>57</sup> rather than the impairments themselves. These barriers may be removed when society provides legal rights including ‘reasonable accommodations.’<sup>58</sup> As such, arguments in favour of disability equality may be used to challenge ASB proceedings. Thus, equality legislation forms part of the conflicted policy framework in which officers’ decision-making operates. Analysis of such policy and judicial discourse via the models illustrates its potential to dismantle the barriers to disability equality. Additionally, the models provide a framework to understand policy and practice and this is important given the central focus of this thesis on officers’ decision-making concerning relevant perpetrators and the potential for discrimination.

## **The Contrasting Social and Medical Models of Disability**

For advocates of the social model, there is a critical distinction between impairment and disability:

Separating out “impairment” (that is, the functional limitations of our bodies and minds) from “disability” (that is, the disabling barriers of unequal access and

---

<sup>56</sup> Mike Oliver, ‘The Social Model in Action: If I had a Hammer’ in Colin Barnes and Geof Mercer (eds), *Implementing the Social Model of Disability: Theory and Research* (The Disability Press 2004) 18, 19

<sup>57</sup> Colin Barnes, *Disabled People in Britain and Discrimination* (Hurst 1994) 8; see UNCRPD definition below, this Chapter.

<sup>58</sup> Peter Conrad and Kristin K Barker, ‘The Social Construction of Illness: Key Insights and Policy Implications’ (2010) 51 no. 1, suppl Journal of Health and Social Behavior 567, 571

negative attitudes) is the cornerstone of what is known as the social model of disability.<sup>59</sup>

Debates concerning the place of impairment within the social model have revolved *inter alia* around lived experience of mental impairments,<sup>60</sup> particularly as some people with mental impairments do not identify as disabled.<sup>61</sup> This thesis does not seek to undermine any such arguments or experience and acknowledges how this may conflict with that of experts<sup>62</sup> and laypeople (housing officers),<sup>63</sup> the latter of whom are central to the thesis in their social construction of disability.

The thesis recognises that there is no consensus on meaning or nomenclature and that 'all terms are likely to be offensive to someone and none necessarily has a shared meaning.'<sup>64</sup> However, the terminology used rests on the assumptions that the behaviour of people with mental impairments may be interpreted by neighbours as antisocial. In their response to ensuing complaints, officers as laypeople, may, in trying to interpret the causes of someone's behaviour, misconceive these as 'being indicative of a mental health problem or a learning disability'.<sup>65</sup> "Mental disabilities" was considered as a combined term but rejected as not consistent with the social model, despite having been used by service users themselves.<sup>66</sup> As a result, and except where quoting from primary or secondary sources, adopting the terminology of service users, the terms "mental health issues"<sup>67</sup> and "learning difficulties"<sup>68</sup> are used. Where both are used together, for the sake of brevity where appropriate, as in the legislation and social model writers<sup>69</sup> "mental impairments" is used. Collectively, for

---

<sup>59</sup> Jenny Morris, 'Impairment and Disability: Constructing an Ethics of Care That Promotes Human Rights' (2001) 16 *Hypatia* 1, 2

<sup>60</sup> Jenny Morris, 'Impairment and Disability: Constructing an Ethics of Care That Promotes Human Rights' (2001) 16 *Hypatia* 1

<sup>61</sup> Peter Beresford, Mary Nettle and Rebecca Perring, *Towards a Social Model of Madness and Distress: Exploring What Service Users Say* (Joseph Rowntree Foundation 2010) [www.jrf.org.uk](http://www.jrf.org.uk) accessed 1 July 2011

<sup>62</sup> Chapter 3

<sup>63</sup> Chapter 5; Peter Conrad and Kristin K Barker, 'The Social Construction of Illness: Key Insights and Policy Implications' (2010) 51 no. 1 *suppl Journal of Health and Social Behavior* 567, 573

<sup>64</sup> Peter Beresford, Mary Nettle and Rebecca Perring, *Towards a Social Model of Madness and Distress: Exploring What Service Users Say* (Joseph Rowntree Foundation 2010) [www.jrf.org.uk](http://www.jrf.org.uk) accessed 1 July 2011, 36

<sup>65</sup> Swift and Wilson found such misconceptions amongst laypersons about brain injury Teresa L Swift and Sarah L Wilson, 'Misconceptions About Brain Injury Among the General Public and Non-Expert Health Professionals: An Exploratory Study' (2001) 15 *Brain Injury* 149

<sup>66</sup> Margaret Price, 'Defining Mental Disability' in Lennard J Davis, (ed) *The Disability Studies Reader* (Routledge, 2016) 305

<sup>67</sup> Peter Beresford, Mary Nettle and Rebecca Perring, *Towards a Social Model of Madness and Distress: Exploring What Service Users Say* (Joseph Rowntree Foundation 2010) [www.jrf.org.uk](http://www.jrf.org.uk) accessed 1 July 2011

<sup>68</sup> V Williams and P Heslop, 'Mental Health Support Needs of People with a Learning Difficulty: a Medical or a Social Model?' (2005) 20 *Disability and Society* 231 who include within this autism whereas Cobb refers to this as mental disorder

<sup>69</sup> T Shakespeare, 'Disability, Identity and Difference, in C Barnes & G Mercer (eds) *Exploring the Divide: Illness and Disability* (The Disability Press 1996)



the sake of brevity and where appropriate, perpetrators known or suspected to have these impairments are referred to as “relevant perpetrators”.

Misconceptions about disabled people may result from stereotyping<sup>70</sup> which may in turn be the product of negative attitudes. While differing experiences of impairment and relatedly identity have been the subject of debate<sup>71</sup> and potential political division in the disability rights movement,<sup>72</sup> there has been common ground that the issue of disability relates to barriers to equality and social inclusion which are both physical and social. The barrier of social exclusion<sup>73</sup> may result from institutional discrimination,<sup>74</sup> in turn the product of negative attitudes,<sup>75</sup> ranging from outright prejudice to selective indifference<sup>76</sup> through to a complete lack of consideration. These attitudes often connect mental impairments with shame, fear and stigma.<sup>77</sup> Stigma may arise ‘when elements of labelling, stereotyping, separation, status loss and discrimination co-occur’.<sup>78</sup> Some mental impairments are concealable<sup>79</sup> and yet highly stigmatised. Fear of violence from those with mental health issues<sup>80</sup> show there is a public perception of disability-related risks that are difficult to separate from stigma.<sup>81</sup>

The causes of attitudinal barriers to disability equality may be illustrated by use of the contrasting medical model. In this model, disability is located at an individual level with health problems presumed to arise from within the person.<sup>82</sup> Disability is therefore understood in ‘an individual disease framework... independent of socioeconomic,

---

<sup>70</sup> Jacoby and others found epilepsy as a mental illness to be another persistent stereotype: Ann Jacoby and others, ‘Epilepsy and Social Identity: The Stigma of a Chronic Neurological Disorder’ (2005) 4 *The Lancet Neurology* 171

<sup>71</sup> T Shakespeare, ‘Disability, Identity and Difference’, in C Barnes & G Mercer (eds) *Exploring the Divide: Illness and Disability* (The Disability Press 1996)

<sup>72</sup> Samuel Bagenstos, *Law and the Contradictions of the Disability Movement* (Yale University Press 2008)

<sup>73</sup> Phil Fennell, ‘Institutionalising the Community: The Codification of Clinical Authority and the Limits of Rights-Based Approaches’ in B McSherry and P Weller (eds) *Rethinking Rights Based Mental Health Laws* (Hart 2010) 14

<sup>74</sup> Colin Barnes, ‘Institutional Discrimination Against Disabled People A Case For Legislation’ <http://www.leeds.ac.uk/disability-studies/archiveuk/Barnes/bcodp.pdf> accessed 26 September 2011

<sup>75</sup> Colin Barnes, *Disabled People in Britain and Discrimination* (Hurst 1994) 2

<sup>76</sup> Samuel Bagenstos, *Law and the Contradictions of the Disability Movement* (Yale University Press 2008) 19

<sup>77</sup> Peter Beresford, Mary Nettle and Rebecca Perring, *Towards a Social Model of Madness and Distress: Exploring What Service Users Say* (Joseph Rowntree Foundation 2010) 14 [www.jrf.org.uk](http://www.jrf.org.uk) accessed 1 July 2011; Eleanor L Higgins and others, ‘Stages of Acceptance of a Learning Disability: the Impact of Labeling’ (2002) 25 *Learning Disability Quarterly* 3, 7

<sup>78</sup> Bruce G Link and Jo C Phelan ‘Conceptualizing Stigma’ (2001) 27 *Annu. Rev. Sociol.* 363, 367

<sup>79</sup> Erving Goffman, *Stigma: Notes on the Management of a Spoiled Identity* (Penguin 1990) 5 although see Margaret Price, ‘Defining Mental Disability’ in Lennard J Davis, (ed) *The Disability Studies Reader* (Routledge, 2016) 304 who argues that behaviour may make “psychosocial disabilities manifest”

<sup>80</sup> Peter Beresford, Chris Harrison and Anne Wilson, ‘Mental Health Service Users and Disability: Implications for Future Strategies’ (2002) 30 *Policy & Politics* 387

<sup>81</sup> Samuel Bagenstos, *Law and the Contradictions of the Disability Movement* (Yale University Press 2008)

<sup>82</sup> Helen Lester and Jonathan Q Tritten, “Listen to my Madness”: Understanding the Experiences of People with Serious Mental Illness’ (2005) 27 *Sociology of Health & Illness* 649, 650

cultural, and political context'.<sup>83</sup> Disabled people are objectified and viewed as problematic, dependent and needing to be perfected ("cured") or cared for. Thus, society responds to disabled people at an individual level via professionals or experts.

The 'power situation'<sup>84</sup> that permits stereotyping, labelling and separation thereby posing a significant barrier to disability equality can be illustrated by examination of the role of medical professionals whose expertise has a privileged position 'in the public imagination'.<sup>85</sup> The construction of disability, under the medical model is founded on assumed categories. Important to this categorisation is diagnosis made by medical professionals. Medical discourse or 'institutionalised medical language'<sup>86</sup> relating to mental impairment that permits the ready construction of risk is found in the Mental Health Act 1983 (MHA 1983). This allows registered medical practitioners to detain patients i.e. people diagnosed as suffering from mental disorder<sup>87</sup> for assessment<sup>88</sup> or treatment<sup>89</sup> on the basis that it 'is necessary for the health or safety of the patient or for the protection of other persons'.<sup>90</sup> Furthermore, negative labels deriving from long since repealed mental health legislation<sup>91</sup> are perpetuated in the media and popular culture that portray stereotypically dangerous killers and their mental impairments, both factual (despite the rarity of such attacks)<sup>92</sup> and fictional.<sup>93</sup>

Thus, the medical profession and its practice provide a discourse 'so pervasive that for many people, the only way to understand disability is as a problem of the individual'.<sup>94</sup> The medical model is 'so strongly ingrained in society that it would be difficult to change... perceptions'<sup>95</sup> of disabled persons, their families and the

---

<sup>83</sup> Beverley Clough, "'People Like That": Realising the Social Model in Mental Capacity Jurisprudence' (2014) 23 *Med.L.Rev* 53, 56

<sup>84</sup> Bruce G Link and Jo C Phelan, 'Conceptualizing Stigma' (2001) 27 *Annu. Rev. Sociol.* 363, 367

<sup>85</sup> Bryan S Turner, *Medical Power and Social Knowledge* (Sage 1995) 47

<sup>86</sup> Beverley Clough, "'People Like That": Realising the Social Model in Mental Capacity Jurisprudence' (2014) 23 *Med.L.Rev* 53, 56

<sup>87</sup> MHA 1983, s 2(2)(a) and 3(2)(a)

<sup>88</sup> MHA 1983, s 2

<sup>89</sup> MHA 1983, s 3

<sup>90</sup> MHA 1983, ss 2 and 3

<sup>91</sup> Vagrancy Act 1714 allowed the arrest of any person 'furiously mad and dangerous' and their detention "for the duration of their the 'lunacy or madness' Peter Bartlett, *The Poor Law of Lunacy: The Administration of Pauper Lunatics in Mid-nineteenth Century* (Leicester University Press 1999) 35

<sup>92</sup> Peter Beresford, Chris Harrison and Anne Wilson, 'Mental Health Service Users and Disability: Implications for Future Strategies' (2002) 30 *Policy & Politics* 387, 391

<sup>93</sup> Otto Wahl, *Media Madness* (Rutgers University Press 1995); Ben Hannigan, 'Mental Health Care in the Community: An Analysis of Contemporary Public Attitudes Towards, and Public Representations of, Mental Illness' (1999) 8 *Journal of Mental Health* 431

<sup>94</sup> Sara Goering, 'Revisiting the Relevance of the Social Model of Disability' (2010) 10 (1) *The American Journal of Bioethics* 54, 54

<sup>95</sup> Peter Beresford, Mary Nettle and Rebecca Perring, *Towards a Social Model of Madness and Distress: Exploring What Service Users Say* (Joseph Rowntree Foundation 2010) [www.jrf.org.uk](http://www.jrf.org.uk) accessed 1 July 2011

professionals involved in their lives.<sup>96</sup> Thus, the embedded and dominant nature of this medically-based discourse perpetuates attitudinal barriers to disability equality. Such discourse reflects a medical model understanding of disability.

It is not the purpose of this thesis to examine in-depth examples of such discourse or to evaluate their relative contributions to stereotyping. It is accepted as given that these stereotypes are entrenched and pervasive with people with mental impairments being viewed as “risky” and “others”. What is of interest is how stereotyping and medically-based discourse may have affected officers’ constructions of perpetrators.

Additionally, officers work with other professionals whose provenance is observed by Oliver:

The medical profession because of its power and dominance, has spawned a whole range of pseudo-professions in its own image; each one geared to the same aim - the restoration of normality.<sup>97</sup>

These may be described as medico-welfare professionals<sup>98</sup> and that term is used in this thesis to include such health professionals including community psychiatric nurses and social workers. These medico-welfare professionals may be employed by agencies who work in partnership with social landlords in the control of ASB.<sup>99</sup> Officers’ interactions with such professionals may cause them frustration, affect their view of their own role and affect their understandings of and attitudes towards disability.

---

<sup>96</sup> Peter Beresford, Mary Nettle and Rebecca Perring, *Towards a Social Model of Madness and Distress: Exploring What Service Users Say* (Joseph Rowntree Foundation 2010) [www.jrf.org.uk](http://www.jrf.org.uk) accessed 1 July 2011

<sup>97</sup> Mike Oliver, *The Individual and Social Models of Disability* (Joint Workshop of the Living Options Group and the Research Unit of the Royal College of Physicians, London July 1990) 5 <http://disability-studies.leeds.ac.uk/files/library/Oliver-in-soc-dis.pdf> accessed 20 February 2017; 2.3.4

<sup>98</sup> N Cobb 'Patronising the Mentally Disordered? Landlords and the Control of Anti-social Behaviour under the Disability Discrimination Act 1995' (2006) 26 LS 238, 251

<sup>99</sup> 1.2.1

## **The Role and Aims of the Social Model**

There is significant debate within disability scholarship as to the meaning of the social model<sup>100</sup> but there is core consensus that it aims to create a non-disablist society<sup>101</sup> and remove barriers to disability equality. It can be utilised to resist negative attitudes which contribute to the construction of disabled people as risky subjects and therefore to discrimination and inequality. The social model allows for better resistance of such stereotyping particularly because professional medical discourses show disagreement on categorisation.<sup>102</sup> Indeed, one criticism of the diagnostic classification of mental health issues is the greater amount of subjectivity in diagnosis in contrast with physical impairments.<sup>103</sup>

The removal of barriers in the built environment seems an obvious solution to people with physical impairments. Yet the built environment can also be adjusted to enable relevant perpetrators to maintain their tenancies: e.g., improved sound insulation can minimise complaints against a perpetrator whose mental or hearing impairment causes them to create noise nuisance.<sup>104</sup> Similarly, the provision of support may enable relevant perpetrators to maintain their tenancies.<sup>105</sup> Advocates of the social model argue that disabled people must be involved in all stages of decision-making including the removal of barriers; failure to do so would be disabling. Effective support of relevant perpetrators would be negotiated with them recognising their needs and wishes. Thus:

A social model of mental health focuses on a person's needs rather than their diagnosis and takes account of social and practical support alongside biomedical interventions. Such an approach is not simply about the rejection of medically-

---

<sup>100</sup> Tom Shakespeare, *Disability Identity and Difference* in Colin Barnes and Geoff Mercer (eds) *Exploring the Divide* (The Disability Press, 1996)

<sup>101</sup> Mike Oliver, *The Politics of Disablement* (MacMillan 1990) in Raymond Lang, 'The Development and Critique of the Social Model of Disability' (Leonard Cheshire Disability and Inclusive Development Centre, London 2007)16 [http://www.ucl.ac.uk/lc-ccr/lccstaff/raymond-lang/DEVELOPMENT\\_AND\\_CRITIQUE\\_OF\\_the\\_SOCIAL\\_MODEL\\_OF\\_D.pdf](http://www.ucl.ac.uk/lc-ccr/lccstaff/raymond-lang/DEVELOPMENT_AND_CRITIQUE_OF_the_SOCIAL_MODEL_OF_D.pdf) accessed 8 November 2017

<sup>102</sup> Samuel Bagenstos, *Law and the Contradictions of the Disability Movement* (Yale University Press 2008) 26

<sup>103</sup> Anna Chur-Hansen and Damon Parker, 'Is Psychiatry an Art or a Science? The Views of Psychiatrists and Trainees' (2005) 13 *Australas Psychiatry* 415

<sup>104</sup> 2.3.7.1

<sup>105</sup> 1.2.3.5; 2.3.7.1

based interventions. Instead, it is about bringing together all the various support on offer, so that people are empowered to help themselves.<sup>106</sup>

Vital to the effective operation of support therefore are the attitudes of the professionals involved and their willingness to *listen to* the disabled person. Negative attitudes and constructions of perpetrators informed by risk and morality combined with the wider risk discourse of ASB may affect the decision-making of officers who have wide discretion in this regard. This may be particularly evident where officers draw distinctions between impairment groupings. Given the dominant medically-based discourse, their differentiation may have a medical rationale. It may also be informed by morality and related notions of welfare conditionality which draws a binary distinction between those deserving social housing and social inclusion as opposed to those who do not.

## **The Social Model and the Law**

Much anti-discrimination legislation seeks to achieve symmetry<sup>107</sup> through equal treatment, i.e. formal equality.

Traditional anti-discrimination law requires disadvantage connected to a protected characteristic (disability, race, gender etc.) to be demonstrated by using a comparison between the protected individual as opposed to others not having that characteristic in the same or similar circumstances. Discrimination is presumed to arise where there is a difference in treatment between the two groups, and it is predicated on the assumption that the treatment between the two groups should be the same if discrimination has not occurred.<sup>108</sup>

---

<sup>106</sup> V Williams and P Heslop, 'Mental Health Support Needs of People with a Learning Difficulty: a Medical or a Social Model?' (2005) 20 *Disability and Society* 231

<sup>107</sup> Michael Connolly, *Discrimination Law* (2nd edn, Sweet & Maxwell 2011) 387

<sup>108</sup> Equality and Human Rights Commission, *An Effective Approach to Disability Discrimination in the Equality Bill* (EHRC 2009) <https://www.equalityhumanrights.com/en> accessed 25 May 2010

This anti-discriminatory approach, that it is not acceptable to treat certain individuals less favourably than others,<sup>109</sup> provides arguments to counter direct and indirect discrimination, treating someone less favourably both intentionally and unintentionally.

While the EA 2010 prohibits direct and indirect discrimination respectively under sections 13 and 19, consistency with the social model requires legislators provide specific protection from discrimination arising from disability for disabled people i.e. for the consequences of their impairments and via rights to different treatment afforded by reasonable adjustments (e.g. sound insulation and support). The EA 2010 provides such protection in section 15 and sections 20 and 21 respectively and further positive rights are bestowed through the Public Sector Equality Duty (PSED) under section 149. These rights may be asserted to provide equality of opportunity thereby removing barriers to equality. However, despite the hopes of the disability rights movement,<sup>110</sup> the potential to achieve the social model objective of disability equality is limited by the drafting of this and other relevant legislation.<sup>111</sup>

Logically, analysis of legal arguments about disability or the consistency of equality law with the models of disability must begin with examination of the definition of disability. Like the DDA 1995, the EA 2010 while premised on the social model<sup>112</sup> adopts a medical model definition that a person has a disability if they have 'a physical or mental impairment'.<sup>113</sup> 'Mental impairment' is not further defined but has been interpreted to include both mental health issues and learning difficulties as noted above.<sup>114</sup> A further *conceptual* problem with the definition is that some impairments are not always equally situated with others. This is given legislative footing by the requirement that an 'impairment has a *substantial* and *long-term* adverse effect on P's ability to carry out normal day-to-day activities'.<sup>115</sup> A focus on 'substantial' (a catchall meaning more than trivial)<sup>116</sup> is incompatible with a social model approach.<sup>117</sup> 'Long-

---

<sup>109</sup> Sarah Fraser Butlin, 'The UN Convention on the Rights of Persons with Disabilities: does the Equality Act 2010 Measure up to UK International Commitments?' (2011) ILJ 428

<sup>110</sup> A Wilson and Peter Beresford, 'Madness, Distress and Postmodernity: Putting the Record Straight', in M Corker and T Shakespeare (eds) *Disability/Postmodernity: Embodying Disability Theory* (Continuum NY 2002)

<sup>111</sup> Civil Evidence Act 1972; 3.2.1.1

<sup>112</sup> Disability Rights Commission, *The Disability Equality Duty: Guidance on Gathering and Analysing Evidence to Inform Action* (DRC 2006) 13

<sup>113</sup> EA 2010, s 6(1)(a)

<sup>114</sup> Page 25

<sup>115</sup> EA 2010, s 6(1)(b)

<sup>116</sup> EA 2010 sch 1 para 2(1)

<sup>117</sup> Sarah Fraser Butlin, 'The UN Convention on the Rights of Persons with Disabilities: does the Equality Act 2010 Measure up to UK International Commitments?' (2011) ILJ 428

term' further accentuates this incompatibility being defined as having 'lasted for at least 12 months'.<sup>118</sup>

Medically-based drafting and qualifications<sup>119</sup> to the definition of disability common to both the DDA 1995 and the EA 2010 are capable of restrictive interpretation. However, 'substantial' has been interpreted generously in employment law. There is no 'sliding scale' between 'trivial' or 'insubstantial'. Therefore, unless a matter can be classified as under the former, it must be treated as the latter.<sup>120</sup> For a person with mental health issues, the fact they can carry out normal day-to-day activities in one aspect of their lives does not mean the impairment does not affect them substantially in other aspects of their lives.<sup>121</sup> In *Goodwin v Patent Office*,<sup>122</sup> Goodwin's paranoid schizophrenia caused him to have auditory hallucinations and consequently he believed others could 'access his thoughts and he misinterpreted the words and actions of colleagues'<sup>123</sup> and frequently left his office. Goodwin brought a claim for disability discrimination when his employer ended his employment because of this behaviour. The Employment Appeal Tribunal held his dismissal from employment to be discriminatory. The employer's argument that Goodwin's ability to carry out domestic chores at home without assistance was held to be irrelevant as to whether he was impaired.<sup>124</sup>

The EA 2010, and its predecessor, the DDA 1995, could be viewed as taking a minority rights approach, described as the American social model.<sup>125</sup> By analogy with the protection of racial minorities, this takes the view that policies provide disabled people with the best protection from negative attitudes and discrimination.'<sup>126</sup> This can be achieved through policies conferring equal rights and / or positive accommodations. One shortcoming of this approach flows from its failure to recognise that disabled people have such widely varying impairments that they lack common experience. Relatedly, the social restructuring such policy seeks to achieve requires identification

---

<sup>118</sup> EA 2010, sch 1, para 2(1)(a)

<sup>119</sup> 3.4.1

<sup>120</sup> *Aderemi v London and South Eastern Railway Ltd* (2012) UKEAT/0316/12/KN, [2013] ICR 591 at [14]

<sup>121</sup> Michael Connolly, *Discrimination Law* (2<sup>nd</sup> edn, Sweet and Maxwell 2011) 401

<sup>122</sup> *Goodwin v Patent Office* [1999] ICR 302, 302

<sup>123</sup> *Goodwin v Patent Office* [1999] ICR 302

<sup>124</sup> *Goodwin v Patent Office* [1999] ICR 302, 310

<sup>125</sup> Tom Shakespeare, *Disability Identity and Difference* in Colin Barnes and Geoff Mercer (eds) *Exploring the Divide* (The Disability Press, 1996)

<sup>126</sup> Jerome E Bickenbach and others, 'Models of Disablement, Universalism and the ICIDH' (1999) 48 *Social Science and Medicine* 1173

with a minority group. Thus, an individual must identify<sup>127</sup> as part of this group by having a physical or mental impairment (and not a condition excluded from the legislation). In order to assert their rights individuals must demonstrate eligibility for membership of this minority group by the production and disclosure of evidence. Being forced to demonstrate the existence of an impairment prevents policy protecting those who do not identify or are unwilling to disclose an impairment and therefore may be discriminated against. Discrimination may also arise where officials implementing policy do not recognise certain categories of impairment.<sup>128</sup> Such officials, including housing officers and the judiciary may 'vigorously polic[e] the line between those who are in and those who are out of the protected class'.<sup>129</sup> This policing fails to recognise that disability is a 'complex relationship between impairment and social environment'<sup>130</sup> Concentrating on the eligibility of the individual, it can encourage a medical model understanding of disabled people that focusses on the individual and their impairments. This focus on the individual supports Oliver's argument that there are only two models, social and individual;<sup>131</sup> domestic legislation as presently drafted falls within the latter.

A shift from this individualised focus depends in part on the framing of policies.

The **Universalist (Social) Model** has more potential in this regard. This model positions differences in abilities on a continuum, therefore disability may be constructed as fluid, continuous, and contextual<sup>132</sup> rather than the fixed sense created by the medical and minority rights models. The United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) provides a more Universalist definition of disability,

---

<sup>127</sup> Tom Shakespeare, *Disability Identity and Difference* in Colin Barnes and Geoff Mercer (eds) *Exploring the Divide* (The Disability Press, 1996)

<sup>128</sup> Samuel Bagenstos, *Law and the Contradictions of the Disability Movement* (Yale University Press 2008) 26

<sup>129</sup> Samuel Bagenstos, *Law and the Contradictions of the Disability Movement* (Yale University Press 2008) 46

<sup>130</sup> D Hosking, 'A High Bar for EU Disability Rights' (2007) 36 ILJ 228, 237; 2.3.3 - C-356/12 *Wolfgang Glatzel v Freistaat Bayern* Judgement of 22 May 2014

<sup>131</sup> Mike Oliver, 'The Social Model in Action: If I had a Hammer' in Colin Barnes and Geoff Mercer (eds), *Implementing the Social Model of Disability: Theory and Research* (The Disability Press 2004) 18, 19

<sup>132</sup> Jerome E Bickenbach and others, 'Models of Disablement, Universalism and the ICIDH' (1999) 48 *Social Science and Medicine* 1173; Bruce H Gross and Harlan Hahn, 'Developing Issues in the Classification of Mental and Physical Disabilities' (2004) 15 *Journal of Disability Policy Studies* 130



...an evolving concept... result[ing] from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others.<sup>133</sup>

By widening the range of “normal”, Universalist approaches permit a more inclusive understanding of disability: looking for common features of humanity and their vulnerability to disability e.g. by emphasis that people are susceptible to loss of capacity and dependence at any stage of life.<sup>134</sup> Such definitions avoid the necessity of identifying special needs that require special legislation, agencies and experts. Consequent upon the definition, Universalist disability policy aims to provide environments and tools suitable for all rather than a minority group.<sup>135</sup>

Important to the success of these arguments is not only the legislative framework but also the shift in attitudes it may effect. This otherwise potentially slow process may gain momentum where there are additional efforts to effect a change in the discourse of those professionals operating this and related policy. Such a shift may be effected by training and this would be necessitated by a change in policy.

## **The Concept of Risk in this Thesis**

This section aims to provide an overview of the concept of risk as used in this thesis.

This thesis notes that the issue of risk is pervasive in ASB discourse<sup>136</sup> but is far more concerned with empirical evidence of officers’ constructions of individuals and situations as risky, the effect of policy on this and the consequences for case-management and its outcomes.

It has already been suggested that present and past mental health legislation has contributed to the stereotyping of people with mental impairments as risky subjects.

---

<sup>133</sup> UNCRPD preamble at e) <http://www.un.org/disabilities/convention/conventionfull.shtml> accessed 30 November 2015

<sup>134</sup> Jerome E Bickenbach and others, ‘Models of Disablement, Universalism and the ICIDH’ (1999) 48 *Social Science and Medicine* 1173

<sup>135</sup> Jerome E Bickenbach and others, ‘Models of Disablement, Universalism and the ICIDH’ (1999) 48 *Social Science and Medicine* 1173,1182

<sup>136</sup> Chapter 1

This relies on the role of discourse and relates to the social construction of perpetrators in policy and social landlords' practice.

Adams points out several stages in social actors' understandings of how situations are constructed as risky and those of relevance to this thesis are: identification, assessment, and management.<sup>137</sup> Thus, officers may identify individual situations of ASB and perpetrators as risky. They may then assess the impact of ASB on individuals as victims. Case-management of ASB and the risks it poses involves officers assessing how perpetrators can mitigate the risks their behaviour poses to others, by engaging with interventions. The link between risk and responsibility is considered in the next chapter. Additionally, Hillman and others note the existence of 'secondary' risks including litigation and reputational risk.<sup>138</sup> While these relate to the 'pervasive and major concern' of risk in society, i.e. risk at a theoretical level, this thesis is concerned with the manifestation of risk and responses to it via policy and accountability in practice. These policies and practices affect officers and their understanding of risk in their day-to-day ASB case-management. The relationship between risk and accountability as well as risk and responsibility and knowledge are considered in the next three chapters.

It will be argued that risk assessment instruments may make the process of risk assessment calculable, yet analysis of the empirical data shows officers identify risks much more widely.<sup>139</sup> While this may mean their understanding of risk is subjective, the thematic analysis of the data permitted common experiences to be discerned. These can be explained by the pressures policy imposes upon officers to control ASB and the nature of their professional role which forces their reliance on "common-sense."

---

<sup>137</sup> Trevor Adams, 'The Social Construction of Risk by Community Psychiatric Nurses and Family Carers for People with Dementia' (2001) 3 *Health, Risk & Society* 307, 308

<sup>138</sup> Alexandra Hillman and others, 'Risk, Governance and the Experience of Care' (2013) 35 *Sociology of Health & Illness* 939, 949

<sup>139</sup> Chapter 6

## **Structure of the Thesis**

The first three chapters review the conflicting ASB and disability policies and related literature including that on housing professionalism, highlighting the surrounding discourses. The purpose of this review is to hypothesise how officers may construct their role, risk and perpetrators and consequently make decisions in the management of ASB. These hypotheses are summarised in boxes throughout these chapters. The methodology for testing these hypotheses is justified in Chapter 4 and the data is analysed to test these hypotheses in Chapters 5 and 6.

The detail of the argument is as follows:

**Chapter 1** sets out the policy background of ASB. It positions the crossroads of inclusionary and exclusionary housing policies at the heart of the thesis in a landscape of risk. To this end, it outlines the reasons for the concentration of disabled and possibly risky people in this residualised tenure and this is related to how relevant perpetrators are constructed in policy and housing practice and which model this is constructed within. The objective of ASB policy, i.e. the control of such behaviour, to resist the moral decline of perpetrator occupants and therefore further residualisation of social housing is explained to link the moral discourse of social housing policy and practice to the mitigation of risk.

The various interventions used in the control of the broadly defined ASB and resistance of its attendant risks are outlined, and their exclusionary implications noted. The outline illustrates both the breadth of the perceived problem of ASB and the consequent degree of responsibility placed upon social landlords while illuminating the conditionality of these control measures with their aim of responsabilising perpetrators.

Housing management literature is selectively reviewed to theorise how officers may construct their roles in relation to ASB, policy and perpetrators at an individual level, being affected by their experiences of their work and professional identity and views of other professionals and their roles in this context. Officers' professional identity and that of relevant perpetrators are considered vis-à-vis the responsabilising aim of ASB

policy. This again illuminates the difficulties of operationalising ASB policy at a conflicted policy juncture.

It is argued that while officers' professional identity may be weak, their awareness of their responsibility and accountability in controlling ASB and its risks are strong. Consequently, officers search for knowledge or evidence about perpetrators with a view to assessing the prospects of successful outcomes. The chapter concludes by hypothesising how officers may choose interventions for perpetrators they know or suspect to have mental impairments.

Having established the risk focus of ASB and its control, **Chapters 2 and 3** analyse policy especially on disability used to challenge ASB control. The particular focus of these chapters on the models of disability are pertinent to answering how relevant perpetrators are constructed in policy, housing practice and outcomes and which model this is constructed within. Both also consider how risk may influence officers in their day-to-day decision-making.

**Chapter 2** begins with an overview of the various challenges perpetrators may raise in ASB proceedings focussing on those relating to disability. As these challenges threaten to undermine ASB control, it assesses their prospects of success. A purposive sample of case-law is qualitatively analysed to highlight the focus of the law on the containment of ASB and its risks. This containment is affected by a narrow, medical construction of disability via arguments of reasonableness, proportionality and comparators. The PSED and reasonable adjustments are assessed as they afford alternative interventions in ASB control yet there have been no relevant successes for the former and the latter legislation is technically complex.

Thus, it is concluded that these challenges are weak in terms of resisting ASB control. However, while this finding may strengthen the landlords' position, the chapter hypothesises how litigation risk, and therefore accountability may impact on officers' views of the challenges. The very fact that their operation of formal ASB control may be countered may be perceived as risky per se. Additionally, it notes how the focus

on risk has potential to affect both officers' constructions of perpetrators and consequently their approach to case-management.

Case-law is again purposively sampled and analysed in **Chapter 3** to demonstrate another way in which perpetrators' arguments may be undermined. This analysis shows how *evidence* of disability is construed very narrowly. It is considered possible that there may be similarities between officers' and judicial discourse in this narrow construction which permits assessment of evidence based on morality, specifically moral agency and individual moral responsibility. Analysis of judicial discourse reveals a particularly narrow construction where perpetrators have misused substances or manipulated welfare. Additionally, the severance of causal links between impairment and behaviour suggest a medical model understanding of disability that lends itself to moralisation. Thus, judicial discourse is used to hypothesise how the presence or absence of evidence of disability may affect officers' constructions of perpetrators and, consequently, their decision-making.

**Chapter 4** explains how the hypotheses raised in the first three chapters will be tested empirically. That officers are street-level bureaucrats and their attitudes to and understandings of disability are to be uncovered justifies the epistemological approach i.e. social constructionism. This, in turn, demands a qualitative methodology. Thus, the research stages and development of research questions, instrumentation and piloting of the same are explained to emphasise the trustworthiness of the data generated. The purposive and convenience sampling of four social landlords in the North of England is justified and the informed consent and assurance of confidentiality in their recruitment is described. The negotiation and maintenance of access to their policies and sampled perpetrator case files and the subsequent participation of their staff in interviews and focus groups is explained.<sup>140</sup> The influence of my experience as a solicitor is addressed in relation to reflexivity. The coding of data and choice of thematic analysis is explicated to illuminate how the findings were generated.

---

<sup>140</sup> NB a summary of the narrative of perpetrators' cases appears in Appendix 10; a further summary of the cases and their outcomes appears at Table 5.3 positioned between Chapters 5 and 6.

**Chapter 5** presents the findings to illustrate the approach officers take to case-management. In so doing it considers how relevant perpetrators are constructed in social landlords' ASB management practice and whether this is best understood as sitting within a medical or social model of disability. It argues that front-line officers' management of ASB cases progresses reflectively rather than linearly, mirroring both the ongoing (in some cases contractual) relationships between social landlords and occupants, both perpetrators and complainants. Officers' emotional responses to case-management are noted including the frustration they feel in gathering robust evidence (which results from poor organisational record-keeping and rare disclosure of disability.) They consider other medico-welfare professionals as better suited to the provision of such evidence but may find these colleagues disappointingly obstructive in the hunt for evidence. Officers fill this evidential gap with guesswork based on training, observations, "common-sense", professional intuition and folk psychiatry suggesting use of a **medical lens**. This means that officers have a medically based understanding of behaviour i.e. they use the medical model to construct relevant perpetrators and their ASB. Furthermore, officer's faith in their "common-sense" means that the medical lens is even employed in the rare instances when diagnoses of perpetrators' mental impairments are disclosed.

Such weighing of evidence of disability also suggests a distinct moral discourse illuminating how the perpetrator is also constructed via a **moral filter** which permits a judgement of their disability and behaviour. Thus, via medical lens and moral filter there is a keen individualised focus on the perpetrator suggesting that the medical model dominates officers' understanding of perpetrators.

**Chapter 6** turns the spotlight from the construction of the objects of policy and practice to the outcomes while considering how housing professionalism and officers' constructions of risk and perpetrators affect these. The findings show that no matter what local policy may encourage focus upon, officers construct the risks of ASB as many and varying beyond those envisaged in Chapters 1-3. Whilst in some cases officers view the ASB complained of to be trivial, because of risk, they often consider the behaviour of both perpetrators and complainants sometimes seeing their roles as reversed. Being aware that ASB may be caused by mental impairments and even in

the absence of knowledge, again because of risk, officers typically offer reasonable adjustments (principally support) to reduce or stop the ASB. However, they expect perpetrators to engage with these adjustments thus welfare conditionality extends to their provision. Furthermore, perpetrators' responses to such offers and the latitude social landlords permit to their engagement affect and are affected by officers' constructions of perpetrators via the medical lens and moral filter, in turn informed by the assumption as per the literature<sup>141</sup> that the role of social housing *in this context* is to control ASB via responsabilisation. However, officers' emotional responses led to favourable constructions of some perpetrators *also* affecting their assessments of the ASB and its risks that may lead them to attempt more solutions with these perpetrators, paradoxically prolonging the risks to neighbours. Finally, the shaping of officers' constructions at an organisational level is considered in relation to accountability and the risks of litigating which are affected by misunderstandings of law (folk law). The implications for case-management are concluded upon. The overall **Conclusion** ties together the themes and arguments of the thesis and suggest future directions for policy, practice and research.

---

<sup>141</sup> 1.2.5

# CHAPTER 1

# Social Housing, Antisocial Behaviour, Responsibility and Risk

## Contents

<b>Introduction</b>	<b>49</b>
<b>1.1 Social Housing: a History of Decline</b>	<b>51</b>
1.1.1 Social Housing: an Overview of the Tenure and Access to it	51
1.1.2 Residualisation ASB and the Discourse of Risk	56
<b>1.2 ASB Controls: Conditionality, Responsibilisation and Identity</b>	<b>61</b>
1.2.1 Responsibilisation and the Governance of ASB	61
1.2.2 The Broad and Common-sense Definition of ASB	63
1.2.3 Interventions Used in ASB Control	67
1.2.4 Housing Officers and Governance: the Effects of an Uncertain Professional Identity	76
1.2.5 Occupants and Self-Regulation	80
<b>1.3 Risk</b>	<b>84</b>
1.3.1 The Social Construction of Risk in ASB	84
1.3.2 Risk and Accountability	87
1.3.3 Risk, Knowledge and Governance	91
<b>Conclusion</b>	<b>94</b>



## **Introduction**

This chapter provides an interdisciplinary review of literature that aims to illustrate how ASB and risk are constructed in policy relating to social housing. It relates to the research questions concerning: how relevant perpetrators are constructed in policy; how officers' constructions of risk, perpetrators and their professional role affect their decision-making and thereby social landlords' ASB management practice and its outcomes. While practice is focused on in chapters 5 and 6, the potential for policy to shape housing professionals' understandings of these issues is examined here. Managing ASB by exclusionary means while housing and therefore socially including many of its perpetrators reflects the conflicted policy intersection at the heart of this thesis. To this end, the chapter argues that in controlling ASB, risk and relatedly responsibility may affect officers' constructions of perpetrators and therefore their choices of ASB interventions.

The overview and analysis will proceed in three sections: A review of relevant literature and policy is provided to reveal the role of social housing as relevant to this thesis. Alternative means of accessing social housing are outlined to emphasise the conflicted position of social landlords as providers of housing to vulnerable people. This also explains the current occupant profile of the tenure and its' disproportionately high concentration of risky inhabitants. The models of disability are employed here to consider how these occupants may be viewed by housing officers. That both these occupants and the residualised tenure may be considered risky, aids an understanding of responses to ASB in policy and practice and the surrounding discourse.

The second part of the chapter relates the broad definition of ASB to the interventions that may be employed in its control and the uncertain identity of housing professionals. It commences by mapping the policy framework of ASB by reference to various individual interventions. This outline serves as a reference point for discussion of these interventions in later chapters. Presently, however, it is intended to illustrate both the perceived scale of ASB and its risks and the corresponding amount of responsibility placed upon social landlords to control them. This mapping is followed by an examination of the discourse of welfare conditionality and responsabilisation of

perpetrators that surrounds and shapes ASB policy in general and affects the interventions in particular. Additionally, the vague definitions of ASB in policy are explicated because this may both influence the discretion of officers as social actors employing these interventions and their ensuing discourse. It is argued that the meaning officers give to policy and its objects, both ASB and perpetrators, is shaped at an individual level by their experiences of practice. These experiences thus affect how officers socially construct their professional identity and that of other professionals working in the field. Housing management literature is therefore reviewed to illustrate the effect officers' constructions of their *role* might have on their constructions of ASB, policy and perpetrators. It is hypothesised that the pressure of responsibility that ASB policy imposes directly on officers combined with uncertain boundaries in their professional roles may, in particular, affect their decision-making. However, the responsibilisation of perpetrators in their self-regulation of ASB is problematic and may affect officers' constructions of them.

The final part of the chapter links the concept of risk and its identification and assessment to its management in ASB cases. This is related to the search for evidence (knowledge) and accountability via the prospect of litigation. As this spectre looms, the need to gather evidence about perpetrators is thrown into sharp relief. Given problems with disclosure of perpetrators' impairments<sup>1</sup> and problems surrounding confidentiality, this arguably leads to officers' guesswork and the construction of the risky subject. The chapter concludes hypothesising by rationale employed in alternative case-management strategies of these potentially risky subjects vis-à-vis the models.

Overall, ASB discourse reveals a social construction of objects and outcomes of ASB management via a policy framework that aims to minimise its attendant risks by engendering responsibility in both perpetrators and social landlords. For perpetrators, responsibility may be constructed as having a moral foundation that may be evident in officers' day-to-day discourse. Issues and hypotheses raised throughout this and the next three chapters are highlighted in boxes. In the empirical chapters (5 and 6), these issues and hypotheses will be analysed in relation to the data.

---

<sup>1</sup> 3.1.1; 3.3.1

## **1.1 Social Housing, Risk and ASB**

This section will provide an overview of social housing, focusing on its recent decline in size and popularity which relates to its residualisation an important influence on ASB policy. While officers' constructions of this role and their agency in relation to it will be returned to later,<sup>2</sup> presently, it is argued that officers may construct the tenure (especially given the effect ASB has on it) and its occupants as risky and this may affect their decision-making. Additionally, it is submitted that as policy accords priority to vulnerable and disabled people accessing the tenure, this may shape housing officers' understanding which may be conceptualised via either model of disability and this may consequently affect housing practice.

### **1.1.1 Social Housing: an Overview of the Tenure and Access to it**

Social housing as a residualised tenure accommodates occupants who may be considered risky, yet their routes of access to the tenure may relate to disability.

Historically, the state via local government and to a lesser extent housing associations with their charitable basis have provided housing. By 1981, social housing provision peaked at over 30% of total UK housing stock.<sup>3</sup> Today the total available stock has shrunk. Social housing accounts for 17% of the housing stock (4 million units of accommodation) in England:<sup>4</sup> 10% provided by housing associations and 7% provided by local authorities. The reduction of the sector's size has resulted from deregulation and privatisation that commenced with the election of a Conservative government in 1979. Key legislation has permitted the transfer of housing stock into non-state ownership by facilitating the large scale voluntary transfer (LSVT) from local authority to private ownership<sup>5</sup> which explains why more social housing is now provided by PRPs. Stock transfer along with the Right to Buy<sup>6</sup> (RTB) for tenants have contributed

---

<sup>2</sup> 1.2.4

<sup>3</sup> David Robinson, 'Social Housing in England: Testing the Logics of Reform' (2013) *Urban Studies* 1489, 1491

<sup>4</sup> Ministry of Housing, Communities and Local Government, *English Housing Survey Headline Report, 2016-2017* (DCLG 2018) 24 [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/675942/2016-17\\_EHS\\_Headline\\_Report.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/675942/2016-17_EHS_Headline_Report.pdf) accessed 23 February 2017

<sup>5</sup> HA 1985, sch 3A; Housing and Planning Act 1986, s 6 and sch 1

<sup>6</sup> HA 1980

to the altered ratio between housing association and local authority provision in the statistics above and here in figure 1.1.

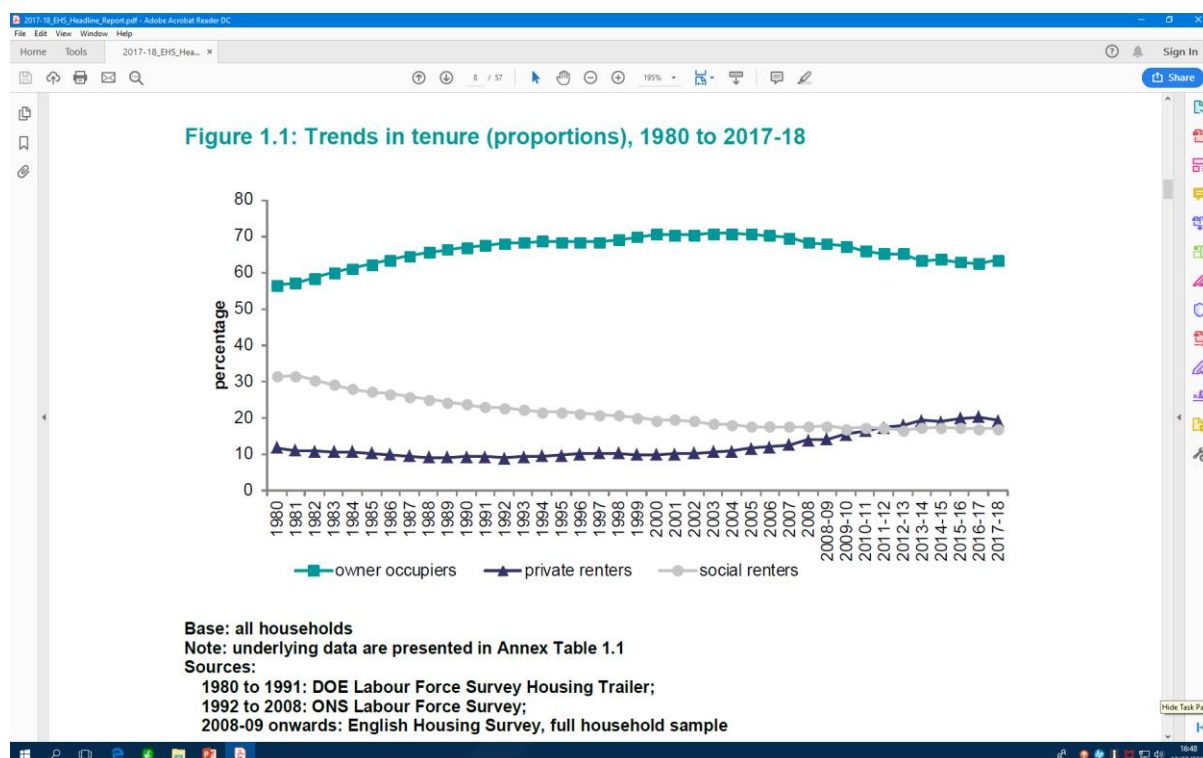


Figure 1.1 Trends across the three main tenures, 1980 - 2017-18<sup>7</sup>

The decline in state provision is considered to have markedly contributed to the residualisation of social housing, i.e. the 'long-term trend'<sup>8</sup> whereby public housing moves towards a position in which it becomes a 'less affluent tenure, catering disproportionately<sup>9</sup> for those in the poorest income groups<sup>10</sup> 'rather than the affluent working class'<sup>11</sup> i.e. people outside the labour market due e.g. to age or infirmity who cannot obtain suitable housing in the private sector, thereby providing only 'safety net'<sup>12</sup> accommodation.

<sup>7</sup> Ministry of Housing, Communities and Local Government, *English Housing Survey Headline Report, 2017-2018* (DCLG 2019)

<sup>8</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/675942/2017-18\\_EHS\\_Headline\\_Report.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/675942/2017-18_EHS_Headline_Report.pdf) accessed 12 February 2019

<sup>9</sup> Alan Murie, 'Linking Housing Changes to Crime' (1997) 31 *Social Policy & Administration* 22, 26

<sup>10</sup> Alan Murie, 'Linking Housing Changes to Crime' (1997) 31 *Social Policy & Administration* 22, 26

<sup>11</sup> Alan Murie, 'Linking Housing Changes to Crime' (1997) 31 *Social Policy & Administration* 22, 26

<sup>12</sup> Alan Murie, 'Linking Housing Changes to Crime' (1997) 31 *Social Policy & Administration* 22, 26

Poverty has thus increased amongst social housing tenants. The percentage of such tenants of working age in full-time employment fell from 67% in 1981 to 34% in 2006.<sup>13</sup> In the social housing sector in 2015-16, '21% of households were lone parent families and 72% of households were in the two lowest income quintile'<sup>14</sup> and 49% of households had at least one member with a long-term illness or disability.<sup>15</sup> There is a far higher percentage of households with a disabled member in social housing than in the owner-occupier and private-rented sectors (respectively 29% and 23%). These statistics are in part explained by the ageing demographic of the social housing sector,<sup>16</sup> (27% of whom are over sixty-five years compared with 8.1% of private renters)<sup>17</sup> but also by the legislation which rations access to a stock base much reduced as a result of privatisation.<sup>18</sup> This rationing is effected by according priority to disabled people and the legislative provisions derive from three sources, explained next:

### 1.1.1.1 Allocations

The Housing Act 1996 (HA 1996), pt VI requires housing authorities to have allocation schemes which must be framed to secure that *reasonable preference* is given to certain groups of people.<sup>19</sup> These include those who 'need to move for medical or welfare reasons (including grounds relating to a disability)'.<sup>20</sup> Disabled people are therefore likely to be afforded reasonable preference under a local authority's allocation scheme.

---

<sup>13</sup> John Hills, *Ends and Means: the Future Roles of Social Housing in England* CASE Report No. 34, (London School of Economics, 2007) in David Robinson, 'Social Housing in England: Testing the Logics of Reform' (2013) *Urban Studies* 1489, 1491

<sup>14</sup> DCLG, *English Housing Survey Social Rented Sector, 2015-2016* (DCLG, 2017) [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/632464/Social\\_rented\\_sector\\_report\\_2015-16.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/632464/Social_rented_sector_report_2015-16.pdf) accessed 28 September 2017

<sup>15</sup> DCLG, *English Housing Survey Social Rented Sector, 2015-2016* (DCLG, 2017) [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/632464/Social\\_rented\\_sector\\_report\\_2015-16.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/632464/Social_rented_sector_report_2015-16.pdf) accessed 28 September 2017

<sup>16</sup> DCLG, *English Housing Survey Social Rented Sector, 2015-2016* (DCLG, 2017) [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/632464/Social\\_rented\\_sector\\_report\\_2015-16.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/632464/Social_rented_sector_report_2015-16.pdf) accessed 28 September 2017

<sup>17</sup> <https://www.gov.uk/government/statistical-data-sets/social-and-private-renters#history> accessed 23 February 2018

<sup>18</sup> David Robinson, 'Social Housing in England: Testing the Logics of Reform' (2013) *Urban Studies* 1489, 1491

<sup>19</sup> HA 1996, s 166A (3)

<sup>20</sup> HA 1996, s 166A (3)(d)

### 1.1.1.2 Homelessness

HA 1996, pt VII requires local authorities to provide advice and assistance for persons applying to be housed as homeless. The duty to secure that accommodation is available<sup>21</sup> on other than an interim basis applies only to those applicants who can show *inter alia* that they are homeless,<sup>22</sup> not intentionally homeless<sup>23</sup> and in priority need.<sup>24</sup> Those in priority need include persons 'vulnerable as a result of old age, mental illness or handicap or physical disability or other special reason'.<sup>25</sup> The vague word 'vulnerable' has proved contentious and case-law reveals a restrictive judicial interpretation of vulnerability.<sup>26</sup>

As local authority stock has shrunk and that of housing associations increased, the former landlords have been able to discharge their statutory duties under HA 1996, pts VI and VII by nominations to the latter.<sup>27</sup> Nominations must be made in accordance with allocation schemes including the priorities given to those households entitled to reasonable preference.<sup>28</sup> Housing associations, who may have their own allocation procedure existing outside the regulation imposed by HA 1996, pt VI must 'co-operate to such extent as is reasonable in the circumstances in offering accommodation to people with priority under the authority's allocation scheme'.<sup>29</sup>

### 1.1.1.3 Community Care and De-institutionalisation

As a consequence of deinstitutionalisation in the twentieth century, particularly since the enactment of the National Health Service and Community Care Act 1990, there

---

<sup>21</sup> HA 1996, s 193(2)

<sup>22</sup> HA 1996, ss 175- 177

<sup>23</sup> HA 1996, s 191

<sup>24</sup> HA 1996, s 189

<sup>25</sup> HA 1996, s 189 (1)(c). Case-law is inconsistent where the applicant is a substance misuse (dual diagnosis with drugs): *Crossley v City of Westminster* [2006] EWCA Civ 140, [2006] All ER (D) 321 (Feb) cf *Simms v LB of Islington* [2008] EWCA Civ 1083, [2009] HLR 343

<sup>26</sup> *R v Waveney DC Ex p. Bowers* [1983] QB 238; *Osmani v Camden LBC* [2004] EWCA Civ 1706, [2004] All ER (D) 268 (Dec); *R v Camden LBC Ex p. Pereira* (1998) 31 HLR 317. While EA 2010 was employed in the formulation of a more generous test in *Hotak (Appellant) v LB of Southwark (Respondent) Kanu (Appellant) v LB of Southwark (Respondent) Johnson (Appellant) v Solihull MBC (Respondent)* [2015] UKSC 30, [2015] 2 WLR 1341 [78] subsequent developments illustrate a return to a restrictive approach: Jed Meers and Helen Taylor, 'Murky Waters: The Ongoing Evolution of Vulnerability under s. 189 Housing Act 1996' (2019) 21 *Journal of Housing Law*

<sup>27</sup> *David Cowan and Karen Morgan, 'Trust, Distrust and Betrayal: A Social Housing Case Study' (2009) 72 The Modern Law Review 157*

<sup>28</sup> Including those homeless within the meaning of HA 1996, pt VII and those who need to move on medical or welfare grounds: HA 1996, s166A (3)

<sup>29</sup> HA 1996, s 170

are more people housed in the community who would previously have been accommodated in institutions.<sup>30</sup> Community care legislation also facilitates access to social housing. Specifically, the National Assistance Act 1948 imposes duties on local authorities to provide 'residential accommodation for persons [aged eighteen or over] who by reason of age, [illness, disability] or any other circumstances are in need of care and attention which is not otherwise available to them.'<sup>31</sup> However, the section has been restrictively interpreted particularly, 'not otherwise available to them'<sup>32</sup> such that the duty to provide accommodation is one of last resort.<sup>33</sup> Patients discharged from compulsory detention<sup>34</sup> under MHA 1983 may also access social housing as part of an aftercare package which statutory agencies have a duty to provide, 'in co-operation with the relevant voluntary agencies'<sup>35</sup> (including social landlords).

These routes into social housing may be understood via the social model of disability, facilitating social inclusion, removing a disadvantage to disabled people who may otherwise struggle to be adequately accommodated. However, in prioritising medical categories, HA 1996 reflects the medical model in its drafting. This restricts access to the tenure to those applicants who can fit themselves within criteria supported by medical evidence.<sup>36</sup> In determining these applications, housing officers are positioned as gatekeepers to this scarce resource,<sup>37</sup> a role which forces them to think in an individualised (medical model) way, actively<sup>38</sup> and reactively identifying applicants as disabled because of their *impairment*. Like the minority rights model,<sup>39</sup> this has potential to reinforce 'the categorisation of disabled people as a separate group.'<sup>40</sup> because it excludes those who cannot fit themselves within that group. This may affect housing officers' views of occupants and also the role of social landlords providing accommodation on a welfare or charity basis and therefore within those respective models of disability. But as Oliver contends, because of their narrow focus, these fall

---

<sup>30</sup> David Clapham and Bridget Franklin 'Housing Management, Community Care and CCT' (Joseph Rowntree Foundation 1995) <https://www.jrf.org.uk/file/37483/download?token=orBov2c6&filetype=findings> accessed 18 March 2018

<sup>31</sup> National Assistance Act 1948, s 21

<sup>32</sup> National Assistance Act 1948, s 21

<sup>33</sup> *R v Sefton MBC ex p Help the Aged* [1997] 4 All ER 532

<sup>34</sup> MHA 1983, s 117(1) referring to ss 3 and 37

<sup>35</sup> MHA 1983, s 117(2)

<sup>36</sup> Joanne Bretherton, Caroline Hunter and Sarah Johnsen, "You Can Judge them on how they Look...": Homelessness Officers, Medical Evidence and Decision-Making in England' (2013) 7 *European Journal of Homelessness* 70

<sup>37</sup> *Holmes Moorhouse v Richmond upon Thames LBC* [2009] UKHL 7

<sup>38</sup> Tom Shakespeare, *Disability Identity and Difference* in Colin Barnes and Geoff Mercer (eds) *Exploring the Divide* (The Disability Press, 1996)

<sup>39</sup> Introduction page 43

<sup>40</sup> Tom Shakespeare, *Disability Identity and Difference* in Colin Barnes and Geoff Mercer (eds) *Exploring the Divide* (The Disability Press, 1996)

within the individual model.<sup>41</sup> This individual focus does not anticipate accessibility of housing as the Universalist approach would. The social model reveals the barriers of negative attitudes that may ensue from an individual focus which may in turn result from officers' role as gatekeepers to the tenure. How these attitudes may be additionally affected by officers' views of their role will be considered later.<sup>42</sup>

Presently, it may be concluded that compared with the population as a whole, the disproportionate representation of disabled people residing in social housing<sup>43</sup> is partly<sup>44</sup> due to priority accorded under the legislation outlined above. However, as the next section will contend, the consequence of the concentration of such persons in this tenure appears to have led to negative constructions of them and the tenure.

***Chapters 5 and 6 will examine the findings addressing which model explains how officers construct perpetrators and how this affects their decision-making.***

### 1.1.2 Residualisation, ASB and the Discourse of Risk

While the causes of stigma<sup>45</sup> and consequent residualisation of social housing are not entirely clear<sup>46</sup> it has come to be perceived as 'a tenure of last resort'.<sup>47</sup> The reasons why a disproportionate number of occupants will have accessed the tenure because of poverty and/or dependence on welfare benefits have just been noted. Yet regardless of an individual's initial rationale for accessing social housing, its occupants, typically de-institutionalised persons and growing numbers of long-term unemployed young men, asylum seekers and never-married single mothers<sup>48</sup> have

---

<sup>41</sup> Mike Oliver, 'The Social Model in Action: If I had a Hammer' in Colin Barnes and Geof Mercer (eds), *Implementing the Social Model of Disability: Theory and Research* (The Disability Press 2004) relate to the two historic bases of social housing, above page 55

<sup>42</sup> 1.2.4

<sup>43</sup> Caroline Hunter and others, *Disabled People's Experiences of Anti-Social Behaviour and Harassment in Social Housing: A Critical Review* (Disability Rights Commission 2007) 14; Sadie Parr, 'The Role of Social Housing in the 'Care' and 'Control' of Tenants with Mental Health Problems' (2010) 9 *Social Policy and Society* 111

<sup>44</sup> There is a greater risk of poverty in the sector considered at page 56 and also by Alan Murie, 'The Social Rented Sector, Housing and the Welfare State in the UK' (1997) 12 *Housing Studies*

<sup>45</sup> Annette Hastings, 'Stigma and Social Housing Estates: Beyond Pathological Explanations' (2004) 19 *Journal of Housing and the Built Environment* 233

<sup>46</sup> Annette Hastings, 'Stigma and Social Housing Estates: Beyond Pathological Explanations' (2004) 19 *Journal of Housing and the Built Environment* 233

<sup>47</sup> Pauline Card, 'Anti-social Behaviour: Managing Anti-social Behaviour - Inclusion or Exclusion?' D Cowan and A Marsh (eds), *Two Steps Forward: Housing Policy into the New Millennium* (The Policy Press 2001) 207

<sup>48</sup> David Cowan, Christina Pantazis and Rose Gilroy, 'Social Housing as Crime Control: An Examination of the Role of Housing Management in Policing Sex Offenders' (2001) 10 *S&LS* 435, 436



been constructed in popular and political discourse as a marginalised, spatially segregated underclass, unable or unwilling to enter into private sector tenures (particularly home ownership),<sup>49</sup> not contributing towards and therefore outside society.<sup>50</sup> In such discourses, these occupants are constructed as risky subjects,<sup>51</sup> David Cameron described the social housing estate where Karen Mathews (who kidnapped her own daughter) resided as one 'where decency fights a losing battle against degradation and despair. A community whose pillars are crime, unemployment and addiction...'<sup>52</sup> and the 'role models are criminals, liars and layabouts'.<sup>53</sup> Social housing has thereby been pathologised alongside the rest of the welfare state as instrumental in the perpetuation of poverty,<sup>54</sup> and as a mechanism that traps people in welfare dependence, inhibiting their engagement in the workforce and consequently the home-owning economy.

As well as housing risky people, much social housing had for a long time a poor physical appearance. Following the introduction of the RTB, budget cuts resulted in 'a dramatic reduction in new-build activity'.<sup>55</sup> Consequently, the sector stagnated becoming aesthetically unattractive, prompting ready application of Wilson and Kelling's 'broken windows' thesis that 'if a window in a building is broken and is left unrepaired, all the rest of the windows will soon be broken.'<sup>56</sup> In turn the poor aesthetic permits ready stigmatisation of a place as dangerous, which for Damer, may be amplified by housing officers and the media alike.<sup>57</sup> Stigma gives rise to negative perceptions<sup>58</sup> of social housing which is constructed through political, social and media discourse. This discourse reflects the poor aesthetic and 'broken windows' thesis, that the tenure is residualised, a site and cause of social problems<sup>59</sup> home to risky subjects

---

<sup>49</sup> David Cowan, Christina Pantazis and Rose Gilroy, 'Social Housing as Crime Control: An Examination of the Role of Housing Management in Policing Sex Offenders' (2001) 10 S&LS 435, 452

<sup>50</sup> Pauline Card, 'Anti-social Behaviour: Managing Anti-social Behaviour - Inclusion or Exclusion?' D Cowan and A Marsh (eds), *Two Steps Forward: Housing Policy into the New Millennium* (The Policy Press 2001) 207

<sup>51</sup> Page 35 above

<sup>52</sup> Lynn Hancock and Gerry Mooney, "'Welfare Ghettos' and the 'Broken Society': Territorial Stigmatization in the Contemporary UK' (2013) 30 *Housing, Theory and Society* 46, 58

<sup>53</sup> <http://www.radiotimes.com/news/2017-10-11/julie-bushby-has-a-very-different-theory-for-why-karen-mathews-lied-about-daughter-shannons-disappearance/> accessed 18 March 2018

<sup>54</sup> David Robinson, 'Social Housing in England: Testing the Logics of Reform' (2013) *Urban Studies* 1489, 1491

<sup>55</sup> David Robinson, 'Social Housing in England: Testing the Logics of Reform' (2013) *Urban Studies* 1489, 1491

<sup>56</sup> James Q Wilson and George L Kelling, 'Broken Windows' (1982) 127 *Atlantic Monthly* 29, 30

<sup>57</sup> S Damer, *From Moorepark to Wine Alley: The Rise and Fall of a Glasgow Housing Scheme*, (Edinburgh University Press 1989)

<sup>58</sup> 1.1.2.1

<sup>59</sup> Alan Murie, 'Linking Housing Changes to Crime' (1997) 31 *Social Policy & Administration* 22, 26

– neighbours from hell<sup>60</sup> ‘dangerous others’<sup>61</sup> - the scapegoated personnel of ASB. Thus, social housing in general and certain estates in particular have been ‘problematized’ and defined as particular sites for intervention.<sup>62</sup>

While this thesis will advance arguments supported by relevant literature that refer to such discourses, it is not its purpose to assess their relative contributions to residualisation (the causes of which are complex)<sup>63</sup> or indeed their relative contributions to the officers’ social constructions as noted above. One discourse worthy of consideration is that examined in the next section: it is accepted as given that increased attention to ASB (and therefore increased discourse) that relates it to social housing has necessarily further contributed to residualisation.

### 1.1.2.1 Discourse and the Social Construction of ASB in Social Housing

‘In England and Wales, politicians and practitioners have since 1997 paid increasing attention to what has become known [as ASB]’.<sup>64</sup> The response of the media<sup>65</sup> in its reporting, and successive governments in their legislation suggest a ‘moral panic’<sup>66</sup> in which ASB is particularly associated with social housing<sup>67</sup> and is perpetrated by its risky occupants.

It seems almost obvious that as the perception of residualisation has increased, the desirability of social housing has evaporated. Papps therefore argues that dealing with the specific problem of ASB, must, ‘be given a high priority by housing organisations, if only because of the adverse effect it can have on allocations and voids.’<sup>68</sup> and consequently further residualisation of the sector. Thus, ASB has, as Cowan and McDermont<sup>69</sup> argue, been shaped by understandings about risks that are

---

<sup>60</sup> Frank Field, *Neighbours from Hell: The Politics of Behaviour* (Politicos 2003)

<sup>61</sup> Judy Nixon and Sadie Parr, ‘Anti-social Behaviour : Voices From the Front-line’ in John Flint (ed), *Housing, Urban Governance and Anti-Social Behaviour: Perspectives, Policy and Practice* (Policy Press 2006) 96

<sup>62</sup> John Flint, ‘Social Housing Agencies and the Governance of Anti-social Behaviour’ (2002) 17 *Housing Studies* 619, 625

<sup>63</sup> Annette Hastings, ‘Stigma and Social Housing Estates: Beyond Pathological Explanations’ (2004) 19 *Journal of Housing and the Built Environment* 233

<sup>64</sup> Andrew Millie and others, *Anti-social Behaviour Strategies: Finding A Balance* (Policy Press 2005)

<sup>65</sup> Caroline Hunter, ‘Looking Two Ways at Once: Anti-Social Behaviour, Law and Social Inclusion’ (Housing Studies Association Conference, Bristol, 2003)

<sup>66</sup> A Haworth and T Manzi, ‘Managing the ‘Underclass’: Interpreting the Moral Discourse of Housing Management’ (1999) 36 *Urban Studies* 153,156

<sup>67</sup> John Flint, ‘Social Housing Agencies and the Governance of Anti-social Behaviour’ (2002) 17 *Housing Studies* 619

<sup>68</sup> Pauline Papps, ‘Anti-social Behaviour Strategies - Individualistic or Holistic?’ (1998) 13 *Housing Studies* 639, 645

<sup>69</sup> David Cowan and Morag McDermont, *Regulating Social Housing: Governing Decline* (Routledge-Cavendish 2006)

related to social housing. This concentration of control in social housing can be interpreted as an attempt to resist further residualisation of the sector populated, as noted above,<sup>70</sup> by risky subjects with risky behaviour. Consequently, social housing occupants have become targets of governmental control strategies (interventions)<sup>71</sup> which seek to rehabilitate them or mitigate the risks that they pose,<sup>72</sup> such policy drive potentially affecting practitioners' social constructions of occupants.

That social landlords have been given increasing power and responsibility to control ASB has led to the concentration of investigatory people and technology in areas of social housing.<sup>73</sup> While Flint notes 'strong research evidence exists showing that both incidences of, and concerns about anti-social behaviour are higher in deprived neighbourhoods of social housing'<sup>74</sup> as Carr and Cowan comment if you go looking for ASB in social housing, that is where you will find it.<sup>75</sup> Thus, the idea that social housing produces ASB is a 'self-fulfilling the prophecy'.<sup>76</sup> This prophecy amplifies 'concerns', subsequent reporting and consequently higher recorded incidents. Concerns and reporting are dependent on perception of ASB by complainants, victims and other residents (witnesses). As ASB is *perceived* to be associated with social housing<sup>77</sup> and because there is a strong correlation between poverty and fear of crime / ASB there are likely to be higher levels of reporting in these areas.<sup>78</sup> Also exacerbating perceptions of ASB is its wide definition encompassing the causing of *inter alia* 'nuisance or annoyance' and 'alarm and distress'.<sup>79</sup>

Thus, a wide range of behaviours and incidents may be reported and their recording and any publicity surrounding them and consequent statistics may further magnify the perception of ASB. In turn, such data and publicity may reinforce the discourses of residualisation and ASB and therefore officers' construction of social housing and its

---

<sup>70</sup> 1.1.2

<sup>71</sup> 1.2.3

<sup>72</sup> Pauline Card, 'Governing Tenants: from Dreadful Enclosures to Dangerous Places' in John Flint (ed), *Housing, Urban Governance and Anti-social Behaviour: Perspectives, Policy and Practice* (Policy Press 2006) 37, 49

<sup>73</sup> Alison P Brown, 'Anti-Social Behaviour, Crime Control and Social Control' (2004) 43 *The Howard Journal of Criminal Justice* 203, 210

<sup>74</sup> John Flint, 'On the New Front-line: Social Housing and the Management of 'Problematic Populations' (The Housing Studies Association Spring Conference 2004: Transforming Social Housing Sheffield Hallam University, 15-16 April 2004) 5

<sup>75</sup> Helen Carr and Dave Cowan, 'Labelling: Constructing Definitions of Anti-social Behaviour?' in John Flint (ed), *Housing, Urban Governance and Anti-social Behaviour: Perspectives, Policy and Practice* (Policy Press 2006) 71

<sup>76</sup> Helen Carr and Dave Cowan, 'Labelling: Constructing Definitions of Anti-social Behaviour?' in John Flint (ed), *Housing, Urban Governance and Anti-social Behaviour: Perspectives, Policy and Practice* (Policy Press 2006) 71

<sup>77</sup> Andrew Millie, 'Looking for Anti-social Behaviour' (2007) 35 *Policy & Politics* 611

<sup>78</sup> Christina Pantazis, 'Fear of Crime', *Vulnerability and Poverty* (2000) 40 *Brit.J.Criminol* 414

<sup>79</sup> ASBCPA 2014, s 2(1); 1.2.2

inhabitants as risky. Social housing is therefore a site of risk. The wide responsibility bestowed on social landlords for the control of the widely defined ASB correspondingly expands the risks being controlled and practitioners' potential constructions of them. Accountability<sup>80</sup> demands, however, that complaints of ASB are responded to and thus an intervention must be chosen.

---

<sup>80</sup> 1.3.2

## **1.2 ASB Controls: Conditionality, Responsibilisation and Identity**

This section considers the purpose and effectiveness of ASB policy relating this to housing officers and perpetrators.

The responsibilising goals of ASB policy are first explained as this is relevant to the moral filter developed in this thesis. Responsibilisation is effected by the use of interventions i.e. mechanisms of ASB control, with and against perpetrators. To understand the interventions used and the discourse associated with and consequent upon them, central government's definition of ASB is first explored as this relates to professionals' employment of "common-sense" in its management. This is followed by an overview of the interventions used in social landlords' ASB management because they are outcomes and are considered in the empirical chapters.

A sense of identity of individuals, both officers and occupants are key to the efficacy of interventions in the responsibilising goal of policy and therefore the governance of ASB. In relation to officers, it is argued that their constructions of their professional role and experiences (work with other professionals; training; and pressure of work) and also their understanding of disability may influence them in their day-to-day decision-making and affect their choice of interventions. Finally, disabled occupants' ability to comply with conditions is problematised.

### **1.2.1 Responsibilisation and the Governance of ASB**

Policy changes of the 1990s saw responsibility for the control of crime and ASB pluralised<sup>81</sup> beyond organisations of the state<sup>82</sup> to non-state agencies including social landlords, their individual employees, tenants and other occupants.<sup>83</sup> Tony Blair's New Labour called for the recasting of British social and economic structures to enable

---

<sup>81</sup> Adam Crawford, 'Contractual Governance' of Deviant Behaviour' (2003) 30 J Law & Soc 479, 483

<sup>82</sup> David Garland, 'The Limits of the Sovereign State' (1996) 36 Brit.J.Criminol 445, 451 in David Cowan, Christina Pantazis and Rose Gilroy, 'Social Housing as Crime Control: An Examination of the Role of Housing Management in Policing Sex Offenders' (2001) 10 S&LS 435, 438

<sup>83</sup> Policies which extend crime and ASB control in this way are described as "neoliberal"

everyone to participate.<sup>84</sup> Thus, all members of society have a contributory role to play, an idea central to New Labour's programme of welfare reform with its emphasis on conditionality and responsabilisation. Responsibility for the control of crime and ASB is pluralised<sup>85</sup> beyond organisations of the state<sup>86</sup> to non-state agencies including social landlords, their individual employees, tenants and other occupants.

This delegation of responsibility for the control of the risks of crime and ASB is effected through governance: the conduct of conduct, based on a dominant moral discourse.<sup>87</sup> As Flint explains, this involves managing populations through technologies i.e. mechanisms by which authorities exercise power over and through a population.

Individuals may demonstrate social and moral responsibility by identifying with the community and its norms.<sup>88</sup> This may be incentivised by e.g. awards for community participation.<sup>89</sup> Thus, once people construct themselves as members of the community, their allegiance to its collective norms and rituals and their 'own sense of responsibility towards [them] is mobilised in self-governance',<sup>90</sup> a 'technology'.<sup>91</sup> Thus, self-governance permits the delegation of risk from social landlord to individual occupant and their responsibility for regulating their own behaviour. Such self-regulation is premised on active agency, i.e. a choice in behaviour, and the desire for autonomy and responsibility. Those unable to demonstrate the autonomy and responsibility necessary for self-regulation may be regarded as risky subjects yet interventions can mitigate the risks their behaviour presents.<sup>92</sup> These sanctions and rewards, which may also be regarded as technologies are utilised to inculcate responsible behaviour which by its very nature is not-anti-social. Some are punitive,

---

<sup>84</sup> Clement Macintyre, 'The Stakeholder Society and the Welfare State: Forward to the Past!' (1999) 5 *Contemporary Politics* 121

<sup>85</sup> Adam Crawford, 'Contractual Governance' of Deviant Behaviour' (2003) 30 *J Law & Soc* 479, 483

<sup>86</sup> David Garland, 'The Limits of the Sovereign State' (1996) 36 *Brit.J.Criminol* 445, 451 in David Cowan, Christina Pantazis and Rose Gilroy, 'Social Housing as Crime Control: An Examination of the Role of Housing Management in Policing Sex Offenders' (2001) 10 *S&LS* 435, 439 and see later multiagency partnership

<sup>87</sup> John Flint, 'Reconfiguring Agency and Responsibility in the Governance of Social Housing in Scotland' (2004) 41 *Urban Studies* 151, 152

<sup>88</sup> Morag McDermont, 'Housing Associations, the Creation of Communities and Power Relations (2004) 19 *Housing Studies* 855, 857

<sup>89</sup> John Flint, 'Reconfiguring Agency and Responsibility in the Governance of Social Housing in Scotland' (2004) 41 *Urban Studies* 151, 163

<sup>90</sup> Morag McDermont, 'Housing Associations, the Creation of Communities and Power Relations (2004) 19 *Housing Studies* 855, 858

<sup>91</sup> John Flint, 'Social Housing Agencies and the Governance of Anti-social Behaviour' (2002) 17 *Housing Studies* 619, 622

<sup>92</sup> John Flint, 'Social Housing Agencies and the Governance of Anti-social Behaviour' (2002) 17 *Housing Studies* 619, 629

others seemingly more benign and supportive, but all aim to manage ASB and its risks, via the imposition of conditions on perpetrators.

### 1.2.2 The Broad and Common-sense Definition of ASB

The manner in which practitioners, especially front-line officers, construct policy on a daily basis in ASB case-management are affected by the definitions of ASB to be found in policy. Yet irrespective of the increase in powers bestowed upon social landlords,<sup>93</sup> ASB is ill-defined in such sources:<sup>94</sup> policy tends to define ASB as including behaviour both criminal and non-criminal, the latter comprising neighbourhood incivilities problems or disputes<sup>95</sup> and to illustrate ASB by listing various types of behaviour ranging from fouling the street with litter to dealing drugs.<sup>96</sup>

The 2012 White Paper<sup>97</sup> provided a definition more general still:

Antisocial behaviour is any aggressive, intimidating or destructive activity that damages or destroys another person's quality of life... [it] is a broad term used to describe the day-to-day incidents of crime, nuisance and disorder that make many people's lives in this country a misery - from litter and vandalism, public drunkenness or aggressive dogs, to noisy or abusive neighbours.<sup>98</sup>

Thus, ASB is ill-defined and highly liable to broad interpretation.

Correspondingly, legislative definitions are also widely drafted. The Antisocial Behaviour Crime and Policing Act 2014 (ASBCPA 2014) defines ASB to be controlled by injunctions as:

---

<sup>93</sup> 1.2.3

<sup>94</sup> Pauline Papps, 'Anti-social Behaviour Strategies - Individualistic or Holistic?' (1998) 13 *Housing Studies* 639, 645-647; Suzie Scott & Hilary Parkey, 'Myths and Reality: Anti-social Behaviour in Scotland' (1998) 13 *Housing Studies* 325, 327-328; Caroline Hunter, 'Antisocial Behaviour: Can Law be the Answer?' in D Cowan and A Marsh (eds), *Two Steps Forward: Housing Policy into the New Millennium* (The Policy Press 2001) 222-223

<sup>95</sup> Suzie Scott & Hilary Parkey, 'Myths and Reality: Anti-social Behaviour in Scotland' (1998) 13 *Housing Studies* 325

<sup>96</sup> Home Office, *A Guide to Antisocial Behaviour Orders* (HMSO 2006); Home Office, *Respect and Responsibility Taking a Stand Against Anti-Social Behaviour* (HMSO March 2003)

<sup>97</sup> Home Office, *Putting Victims First: More Effective Responses to Anti-social Behaviour* (HMSO May 2012) 7 <https://www.gov.uk/government/publications/putting-victims-first-more-effective-responses-to-anti-social-behaviour> accessed 21 May 2017

<sup>98</sup> Home Office, *Putting Victims First: More Effective Responses to Anti-social Behaviour* (HMSO May 2012) 7 <https://www.gov.uk/government/publications/putting-victims-first-more-effective-responses-to-anti-social-behaviour> accessed 21 May 2017

- (a) conduct that has caused, or is likely to cause, harassment, alarm or distress to any person,
- (b) conduct capable of causing nuisance or annoyance to a person in relation to that person's occupation of residential premises.<sup>99</sup>

Court orders made pursuant to the statutory predecessor of a), the ASBO which was identically drafted,<sup>100</sup> included prohibitions on allowing the escape of pigs and geese, use of a trampoline, attempted suicide<sup>101</sup> and singing in the bath.<sup>102</sup> The behaviour targeted by b) (and their predecessor ASBIs)<sup>103</sup> has similarly broad scope.

While such legislative controls are not necessarily tenure specific, part of the reason social landlords have responsibility for the control of ASB is their standing for taking the nuclear option of possession proceedings. With wording similar to that required for the injunction under b), albeit affecting a potentially smaller class of victims / complainants, possession may be sought against a tenant where

- 1) the tenant or person residing or visiting the dwelling house
  - a) has been guilty of conduct causing or likely to cause a nuisance or annoyance to a person residing, visiting or otherwise engaging in lawful activity in the locality.<sup>104</sup>

However, such conduct can range from that required for an injunction (under (a))<sup>105</sup> to keeping cats that foul in neighbours' gardens.<sup>106</sup> Possession may also be sought 'where the tenant or person residing or visiting the dwelling-house has been convicted of<sup>107</sup> using the dwelling-house or allowing it to be used for illegal or immoral purposes,<sup>108</sup> or 'an arrestable offence committed in or in the locality of the dwelling-

---

<sup>99</sup> ASBCPA 2014, s 2(1)

<sup>100</sup> Crime and Disorder Act 1998, s 1

<sup>101</sup> Stuart Macdonald, 'Suicidal Woman, Roaming Pigs and a Noisy Trampolinist: Refining the ASBO's Definition of 'Anti-Social Behaviour' (2006) 69 MLR 183, 213

<sup>102</sup> <http://metro.co.uk/2007/01/23/asbo-for-singing-in-the-bath-16562/> accessed 15 February 2017

<sup>103</sup> HA 1996, ss 153A-E and 154

<sup>104</sup> HA 1985, sch 2, Ground 2; HA 1988, sch 2, Ground 14

<sup>105</sup> ASBCPA 2014, s 2(1)(a)

<sup>106</sup> *Sewell v Harlow DC* [2000] EHLR 122

<sup>107</sup> Secure tenants - HA 1985, sch 2, Ground 2 and assured tenants - HA 1988, sch 2, Ground 14 b)

<sup>108</sup> Secure tenants - HA 1985, sch 2, Ground 2 and assured tenants - HA 1988, sch 2, Ground 14 b) i) *Bristol CC v Mousah* (1997) 30 HLR 32, CA



house'.<sup>109</sup> There are separate grounds for intra-familial domestic violence and threats of same<sup>110</sup> and the deterioration of the condition of the dwelling-house 'owing to acts of waste by, or the neglect or default of, the tenant or any other person residing in the dwelling-house.'<sup>111</sup>

Thus, legislation permits civil law to control not only nuisance, but criminal behaviour. Consequently, ASB may be described as ill-defined as it blurs the boundaries<sup>112</sup> of this fundamental divide substituting rules (legislative provisions) so vague (broad) that, as the examples in policy documents<sup>113</sup> and case-law<sup>114</sup> show, almost any behaviour could break them.<sup>115</sup> Additionally, policy documents<sup>116</sup> and law reports demonstrate this point with non-exhaustive lists of wide-ranging behaviour.



Illustration 1 This illustration from Abertay Housing Association<sup>117</sup> shows some of the forms of ASB: litter, noise nuisance, street drinking and graffiti

The official rationale for the drafting reflects a concern with practical application: as MP Alun Michael said:

If things are too tightly drawn, there is always a danger of ending up with a definition that cannot be applied sensibly. The phrase that has been used on a

<sup>109</sup> Secure tenants - HA 1985, sch 2, Ground 2 and assured tenants - HA 1988, sch 2, Ground 14 b) ii)

<sup>110</sup> Secure tenants - HA 1985, sch 2, Ground 2A and assured tenants - HA 1988, sch 2, Ground 14A

<sup>111</sup> Secure tenants - HA 1985, sch 2, Ground 2 and assured tenants - HA 1988, sch 2, Ground 13

<sup>112</sup> Alison P Brown, 'Anti-Social Behaviour, Crime Control and Social Control' (2004) 43 *The Howard Journal of Criminal Justice* 203, 204

<sup>113</sup> Home Office, *Putting Victims First: More Effective Responses to Anti-social Behaviour* (HMSO May 2012)

<sup>114</sup> Home Office, *Respect and Responsibility Taking a Stand Against Anti-Social Behaviour* (HMSO March 2003)

<sup>115</sup> Alison P Brown, 'Anti-Social Behaviour, Crime Control and Social Control' (2004) 43 *The Howard Journal of Criminal Justice* 203, 204

<sup>116</sup> Home Office, *Putting Victims First: More Effective Responses to Anti-social Behaviour* (HMSO May 2012) 7

<sup>117</sup>

[https://www.google.co.uk/search?q=abertay+housing+anti+social+behaviour&source=lnms&tbm=isch&sa=X&ved=0ahUKEwjqi-e2\\_N7ZAhVHchQKHVj0CicQ\\_AUICygC&biw=1098&bih=544#imgrc=2IBq\\_a6uTgxT3M](https://www.google.co.uk/search?q=abertay+housing+anti+social+behaviour&source=lnms&tbm=isch&sa=X&ved=0ahUKEwjqi-e2_N7ZAhVHchQKHVj0CicQ_AUICygC&biw=1098&bih=544#imgrc=2IBq_a6uTgxT3M): accessed 9 March 2018

number of occasions is “recognising an elephant on the doorstep”. One knows that it is not a cow or pig, but defining an elephant in precise terms is a little more difficult, at least in legal language. The application of common-sense leads to a practice that is well understood by all.<sup>118</sup>

Housing management has been referred to as a “common-sense” profession and the use of “common-sense” by street level bureaucrats has been noted.<sup>119</sup> Thus, this appeal to “common-sense” in policy endorses officers’ use of “common-sense” in practice. “Common-sense” may be defined as, a source which people share ‘in the normal, self-evident routines of everyday life offering frameworks of meaning with which to make sense of the world.’<sup>120</sup> “Common-sense” contains ‘a compendium of well-tried knowledge, customary beliefs... and wise sayings... some of which seem eminently sensible... its virtue is that it is obvious.’<sup>121</sup>

As such, “common-sense” appears to be objectively and empirically identifiable. Berger and Luckman contend that the social construction of “common-sense” may be discerned from language used.<sup>122</sup> Yet, just as language develops, so too does “common-sense”, ‘continually transforming itself.’<sup>123</sup> What is “common-sense”, and specifically ASB, may not be matters that we will all necessarily agree about, being merely purported. Furthermore “common-sense” is something of an oxymoron – a term used to confirm one’s own rationality. Individuals are unlikely to self-identify as lacking in “common-sense”, yet it often represents ideas and values that people do not hold in common.

To note how ASB may be perceived and understood using “common-sense” and linking this with the breadth of its definition and risk is to underline the role of these discourses and to highlight the difficulties in empirical measurement rather than to deny the reality of ASB.<sup>124</sup> The construction of ASB is made even more difficult and liable to subjectivity<sup>125</sup> as it requires only a civil standard of proof. However, as Flint

---

<sup>118</sup> Andrew Millie, ‘Looking for Anti-social Behaviour’ (2007) 35 Policy & Politics 611, 614

<sup>119</sup> Introductory Chapter

<sup>120</sup> Peter Berger and Thomas Luckmann, *The Social Construction of Reality* (Penguin 1966) 37

<sup>121</sup> Stuart Hall and Alan O’Shea, ‘Common-sense Neoliberalism’ (2013) 55 Soundings 9, 10

<sup>122</sup> Peter Berger and Thomas Luckmann, *The Social Construction of Reality* (Penguin 1966)

<sup>123</sup> Stuart Hall and Alan O’Shea, ‘Common-sense Neoliberalism’ (2013) 55 Soundings 9, 10

<sup>124</sup> Caroline Hunter, ‘Looking Two Ways at Once: Anti-Social Behaviour, Law and Social Inclusion’ (Housing Studies Association Conference, Bristol, 2003

<sup>125</sup> 1.1.3.1

notes, definitions of ASB rely on accepted norms of behaviour which may be easier to discern in cases of high level ASB and crime<sup>126</sup> whereas, 'lifestyle clashes, boundary disputes, litter, noise and the behaviour of children [have been found to be] common causes of complaint'<sup>127</sup> making ASB more difficult to govern.<sup>128</sup> On a daily basis, this governance including the responsibility for the control of the risks of ASB is effected by individual officers, and their difficulties in this will be explored in Chapter 6. The following section will explore the interventions that officers have at their disposal to control ASB.

***Chapters 5 and 6 will examine the findings addressing how officers construct the widely defined ASB and how it affects decision-making.***

### 1.2.3 Interventions Used in ASB Control

Here I concentrate on the main interventions used by the landlords in this study. Some derive from the statutory status of social tenants. Other interventions are not solely targeted against social tenants; although they are often used against them, they may also be used against other occupiers in the tenant's home. There are three related purposes of outlining the interventions. First, as a reference point for later discussion. Secondly, the potentially exclusionary implications that flow from officers' discretion in their choices of interventions, highlights the conflicted position of social landlords in controlling ASB perpetrated by relevant perpetrators who they have a purpose or duty to house.<sup>129</sup> Their position is further conflicted as the provision of stable and long-term accommodation in social housing can bring social inclusion. Finally, while all interventions may potentially impose conditions, giving perpetrators scope for compliance and therefore a demonstration of their ability to change their behaviour, such ability may be affected by their mental impairments. The appropriateness of officers' choices here, relate to their construction of such perpetrators, their impairments and therefore capacity for self-governance.

---

<sup>126</sup> J Flint, 'Social Housing Agencies and the Governance of Antisocial Behaviour' (2002) 17 Housing Studies, 619, 624

<sup>127</sup> Suzie Scott & Hilary Parkey, 'Myths and Reality: Anti-social Behaviour in Scotland' (1998) 13 Housing Studies 325, 353

<sup>128</sup> J Flint, 'Social Housing Agencies and the Governance of Antisocial Behaviour' (2002) 17 Housing Studies, 619, 624

<sup>129</sup> 1.1.2

### 1.2.3.1 Contractual Devices

Contractual devices formalise self-governance<sup>130</sup> and therefore self-regulation. They are usually non-negotiable, necessarily stating standards of expected behaviours: conditions to be complied with, failing which a sanction may be imposed. They include good neighbour agreements,<sup>131</sup> statements of expected behaviour in tenancy handbooks, tenancy agreements themselves and **acceptable behaviour contracts (ABC)**. ABCs give perpetrators the chance to act responsibly<sup>132</sup> by stating expected standards of behaviour. They are defined by Brown as informal contracts in the sense that they do not give rise to enforceable rights or legal obligations although their terms commonly include the threat of legal action.<sup>133</sup> Use of ABCs is not dependent on tenure.

While bargaining power in the negotiation of ABCs may be uneven, (conditions being usually unilaterally imposed by landlords), Brown found that negotiation of ABCs forms part of the process of active responsabilisation: failure to honour the contract by not conforming to its terms may be sanctioned through litigation (injunction or possession)<sup>134</sup> in which evidence of failure to adhere to the ABC will be used.<sup>135</sup> Moreover the 2012 White Paper explains this tool 'gets the individual to acknowledge their behaviour and its effect on victims, with the aim of stopping it quickly'<sup>136</sup> and 'awareness of the impact of the behaviour on their neighbours, and the threat of more formal enforcement tools, can be a sufficient incentive for an individual to change their behaviour.'<sup>137</sup>

**Tenancy agreements** have long contained nuisance clauses but ASB discourse and the focus on the need for their enforcement against tenants who perpetrate ASB (and

---

<sup>130</sup> John Flint, 'Social Housing Agencies and the Governance of Anti-social Behaviour' (2002) 17 Housing Studies 619  
John Flint, 'On the New Front-line: Social Housing and the Management of 'Problematic Populations' (The Housing Studies Association Spring Conference 2004: Transforming Social Housing Sheffield Hallam University, 15-16 April 2004) 9

<sup>132</sup> 6.3.3.2 - Larry

<sup>133</sup> Kevin J Brown, "'It Is Not as Easy as ABC": Examining Practitioners' Views on Using Behavioural Contracts to Encourage Young People to Accept Responsibility for their Anti-Social Behaviour' (2012) 76 JCL 53

<sup>134</sup> See below this section

<sup>135</sup> Kevin J Brown, 'It Is Not as Easy as ABC': Examining Practitioners' Views on Using Behavioural Contracts to Encourage Young People to Accept Responsibility for their Anti-Social Behaviour' (2012) 76 JCL 53

<sup>136</sup> Home Office, *Putting Victims First: More Effective Responses to Anti-social Behaviour* (HMSO May 2012) 1.18  
<https://www.gov.uk/government/publications/putting-victims-first-more-effective-responses-to-anti-social-behaviour> accessed 21 May 2017

<sup>137</sup> Home Office, *Putting Victims First: More Effective Responses to Anti-social Behaviour* (HMSO May 2012)  
<https://www.gov.uk/government/publications/putting-victims-first-more-effective-responses-to-anti-social-behaviour> accessed 21 May 2017

reflecting the shift in governance away from the state) led to the more forceful drafting of new agreements.<sup>138</sup> Again, breach of the terms may be sanctioned through litigation (injunction or possession).

### 1.2.3.2. Possession

For the tenant, control may be effected via the threat of possession proceedings and consequent eviction. Here the ASB may have been committed 'by the tenant or person residing in'<sup>139</sup> or visiting 'the dwelling house'.<sup>140</sup> Thus, the tenant may be responsabilised not only for the risks of their own behaviour but for the conduct of others whom they may not even have invited to the property. Possession orders may be outright or suspended,<sup>141</sup> and this is an important discretion of the court, which is returned to below.<sup>142</sup>

For possession to be sought against secure and assured tenants under the Housing Acts 1985 and 1988 (respectively HA 1985 and HA 1988) on the basis of nuisance / ASB in breach of their tenancy agreement<sup>143</sup> or the ASB grounds<sup>144</sup> the landlord must prove the ASB occurred necessitating their accumulation of evidence. As originally drafted, the ASB / nuisance grounds for possession were considered weak and therefore amended by HA 1996 allowing the more objective test of conduct causing *or likely to cause* a nuisance or annoyance permitting the use of professional witnesses (in practice, most likely, officers). However, the need for evidence may still lead to protracted and therefore costly litigation.

---

<sup>138</sup> Diane Lister, 'Tenancy Agreements: A Mechanism for Governing Anti-Social Behaviour?' in John Flint (ed), *Housing, Urban Governance and Anti-social Behaviour: Perspectives, Policy and Practice* (Policy Press 2006) 119

<sup>139</sup> HA 1985, sch 2, Ground 2; HA 1988, sch 2, Ground 14; 1.2.2

<sup>140</sup> HA 1985, sch 2, Ground 2; HA 1988, sch 2, Ground 14; 1.2.2

<sup>141</sup> CPR, part 55

<sup>142</sup> 1.2.5

<sup>143</sup> Respectively, HA 1985, sch 2, Ground 1; HA 1988, sch 2, Ground 12

<sup>144</sup> Respectively, HA 1985, sch 2, Ground 2; HA 1988, sch 2, Ground 14

### 1.2.3.3 Injunctions

Social landlords may apply for injunctions against tenants in breach of the terms of their tenancies. In addition, under ASBCPA 2014, local authorities and other public bodies, including social landlords<sup>145</sup> may apply for a statutory injunction.<sup>146</sup> As already suggested,<sup>147</sup> these are an amalgam of the now defunct ASBO that applied to persons aged over ten-years<sup>148</sup> and ASBI<sup>149</sup> that only applied to persons aged over eighteen-years.<sup>150</sup> The rationale for repeal and reform was explained in the 2012 White Paper.<sup>151</sup> The ASBO was seen to fail due to its 'high breach rate'<sup>152</sup> which was attributed to 'stringent conditions to stop future ASB'<sup>153</sup> without addressing 'underlying causes'<sup>154</sup> thus not changing behaviour and thereby failing 'to protect victims and communities in the long-term'.<sup>155</sup> Furthermore, the new injunction was intended to apply to all persons aged over ten-years and be quicker and 'easier to use than the ASBO'<sup>156</sup> with an increased number of agencies with the power to 'apply for it'<sup>157</sup> ensuring its use 'in a wider range of circumstances'.<sup>158</sup> These court orders may contain prohibitions<sup>159</sup> and also positive requirements for respondents intended to prevent them from engaging in ASB<sup>160</sup> e.g. attendance at 'alcohol awareness classes for alcohol-related problems [or] recreational activity to encourage more positive use of [the person's] free time.'<sup>161</sup> The rationale for the imposition of positive requirements was to 'address underlying issues and change behaviour in the long term'.<sup>162</sup> In compliance with the terms of injunctions, perpetrators can demonstrate responsibility for their own behaviour.

---

<sup>145</sup> Housing providers as per ASBCPA 2014, s 2. These are defined in ASBCPA 2014, s 20 as including (1) a housing trust, within the meaning given by the Housing Associations Act 1985, s 2, i.e. a charity; (2) a housing action trust established under the Housing Act 1988, s 62 and (3) in relation to England, a non-profit private registered provider of social housing

<sup>146</sup> ASBCPA 2014, s 1

<sup>147</sup> 1.2.2

<sup>148</sup> Crime and Disorder Act 1998, s 1; repealed by ASBCPA 2014, s 181(1), Sch 11, Pt 1, para 24(a)

<sup>149</sup> 1.2.2

<sup>150</sup> HA 1996 ss 153A - 153E and s 154 Repealed by ASBCPA 2014, s 181(1), Sch 11, Pt 1, para 22

<sup>151</sup> Home Office, Putting Victims First: *More Effective Responses to Anti-Social Behaviour* (HMSO May 2012)

<sup>152</sup> Home Office, Putting Victims First: *More Effective Responses to Anti-Social Behaviour* (HMSO May 2012) 1.20

<sup>153</sup> Home Office, Putting Victims First: *More Effective Responses to Anti-Social Behaviour* (HMSO May 2012) 3.10

<sup>154</sup> Home Office, Putting Victims First: *More Effective Responses to Anti-Social Behaviour* (HMSO May 2012) 3.10

<sup>155</sup> Home Office, Putting Victims First: *More Effective Responses to Anti-Social Behaviour* (HMSO May 2012) 1.20

<sup>156</sup> Home Office, Putting Victims First: *More Effective Responses to Anti-Social Behaviour* (HMSO May 2012) 3.10

<sup>157</sup> Home Office, Putting Victims First: *More Effective Responses to Anti-Social Behaviour* (HMSO May 2012) 3.10

<sup>158</sup> Home Office, Putting Victims First: *More Effective Responses to Anti-Social Behaviour* (HMSO May 2012) 3.10

<sup>159</sup> ASBCPA 2014, s 1 (4)(a)

<sup>160</sup> ASBCPA 2014, s 1 (4)(b)

<sup>161</sup> Youth Justice Board, *Interim YOT Practitioner's Guide: Anti-Social Behaviour, Crime and Policing Act 2014*

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/373705/Interim\\_ASB\\_practice\\_guidance.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/373705/Interim_ASB_practice_guidance.pdf)

accessed 29 February 2016

<sup>162</sup> Home Office, Putting Victims First: *More Effective Responses to Anti-Social Behaviour* (HMSO May 2012) 3.11

Save for the injunction, the mechanisms considered so far are individualistic<sup>163</sup> tending only to address the perpetrator's behaviour without consideration of pathology, imposing conditions without tackling causes. Thus, the law merely requires proof that the ASB has occurred,<sup>164</sup> as Alison Brown argues 'motivation and intention are largely irrelevant'<sup>165</sup> (despite the reference to 'guilt' in the grounds for possession). While there is no requirement that intention is assessed, it is hypothesised that officers may still do this in practice.<sup>166</sup>

#### 1.2.3.4 Alternative Interventions

These are based neither on contract or sanctions. Thus, mediation may be used to resolve ASB stemming from neighbour disputes. For disabled perpetrators, reasonable adjustments including alternative accommodation and modifications to existing accommodation may be used and these are considered further below in Chapter 2.

#### 1.2.3.5 Support

The Explanatory Notes to ASBCPA 2014 assert that 80% of complaints<sup>167</sup> can be successfully resolved by early intervention. Data on all ASB interventions with disabled people is patchy and the evidence of their effectiveness is inconclusive. However, there is evidence that *supportive* or "therapeutic" interventions have 'largely been positive including reducing antisocial behaviour (and consequently, reducing eviction)'.<sup>168</sup> Thus support may aid social inclusion for relevant perpetrators.

This thesis considers supportive interventions may amount to reasonable adjustments, drawing on the Equality and Human Rights Commission's (EHRC's) code which suggests auxiliary services include extra staff assistance to disabled

---

<sup>163</sup> Pauline Papps, 'Anti-social Behaviour Strategies - Individualistic or Holistic?' (1998)13 *Housing Studies*, 639-656

<sup>164</sup> *Bryant v Portsmouth CC* [2000] 32 HLR 906, [2000] All ER (D) 729

<sup>165</sup> Alison P Brown, 'Anti-Social Behaviour, Crime Control and Social Control' (2004) 43 *The Howard Journal of Criminal Justice* 203; See discussions on folk psychiatry 3.4.1

<sup>166</sup> 5.4.1

<sup>167</sup> ASBCPA 2014 Explanatory Notes, para 16; 1.2.3

<sup>168</sup> DCLG, *Working with Troubled Families: A Guide to the Evidence and Good Practice* (DCLG 2012); Beth Watts and others, *Welfare Sanctions and Conditionality in the UK* (Joseph Rowntree Foundation, 2014) 12 [www.jrf.org.uk/sites/default/.../Welfare-conditionality-UK-Summary.pdf](http://www.jrf.org.uk/sites/default/.../Welfare-conditionality-UK-Summary.pdf) Cached accessed 14 February 2016

people.<sup>169</sup> These approaches, for tackling ASB usually aim to help vulnerable and disabled perpetrators live independently. Support may include help with budgeting for and payment of household expenses; finding work and gaining household skills e.g. cooking, cleaning and meal-planning; emotional support; pursuit of social or leisure interests,<sup>170</sup> recovery from ill-health and maintenance of health, establishment and maintenance of the home and advice and representation on housing related matters.<sup>171</sup> It may be provided in sheltered schemes with wardens or working with people in their homes on an outreach basis.<sup>172</sup> Thus, support may be provided by local community health teams, local authority social services departments or specialist voluntary agencies e.g. addiction advice projects, drug and alcohol action and support teams, other community-based organisations and mental health services and also by in-house teams employed by landlords themselves.<sup>173</sup>

Therapeutic projects e.g. Dundee Families and Family Intervention Project (FIP)<sup>174</sup> were run by multidisciplinary teams taking intensive<sup>175</sup> approaches to managing the risks of ASB. They have been replaced by the Troubled Families Programme.<sup>176</sup> Comparable initiatives to support individual perpetrators were less prevalent<sup>177</sup> and were without consideration in the 2012 White Paper.<sup>178</sup>

ODPM Guidance<sup>179</sup> recommended ASB policies make reference to the earliest possible interventions of specialist agencies with vulnerable perpetrators in maintaining their tenancies.<sup>180</sup> This Guidance advised landlords to consider taking

---

<sup>169</sup> Equality and Human Rights Commission, *EA 2010 Statutory Code of Practice – Services, Public Functions and Associations* (EHRC 2011) 7.47; 2.3.7.1

<sup>170</sup> [http://england.shelter.org.uk/get\\_advice/housing\\_with\\_support/housing\\_support#what\\_is\\_housing\\_support%3F](http://england.shelter.org.uk/get_advice/housing_with_support/housing_support#what_is_housing_support%3F) accessed 23 October 2017

<sup>171</sup> [http://www.manchester.gov.uk/info/500341/housing\\_help\\_and\\_advice/968/housing\\_support\\_to\\_live\\_independently](http://www.manchester.gov.uk/info/500341/housing_help_and_advice/968/housing_support_to_live_independently) accessed 23 October 2017

<sup>172</sup> <https://jobs.theguardian.com/jobs/supported-and-sheltered-housing/> accessed 23 October 2017

<sup>173</sup> [http://england.shelter.org.uk/housing\\_advice/housing\\_support/help\\_with\\_housing\\_support#what\\_is\\_housing\\_support%3F](http://england.shelter.org.uk/housing_advice/housing_support/help_with_housing_support#what_is_housing_support%3F) accessed 23 October 2017

<sup>174</sup> Helen Carr and Dave Cowan, 'Labelling: Constructing Definitions of Anti-social Behaviour?' in John Flint (ed), *Housing, Urban Governance and Anti-social Behaviour: Perspectives, Policy and Practice* (Policy Press 2006) 70

<sup>175</sup> Pauline Papps, 'Anti-social Behaviour Strategies - Individualistic or Holistic?' (1998) 13 *Housing Studies* 639

<sup>176</sup> DCLG, *Supporting Disadvantaged Families Troubled Families Programme 2015 – 2020: Progress So Far* (HMSO April 2017)

<sup>177</sup> Hal Pawson and others, *The Use of Possession Actions and Evictions by Social Landlords* (ODPM, 2005) and see Table 1.1 below

<sup>178</sup> Home Office, *Putting Victims First: More Effective Responses to Anti-social Behaviour* (HMSO May 2012)

<https://www.gov.uk/government/publications/putting-victims-first-more-effective-responses-to-anti-social-behaviour> accessed 21 May 2017

<sup>179</sup> Office of the Deputy Prime Minister, *Anti-social Behaviour: Policy and Procedure: Code of Guidance for Local Housing Authorities and Housing Action Trusts* (ODPM 2004) 3.24

<sup>180</sup> Office of the Deputy Prime Minister, *Anti-social Behaviour: Policy and Procedure: Code of Guidance for Local Housing Authorities and Housing Action Trusts* (ODPM 2004) 3.24



actions to 'achieve *long-term* changes in the behaviour of perpetrators, and to prevent displacement of antisocial behaviour'.<sup>181</sup> This appeared borne out by empirical evidence: Pawson and others found support more effective than litigation for perpetrators with "mental ill-health" but that this is in part dictated by the courts' expectations of appropriate action by landlords.<sup>182</sup>

Table 1.1 below summarises published research on the use of ASB interventions with disabled perpetrators or perpetrator households with at least one disabled member.

183

---

<sup>181</sup> Office of the Deputy Prime Minister, *Anti-social Behaviour: Policy and Procedure: Code of Guidance for Local Housing Authorities and Housing Action Trusts* (ODPM 2004) 3.25 (emphasis added)

<sup>182</sup> Hal Pawson and others, *The Use of Possession Actions and Evictions by Social Landlords* (ODPM, 2005)

<sup>183</sup> It is important to note that such research fails to provide a clear indication of the proportion of perpetrators of ASB that have mental impairments. This lack of clarity is in part due to the problems of disclosure and definition that distort disability statistics: it is not clear whether the subjects of the studies referred to in Table 1.1 below were disabled as per the definition in EA 2010, section 6 (see Introductory Chapter) or were included for self-report of e.g. depression. Comparisons between studies are difficult to draw as some record mental impairments of individual perpetrators and others record perpetrator households of inconsistent composition, some with at least one member with impairments and others where this is not clear.

Table 1.1 Published research linking disability with ASB						
Authors	Year of publication	Sample	Criterion for inclusion in sample	Percentage of disabled people in sample	Nature of disability as described by researchers	Outcome of intervention (where reported)
BIBIC <sup>184</sup>	2005	Reports of youth offending teams in England	Individuals - Recipients of ASBOs	37%	Learning difficulties or mental health issues	
Hunter and others <sup>185</sup>	2000	A survey of 67 ASB files	Individual perpetrators of ASB	18%	Mental impairment	
				9%	Physical disability	
Hunter and others <sup>186</sup>	2007	Various projects	Recipients of intensive support e.g. Dundee Families Project	Approx 50-60% of each project	Mental impairment	
Hunter <sup>187</sup>	2005	6 projects including 77 families	Families at Risk of Losing Their Homes as a Result of ASB	39%	One or more members of the family suffered mental health problems, principally depression	95% maintained their tenancies or planned to move.
Hoffman and others <sup>188</sup>	2010	Shelter Cymru case Files and other inclusion projects.	Households* alleged to have committed ASB	47%	Household members had experienced physical and mental health problems	50% faced negative outcomes
			Family households referred to FIPs	63%		20% faced negative outcomes
Jones and others <sup>189</sup>	2006	The Shelter Inclusion Project	Households* alleged to have committed ASB and at risk of homelessness	60% of adults within the households	Reported depression or other mental health problems (although only seven reported contact with mental health services).	Available data suggests that for most households tenancies were maintained and ASB reduced.

\* Including single people, couples and families

Approaches to support may vary however, some being balanced with sanctions. Under New Labour, the aim of parenting orders for example was to impose sanctions for non-compliance with any offers of support<sup>190</sup> being non-negotiable, with an expectation of compliance, failing which sanctions would be imposed. Alison Brown

<sup>184</sup> Rachel Fyson and Joe Yates, 'Anti-social Behaviour Orders and Young People with Learning Disabilities' (2011) 31 Critical Social Policy 113

<sup>185</sup> C Hunter, J Nixon and S Shayer, 'Neighbour Nuisance' *Social Landlords and the Law* (Chartered Institute of Housing 2000) 19

<sup>186</sup> Caroline Hunter and others, *Disabled People's Experiences of Anti-Social Behaviour and Harassment in Social Housing: A Critical Review* (Disability Rights Commission 2007) 83

<sup>187</sup> C Hunter, J Nixon and S Parr, *Interim Evaluation of Rehabilitation Projects for Families at Risk of Losing Their Homes as a Result of Antisocial Behaviour* (ODPM 2006) 22

<sup>188</sup> S Hoffman, P K Mackie and J Pritchard, 'Antisocial Behaviour Law and Policy in the United Kingdom: Assessing the Impact of Enforcement Action in the Management of Social Housing' (2010) 2 International Journal of Law in the Built Environment 26, 36

<sup>189</sup> A Jones, N Pleace and D Quiglar, 'Evaluating the Shelter Inclusion Project: A Floating Support Service the Household Is Accused of Antisocial Behaviour' in John Flint (ed), *Housing, Urban Governance and Anti-social Behaviour: Perspectives, Policy and Practice* (Policy Press 2006) 182

<sup>190</sup> Kevin J Brown, 'It Is Not as Easy as ABC': Examining Practitioners' Views on Using Behavioural Contracts to Encourage Young People to Accept Responsibility for their Anti-Social Behaviour' (2012) 76 JCL 53

explained that antisocial *families* were ‘offered a support worker [to aid with] discipline and routine in the home’<sup>191</sup> while simultaneously being threatened with eviction.<sup>192</sup> That local ASB policy may demand support is offered with vulnerable perpetrators is clear from *Barber v Croydon LBC*.<sup>193</sup>

Support may employ multiple means<sup>194</sup> and may take a social model strategy, where a person’s is involved in discussions about their needs and choice of support.<sup>195</sup> However, ‘individualised casework that position(s) disabled people as tragic victims in need of personalised therapeutic intervention’<sup>196</sup> that could be effected via leverage e.g. insisting on compliance with medication or attendance at rehabilitation programmes<sup>197</sup> is a medical model approach.

Such compliance may now be more expected given the change from the seemingly inclusive policy assertion that ‘everyone can change’<sup>198</sup> to the Coalition and Conservative governments’ ‘a) working with people who *want* to take the necessary steps and b) the addressing of underlying causes’.<sup>199</sup> This policy encourages an individual focus.

Defining what constitutes an ‘underlying cause’ is a political act: what may be described as biographical may in fact be a structural problem.<sup>200</sup> Nevertheless, this focus on individual choice and therefore agency in a) may compound officers’ need to understand<sup>201</sup> the relationship between perpetrators’ behaviour and vulnerability, typically defined as including mental illness and personality disorders.<sup>202</sup> If outcomes

---

<sup>191</sup> Alison P Brown, ‘Anti-Social Behaviour, Crime Control and Social Control’ (2004) 43 *The Howard Journal of Criminal Justice* 203, 206

<sup>192</sup> Alison P Brown, ‘Anti-Social Behaviour, Crime Control and Social Control’ (2004) 43 *The Howard Journal of Criminal Justice* 203, 206

<sup>193</sup> *Barber v Croydon LBC* [2010] EWCA Civ 51, [2010] 2 P & CR D25; 2.2.1

<sup>194</sup> Pauline Papps, ‘Anti-social Behaviour Strategies - Individualistic or Holistic?’ (1998) 13 *Housing Studies* 639

<sup>195</sup> V Williams and P Heslop, ‘Mental Health Support Needs of People with a Learning Difficulty: a Medical or a Social Model?’ (2005) 20 *Disability and Society* 231; Introductory Chapter

<sup>196</sup> Mike Oliver, ‘The Social Model in Action: If I had a Hammer’ in Colin Barnes and Geof Mercer (eds), *Implementing the Social Model of Disability: Theory and Research* (The Disability Press 2004) 18, 25

<sup>197</sup> Tom Burns and others, ‘Pressures to Adhere to Treatment (‘Leverage’) in English Mental Healthcare’ (2011) 199 *British Journal of Psychiatry* 145, 148; 1.2.5; 2.3.3

<sup>198</sup> Beth Watts and others, *Welfare Sanctions and Conditionality in the UK* (Joseph Rowntree Foundation, 2014) [www.jrf.org.uk/sites/default/.../Welfare-conditionality-UK-Summary.pdf](http://www.jrf.org.uk/sites/default/.../Welfare-conditionality-UK-Summary.pdf) Cached accessed 14 February 2016

<sup>199</sup> Beth Watts and others, *Welfare Sanctions and Conditionality in the UK* (Joseph Rowntree Foundation, 2014) [www.jrf.org.uk/sites/default/.../Welfare-conditionality-UK-Summary.pdf](http://www.jrf.org.uk/sites/default/.../Welfare-conditionality-UK-Summary.pdf) Cached accessed 14 February 2016 (emphasis added)

<sup>200</sup> Vando Borghi, ‘One Way Europe? Institutional Guidelines, Emerging Regimes of Justification, and Paradoxical Turns in European Welfare Capitalism’ (2011) 14 *European Journal of Social Theory* 321, 326

<sup>201</sup> Sadie Parr, ‘The Role of Social Housing in the ‘Care’ and ‘Control’ of Tenants with Mental Health Problems’ (2010) 9 *Social Policy and Society* 111, 117; 1.2.4; 3.3.1

<sup>202</sup> *Barber v Croydon LBC* [2010] EWCA Civ 51, [2010] 2 P & CR D25

of supportive interventions are positive but some are more intensive and therefore prima facie costly<sup>203</sup> than others, it seems pertinent to question how officers construct perpetrators and its effect on their exercise of discretion in the employment of such interventions and for which perpetrators. While difficulties that officers may experience in such decision-making will be problematised later,<sup>204</sup> the impact of officers' professional identity on their decision-making will be explored in the next section.

***Chapters 5 and 6 will examine the findings addressing how officers' constructions of perpetrators affect their choice of interventions and therefore the outcomes of social landlords' ASB management practice.***

#### **1.2.4 Housing Officers and Governance: the Effects of an Uncertain Professional Identity**

In the governance of ASB, responsibility for the control of risk is delegated from state to social landlord, to individual officers and in turn to individual occupants. In order to analyse issues of governance, it is helpful to draw upon Foucault. His ideas rely upon considerations of self and identity for those who govern<sup>205</sup> as well as those who are governed i.e. respectively, officers and the occupants of the housing they manage. While perpetrators and their capacity for self-governance will be considered later,<sup>206</sup> here, one of the criticisms of Foucault's theory of governance will be addressed, i.e. its lack of consideration of lived experience and how that may be constructed by such social actors.<sup>207</sup> Thus, here I argue that officers' decision-making and ultimately their constructions of policy may be affected by their constructions of their professional roles. Foucault may also be criticised for not grounding 'his theories in the analysis of real texts or talk'<sup>208</sup> whereas in chapters 5 and 6, this thesis will empirically analyse such discourse (of housing professionals) to illuminate ASB case-management

---

<sup>203</sup> Suzie Scott, 'Tackling Anti-Social Behaviour: An Evaluation of the Dundee Families Project' in Flint J (ed), *Housing, Urban Governance and Antisocial Behaviour: Perspectives, Policy and Practice* (Policy Press 2006) 199

<sup>204</sup> 1.2.5 and Conclusion of this chapter

<sup>205</sup> M Dean, 'Governmentality: Power and Rule in Modern Society' (Sage 1999); Nikolas Rose, 'The Death of the Social? Refiguring the Territory of Government' (1996) 25 *Economy and Society* 327 in John Flint, 'Social Housing Agencies and the Governance of Anti-social Behaviour' (2002) 17 *Housing Studies* 619, 620

<sup>206</sup> 1.2.5

<sup>207</sup> John Flint, 'Social Housing Agencies and the Governance of Anti-social Behaviour' (2002) 17 *Housing Studies* 619, 622

<sup>208</sup> Annette Hastings, 'Discourse Analysis: What Does it Offer Housing Studies?' (2000) 17 *Housing, Theory and Society* 131, 132

practice. This empirical analysis addresses questions raised in the following reviews of literature relevant to officers' constructions of their roles and professional identity.

Despite the increased responsibility for controlling ASB that policy has imposed upon social landlords and the corresponding demands of an expanded and more challenging skillset, officers have not gained a commensurate increase in professional status or identity.<sup>209</sup> While the CIH<sup>210</sup> is the professional body of housing practitioners, membership is low being non-compulsory in contrast with other professions with codes of conduct.<sup>211</sup> This absence of a professional code<sup>212</sup> and lower professional status than social workers<sup>213</sup> may affect officers' feelings about their work. They have nevertheless encroached on the professional territory of social workers, due to the increased resources given to controlling the widely defined ASB. Alison Brown argues this 'net widening and mesh thinning',<sup>214</sup> has led social control away from reliance on social work as a rehabilitative tool thus 'bringing moderately deviant people and problems within'<sup>215</sup> ASB control. These '...situations were generally not neighbour disputes but problems in themselves which the system (the penal-welfare complex) had failed to manage before'.<sup>216</sup>

Albeit with a different objective, officers paradoxically remain involved in the support of perpetrators of ASB. Policy has long recognised the collaboration between social landlords and other agencies in the provision of support<sup>217</sup> which may be viewed as concomitant with community care. Standing in tension with this is ASB policy, given its drive for social control. The commercial role [of] housing management<sup>218</sup>

---

<sup>209</sup> Bridget Franklin and David Clapham, 'The Social Construction of Housing Management' (1997) 12 Housing Studies 7

<sup>210</sup> <http://www.cih.org> accessed 24 February 2017

<sup>211</sup> E.g. solicitors' membership of the Law Society and corresponding observance of the Solicitors' Regulation Authority code of conduct <http://www.sra.org.uk/handbook/> accessed 23 October 2017

<sup>212</sup> Bridget Franklin and David Clapham, 'The Social Construction of Housing Management' (1997) 12 Housing Studies 7; Bridget J Franklin, 'Demands, Expectations and Responses: The Shaping of Housing Management' (2000) 15 Housing Studies 907, 925; David Clapham, Bridget Franklin and Lise Saugères, 'Housing Management: The Social Construction of an Occupational Role' (2000) 17 Housing, Theory and Society, 68

<sup>213</sup> Bridget Franklin and David Clapham, 'The Social Construction of Housing Management' (1997) 12 Housing Studies 7

<sup>214</sup> Alison P Brown, 'Anti-Social Behaviour, Crime Control and Social Control' (2004) 43 The Howard Journal of Criminal Justice 203, 207

<sup>215</sup> John J Rodger, *Criminalising Social Policy: Anti-social Behaviour and Welfare in a De-civilised Society* (Willan 2008) 8

<sup>216</sup> Alison P Brown, 'Anti-Social Behaviour, Crime Control and Social Control' (2004) 43 The Howard Journal of Criminal Justice 203, 209

<sup>217</sup> *What is Supporting People?* (ODPM 2003)

<http://www.peoplefirsthousing.co.uk/downloads/Info%20What%20Is%20Supporting%20People.pdf> accessed 20 September 2017

<sup>218</sup> Bridget Franklin and David Clapham, 'The Social Construction of Housing Management' (1997) 12 Housing Studies 7, 12

accentuated by austerity<sup>219</sup> also stands in tension with support. These tensions may exacerbate officers' confusion in constructing their roles.

Franklin and Clapham found generic officers most concerned about their role in support feeling 'anxious about dealing with tenants whose problems they did not understand, or with situations which potentially posed a threat'<sup>220</sup> and that this could be a particular risk for officers when dealing with the specific problems of somebody with mental [health issues] and not knowing 'where to get the help [or] what the laws [and] medications are'.<sup>221</sup> These findings resonate with those of Parr: officers also found the lack of clear definition of the role of housing management *per se* lead to contradictory pressures such that they were 'ambivalent about the extent to which their organisation should take on responsibilities relating to ASB or community care.'<sup>222</sup>

These feelings may be exacerbated by a lack of training: the CIH has developed programmes of training in ASB<sup>223</sup> and Hunter and others<sup>224</sup> found that 70% of social landlords surveyed claimed to provide disability awareness training to their staff dealing with ASB cases. However, Parr reported that officers found their difficulties in case-management to be exacerbated by a lack of medico-welfare and disability legislation training and a feeling that any training received was poor.<sup>225</sup> Consequently, officers managing such cases experienced anxiety in handling perpetrators, wanting to understand causes of behaviour and find a holistic solution.<sup>226</sup>

While there is a blurred boundary<sup>227</sup> between the roles of social workers and housing officers,<sup>228</sup> Casey found those officers who took a proactive rather than pragmatic view of their career to be more likely to identify with and present the caring aspects of the

---

<sup>219</sup> Tony Manzi and Jo Richardson, 'Rethinking Professional Practice: the Logic of Competition and the Crisis of Identity in Housing Practice' (2017) 32 *Housing Studies* 209; Chapter 6

<sup>220</sup> Bridget Franklin and David Clapham, 'The Social Construction of Housing Management' (1997) 12 *Housing Studies* 7

<sup>221</sup> Bridget Franklin and David Clapham, 'The Social Construction of Housing Management' (1997) 12 *Housing Studies* 7

<sup>222</sup> Sadie Parr, 'The Role of Social Housing in the 'Care' and 'Control' of Tenants with Mental Health Problems' (2010) 9 *Social Policy and Society* 111

<sup>223</sup> Alison P Brown, 'Anti-Social Behaviour, Crime Control and Social Control' (2004) 43 *The Howard Journal of Criminal Justice* 203, 209

<sup>224</sup> Caroline Hunter and others, *Disabled People's Experiences of Anti-Social Behaviour and Harassment in Social Housing: A Critical Review* (Disability Rights Commission 2007) 50

<sup>225</sup> Sadie Parr, 'The Role of Social Housing in the 'Care' and 'Control' of Tenants with Mental Health Problems' (2010) 9 *Social Policy and Society* 111, 117

<sup>226</sup> Sadie Parr, 'The Role of Social Housing in the 'Care' and 'Control' of Tenants with Mental Health Problems' (2010) 9 *Social Policy and Society* 111, 117

<sup>227</sup> Bridget Franklin and David Clapham, 'The Social Construction of Housing Management' (1997) 12 (1) *Housing Studies*, 7, 23

<sup>228</sup> Bridget J Franklin, 'Demands, Expectations and Responses: The Shaping of Housing Management' (2000) 15 *Housing Studies* 907, 925

role, keen to point out to others that 'housing management is about helping people' because they see their public profile 'constructs them as being 'hard edged' [and] 'tough'.<sup>229</sup>

Tensions that officers feel about their own role extend to their feelings about other medico-welfare professionals, chiefly social workers: Franklin and Clapham reported that while some officers believed they willingly provided individual welfare services, they saw this as the appropriate role of social workers and nurses.<sup>230</sup> Yet disability scholars have been acutely critical of the role of experts in the provision of support.<sup>231</sup>

Kevin Brown found officers to have a strong belief in their role, yet struggling to determine the value of their work because of the wide scope of both ASB and the work they undertake 'often in partnership with other agencies'.<sup>232</sup> Clapham and others found the expectation that officers are expected to act as policeman and social worker was a source of resentment<sup>233</sup> especially as the latter were in practice seen to not understand the role of housing management.<sup>234</sup> Social workers felt reciprocal frustrations seeing housing officers as focused on property management i.e. the physical maintenance of properties 'and the maximisation of rental income, as having neither the right attitude nor the remit to provide welfare support'<sup>235</sup> although this may reflect the lack of training that social workers have in housing matters.<sup>236</sup>

The literature therefore suggests that officers' lack of clear professional identity is manifest in the uncertainties and frustrations surrounding their role in relation to ASB, mirroring the conflicted role social landlords play in care and control. Their poor training combined their considerable discretion in managing ASB with its nebulously defined policy and the related pressures of its control may lead them to rely on street-

---

<sup>229</sup> Rionach Casey, 'On Becoming a Social Housing Manager: Work Identities in an 'Invisible' Occupation' (2008) 23 *Housing Studies* 761, 772

<sup>230</sup> Bridget Franklin and David Clapham, 'The Social Construction of Housing Management' (1997) 12 *Housing Studies* 7

<sup>231</sup> Colin Barnes, *The Social Model of Disability: Valuable or Irrelevant?* In in Watson N, Roulstone A. and Thomas C (eds), *The Routledge Handbook of Disability Studies* (Routledge 2012) 20

<sup>232</sup> Kevin J Brown, 'The Developing Habitus of the Anti-Social Behaviour Practitioner: From Expansion in Years of Plenty to Surviving the Age of Austerity' (2013) 40 *J.L.Soc'y* 375, 386

<sup>233</sup> David Clapham, Bridget Franklin and Lise Saugères, 'Housing Management: The Social Construction of an Occupational Role' (2000) 17 *Housing, Theory and Society*, 68, 73

<sup>234</sup> Bridget Franklin and David Clapham, 'The Social Construction of Housing Management' (1997) 12 *Housing Studies* 7 dog barking example

<sup>235</sup> Bridget Franklin and David Clapham, 'The Social Construction of Housing Management' (1997) 12 *Housing Studies* 7

<sup>236</sup> Bridget J Franklin, 'Forms and Functions: Assessing Housing Need in the Community Care Context' (1998) 6 *Health and Social Care in the Community* 420, 425

level bureaucratic coping mechanisms including “common-sense” and intuition. Indeed Casey, found officers saw their job as requiring ‘common-sense’.<sup>237</sup>

Given that the nature of housing officers’ roles leads to their reliance on “common-sense” in exercising their broad discretion, the literature considered here exposes a gap: it does not address officers’ understandings of disability in light of the models and as against their construction of risk. The potential consequences of this are considered in the conclusion of this chapter and revisited in the empirical chapters.

**Chapters 5 and 6 will consider how the following factors relating to officers’ experiences and constructions of their roles and professional identity influence them in their day-to-day decision-making:**

- **work with other professionals**
- **training**
- **pressure of work, identifying what those pressures are.**

### 1.2.5 Occupants and Self-Regulation

Social housing occupants have been problematised as a welfare-dependent underclass, immoral, with weak will and unable to control their own behaviour or that of their families and visitors. Interventions enable the delegation of responsibility for the control of behaviour and therefore risk to occupants, and additionally in the case of tenants, for that of their visitors and families.<sup>238</sup>

When social landlords select any occupants as targets of ASB interventions, they may demonstrate their responsibility for minimising risk by complying with them. These individuals thereby comply with conditions.<sup>239</sup> As compliance with these conditions permits the continued occupation of social housing, a form of welfare,<sup>240</sup> they and the policies on which they are based, may be regarded as welfare conditional.<sup>241</sup> These

<sup>237</sup> Rionach Casey, ‘On Becoming a Social Housing Manager: Work Identities in an ‘Invisible’ Occupation’ (2008) 23 Housing Studies 761, 768

<sup>238</sup> John Flint, ‘Social Housing Agencies and the Governance of Anti-social Behaviour’ (2002) 17 Housing Studies 619, 622

<sup>239</sup> Sanford F Schram, *Welfare Discipline: Discourse, Governance, and Globalization* (Temple University Press 2006); See further 1.2.5

<sup>240</sup> David Cowan and Morag McDermont, *Regulating Social Housing: Governing Decline* (Routledge-Cavendish 2006) 21

<sup>241</sup> Beth Watts and others, *Welfare Sanctions and Conditionality in the UK* (Joseph Rowntree Foundation 2014) [www.jrf.org.uk/sites/default/.../Welfare-conditionality-UK-Summary.pdf](http://www.jrf.org.uk/sites/default/.../Welfare-conditionality-UK-Summary.pdf) Cached accessed 14 February 2016



conditions,<sup>242</sup> link occupants' continued use of this welfare right to 'responsible' behaviour'.<sup>243</sup> In complying with conditions attached to ASB interventions, occupants demonstrate their ability to regulate and therefore minimise the risks of their own behaviour or that within their home. They thereby demonstrate their responsibility and capacity for self-governance. Policy therefore achieves its aim of rehabilitating passive welfare recipients into active responsabilisation.<sup>244</sup>

Compliance with such welfare conditionality is decided at the discretion of the landlord. Perpetrators can potentially comply with the conditions imposed at any point. Even after possession proceedings have been pursued, the court may make a suspended possession order (SPO) on terms and the enforcement of such orders is suspended for as long as the perpetrator complies with them.<sup>245</sup> While there is an assessment of risk (to neighbours; a prediction of recurrence)<sup>246</sup> in setting terms that the perpetrator can comply with, this order gives them the opportunity to comply with a further set of conditions. Additional bad behaviour is discouraged and social landlords thereby only (continue to) house those capable of meeting socially constructed standards of behaviour proving their worth<sup>247</sup> i.e. their amenability to moral regulation<sup>248</sup> while those who do not demonstrate such ability face sanctions. Ultimately, policy justifies exclusion from social housing. This accords with Deacon's argument that welfare conditionality is not to 'determine entitlement or establish need but to change behaviour',<sup>249</sup> to reaffirm and enforce the responsibilities of those in receipt of welfare.<sup>250</sup>

Thus, in case-management, it is hypothesised that officers may construct (or re-construct) occupants through a filter of morality as worthy if they comply with the conditions<sup>251</sup> imposed by interventions,<sup>252</sup> having taken individual *moral* responsibility

---

<sup>242</sup> 1.2.3

<sup>243</sup> <http://www.welfareconditionality.ac.uk/about-our-research/what-is-welfare-conditionality/> accessed 6 July 2015

<sup>244</sup> Kevin J Brown, 'It Is Not as Easy as ABC': Examining Practitioners' Views on Using Behavioural Contracts to Encourage Young People to Accept Responsibility for their Anti-Social Behaviour' (2012) 76 JCL 5

<sup>245</sup> E.g. *Manchester CC v Romano*, *Manchester CC v Samari* [2004] EWCA Civ 834, [2005] 1 WLR 2775; 1.3.1; 2.3.3

<sup>246</sup> David Cowan, *Housing Law and Policy* (Cambridge University Press 2011)

<sup>247</sup> John Flint, 'Social Housing Agencies and the Governance of Anti-social Behaviour' (2002) 17 Housing Studies, 623

<sup>248</sup> David Cowan and Morag McDermont, *Regulating Social Housing: Governing Decline* (Routledge-Cavendish 2006) 22

<sup>249</sup> Alan Deacon, 'Justifying Conditionality: the Case of Antisocial Tenants' (2004) 19 Housing Studies 911

<sup>250</sup> Alan Deacon, 'Justifying Conditionality: the Case of Antisocial Tenants' (2004) 19 Housing Studies 911

<sup>251</sup> John Flint and Judy Nixon, 'Governing Neighbours: Anti-social Behaviour Orders and New Forms of Regulating Conduct in the UK' (2006) 43 Urban Studies 939; Alan Deacon, 'Justifying Conditionality: the Case of Antisocial Tenants' (2004) 19

Housing Studies 911

<sup>252</sup> 1.2.3

for regulating their own behaviour (or that of their families / visitors) and the associated risks (self-governance) and resolving social exclusion.<sup>253</sup> By taking responsibility, occupants 'create moral communities' of self-regulating households'.<sup>254</sup> Yet as Flint notes,<sup>255</sup> responsibility is yet another vague term in the discourse of ASB subject to wide interpretation by officers in their exercise of their broad discretion in ASB case-management.

Self-governance aims to responsabilise but is problematic as it serves to exacerbate notions of the perpetrator as risky for three reasons. Firstly, self-governance rests on the assumption that norms and understandings of what constitutes acceptable of antisocial behaviour and neighbour nuisance are shared between officers and their occupants<sup>256</sup> i.e. that they construct ASB in the same way. However, this is difficult in practical terms given that ASB is so ill-defined. Secondly, self-governance presumes the individual has unimpeded agency to socially (re)construct their view of themselves,<sup>257</sup> taking ownership of their behaviour and actions and their consequences and change their behaviour. I.e. *capable* of autonomy and having moral agency<sup>258</sup> in respect of the control of their own behaviour or that of their families or visitors i.e. 'responsible moral agency'.<sup>259</sup> As suggested already,<sup>260</sup> officers' understandings of agency may be affected by understandings of disability. Finally, therefore, in assessing perpetrators' responses to interventions, it is hypothesised that officers may differentiate between two types of perpetrators. On one side of this divide are those who may conform to constructions of vulnerability<sup>261</sup> or "genuine" disability while also demonstrating the ability for compliance with support. On the other side of the divide, are those perpetrators who either do not meet these constructions, perhaps instead seen as risky subjects *per se*, or because they do not demonstrate such compliance. It may be postulated that the former are more likely to be constructed as

---

<sup>253</sup> David Robinson, 'Social Housing in England: Testing the Logics of Reform' (2013) *Urban Studies* 1489, 1490

<sup>254</sup> John Flint, 'Social Housing Agencies and the Governance of Anti-social Behaviour' (2002) 17 *Housing Studies* 621

<sup>255</sup> John Flint, 'The Responsible Tenant: Housing Governance and the Politics of Behaviour' (2004) 19 *Housing Studies* 893, 896

<sup>256</sup> John Flint, 'Social Housing Agencies and the Governance of Anti-social Behaviour' (2002) 17 *Housing Studies* 619, 623

<sup>257</sup> Vivien Burr, *Social Constructionism* (3rd edn, Routledge 2015)

<sup>258</sup> 3.4.2

<sup>259</sup> N Cobb 'Patronising the Mentally Disordered? Social Landlords and the Control of Anti-social Behaviour under the Disability Discrimination Act 1995' (2006) 26 *LS* 238

<sup>260</sup> 1.2.3.5

<sup>261</sup> Kate Brown 'Re-moralising 'Vulnerability'' (2012) 6 *People, Place & Policy Online* 41, 46 <https://extra.shu.ac.uk/ppp-online/re-moralising-vulnerability-2/> accessed 12 May 2015

deserving, the latter as undeserving. The construction of perpetrators may at once be via the medical model and moralistic.

***Chapters 5 and 6 will analyse the findings to discover how officers construct perpetrators, whether this was via a model of disability or a moral lens (shaped by agency, responsibility, compliance and risk).***

## **1.3 Risk**

This section considers the influence of risk on social landlords' ASB case-management practice. It relates the broad definition of ASB to the risks officers have to manage and to their exercise of discretion. It argues that the meaning that officers and other relevant professionals may give to risk may shape their understandings of ASB and its perpetrators.

It will be argued that officers' construction of risk relates to responsibility; that accountability is a mechanism by which their responsibility is operationalised postulating that officers may become defensive in their practice. Furthermore, as social landlords may demonstrate their accountability by litigating, officers are under pressure to gather knowledge (evidence) about perpetrators' impairments. Given problems surrounding both disclosure of perpetrators' impairments<sup>262</sup> and confidentiality,<sup>263</sup> officers may fill this knowledge gap by relying on "common-sense" and intuition. This at once illustrates how relevant perpetrators may be constructed by officers via a model of disability and also as risky or vulnerable. The consequences for case-management are hypothesised in the conclusion.

### **1.3.1 The Social Construction of Risk in ASB**

Just as definitions of ASB<sup>264</sup> make it a vague<sup>265</sup> concept capable of wide interpretation, as easy to define as an 'elephant on the doorstep'<sup>266</sup> so too is risk: Indeed, ASB and risk may be seen as inherently linked. Risk may be conceptualised in terms of hazard, harm or loss.<sup>267</sup> The statutory definitions of ASB are based on harm. As already acknowledged,<sup>268</sup> ASB can be defined as risky *per se*: Social landlords' responsibility to control, i.e. manage, ASB involves the management of the risks posed by individual

---

<sup>262</sup> 3.1.1

<sup>263</sup> 3.1.2.1

<sup>264</sup> 1.2.2

<sup>265</sup> Alison P Brown, 'Anti-Social Behaviour, Crime Control and Social Control' (2004) 43 *The Howard Journal of Criminal Justice* 203, 204

<sup>266</sup> Andrew Millie, 'Looking for Anti-social Behaviour' (2007) 35 *Policy & Politics* 611, 614; 1.2.2

<sup>267</sup> Trevor Adams, 'The Social Construction of Risk by Community Psychiatric Nurses and Family Carers for People with Dementia' (2001) 3 *Health, Risk & Society* 307

<sup>268</sup> 1.1.1

occupants and their behaviour and social housing as a tenure. Consequently, risk pervades ASB discourse affecting how officers may understand ASB.

As the ASB industry has grown, technical knowledge and understanding of risk have correspondingly expanded.<sup>269</sup> As key agents of ASB control, social landlords are involved in the assessment of related risks. Much literature on the subject of risk written in the last three decades works from an actuarial definition or process, focusing on the *outcome*: the probability of some future event occurring. Such definitions make risk sound like a 'real phenomenon that is external to the observer'<sup>270</sup> and therefore capable of the objective assessment. This implies that risk is calculable or quantifiable and that risks can be predicted with some certainty. In response to this, risk assessment instruments are created. These are based on data drawn from population based studies<sup>271</sup> e.g. victims of ASB who are known to perpetrators as opposed to strangers and additional factors including the number of incidents.<sup>272</sup>

Such a technical approach appears to guard against the subjective and potentially normative judgements of a risk assessor. Alternative, qualitative risk assessment methods reliant on observation and interview,<sup>273</sup> seem, *prima facie*, far more likely to be prone to these influences and therefore less reliable.

Technical or quantitative approaches to risk and its assessment are, however, 'problematic because [they fail] to take account of social and cultural factors that shape understanding of with risk, and neglects the *contribution of language* to the perception that particular situations are a risk'.<sup>274</sup> Thus, discourse may shape constructions of risk.

The discourses of ASB and its policy relates to its governance. This involves the control of more than mere situations of ASB, but a wider remoulding or norms and the

---

<sup>269</sup> David Cowan and Morag McDermont, *Regulating Social Housing: Governing Decline* (Routledge-Cavendish 2006)

<sup>270</sup> Trevor Adams, 'The Social Construction of Risk by Community Psychiatric Nurses and Family Carers for People with Dementia' (2001) 3 *Health, Risk & Society* 307, 308

<sup>271</sup> George Szukler, 'Why Risk Assessment in Mental Health Care is Quite Hopeless at Predicting the Events we Most Want to Prevent' <http://georgeszukler.org/risk-assessment-in-mental-healthcare/> accessed 14 November 2017

<sup>272</sup> See Chapter 6, figure 6.1 <http://asbhelp.co.uk/wp-content/uploads/2013/10/Risk-Assessment-Matrix-RHP.pdf> accessed 15 November 2017

<sup>273</sup> Trevor Adams, 'The Social Construction of Risk by Community Psychiatric Nurses and Family Carers for People with Dementia' (2001) 3 *Health, Risk & Society* 307

<sup>274</sup> Trevor Adams, 'The Social Construction of Risk by Community Psychiatric Nurses and Family Carers for People with Dementia' (2001) 3 *Health, Risk & Society* 307, 308 (emphasis added)

resistance of residualisation. Social landlords' responsibility to control these risks is correspondingly broad and therefore difficult to scope. As such there is a wide range of discourses which may influence officers' understandings of risk.

As further considered in the next chapter, at the situational level, the requirement to predict further ASB in possession proceedings, i.e. assess risk, is found in statute<sup>275</sup> there is no legislative definition of risk. ASB case-law provides some guidance on what factors the courts will take into account yet this is imprecise because each case is based on its own facts. As Crawford argues, '[I]n seeking to govern future behaviour, ASB controls have a pre-emptive logic that resonates with the 'precautionary principle'<sup>276</sup> i.e. taking 'protective measures without having to wait until the reality and the seriousness of the risks become fully apparent'.<sup>277</sup> However, there is scant scientific evidence underlying this approach which:

[m]agnifies uncertainty, justifying early interventions before harm occurs on the basis of 'likelihood' that future acts might cause 'harassment, alarm or distress.' The assessments of risk that inform these judgments are subjective perceptions rather than based on 'rationalistic' science informing risk calculations', become defining characteristics of future governance.<sup>278</sup>

In assessing or predicting risk, officers can therefore be compared with mental health professionals who are required to assess risk working from a broad legislative definition of 'mental disorder'<sup>279</sup> but without any comprehensive legislative definition of risk<sup>280</sup> or guidance on factors to take into account to assess it.<sup>281</sup> They have wide discretion in assessing risk that typically reveals the 'risk is risk paradox... [they] know it when they see it but cannot define it in the abstract'.<sup>282</sup> Consequently, they 'operate on a personal and ad hoc system of interviewing, observation and self-report of the

---

<sup>275</sup> 2.1.2

<sup>276</sup> 2.3.3

<sup>277</sup> C-356/12 *Wolfgang Glatzel v Freistaat Bayern* Judgement of 22 May 2014 [65] in Charlotte O'Brien. 'Driving Down Disability Equality' (2014) 21 *Maastricht J. Eur. & Comp. L.* 723, 727

<sup>278</sup> A Crawford 'Governing Through Anti-Social Behaviour' (2009) 49 *Brit.J.Criminol* 810, 818

<sup>279</sup> MHA 1983, s 1(2)

<sup>280</sup> HA 1985, s 84(2); HA 1988, s 7(4)

<sup>281</sup> Nicola Glover-Thomas, 'The Age of Risk: Risk Perception and Determination Following the Mental Health Act 2007' (2011) 19 *Med L Rev* 581, 588

<sup>282</sup> Nicola Glover-Thomas, 'The Age of Risk: Risk Perception and Determination Following the Mental Health Act 2007' (2011) 19 *Med L Rev* 581, 604

person being assessed'<sup>283</sup> and 'based on their own experience of which patients have turned out to be dangerous in the past'.<sup>284</sup>

As a result of such imprecise definitions of these key concepts, in the context of ASB, it is hypothesised that housing officers may take similarly intuitive approaches: drawing on past experience and "common-sense".<sup>285</sup> Thus, officers' assessments of the risks of ASB will affect and be affected by their social constructions.

**Chapter 6 will analyse the findings to illustrate how officers construct risk. It will show whom and what officers consider risks are posed to, the risk assessment instruments they use<sup>286</sup> and gauge the extent of their reliance on "common-sense" and a focus on the outcome of the process.<sup>287</sup>**

### 1.3.2 Risk and Accountability

Douglas<sup>288</sup> and Beck<sup>289</sup> explain how 'risk has shaped our relationship to blame so that every accident must hold within it a fault to which someone is held to account'.<sup>290</sup> While social landlords have been vested with responsibility for ASB control, such that they are held to account for that which occurs within their stock, the task of day-to-day decision-making has been delegated to officers. While officers' must first identify ASB to exist to such a degree that a response is necessary<sup>291</sup> (i.e. an assessment of risk),<sup>292</sup> accountability makes it unlikely that they will ignore complaints.

---

<sup>283</sup> Hazel Kemshall, *Reviewing Risk: A Review of Research on the Assessment and Management of Risk and Dangerousness: Implications for Policy and Practice in the Probation Service* (Home Office 1996) 17 in David Cowan, Christina Pantazis and Rose Gilroy, 'Risking Housing Need' (1999) 26 J.L.Soc'y 403, 415

<sup>284</sup> Peter Bartlett, 'Civil Confinement' in J McHale and others (eds), *Principles of Mental Health Law* (OUP 2010) para 12.19

<sup>285</sup> Rionach Casey, 'On Becoming a Social Housing Manager: Work Identities in an 'Invisible' Occupation' (2008) 23 Housing Studies 761, 768; 1.2.3

<sup>286</sup> 6.1

<sup>287</sup> Nicola Glover-Thomas, 'The Age of Risk: Risk Perception and Determination Following the Mental Health Act 2007' (2011) 19 Med L Rev 581

<sup>288</sup> Mary Douglas, *Risk and Blame: Essays in Cultural Theory* (Routledge 1994)

<sup>289</sup> Ulrich Beck, *Risk Society: Towards a New Modernity* (Sage 1992)

<sup>290</sup> Alexandra Hillman and others, 'Risk, Governance and the Experience of Care' (2013) 35 *Sociology of Health & Illness* 939, 941

<sup>291</sup> 1.2.2

<sup>292</sup> Introductory Chapter

Accountability exists for acts or omissions<sup>293</sup> within a 'range of activity that is open to scrutiny'.<sup>294</sup> It may be to 'a body of people whom the organisation in some sense represents, on whose behalf it acts and which gives it legitimacy'.<sup>295</sup> While only local authority landlords are accountable to an electorate, all social landlords are accountable to their local community because policy has given them with such responsibility in the control of ASB. Furthermore, the communities to which social landlords are accountable include victims and other complainants with whom they may have a contractual relationship.

Accountability exists not only at this organisational, structural level but also at the level of individual officers in turn exacerbating officers' street-level bureaucratic stresses, affecting their decision-making.<sup>296</sup> Hillman and others found accountability for complaints and litigation caused defensive practice amongst front-line health care staff i.e. those with less autonomy.<sup>297</sup> Marsh and Triseliotis reported that the 'increasing emphasis on administrative law as a mechanism for accountability lead to fear and defensive practice among social workers.'<sup>298</sup> Defensive practice may occur 'whenever a practitioner gives a higher priority to self-protection from blame than to the best interests of the [client]',<sup>299</sup> their practice being shaped 'less by the presence of their [clients] as full persons',<sup>300</sup> than the requirements of accountability including maintenance of records.<sup>301</sup>

While such defensiveness may lead to good practice including reflection and greater sensitivity to societal and professional expectations<sup>302</sup> it may also be experienced negatively by professionals including increased investigation, and documentation,

---

<sup>293</sup> G Hunt, 'Whistleblowing and the Crisis of Accountability' in G Hunt (ed), *Whistleblowing in the Social Services* (Arnold 1998)

<sup>294</sup> Suzy Braye and Michael Preston-Shoot, 'Accountability, Administrative Law and Social Work Practice: Redressing or Reinforcing the Power Imbalance?' (1999) 21 JSWFL 235, 235-6

<sup>295</sup> S Wilmot, *The Ethics of Community Care* (Cassell 1997)

<sup>296</sup> 1.2.4

<sup>297</sup> Alexandra Hillman and others, 'Risk, Governance and the Experience of Care' (2013) 35 *Sociology of Health & Illness* 939, 949

<sup>298</sup> Peter Marsh and John P Triseliotis, *Ready to Practise?: Social Workers and Probation Officers: Their Training and First Year in Work* (Avebury 1996) in Suzy Braye and Michael Preston-Shoot, 'Accountability, Administrative Law and Social Work Practice: Redressing or Reinforcing the Power Imbalance?' (1999) 21 JSWFL 235, 237

<sup>299</sup> Richard Mullen, Anita Admiraal and Judy Trevena, 'Defensive Practice in Mental Health' (2008) 121 *The New Zealand Medical Journal* 85, 121

<sup>300</sup> T Cresswell, *In Place/out of Place: Geography, Ideology, and Transgression* (University of Minnesota Press 1996) in Alexandra Hillman and others, 'Risk, Governance and the Experience of Care' (2013) 35 *Sociology of Health & Illness* 939, 952

<sup>301</sup> Alexandra Hillman and others, 'Risk, Governance and the Experience of Care' (2013) 35 *Sociology of Health & Illness* 939, 949

<sup>302</sup> Wayne Cunningham and Susan Dovey, 'Defensive Changes in Medical Practice and the Complaints Process: A Qualitative Study of New Zealand Doctors' (2006) 119 *NZMJ* 1, 1



'active identification of potential problem'<sup>303</sup> occupants, and changes to patterns and amounts of work.<sup>304</sup>

In the management of ASB by relevant perpetrators, there may be particular impetus to practice defensively' because of:

pressure to respond... to wider societal concerns. Controversies in mental health, and occasional tragedies, are often the subject of close media attention and reporting which may be inflammatory. Negative public perception of the mental health service may influence health care professionals' decision-making and so contribute to defensive practice.<sup>305</sup>

Officers' anxieties<sup>306</sup> resulting from the tensions between their role in community care and ASB case-management may be heightened in fear that their personal failures may reflect badly on their employers leading to their own defensive practice.

Negative publicity was cited as having a similar effect on the reputations of prisons that in turn affected the perception of litigation risk against these organisations. The growth in the human rights of prisoners who will use 'whatever resources are available to them to improve or challenge their status'<sup>307</sup> has led to a groundswell of litigation against prisons.<sup>308</sup> Whitty calls this *legal risk+* i.e. 'the capacity of human rights activism to propel an issue to centre stage, damaging an organisation's operations and reputation, irrespective of actual legal liability'.<sup>309</sup> This thesis adopts as a premise Whitty's argument and applies it to social landlords. The risk to them is not that they may be litigated *against*, rather that when taking proceedings against a perpetrator, they may raise a successful challenge. Consequently, social landlords, may out of self-interest, and in anticipation of such challenge, comply with any rights that

---

<sup>303</sup> Wayne Cunningham and Susan Dovey, 'Defensive Changes in Medical Practice and the Complaints Process: A Qualitative Study of New Zealand Doctors' (2006) 119 NZMJ 1, 1

<sup>304</sup> Wayne Cunningham and Susan Dovey, 'Defensive Changes in Medical Practice and the Complaints Process: A Qualitative Study of New Zealand Doctors' (2006) 119 NZMJ 1, 1

<sup>305</sup> Richard Mullen, Anita Admiraal and Judy Trevena, 'Defensive Practice in Mental Health' (2008) 121 The New Zealand Medical Journal 85

<sup>306</sup> 1.2.4

<sup>307</sup> Noel Whitty, 'Human Rights as Risk: UK Prisons and the Management of Risk and Rights' (2011) 13 Punishment & Society 123, 130

<sup>308</sup> Noel Whitty, 'Rights as Risk: Managing Human Rights and Risk in the UK Prison Sector' Published by the Centre for Analysis of Risk and Regulation at the London School of Economics and Political Science, 2010, 2

<sup>309</sup> Noel Whitty, 'Rights as Risk: Managing Human Rights and Risk in the UK Prison Sector' Published by the Centre for Analysis of Risk and Regulation at the London School of Economics and Political Science, 2010, 2

perpetrators may assert in this process, but only to the minimal extent necessary to resist such challenge.<sup>310</sup> Furthermore, senior management may become averse to any risk of litigation,<sup>311</sup> its 'mere prospect... with its attendant costs and unpredictability'<sup>312</sup> becoming 'unacceptable to organisational risk management.'<sup>313</sup> Thus, without due caution in ASB case-management and careful preparation of its formal stages, the outcome of litigation may seem risky to the organisation, only to be resorted to in cases of dead certainty.

Despite the possibility of risks of accountability for inaction, where social landlords fail to take action against their antisocial tenants, the courts have shown wariness in imposing liability for breach of the covenant of quiet enjoyment<sup>314</sup> or in negligence to any tenant victims of criminal behaviour despite harm caused.<sup>315</sup> Thus, social landlords are *unlikely* to be held legally responsible for permitting ASB or allowing it to continue. However, the community remedy<sup>316</sup> (which gives victims the right to request a review of their case bringing police, local authorities, clinical commissioning groups and PRPs together to find a joined-up solution) provides a specific means of bringing agencies, including social landlords, to account for inaction.

The secondary risk of litigation is thus a mechanism for accountability. Accountability forces the assessment of litigation risk and is likely to result in officers experiencing pressure i.e. stress and taking a risk-averse approach to decision-making.

**Chapter 6 will analyse the findings to reveal whether and how accountability and relatedly litigation risk influenced officers in their decision-making.**

---

<sup>310</sup> 2.3.5

<sup>311</sup> Noel Whitty, 'Human Rights as Risk: UK Prisons and the Management of Risk and Rights' (2011) 13 *Punishment & Society* 123, 124

<sup>312</sup> Noel Whitty, 'Human Rights as Risk: UK Prisons and the Management of Risk and Rights' (2011) 13 *Punishment & Society* 123, 124

<sup>313</sup> Noel Whitty, 'Human Rights as Risk: UK Prisons and the Management of Risk and Rights' (2011) 13 *Punishment & Society* 123, 124

<sup>314</sup> *Sedleigh-Denfield v O'Callaghan* [1940] AC 880; *Octavia Hill Housing Trust v Brumby* [2010] EWHC 1793 (QB), [2010] All ER (D) 165 (Jul) cf *Smith v Scott* [1973] Ch 314; *Hussain v Lancaster CC* [2000] 1 QB 1; *Mowam v LB Wandsworth* (2001) 33 HLR 56; *Southwark LBC v Tanner* [2001] 1 AC 1

<sup>315</sup> *X v Hounslow LBC* [2009] EWCA Civ 286, [2009] PTSR 1158; *Mitchell and Another v Glasgow CC* [2009] UKHL 11, [2009] AC 874

<sup>316</sup> ASBCPA 2014, s 104

### 1.3.3 Risk, Knowledge and Governance

The search for knowledge or information (evidence) is part of the everyday work of officers and in turn, part of the professional discourse of housing management. In the governance of ASB, the management of risk is dependent on knowledge.<sup>317</sup> As the risks to be managed may be caused by the ASB of individuals, who may be constructed as risky per se<sup>318</sup> knowledge of those individuals may be sought. Gathering information about the population makes assessing the risks they pose and therefore the task of controlling them easier. Thus, officers engage in information-gathering as part of the assessment of risks associated with ASB and its perpetrators. It should be noted here that knowledge has several meanings in this thesis: robust evidence in the form of a medical report stating a diagnosis<sup>319</sup> may provide a social landlord with knowledge of a perpetrator's impairments. This will further assist officers in their assessment of litigation risk that accountability forces consideration of. However, because of the requirements of the EA 2010, section 15(2) which in ASB litigation, provides landlords with a counter-argument to a perpetrator's disability challenge, knowledge can be less "robust": a reasonable expectation of a perpetrator's impairment.<sup>320</sup> If they did not know, they could not discriminate.<sup>321</sup>

Even where the ASB complained of seems trivial and resort to litigation seems very unlikely, the management of any case and decisions about how to proceed, including the anticipation of a disability challenge, is dependent on evidence. Thus, long before formal gathering of witness statements occurs, knowledge of the surrounding facts of a case may be acquired and such investigation may shape the officer's construction of the perpetrator. However, social landlords' inadequate monitoring<sup>322</sup> of disability in addition to the lack of disclosure<sup>323</sup> caused by stigma<sup>324</sup> may mean that they have little information about individual perpetrators' impairments.

---

<sup>317</sup> David Cowan, Christina Pantazis and Rose Gilroy, 'Risking Housing Need' (1999) 26 J.L.Soc'y 403, 410-411

<sup>318</sup> David Cowan, Christina Pantazis and Rose Gilroy, 'Risking Housing Need' (1999) 26 J.L.Soc'y 403, 410-411

<sup>319</sup> 3.3.1

<sup>320</sup> This principle was first established in *Mayor and Burgesses of the LB of Lewisham (Appellants) v Malcolm (Respondent)* [2008] UKHL 43, [2008] 1 AC 1399 [161]-[163] (Lord Neuberger)

<sup>321</sup> 3.2; 6.4.2.1

<sup>322</sup> Caroline Hunter and others, *Disabled People's Experiences of Anti-Social Behaviour and Harassment in Social Housing: A Critical Review* (Disability Rights Commission 2007) 83

<sup>323</sup> 3.1.1

<sup>324</sup> Introductory Chapter

Despite the responsibility imposed on them in the control of ASB, no social landlord is an island. Rose<sup>325</sup> assumed the existence of information-sharing by multi-agency partnerships and while management of the risks of ASB has been made difficult by dispersal of the stock and the consequent dilution of opportunities for information (knowledge) gathering, the HCA's Regulatory Framework requires social landlords 'work in partnership with other agencies to prevent and tackle [ASB] in the neighbourhoods where they own homes'.<sup>326</sup> The sharing of medical evidence in cases where the perpetrator of ASB has a known or suspected mental health issue has been recommended by senior members of the judiciary<sup>327</sup> and academics.<sup>328</sup>

The effective governance of ASB is dependent upon expert knowledge. While officers may be experts in housing management, in their understanding of mental impairments they lack 'relevant skills or knowledge'<sup>329</sup> being laypeople. Consequently, they may turn to medico-welfare professionals, seeking information from them. The powerful position of medical knowledge and expertise these other professionals have may provide officers with an antidote to feelings of insecurity<sup>330</sup> and consequent anxieties in managing the risks of ASB in such cases. Disability scholars' concerns that such reliance on expertise reflects and gives rise to a medical model understanding of disability have been noted elsewhere.<sup>331</sup>

The recently repealed<sup>332</sup> section 29 of the Data Protection Act 1998 (DPA 1998) contained exemptions from non-disclosure of personal or sensitive information where the objective is the prevention or detection of crime. Cowan and McDermont note that 'officers engage in regular cross-disciplinary dialogues... about individuals they perceive as risky.'<sup>333</sup> While the shift of responsibility for the control of ASB to social

---

<sup>325</sup> Nikolas Rose, 'The Death of the Social? Refiguring the Territory of Government' (1996) 25 *Economy and Society* 327, 333

<sup>326</sup> Homes and Communities Agency *Neighbourhood and Community Standard* (HCA 2012) [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/419766/Neighbourhood\\_and\\_Community\\_Standard\\_2015.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/419766/Neighbourhood_and_Community_Standard_2015.pdf) accessed 24 November 2017

<sup>327</sup> *Manchester CC v Romano*, *Manchester CC v Samari* [2004] EWCA Civ 834, [2005] 1 WLR 2775 [118] (LJ Brooke); *Lewisham LBC v Malcolm and another* [2007] EWCA Civ 763 [117] (LJ Arden)

<sup>328</sup> N Cobb 'Patronising the Mentally Disordered? Social Landlords and the Control of Anti-social Behaviour under the Disability Discrimination Act 1995' (2006) 26 *LS* 238, 251

<sup>329</sup> David Clapham, Bridget Franklin and Lise Saugères, 'Housing Management: The Social Construction of an Occupational Role' (2000) 17 *Housing, Theory and Society*, 68, 74

<sup>330</sup> S Halliday, C Kitzinger, and J Kitzinger 'Law in Everyday Life and Death: A Socio-Legal Study of Chronic Disorders of Consciousness' (2014) 35 *LS* 1, 7

<sup>331</sup> Introductory Chapter

<sup>332</sup> Data Protection Act 2018, s 211(1)(a), Sch 19, Pt 1, para 44

<sup>333</sup> David Cowan and Morag McDermont, *Regulating Social Housing: Governing Decline* (Routledge-Cavendish 2006)136; see also Pauline Papps, 'Anti-social Behaviour Strategies - Individualistic or Holistic?' (1998) 13 *Housing Studies* 639, 645-647

landlords may have made them 'receptive to risk dialogues'<sup>334</sup> and sharing of confidential information (and evidence) with other agencies, the research confirming this focused on sex offenders.<sup>335</sup> However, the gathering of such evidence from medico-welfare professionals may be frustrated in cases where perpetrators seem less risky or immoral or because relations with these colleagues are tense in any event.<sup>336</sup> Further, these partner agents may prove less amenable to co-operating because of their professional codes of ethics<sup>337</sup> and data protection law, particularly in light of recent changes<sup>338</sup> and their own accountability.<sup>339</sup> Thus, medico-welfare professionals may be unwilling to disclose where they consider information-sharing too great a competing risk.

Officers have therefore been found to commonly feel 'that the routine processes of obtaining knowledge about particular households were not sufficient'<sup>340</sup> thereby engaging in a bureaucratic imperative for 'information bingeing'.<sup>341</sup> Where their investigations fail, these street-level bureaucrats may feel particularly disappointed in their partner agents, yet accountability may drive them in their insatiable quest for more and better knowledge.<sup>342</sup> In the absence of disclosure, and where information bingeing fails to produce dessert in the form of evidence of a perpetrator's mental impairment, officers' constructions of perpetrators may be based on "common-sense",<sup>343</sup> instinctual understandings of what drives human behaviour<sup>344</sup> or popular psychology in an attempt to classify behaviour.<sup>345</sup> At this point of assessing the risks of ASB control and exclusion, officers may construct perpetrators via the medical model just as they did in relation to occupants accessing the tenure.<sup>346</sup> Yet also

---

<sup>334</sup> David Cowan, Christina Pantazis and Rose Gilroy, 'Risking Housing Need' (1999) 26 J.L.Soc'y 403, 421

<sup>335</sup> David Cowan, Christina Pantazis and Rose Gilroy, 'Risking Housing Need' (1999) 26 J.L.Soc'y 403, 421

<sup>336</sup> 1.2.4

<sup>337</sup> [http://cdn.basw.co.uk/upload/basw\\_95243-9.pdf](http://cdn.basw.co.uk/upload/basw_95243-9.pdf) accessed 20 January 2017; 3.1.2.1

<sup>338</sup> Data Protection Act 2018

<sup>339</sup> Richard Victor Ericson and Kevin D Haggerty, *Policing the Risk Society* (OUP 1996) 118 in David Cowan, Christina Pantazis and Rose Gilroy, 'Risking Housing Need' (1999) 26 J.L.Soc'y 403, 421

<sup>340</sup> David Cowan, Christina Pantazis and Rose Gilroy, 'Social Housing as Crime Control: An Examination of the Role of Housing Management in Policing Sex Offenders' (2001) 10 S&LS 435, 448. Indeed local authorities on the whole feel they have insufficient data on disabled occupants in their areas in order to assess their need for appropriate housing - Adams, Lorna and others, 'Housing and Disabled People: the Role of Local Authorities' (Equality and Human Rights Commission, 2018) 30 <https://www.equalityhumanrights.com/sites/default/files/research-report-115-housing-and-disabled-people-the-role-of-local-authorities.pdf> accessed 11 July 2018

<sup>341</sup> Simon Halliday, *Judicial Review and Compliance with Administrative Law* (Hart 2004) 77

<sup>342</sup> David Cowan, Christina Pantazis and Rose Gilroy, 'Risking Housing Need' (1999) 26 J.L.Soc'y 403, 414

<sup>343</sup> Rionach Casey, 'On Becoming a Social Housing Manager: Work Identities in an 'Invisible' Occupation' (2008) 23 Housing Studies 761, 768

<sup>344</sup> Kevin J Brown, "'It Is Not as Easy as ABC": Examining Practitioners' Views on Using Behavioural Contracts to Encourage Young People to Accept Responsibility for their Anti-Social Behaviour' (2012) 76 JCL 53, 59

<sup>345</sup> 3.4.1

<sup>346</sup> 1.1.2

consistent with the inherent risk discourse of ASB,<sup>347</sup> such occupants are portrayed as risky subjects and this may also affect officers' instinctual judgements. Thus, as a result of employing their "common-sense" and intuition, it is hypothesised that officers may engage in a further street-level bureaucrat coping mechanism: stereotyping.<sup>348</sup>

However officers socially construct perpetrators, this may affect the progress of case-management and the intervention chosen for them may be based on their assumed capacity for compliance.

***Chapter 5 will consider which model of disability best explains officers' practice in gathering and evaluating evidence of perpetrators' mental impairments. Chapter 6 will relate officers' evaluations of evidence of these impairments to the outcomes of social landlords' ASB management practice.***

## **Conclusion**

This chapter has outlined how officers may construct ASB and its perpetrators. Given the broad definition of ASB, there is correspondingly wide scope for officers to construct both ASB and its perpetrators. While criteria used to assess applicants for social housing forces a medical model understanding, occupants may also be constructed as risky like the residualised tenure they inhabit. To mitigate the risks of ASB, policy therefore permits exclusion from or continued occupation of social housing by various controls and interventions.

Officers' construction of ASB and its perpetrators is further affected by the wide discretion these street-level bureaucrats have in their day-to-day operation of ASB policy. Both the broad definition of ASB and this wide discretion permit the employment of "common-sense" in case-management that permits a wide range of interventions in ASB control.

---

<sup>347</sup> David Cowan and Morag McDermont, *Regulating Social Housing: Governing Decline* (Routledge-Cavendish 2006) 138; 1.1.2.1

<sup>348</sup> Introductory Chapter; 2.3.3; 3.1.2.3

Also influencing officers' decision-making in case-management is their understanding of risk. ASB policies have shifted the responsibility for resisting the decline of social housing and all its associated risks – ASB and its perpetrators – from the state to social landlords and in turn onto individual officers and the occupants of social housing. A great deal of responsibility is vested in these individuals on both sides of the landlord / tenant divide and this puts strain on front-line officers which is magnified by their uncertain professional identity.

Officers' constructions of perpetrators and their behaviour may be affected by this identity and their lack of or poor training.<sup>349</sup> Combined with the seemingly insurmountable obstacles to finding “robust”, corroborated evidence posed by a lack of disclosure and information-sharing, officers in their need to understand may become reliant on “common-sense”, past experience and a ‘professionally intuitive sense of the “real story” behind’<sup>350</sup> cases where they suspect perpetrators have mental impairments. This ‘bureaucratic knowledge’<sup>351</sup> may also be affected by the discourse of risk that pervades ASB. Officers’ “common-sense” and intuitive constructions of perpetrators’ impairments may also be shaped by the application of ‘criteria based on [their] own standards of moral and acceptable behaviour’<sup>352</sup> that may be influenced by welfare conditionality. These moral influences may combine to affect notions of what constitutes “genuine” disability. These factors may also affect the weight officers attach to any available evidence as against consonance and dissonance with their intuitive sense’.<sup>353</sup> Thus, Kevin Brown found sceptical responses to some perpetrators who disclosed their disorders, giving an example of a woman who

...claimed that she had, well she does have mental health problems, and [her son] had ADHD so she was citing that as the reason why he couldn't stick to this agreement so wouldn't have him sign anything that he couldn't stick to basically.<sup>354</sup>

---

<sup>349</sup> 1.2.4

<sup>350</sup> Simon Halliday ‘Institutional Racism in Bureaucratic Decision-Making: A Case Study in the Administration of Homelessness Law’ (2000) 27 J L & Soc’y 449, 465

<sup>351</sup> Simon Halliday, ‘Institutional Racism in Bureaucratic Decision-Making: A Case Study in the Administration of Homelessness Law’ (2000) 27 J.L.Soc’y 449, 451

<sup>352</sup> Pauline Card, ‘Governing Tenants: from Dreadful Enclosures to Dangerous Places’ in John Flint (ed), *Housing, Urban Governance and Anti-social Behaviour: Perspectives, Policy and Practice* (Policy Press 2006) 37, 44

<sup>353</sup> Caroline Hunter and others, ‘Reconfiguring Knowledge Hierarchies? The Weighting of Medical Evidence in Homelessness Assessments in England’ unpublished, 18

<sup>354</sup> Kevin J Brown, ‘It Is Not as Easy as ABC’: Examining Practitioners’ Views on Using Behavioural Contracts to Encourage Young People to Accept Responsibility for their Anti-Social Behaviour’ (2012) 76 JCL 53

While Brown is writing about capacity for compliance, there is some scepticism suggested not only by the use of “citing that as the reason” for non-compliance but also the initial reference to the mother’s “claim” to mental health problems. The weighing of evidence is further considered in the next two chapters but for the time being it is sufficient to say that these moral and intuitive judgements may affect the outcomes of ASB case-management especially given the views of deserving and undeserving cases that officers have been found to have.<sup>355</sup> Thus, Schneider<sup>356</sup> found ‘representatives of supported housing agencies in Canada used apparently clear-cut criteria for admission e.g. medication compliance in contingent and flexible ways to assess *worthiness* for admission’.<sup>357</sup> Similarly, officers’ constructions of perpetrators may be affected by their responses to interventions and compliance with behavioural conditions of interventions and these assessments may affect further ASB case-management.

Moral constructions of perpetrators are likely to be particularly evident where officers make different decisions in similar cases with sympathy afforded to those constructed as more deserving. Thus, officers may bend rules providing extraordinary and unauthorised support for some individuals and, with minimal compliance with the law, only limited assistance to others who are constructed as less deserving, less responsible or more risky.<sup>358</sup> Ultimately, these normative judgements of the worth<sup>359</sup> of perpetrators may be prioritised over adherence to rules, procedures or policies becoming the policy being used to differential effect with different individuals receiving support as against control.<sup>360</sup> Thus, in their discretionary decision-making it is hypothesised that officers may be reliant on street-level bureaucratic coping mechanisms. An additional pressure on officers shaping their constructions of

---

<sup>355</sup> David Clapham, Bridget Franklin and Lise Saugères, ‘Housing Management: The Social Construction of an Occupational Role’ (2000) 17 *Housing, Theory and Society*, 68, 77

<sup>356</sup> Barbara Schneider, ‘Housing People with Mental Illnesses: The Discursive Construction of Worthiness’, (2009) 27 *Housing, Theory and Society* 1, 2

<sup>357</sup> Barbara Schneider, ‘Housing People with Mental Illnesses: The Discursive Construction of Worthiness’, (2009) 27 *Housing, Theory and Society* 1, 2

<sup>358</sup> Mike Rowe, ‘Going Back to the Street: Revisiting Lipsky’s Street-level Bureaucracy’ (2012) 30 *Teaching Public Administration* 10, 14; Steven Maynard-Moody and Michael Musheno, *Cops, Teachers, Counsellors: Stories from the Front Lines of Public Service* (University of Michigan Press 2003); 1.3.2; 2.3.5

<sup>359</sup> Eileen Pye, Chapters 5 and 6

<sup>360</sup> Steven Maynard-Moody and Michael Musheno, *Cops, Teachers, Counsellors: Stories from the Front Lines of Public Service* (University of Michigan Press 2003)



perpetrators and consequent case-management are the legal arguments their opponents may raise in proceedings and it is these that I consider next.

# CHAPTER 2 Defences and Challenges to Antisocial Behaviour Proceedings

## Contents

<b><u>Introduction</u></b>	<b>100</b>
<b><u>2.1 The Housing Law Defences</u></b>	<b>102</b>
2.1.1 Reasonableness	102
2.1.2 Structured Discretion	103
<b>2.2 Challenges at Public Law</b>	<b>104</b>
2.2.1 Policies and their relationship with Public Law	
Defences	104
2.2.2 The Meaning of Proportionality in Public Law	105
<b><u>2.3 Challenges relating to Disability and Discrimination and their Limitations</u></b>	<b>106</b>

<b>2.3.1</b>	<b>The Drafting of Legislation and the Models of Disability</b>	<b>107</b>
<b>2.3.2</b>	<b>Discrimination Arguments: The DDA 1995 and its Early Social Model Success: <i>North Devon Homes Ltd v Brazier</i><sup>1</sup></b>	<b>108</b>
<b>2.3.3</b>	<b>Discrimination Arguments: the Limitations Posed by Risk Considerations</b>	<b>110</b>
<b>2.3.4</b>	<b>Discrimination Arguments: the Limitations Posed by Comparators</b>	<b>115</b>
<b>2.3.5</b>	<b>Litigation Risk: Challenges and Proportionality</b>	<b>118</b>
<b>2.3.6</b>	<b>Discrimination Arguments: the Limitations Posed by Causation</b>	<b>124</b>
<b>2.3.7</b>	<b>Other Disability Related Challenges and Remedies</b>	<b>127</b>
	<b><u>Conclusion</u></b>	<b><u>135</u></b>

---

<sup>1</sup> *North Devon Homes Ltd v Brazier* [2003] EWHC 574 (QB), [2003] HLR 905

## **Introduction**

This chapter considers the various challenges and defences to ASB proceedings. This at once achieves three tasks: it maps out the part of the policy landscape relevant to the thesis; in so doing, it illustrates the potential of the law to resist the responsabilisation and risk-based agenda of ASB policy. Finally, it partially addresses the research questions relating constructions of perpetrators in policy via the models of disability to how this may affect practice and outcomes via considerations of risk.

Given the disproportionate representation of people with physical and mental impairments ‘living in social housing rendering them potential recipients and beneficiaries of anti-social behaviour interventions,’<sup>2</sup> then in litigation, social landlords must frequently encounter disability-based and other challenges to proceedings. The chapter therefore outlines all challenges setting out the bases of the housing law defence of reasonableness and arguments from equality law: discrimination, reasonable adjustments and the PSED. Additionally, the public law challenges to ASB proceedings are considered because the terminology and jurisprudence of proportionality overlaps with that which has developed in interpretations of disability equality legislation.

The challenges considered mostly originate in policy, yet none caters specifically for relevant perpetrators. To understand how perpetrators are constructed in such policy and whether this is best understood as sitting within a medical or social model of disability, interpretations in case-law are also examined, its effect on policy discourse having been noted.<sup>3</sup> This analysis illustrates how the judiciary assess various risks in ASB cases where equality challenges are raised and this is continued in the next chapter. The analysis also reveals how causation, reasonableness, justification or proportionality are narrowly constructed. This is consistent with the individualised focus on impairment of the medical as opposed to the social model and the barriers including social exclusion that it seeks to address.<sup>4</sup> It is therefore argued that in its control of ASB, housing law trumps legal challenges relating to disability (“disability

---

<sup>2</sup> Caroline Hunter and others, *Disabled People’s Experiences of Anti-Social Behaviour and Harassment in Social Housing: A Critical Review* (Disability Rights Commission 2007) 14; 1.1.2

<sup>3</sup> Introductory Chapter

<sup>4</sup> Introductory Chapter and Chapter 4

challenges”) which pose a limited risk to the success of litigation when this is contemplated by landlords. Yet the mere prospect of a challenge raises consideration of litigation risk that may affect how officers manage cases.

## **2.1 The Housing Law Defences**

The following overview is provided because officers may be familiar with these legal arguments or at least their terminology. They are relevant to the possibility of litigation, a secondary risk and a mechanism for accountability, which is a pressure on officers in their day-to-day decision-making.<sup>5</sup> Additionally, structured discretion demands risk assessment in court. These matters will be considered as against the empirical evidence in Chapter 6.

### **2.1.1 Reasonableness**

Landlords bringing possession<sup>6</sup> proceedings on the grounds of ASB against secure<sup>7</sup> and assured tenants,<sup>8</sup> must not only show the ASB occurred but also that it is reasonable for the court to make the order.<sup>9</sup> Thus, once the grounds for possession is made out, the court may still not make the order. The judge's discretion here is wide requiring them to consider 'all relevant circumstances as they exist at the date of the hearing... in... a broad, common-sense way'<sup>10</sup> and to make their 'conclusion giving such weight as [they think] right to the various factors.'<sup>11</sup> Thus, not only the occupant's behaviour but also the effects of the order on both parties<sup>12</sup> should be taken into account. Here a parallel may be drawn with the reliance on "common-sense" in determining behaviour as anti-social and determining reasonableness in making a possession order in cases of ASB. In the latter, reasonableness is defined by reference to "common-sense". Both reasonableness and "common-sense" are matters individuals are likely to believe they possess. Yet as already suggested in relation to "common-sense", neither are matters that people necessarily agree on.

---

<sup>5</sup> 1.3.2

<sup>6</sup> HA 1985, s 84; HA 1988, s 7

<sup>7</sup> HA 1985, s 79

<sup>8</sup> HA 1988, s 1

<sup>9</sup> HA 1985, s 84(2); HA 1988, s 7(4)

<sup>10</sup> *Cumming v Danson* [1942] 2 All ER 653, 655

<sup>11</sup> *Cumming v Danson* [1942] 2 All ER 653, 655

<sup>12</sup> *Cresswell v Hodgson* [1951] 2 KB 92

Baroness Hale<sup>13</sup> has held that disability [equality, ex “discrimination”] issues were relevant factors to be considered in the context of reasonableness.<sup>14</sup> Therefore, where a disability is pleaded, this may affect the outcome of litigation.

### 2.1.2 Structured Discretion

Section 16 of the Antisocial Behaviour Act 2003 amended HA 1985 and HA 1988 by qualifying the reasonableness considerations<sup>15</sup> with structured discretion that requires the court, when making an order for possession,<sup>16</sup> ‘to consider the past impact of the [ASB on others], the likely continuing effect of the nuisance and the likely future effect of any repetition.’<sup>17</sup> This explicitly imports risk assessment into judicial decision-making. Case-law on drug-related ASB possession proceedings suggests the focus is on future compliance with the tenancy agreement and consequently there is a need for cogent evidence that the conduct will cease<sup>18</sup> thus there will be no risk of its repetition.

Furthermore, the perpetrator’s honesty, genuine remorse, early acceptance of culpability and cooperation with the authorities are relevant matters for the court to adjudicate.<sup>19</sup> This enables both a risk assessment and a moral evaluation of the perpetrator’s responsibility.

It is argued that structured discretion mirrors officers’ decision-making in the way they assess risks. Additionally, moral considerations may affect their decision-making and this will be further considered in the next chapter.

**Chapter 6 will analyse the findings to demonstrate officers’ awareness or understanding of terminology including “reasonableness” and how this and risk affected their decision-making.**

<sup>13</sup> *Mayor and Burgesses of the LB of Lewisham v Malcolm* [2008] UKHL 43, [2008] 1 AC 1399 [97]

<sup>14</sup> HA 1985, s 84(2); HA 1988, s 7(4)

<sup>15</sup> HA 1985, s 84(2); HA 1988, s 7(4)

<sup>16</sup> 1.2.3.2

<sup>17</sup> HA 1985, s 85A(2); HA 1988, s 9A(2)

<sup>18</sup> *Sandwell MBC v Hensley* [2007] EWCA Civ 1425, [2008] HLR 358; *City West Housing Trust v Massey; Manchester and District Housing Association v Roberts* [2016] EWCA Civ 704, [2017] 1 WLR 129 [14] (Lady Justice Arden)

<sup>19</sup> *City West Housing Trust v Massey; Manchester and District Housing Association v Roberts* [2016] EWCA Civ 704, [2017] 1 WLR 129 [14] (Lady Justice Arden)

## **2.2 Challenges at Public Law**

The following overview relates to the position of most social landlords as public bodies.<sup>20</sup> As such, their decisions to take ASB proceedings which may involve use of their own policies is subject to judicial review which may also assess proportionality of their decision-making. The possibility of such litigation is a secondary risk.<sup>21</sup> This overview is provided because, as examined in Chapter 6, local policy, litigation risk and proportionality may all influence officers' decision-making. Additionally, officers' operation of local policies may be influenced by their constructions of perpetrators.

### **2.2.1 Policies and their Relationship with Public Law Defences**

Social landlords must prepare ASB policies.<sup>22</sup> How perpetrators are constructed in policy may affect practice.

In challenging ASB litigation, perpetrators may argue that their landlord has failed to comply with their own policy. The importance of following such policy, particularly in relation to a perpetrator with mental impairments, was central to the decision in *Barber v Croydon LBC*.<sup>23</sup> Barber assaulted the caretaker of the block of flats in which he resided. The caretaker's resulting injuries required hospital treatment and consequently his employers, Croydon, pursued possession proceedings against Barber. However, Croydon had not followed their policy in dealing with the incident. This referred to the use of ABCs and the support to be provided by Croydon and 'other agencies to help them keep to the agreement'.<sup>24</sup> The Court of Appeal specifically noted that the policy described ABCs as "'an effective and valuable part of our prevention, diversion and behaviour change agenda for use with young people, as well as adults - including those with diagnosed mental illness'".<sup>25</sup> In failing to use an ABC and because there had been no recurrence of ASB, Croydon were held *Wednesbury*<sup>26</sup> unreasonable.<sup>27</sup> Thus, while Croydon saw Barber's behaviour (and possibly Barber

---

<sup>20</sup> *London and Quadrant Housing Trust v R (on the application of Weaver)* [2009] EWCA Civ 587, [2010] 1 WLR 363

<sup>21</sup> 1.3.2

<sup>22</sup> HA 1996, s 218A(2)(a)

<sup>23</sup> *Barber v Croydon LBC* [2010] EWCA Civ 51, [2010] 2 P & CR D25; 1.2.3.5

<sup>24</sup> [2010] EWCA Civ 51, [2010] 2 P & CR D25 [34] (Patten LJ)

<sup>25</sup> [2010] EWCA Civ 51, [2010] 2 P & CR D25 [34] (Patten LJ)

<sup>26</sup> *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223

<sup>27</sup> *Barber v Croydon LBC* [2010] EWCA Civ 51, [2010] 2 P & CR D25 [42] (Patten LJ)



himself) as very risky, justifying deviation from policy, this was not permitted by the Court of Appeal.

**Chapters 5 and 6 will analyse the findings to demonstrate officers' use of local policy and how this affected their constructions of perpetrators and practice.**

## 2.2.2 The Meaning of Proportionality in Public Law

While disability discrimination was not an issue in *Pinnock*,<sup>28</sup> Lord Neuberger nevertheless highlighted the relevance of proportionality per Article 8 'in respect of occupants who are vulnerable as a result of mental illness, physical or learning disability, poor health or frailty'.<sup>29</sup> This is a medical model definition, suggesting vulnerability is inherent in the impairment. Thus, where the perpetrator of ASB is vulnerable, the assessment as to whether the social landlord's decision-making is proportionate will be subject to greater scrutiny in medical model terms where an Article 8 argument is raised. However, sympathy for the occupant, no matter how sad their case, is insufficient to displace the considerations in the landlord's favour that justify their pursuit of possession.<sup>30</sup>

Nevertheless, the occupant's vulnerability may require the landlord 'to explain why they are not securing alternative accommodation'.<sup>31</sup> Alternative accommodation and modifications to existing accommodation are interventions in ASB that amount to reasonable adjustments<sup>32</sup> and may be relevant considerations in the assessment of proportionality in the context of disability discrimination.<sup>33</sup> Thus, in addition to reasonableness and *Wednesbury*<sup>34</sup> unreasonableness, proportionality and vulnerability expand the bewildering lexicon of ASB. While consideration of vulnerability invites officers to construct perpetrators, the array of vague defences and, in relation to article 8, the onus of justifying why they are not providing alternative accommodation, may increase their employers' anxieties in litigation risk assessment.

<sup>28</sup> *Manchester CC v Pinnock* [2010] UKSC 45, [2011] 2 AC 104 [64] (Lord Neuberger)

<sup>29</sup> *Manchester CC v Pinnock* [2010] UKSC 45, [2011] 2 AC 104 [64] (Lord Neuberger)

<sup>30</sup> *Holley and another v LB of Hillingdon* [2016] EWCA Civ 1052, [2017] HLR 24 [31]

<sup>31</sup> *Manchester CC v Pinnock* [2010] UKSC 45, [2011] 2 AC 104 [64] (Lord Neuberger)

<sup>32</sup> 2.3.7.1

<sup>33</sup> EA 2010, s 21; 2.3.7.1

<sup>34</sup> *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223

### **2.3 Challenges relating to Disability and Discrimination and their Limitations**

Adding to the landlord's assessment of litigation risk in ASB possession and injunction proceedings<sup>35</sup> is the possibility that the perpetrator may raise an argument of disability discrimination.

This section will trace the development of disability discrimination as a challenge to ASB proceedings. This overview illustrates which model of disability best explains how relevant perpetrators are constructed in policy. With reference to case-law it illustrates the potential of the social model to resist social exclusion. It then argues that this potential has been curtailed by considerations of causation, comparators and proportionality which encourage construction of perpetrators via the individual focus of the medical model, evident in legislative drafting.<sup>36</sup> This focus may be sharpened by consideration of the risks posed by perpetrator's behaviour.

These developments in policy and case-law affect the discourse of ASB.<sup>37</sup> It is argued that this may affect social landlords' constructions of perpetrators and consequently their ASB management practice and its outcomes. It further argues that the restrictive interpretation of the DDA 1995 and its successor, the EA 2010 provide perpetrators of ASB with little protection and this challenge therefore poses a low litigation risk. However, the mere prospect of a proportionality argument may affect social landlords' assessments of litigation risk when contemplating ASB proceedings and in turn officers' decision-making, resulting in minimal compliance thereby undermining the aims of the social model.

---

<sup>35</sup> *Lalli v Spirita Housing Ltd* [2012] EWCA Civ 497, [2012] HLR 477

<sup>36</sup> Introductory Chapter

<sup>37</sup> Introductory Chapter

### 2.3.1 The Drafting of Legislation and the Models of Disability

The DDA 1995 introduced disability discrimination into English Law. By allowing rights arguments to resist ASB control, especially possession, this may achieve the social model objective of removing barriers to inclusion, in this case retention of housing.

Under the DDA 1995, the burden was on the perpetrator to prove both the disability, and the discrimination. Thus, a person discriminated:

against a disabled person [where] for a reason which relate[d] to the disabled person's disability, he treat[ed] him less favourably than he treat[ed] or would treat others to whom that reason does not or would not apply...<sup>38</sup>

Thus, a landlord may discriminate against an occupant by taking ASB proceedings or indeed any policy-based measure of ASB control against him. Strictly speaking, this was not a defence<sup>39</sup> (and the position remains the same under the EA 2010.)<sup>40</sup> Nevertheless, to use an argument of discrimination to challenge ASB proceedings (hereafter “the disability-based challenge”), under the DDA the occupant had to establish:

- 1) they had an impairment within the meaning of the DDA 1995
- 2) that the landlord’s reason for taking that action related to “the disability”. Thus, they have to prove causation: their disability caused their behaviour which led to the landlord’s response
- 3) this was less favourable treatment in comparison with others

All three requirements, particularly consideration of a comparator (3) tend to focus on the individual and their impairment and therefore the provision may be criticised for falling within a medical model construction of disability. The equivalent provision under

---

<sup>38</sup> DDA 1995, s 24(1)(a)

<sup>39</sup> *Manchester CC v Romano, Manchester CC v Samari* [2004] EWCA Civ 834, [2005] 1 WLR 2775 [63]

<sup>40</sup> However, for the tenant defending possession proceedings, disability is relevant to the reasonableness of making the order and therefore the defence - see 2.1.1. above (Baroness Hale)

the EA 2010, section 15, essentially only removed the need for comparison. This remains in other sections which may be used in disability arguments e.g. the EA 2010, sections 19(2)(b) and 20, although neither section is relied on in case-law concerning ASB and possession which revolves around the EA 2010, sections 15, 35 and 149.

As the following sections will illustrate, domestic legislation is limited in its potential to achieve its goals because of its focus on the individual and causation. If its potential is limited, landlords' concerns about litigation risk may be exaggerated.

### 2.3.2 Discrimination Arguments: Early Success: *North Devon Homes Ltd v Brazier*<sup>41</sup>

*Brazier*,<sup>42</sup> the first reported case to consider disability discrimination in the context of possession, illustrates the potential of the social model to resist social exclusion. Psychiatric evidence confirmed a diagnosis of paranoid psychosis which was found to have caused the defendant tenant to commit

persistent ASB including shouting at neighbouring residents and keeping neighbours awake at night by banging and shouting within the premises, using foul language in front of neighbours, making rude gestures to neighbours and causing nuisance and annoyance to neighbours.<sup>43</sup>

The claimant's decision to take possession proceedings was due to Brazier's inability to perform her tenancy obligations (not to cause ASB). This was held to have breached the DDA 1995, section 22(3)(c) which provided it was

unlawful for a person managing any premises to discriminate against a disabled person occupying those premises by evicting the disabled person, or subjecting him to any other detriment.

---

[2003] EWHC 574 (QB), [2003] HLR 905

<sup>42</sup> *North Devon Homes Ltd v Brazier* [2003] EWHC 574 (QB), [2003] HLR 905

<sup>43</sup> [2003] EWHC 574 (QB), [2003] HLR 905 [3] (Steel J)

*Clark v Novacold*<sup>44</sup> was cited as authority for the comparator: was the treatment less favourable than for others and therefore discriminatory? Under the DDA 1995, a landlord faced with a disability-based challenge may 'show that the treatment in question was justified'.<sup>45</sup> Treatment may have been justified if 'necessary in order not to endanger the health or safety of any person (which may include that of the disabled person)'.<sup>46</sup>

The High Court in *Brazier*<sup>47</sup> held that reasonableness<sup>48</sup> would only bar evictions not justified by the higher standard set out in the DDA 1995, section 24. In considering whether the eviction was justified, the High Court upheld the county court's finding that "Although the neighbours underwent a great deal of uncomfortableness, and are still experiencing these difficulties, they are not such as to<sup>49</sup> "endanger the health or safety of any person".<sup>50</sup> This was contrasted with the likely stress of the proceedings and probable intentional homelessness<sup>51</sup> on Brazier that were considered to be worsening her clinical state.<sup>52</sup> Thus, this decision set an important benchmark in disability challenges to ASB proceedings by acknowledging the risk to the perpetrator. The focus on the risk to perpetrators of social exclusion facilitated an outcome of social inclusion by retaining the stable and long-term accommodation that social housing can bring. Raising this argument to challenge possession proceedings thereby addresses barriers to disability equality, an aim of the social model.<sup>53</sup> Yet for social landlords, whose conflicted role in accommodating vulnerable people while managing ASB has already been noted,<sup>54</sup> this risk of socially excluding perpetrators sits alongside the risk of litigating unsuccessfully. An assessment of these combined risks may disincline officers on the part of their employers to take proceedings therefore affecting earlier case-management.

---

<sup>44</sup> [1999] ICR 951; an employment case concerning an employee with a physical disability

<sup>45</sup> DDA 1995, s 24(1)(b)

<sup>46</sup> DDA 1995, s 24(3)

<sup>47</sup> [2003] EWHC 574, [2003] HLR 905

<sup>48</sup> HA 1988, s 7; 2.1.1

<sup>49</sup> [2003] EWHC 574, [2003] HLR 905 [20]

<sup>50</sup> DDA 1995, s 24(3)

<sup>51</sup> 2.3.6

<sup>52</sup> [2003] EWHC 574, [2003] HLR 905 [20]

<sup>53</sup> cf N Cobb, 'Patronising the Mentally Disordered? Social Landlords and the Control of Anti-social Behaviour under the Disability Discrimination Act 1995' (2006) 26 LS 238 3.2.1

<sup>54</sup> Chapter 1

### 2.3.3 Discrimination Arguments: the Limitations Posed by Risk Considerations

The socially inclusive outcome of *Brazier*<sup>55</sup> may be seen as a social model victory but this was short-lived being particularly modified by the conjoined appeals in *Manchester CC v Romano*, *Manchester CC v Samari*.<sup>56</sup> Here the Court of Appeal narrowly interpreted the discrimination provisions to take greater account of risk to neighbours.

Possession proceedings against Romano particularised *inter alia* sixty counts of ASB including loud music, offensive language, conducting DIY in the small hours of the morning and the 'rowdy and abusive behaviour... of her sons and visitors.'<sup>57</sup> A SPO<sup>58</sup> was made on terms that neither Romano nor her visitors nor anyone residing with her commit a nuisance to, amongst others, her neighbours. The order was breached<sup>59</sup> and a warrant for possession issued. On appeal against a district judge's refusal to suspend the warrant, evidence was presented for the first time that Romano suffered from a depressive illness with psychotic symptoms and 'was unable to deliver what she promised'<sup>60</sup> in the SPO.

Medical evidence that Samari had a borderline personality disorder was produced in defence of committal proceedings after she breached an ASBI.<sup>61</sup> Possession was subsequently ordered on the basis of the nuisance, annoyance and harassment Samari had caused to neighbours (one of whom had become suicidal). The behaviour of both Romano and Samari had resulted in neighbours suffering great stress or depression. Both tenants relied on expert medical opinion to demonstrate that they were suffering from "impairments" that constituted "disabilities" as defined by the DDA 1995 which caused their ASB and argued that the possession proceedings constituted discrimination under the DDA 1995, section 22(3)(c). The Court accepted that while both tenants' impairments fell within the DDA 1995 it took into account how the health of the neighbours had been affected in order to assess whether the eviction, was

---

<sup>55</sup> *North Devon Homes Ltd v Brazier* [2003] EWHC 574 (QB), [2003] HLR 905

<sup>56</sup> *Manchester CC v Romano*, *Manchester CC v Samari* [2004] EWCA Civ 834, [2005] 1 WLR 2775

<sup>57</sup> *Manchester CC v Romano*, *Manchester CC v Samari* [2004] EWCA Civ 834, [2005] 1 WLR 2775 [5]

<sup>58</sup> 1.2.5

<sup>59</sup> 1.2.5

<sup>60</sup> *Manchester CC v Romano*, *Manchester CC v Samari* [2004] EWCA Civ 834, [2005] 1 WLR 2775

<sup>61</sup> 1.2.5

‘necessary in order not to endanger the health or safety of any person’<sup>62</sup> with “health” defined broadly as ‘a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity’<sup>63</sup> as defined by the World Health Organisation. While trivial risks to health were to be ignored,<sup>64</sup> the neighbours in these cases were considered to be harmed by suffering sleeplessness.<sup>65</sup>

Having regard to the rights of tenants and neighbours, the court therefore found itself bound to ask:

- (i) whether the landlord held the opinion that it was necessary to serve a notice seeking possession and/or to bring possession proceedings in order that the health of an identified person or persons would not be put at risk,<sup>66</sup> and
- (ii) whether that opinion was objectively justified.<sup>67</sup>

The Court dismissed the appeals holding that it was reasonable to order possession and that discrimination was objectively justified. Similarly, in *Gloucester CC v Simmonds*,<sup>68</sup> it was concluded as per *Romano*<sup>69</sup> that if there was any discrimination under the DDA 1995, it was justified because of the risk to neighbours.

As health and safety was broadly defined, a low level of risk to health was set. While those to whom the risk was to be assessed needed to be identified, this could be a large group of potential complainants because of this low threshold.

Thus, both *Brazier*<sup>70</sup> and *Romano*<sup>71</sup> acknowledge that social landlords have a duty to both relevant tenant perpetrators of ASB and those affected by it. However, the balance of risk seems weighted towards victims (neighbours affected by the nuisance) because of objective justification and structured discretion.<sup>72</sup> The latter provisions, formalising the court’s risk assessment in considering reasonableness when making

---

<sup>62</sup> DDA 1995, s 24(3)(a)

<sup>63</sup> *Manchester CC v Romano, Manchester CC v Samari* [2004] EWCA Civ 834, [2005] 1 WLR 2775 [69]

<sup>64</sup> *Manchester CC v Romano, Manchester CC v Samari* [2004] EWCA Civ 834, [2005] 1 WLR 2775 [69]

<sup>65</sup> *Manchester CC v Romano, Manchester CC v Samari* [2004] EWCA Civ 834, [2005] 1 WLR 2775

<sup>66</sup> This relates to DDA 1995, s 24(3)(a)

<sup>67</sup> This relates to DDA 1995, s 24(1)(b)

<sup>68</sup> *Gloucester CC v Simmonds* [2006] EWCA Civ 254 see below

<sup>69</sup> *Manchester CC v Romano, Manchester CC v Samari* [2004] EWCA Civ 834, [2005] 1 WLR 2775

<sup>70</sup> [2003] EWHC 574 (QB), [2003] HLR 905

<sup>71</sup> *Manchester CC v Romano, Manchester CC v Samari* [2004] EWCA Civ 834, [2005] 1 WLR 2775

<sup>72</sup> HA 1985, s 85A(2); HA 1988, s 9A(2)

a possession order, came into force the day after *Romano*<sup>73</sup> was decided. The two risk assessments are mutually supportive and like ASBCPA 2014<sup>74</sup> weighted towards the risks to victims.

In *Accent Peerless Ltd v Kingsdon*,<sup>75</sup> medical evidence was used in assessing reasonableness vis-à-vis the risk of future ASB. The evidence, that the tenants would not 'engage with treatment'<sup>76</sup> and would therefore be unable to live next door to their neighbour without overreacting to his behaviour was accepted. The tenants, a mother and daughter both suffered from "mental disabilities" that caused their hypersensitivity to noise (their neighbour's DIY), propensity to exaggerate the effect of noise and chronic complaining. While arguments of disability discrimination were considered at trial, the basis of the appeal was structured discretion:<sup>77</sup> was it reasonable to make a possession order due to the likelihood of future recurrence? This was upheld: the risks to neighbours were therefore an important consideration but so too was the lack of engagement with treatment. This introduces a moral agenda which imposes individual responsibility on the perpetrator to engage with treatment or support.<sup>78</sup> Thus, the ambit of self-governance is extended into meta-responsibilising: in being responsible for their health, people are responsabilised to avoid committing ASB thereby limiting their own risk. Such self-governance may be effected by compliance with medication or attendance at rehabilitation programmes.<sup>79</sup>

Consideration of the balance of risks caused by ASB as against the risks to the perpetrator consequent upon use of the intervention (here, the outcome of litigation) gives scope for moral differentiation between complainants (and victims) and perpetrators. So too does an assessment of risk of compliance with interventions used throughout case-management.

---

<sup>73</sup> *Manchester CC v Romano, Manchester CC v Samari* [2004] EWCA Civ 834, [2005] 1 WLR 2775

<sup>74</sup> 1.2.3

<sup>75</sup> *Accent Peerless Ltd (formerly Surrey Heath Housing Association Ltd) v Kingsdon* [2007] EWCA Civ 1314, [2007] All ER (D) 174 (Dec)

<sup>76</sup> *Accent Peerless Ltd (formerly Surrey Heath Housing Association Ltd) v Kingsdon* [2007] EWCA Civ 1314, [2007] All ER (D) 174 (Dec)

<sup>77</sup> HA 1988, s 9A; 2.1.2

<sup>78</sup> 1.2.5; 3.4.2; 6.3.3.2

<sup>79</sup> Tom Burns and others, 'Pressures to Adhere to Treatment ('Leverage') in English Mental Healthcare' (2011) 199 *British Journal of Psychiatry* 145, 148; 1.2.3.5; 1.2.5



In *Lalli v Spirita Housing Ltd*,<sup>80</sup> the appellant who had short-term memory and learning difficulties had behaved anti-socially to fellow residents in the communal lounge of their sheltered accommodation. While it was acknowledged that Spirita had failed to make reasonable adjustments<sup>81</sup> which had they made could have obviated the need to take injunction proceedings altogether, this was not the same as them being obliged not to do so.<sup>82</sup> Thus, it was held that Spirita was justified in taking the action to protect the other residents,<sup>83</sup> a risk-based argument.

Housing case-law thus shows a narrowing of the scope of disability-based challenges thereby reducing the potential of the social model: while in *Brazier*,<sup>84</sup> where the balance between risk to the health of both neighbours and perpetrator was weighed in favour of the latter preventing justification of discrimination, this recognition of social inclusion was short-lived.<sup>85</sup> Focus soon shifted to the disabled person and the risks their behaviour posed to neighbours via a wide definition of health.<sup>86</sup> This approach permitting discrimination as objectively justified by assessment of risk was followed in *Accent Peerless*,<sup>87</sup> *Simmonds*<sup>88</sup> and *Lalli*.<sup>89</sup>

The potential of the social model may be realised by the courts' recognition of the UNCRPD's broader definition of disability<sup>90</sup> and prohibition of 'all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds'.<sup>91</sup> More generous interpretations of disability and restrictions on discrimination can be found where the UNCRPD has been used as an interpretive aid to the ECHR: it was used to support the argument that Birmingham's application of the 'bedroom tax' breached article 14. This was discriminatory because it failed to allow for the fact that the claimants' children's "disabilities" meant that the claimants required larger properties, and were therefore

---

<sup>80</sup> [2012] EWCA Civ 497, [2012] HLR 477

<sup>81</sup> 2.3.7.1

<sup>82</sup> [2012] EWCA Civ 497, [2012] HLR 477 [68]

<sup>83</sup> DDA 1995, ss 21B(1)(b), 21B(3)(5) or 21B (7)(c) and 21D(2)(b)

<sup>84</sup> *North Devon Homes Ltd v Brazier* [2003] EWHC 574 (QB), [2003] HLR 905

<sup>85</sup> *North Devon Homes Ltd v Brazier* [2003] EWHC 574 (QB), [2003] HLR 905

<sup>86</sup> *Manchester CC v Romano, Manchester CC v Samari* [2004] EWCA Civ 834, [2005] 1 WLR 2775

<sup>87</sup> *Accent Peerless Ltd (formerly Surrey Heath Housing Association Ltd) v Kingsdon* [2007] EWCA Civ 1314, [2007] All ER (D) 174 (Dec)

<sup>88</sup> *Gloucester CC v Simmonds* [2006] EWCA Civ 254; 3.4.3.1

<sup>89</sup> *Lalli v Spirita Housing Ltd* [2012] EWCA Civ 497, [2012] HLR 477

<sup>90</sup> UNCRPD preamble at e) <http://www.un.org/disabilities/convention/conventionfull.shtml> accessed 30 November 2015; Introductory Chapter

<sup>91</sup> UNCRPD, article 5 (2) <http://www.un.org/disabilities/convention/conventionfull.shtml> accessed 30 November 2015

placed at a particular disadvantage.<sup>92</sup> Lady Hale has referred to the approach of the UNCRPD which places 'upon the state (and upon others) the duty to... cater for the special needs of those with disabilities'<sup>93</sup> and 'promoting equality and eliminating discrimination by taking all appropriate steps to ensure that reasonable accommodations are provided'.<sup>94</sup>

However, in cases where the UNCRPD has been used to the benefit of the individual, the contentions or risks under consideration were essentially between state or landlord and individual. The tendency towards a restrictive, medical model interpretation arises where the facts revolve around risks to other individuals as it does in ASB cases. Aversion to such risk extends beyond housing law and domestic jurisprudence to the CJEU. In *Wolfgang Glatzel v Freistaat Bayern*<sup>95</sup> a haulier's driving licence had been limited pursuant to the requirements of a directive<sup>96</sup> because of his monocular vision. Glatzel's challenge of this restriction led the CJEU to scrutinise this discriminatory risk assessment that took account of the apparently negligible risk of sudden loss of vision to his other eye. The court reasoned that refusal of the licence was a proportionate response based on the precautionary principle.<sup>97</sup> Despite the court's reliance on the definition of disability found in the UNCRPD,<sup>98</sup> use of this principle concluded in their 'intuitive, anti-progressive approach to risk assessment',<sup>99</sup> equating disability with risk. Thus, risk to others tends to trump the inclusionary aims of the social model. The relevance of the precautionary principle to ASB proceedings in domestic housing law is referred to above. This focus of risks *posed to* neighbours and the impact on them by the behaviour may similarly trump the inclusionary aims of the UNCRPD should it ever be relied on in this context.

Perceptions of risks to others may be influenced by stereotyping of people with mental impairments. For Perlin, even the judiciary are affected by 'the statistically-exceptional but graphically compelling case[s] of the person with major mental disorder who is

---

<sup>92</sup> [2012] EWCA Civ 629, [2013] HLR 1

<sup>93</sup> *P v Cheshire West and Chester Council; P and Q v Surrey County Council* [2014] UKSC 19 [45] (Lady Hale)

<sup>94</sup> *Akerman-Livingstone v Aster Communities Limited (formerly Flourish Homes Limited)* [2015] UKSC 15, [2015] AC 1399 [26] (Lady Hale)

<sup>95</sup> C-356/12 *Wolfgang Glatzel v Freistaat Bayern* Judgement of 22 May 2014 [65] in Charlotte O'Brien. 'Driving Down Disability Equality' (2014) 21 Maastricht J. Eur. & Comp. L. 723, 727

<sup>96</sup> Directive 2006/126/EC as amended by Commission Directive 2009/113/EC

<sup>97</sup> See above page 90

<sup>98</sup> UNCRPD preamble at e) <http://www.un.org/disabilities/convention/conventionfull.shtml> accessed 30 November 2015

<sup>99</sup> Charlotte O'Brien. 'Driving Down Disability Equality' (2014) 21 Maastricht J. Eur. & Comp. L. 723, 736

randomly violent... using false "ordinary common-sense" to justify this intellectual reductionism.<sup>100</sup> This is commonplace, extending to 'well-trained professionals from most mental health disciplines.'<sup>101</sup> There is evidence that officers rely on stereotyping in housing management.<sup>102</sup> In the absence of disclosure,<sup>103</sup> it is hypothesised that officers as street-level bureaucrats, may be particularly reliant on "common-sense" and stereotyping as coping mechanisms.<sup>104</sup> In case-management, officers may consequently conflate risks posed to others with riskiness per se. These risk assessments may be made under the guise of proportionality under the EA 2010, section 15. The possibility of such risk assessments will be returned to later.<sup>105</sup>

**Chapter 6 will analyse the findings to demonstrate officers' understanding of risk and its assessment and how this affected their decision-making.**

### 2.3.4 Discrimination Arguments: the Limitations Posed by Comparators

Advances of the courts in the interpretation of discrimination were significantly modified by the House of Lords in *Mayor and Burgesses of the London Borough of Lewisham v Malcolm*.<sup>106</sup> Here Lewisham sought possession against Malcolm upon discovering that he had moved out of the property and sublet it (while pursuing his right to buy). As Malcolm no longer satisfied the tenancy condition of his statutory status as a secure tenant,<sup>107</sup> reasonableness was not an argument to be raised in defence. However, Malcolm, who suffered with schizophrenia disclosed this condition in his defence claiming that the subletting was caused by his disability and arguing that Lewisham had therefore breached DDA 1995, section 22.<sup>108</sup>

<sup>100</sup> Michael L Perlin, 'Half-Wracked Prejudice Leaped Forth: Sanism, Pretextuality, and why and how Mental Disability Law Developed as it did' (1999) 10 J. Contemp. Legal Issues 3, 29

<sup>101</sup> Patrick W Corrigan and Amy C Watson, 'Understanding the Impact of Stigma on People with Mental Illness' (2002) 1 World Psychiatry 16

<sup>102</sup> David Clapham, Bridget Franklin and Lise Saugères, 'Housing Management: The Social Construction of an Occupational Role' (2000) 17 Housing, Theory and Society, 68

<sup>103</sup> 1.3.3

<sup>104</sup> Explanations of stereotyping are developed in the next chapter: 3.1.2.2

<sup>105</sup> 2.3.5

<sup>106</sup> [2008] UKHL 43, [2008] 1 AC 1399

<sup>107</sup> HA 1985, ss 72(2)(c), 81 and 93(2)

<sup>108</sup> That Malcolm relied on disability discrimination in his defence is clear from *Mayor and Burgesses of the LB of Lewisham v Malcolm* [2008] UKHL 43, [2008] 1 AC 1399 [25]

It was accepted that Malcolm was disabled and held that the treatment to which he was subjected was the eviction process. The statutory comparator was held to be another tenant with the same statutory protection (secure tenant) with no mental impairment who had sublet. Such a tenant would have received no different treatment from the landlord than Malcolm. Malcolm had therefore not been treated less favourably and had therefore not been discriminated against. The comparator in *Clark v Novacold*<sup>109</sup> as successfully used in *Brazier*<sup>110</sup> (someone who was not disabled and had not sublet) was specifically overruled because it assumes the relevant behaviour (here, subletting) is caused by the “disability” meaning that there will always be discrimination where action is taken against a “disabled person”. The House of Lords held that the reason for the discrimination must relate to the “disability”, not the consequences of the “disability”. The reason for the less favourable treatment was that Malcolm had sublet his flat, but that was a housing management decision rather than a reason relating to his “disability”. Thus, Malcolm was not evicted for a reason which related to his “disability” nor was he treated less favourably than others who were not “disabled.”

The comparator in *Malcolm*<sup>111</sup> meant there could be no discrimination unless the reason for action being taken against a disabled person was that person’s disability. This requirement for this direct causal link to be established by comparison with others only allowed for direct discrimination. As the EHRC pointed out, the House of Lords took a traditional anti-discrimination stance<sup>112</sup> severely curtailing the potential of the discrimination defence by promoting the medical model.

While the EA 2010, section 15 no longer demands comparisons with non-disabled people,<sup>113</sup> this does not in itself prevent front-line officials comparing relevant perpetrators and their behaviour as against their known or suspected impairments or those of other perpetrators. Thus, comparisons force an individualised focus on medical differences. This tends to lead to interrogation of the person and the effects

---

<sup>109</sup> [1999] ICR 951

<sup>110</sup> *North Devon Homes Ltd v Brazier* [2003] EWHC 574 (QB), [2003] HLR 905

<sup>111</sup> [2008] UKHL 43, [2008] 1 AC 1399

<sup>112</sup> Equality and Human Rights Commission, *An Effective Approach to Disability Discrimination in the Equality Bill* (EHRC 2009)

<sup>113</sup> It remains in EA 2010, ss 19 and 20

of the impairment on them, a medical model approach rather than a social model one that would consider the effects of the discrimination.

#### 2.3.4.1 The Muddle of Malcolm<sup>114</sup> and the Response of the EA 2010

Parliament sought to remedy the significant restriction of the interpretation of discrimination in *Malcolm*<sup>115</sup> by removing the need for comparators in section 15.<sup>116</sup> Again, a perpetrator having a 'mental impairment'<sup>117</sup> and therefore being 'a disabled person (B)'<sup>118</sup> may use the challenge against ASB proceedings by a social landlord (A) arguing that the proceedings discriminate against them. B would argue that 'A treat[ed] them 'unfavourably because of something arising in consequence' of their disability'.<sup>119</sup> Thus, their disability caused their behaviour and this had led to the unfavourable treatment, in this case the ASB proceedings. Thus, while the need for a comparator is removed, the requirement of causation is retained.

Where ASB control is being effected by possession proceedings, section 35<sup>120</sup> provides additional protection that A person 'who manages premises must not discriminate against a person... who occupies the premises by evicting [them] (or taking steps for the purpose of securing [their] eviction)'<sup>121</sup> or 'by subjecting [them] to any other detriment'.<sup>122</sup> However, for the disabled perpetrator, the potential of their argument may be restricted by proportionality and causation and these will now be considered in turn.

**Chapters 5 and 6 will analyse the findings to establish whether officers look for comparators and therefore medically construct relevant perpetrators.**

<sup>114</sup> *Mayor and Burgesses of the LB of Lewisham v Malcolm* [2008] UKHL 43, [2008] 1 AC 1399

<sup>115</sup> *Mayor and Burgesses of the LB of Lewisham v Malcolm* [2008] UKHL 43, [2008] 1 AC 1399

<sup>116</sup> EA 2010, s 15; 2.3.4

<sup>117</sup> EA 2010, s 6(1)(a)

<sup>118</sup> EA 2010, s 6(1)(a)

<sup>119</sup> EA 2010, s 15(1)(a)

<sup>120</sup> EA 2010

<sup>121</sup> EA 2010, s 35(1)(b)

<sup>122</sup> EA 2010, s 35(1)(c)

### 2.3.5 Litigation Risk: Challenges and Proportionality

A social landlord seeking a court order to control ASB may anticipate a disability-based challenge from the perpetrator e.g. relying on the EA 2010, sections 15 and / or 35. As such, they may seek to prepare themselves by taking steps to make their response appear proportionate per the EA 2010, section 15(1)(b).which permits objective justification for discrimination albeit differently phrased to the DDA 1995:<sup>123</sup> If the social landlord ‘cannot show that the treatment is a proportionate means of achieving a legitimate aim’<sup>124</sup> then they have discriminated; if they can show that the treatment is a ‘proportionate means of achieving a legitimate aim’<sup>125</sup> then they have not discriminated. As held in *Akerman-Livingstone v Aster*<sup>126</sup>

Once the possibility of discrimination is made out, the burden of proof is firmly on the landlord to demonstrate that there was no discrimination contrary to s 15(1)(a)... or that an order for possession is proportionate under s 15(1)(b).<sup>127</sup>

Thus, the issue of disability discrimination may not be dealt with summarily and the matter must proceed to trial where the testing of arguments about alternative means of achieving a legitimate aim (that the ASB stops)<sup>128</sup> may take place.

The meaning of ‘proportionate’ is open to broad interpretation being ill-defined. It is not defined in the EA 2010 and interpretations in public law cases,<sup>129</sup> nor the Code<sup>130</sup> get us much further. The latter merely explains that treatment is proportionate if it is an ‘appropriate and necessary’<sup>131</sup> means of achieving a legitimate aim. ‘Necessary’ does not mean that the treatment ‘is the only possible way of achieving the legitimate

---

<sup>123</sup> DDA, s 24(3)(a)

<sup>124</sup> EA 2010, s 15(1)(b)

<sup>125</sup> EA 2010, s 15(1)(b)

<sup>126</sup> *Akerman-Livingstone v Aster Communities Limited (formerly Flourish Homes Limited)* [2015] UKSC 15, [2015] AC 1399

<sup>127</sup> *Akerman-Livingstone v Aster Communities Limited (formerly Flourish Homes Limited)* [2015] UKSC 15, [2015] AC 1399 [55]

<sup>128</sup> Home Office, *Putting Victims First – More Effective Responses to Anti-Social Behaviour* (HMSO May 2012) 1.18, 3.10

<https://www.gov.uk/government/publications/putting-victims-first-more-effective-responses-to-anti-social-behaviour>

accessed 21 May 2017; 1.2.3

<sup>129</sup> 2.2.2

<sup>130</sup> Equality and Human Rights Commission, *EA 2010 Statutory Code of Practice – Services, Public Functions and Associations* (EHRC 2011) applies to public bodies including social landlords

<sup>131</sup> Equality and Human Rights Commission, *EA 2010 Statutory Code of Practice – Services, Public Functions and Associations* (EHRC 2011) 5.32

aim: it is sufficient that the same aim could not be achieved by less discriminatory<sup>132</sup> or less restrictive means.

However, proportionality has been recently developed specifically in relation to disability discrimination in possession proceedings. *Akerman-Livingstone*<sup>133</sup> held that the protection offered by the EA 2010, sections 15 and 35 exists over and above the Article 8 right providing 'for disabled people to have rights in respect of the accommodation which they occupy which are different from and extra to the rights of non-disabled people'.<sup>134</sup> *Akerman-Livingstone*<sup>135</sup> therefore introduced a four-stage test<sup>136</sup> to determine whether an otherwise discriminatory action - eviction – is 'a proportionate means of achieving a legitimate aim':<sup>137</sup>

- (a) Is the objective sufficiently important to justify limiting a fundamental right? This would include respect for the home<sup>138</sup>
- (b) Is the measure rationally connected to the objective?
- (c) Are the means chosen no more than is necessary to accomplish the objective?
- (d) Do the 'ends' justify the 'means' in assessing an overall balance between the aims pursued and the disadvantages caused.<sup>139</sup>

It is hard to argue that possession will not cause disadvantage particularly for disabled people who may have more difficulty finding accommodation in the private sector being almost 50% less likely to be in employment than non-disabled people are.<sup>140</sup> There is evidence that private sector landlords let selectively, refusing to grant tenancies to those reliant on housing benefit.<sup>141</sup> Given the unemployment rate amongst disabled people, they are more likely to be in receipt of this benefit. Similarly, selection criteria that extend to requirements for references and 'tenant profiling' to

---

<sup>132</sup> Equality and Human Rights Commission, *EA 2010 Statutory Code of Practice – Services, Public Functions and Associations* (EHRC 2011) 5.32

<sup>133</sup> *Akerman-Livingstone v Aster Communities Limited (formerly Flourish Homes Limited)* [2015] UKSC 15, [2015] AC 1399

<sup>134</sup> *Akerman-Livingstone v Aster Communities Limited (formerly Flourish Homes Limited)* [2015] UKSC 15, [2015] AC 1399

<sup>135</sup> *Akerman-Livingstone v Aster Communities Limited (formerly Flourish Homes Limited)* [2015] UKSC 15, [2015] AC 1399

<sup>136</sup> *Akerman-Livingstone v Aster Communities Limited (formerly Flourish Homes Limited)* [2015] UKSC 15, [2015] AC 1399 [25]

<sup>137</sup> EA 2010, s 15(1)(b)

<sup>138</sup> *Akerman-Livingstone v Aster Communities Limited (formerly Flourish Homes Limited)* [2015] UKSC 15, [2015] AC 1399 [25]

<sup>139</sup> *Akerman-Livingstone v Aster Communities Limited (formerly Flourish Homes Limited)* [2015] UKSC 15, [2015] AC 1399 [28]

<sup>140</sup> <http://www.papworthtrust.org.uk/sites/default/files/Disability%20Facts%20and%20Figures%202016.pdf> accessed 23 November 2017

<sup>141</sup> Steve Rolfe and Lisa Garnham, 'Housing through Social Enterprise Report of Phase 1 – Research Scoping Exercise' (Glasgow: Commonhealth Programme 2017) 16

discover employment status and histories of rent payment are likely to disadvantage<sup>142</sup> disabled people. References from previous landlords may also provide histories of past ASB, a further ground for private sector landlords to refuse to grant tenancies. The further exclusionary consequences of possession extend to the social housing sector: anyone losing their home because of ASB and subsequently applying to be housed by a local authority is likely to be considered intentionally homeless.<sup>143</sup> Moreover, in drafting their allocation schemes, authorities may

adopt criteria that would disqualify individuals who satisfy the reasonable preference requirements... [e.g.]... those disqualified on a ground of anti-social behaviour.<sup>144</sup>

Therefore, possession may be more likely to be argued to be disproportionate and discriminatory compared with the various alternative interventions, already discussed,<sup>145</sup> that may achieve the objective, i.e. that ASB stops.<sup>146</sup> A selection of these 'lesser measures'<sup>147</sup> will now be assessed vis-à-vis proportionality:

1 An injunction.<sup>148</sup> 'may prohibit the respondent from doing anything described'.<sup>149</sup> In addition to controlling a perpetrator's behaviour, these orders may also restrict their movements and for this reason be considered socially exclusionary. While restrictive, injunctions may be drafted such that perpetrators may continue to reside in their own homes and may therefore be considered a more proportionate response than possession.

---

<sup>142</sup> Steve Rolfe and Lisa Garnham, 'Housing through Social Enterprise Report of Phase 1 – Research Scoping Exercise' (Glasgow: Commonhealth Programme 2017) 16

<sup>143</sup> While the *Homelessness Code of Guidance for Local Authorities* (Department for Communities and Local Government, London, July 2006) at 11.20 cites eviction because of anti-social behaviour, for example by nuisance to neighbours, harassment etc. as an act or omission which may be regarded as deliberate, the homelessness therefore intentional, case-law provides a more nuanced approach: *Griffiths v St Helens MBC*, St Helens County Court HHJ Mackay 28 July 2004, reported Legal Action January (2005) 29 cf *Denton v Southwark LB Council* [2007] EWCA Civ 623, [2008] HLR 161; *Minchin v Sheffield CC* [2000] All ER (D) 471

<sup>144</sup> Department for Communities and Local Government, *Allocation of Accommodation: Guidance For Local Housing Authorities in England* (2012) DCLG: <https://www.gov.uk/government/publications/allocation-of-accommodation-guidance-for-local-housing-authorities-in-england>, 3.21 accessed 6 March 2017; see also HA 1996, s 166A (5)(b)

<sup>145</sup> 1.2.3.3-1.2.3.5

<sup>146</sup> 1.2.3.1-1.2.3.3

<sup>147</sup> *Akerman-Livingstone v Aster Communities Limited (formerly Flourish Homes Limited)* [2015] UKSC 15, [2015] AC 1399 [31]

<sup>148</sup> 1.2.3.3

<sup>149</sup> ASBCPA 2014, s 1(4)(a)



2 Alternative accommodation.<sup>150</sup> Social landlords may sensibly offer alternative accommodation prior to pursuing ASB proceedings to pre-empt perpetrators' counter-arguments under the EA 2010, section 15(1)(b) that the litigation is not proportionate. This is underscored by Lord Neuberger's comment about alternative accommodation in *Pinnock*<sup>151</sup> albeit that was made in a case concerning article 8.

3 Support.<sup>152</sup> Thus far, case-law developing the concept of proportionality does not demand that defendants receive support. Some cases where reasonableness was used to defend proceedings have suggested similar measures. In *Croydon LBC v Moody*,<sup>153</sup> the Court of Appeal held that the medical evidence should have been taken into account in considering reasonableness particularly if there was 'a prospect of the defendant being *treated* (a medical term) so that his behaviour improved'.<sup>154</sup> In *Romano*<sup>155</sup> it was held that at the point of sending a warning letter, the landlord should also consider recommend multidisciplinary liaison.<sup>156</sup> In *Knowsley Housing Trust v McMullen*<sup>157</sup> the Defendant's argument that the Claimant landlord was partly responsible for the duration of the nuisance because it should have acted more promptly in alerting social services to the Defendant's plight was accepted by the trial judge and Court of Appeal. Thus, while support is not demanded, case-law suggests social landlords should be mindful of it. Support and other alternative interventions or reasonable adjustments including modifications to existing accommodation<sup>158</sup> must therefore be considered in order that any exclusionary action ultimately taken is not considered to be disproportionate. Indeed, the Code acknowledges that making reasonable adjustments may avoid unfavourable treatment<sup>159</sup> and therefore discrimination.

---

<sup>150</sup> 1.2.3.4

<sup>151</sup> *Akerman-Livingstone v Aster Communities Limited (formerly Flourish Homes Limited)* [2015] UKSC 15, [2015] AC 1399 [64] Lord Neuberger

<sup>152</sup> 1.2.3.5

<sup>153</sup> *Croydon LBC v Moody* (1999) 31 HLR 738; 3.2.1.2

<sup>154</sup> *Croydon LBC v Moody* (1999) 31 HLR 738, 750

<sup>155</sup> *Manchester CC v Romano, Manchester CC v Samari* [2004] EWCA Civ 834, [2005] 1 WLR 2775; 2.3.3

<sup>156</sup> [2004] EWCA Civ 834, [2005] 1 WLR 2775 [117]; 2.3.3

<sup>157</sup> [2006] EWCA Civ. 539, [2006] 2 P & CR D45 [62]

<sup>158</sup> 2.3.7.1

<sup>159</sup> Equality and Human Rights Commission, *EA 2010 Statutory Code of Practice – Services, Public Functions and Associations* (EHRC 2011) 6.21

*Birmingham CC v Stephenson*<sup>160</sup> concerned possession proceedings on grounds of noise nuisance against an introductory tenant surviving on benefits and begging.<sup>161</sup> Stephenson could not therefore afford to carpet his flat. He suffered from paranoid schizophrenia and received treatment for this but struggled to comply with his medication. In an appeal against summary disposal of the possession proceedings, alternative measures to Stephenson's eviction were discussed in terms of proportionality.<sup>162</sup> Specifically, in relation to his medication, support from Social Services to remind him of appointments and support from mental health professionals were considered as well as changes to dosage. In relation to noise nuisance, 'sound attenuation measures could be installed...' <sup>163</sup> e.g. carpets 'or a specific agreement on permitted hours for the playing of music'. <sup>164</sup> Alternative interventions considered included Birmingham seeking a statutory injunction<sup>165</sup> requiring 'supervised compliance... [or]... provid[ing] him with more suitable alternative accommodation'.<sup>166</sup> While this case was remitted to the county court for retrial, it is possible to see that consideration of alternatives provides scope for a social model approach in using the disability challenge against possession proceedings.

However, the *Akerman-Livingstone*<sup>167</sup> test at (d) may justify an exclusionary approach where the ASB is assessed to pose particular risks to neighbours such that injunctions are considered unsuitable. In *Smith v Contour Homes*<sup>168</sup> the argument was unsuccessful, essentially because the risks (masturbation in public) posed by the behaviour of a tenant with schizoaffective disorder outweighed the use of any other intervention. A focus on the risks presented by a person with a mental impairment may therefore limit the potential of a social model approach to disability discrimination.

As arguments about proportionality cannot be dealt with summarily, they will extend the duration of proceedings and thereby increase costs, consequently amplifying officers' existing concerns, borne of accountability,<sup>169</sup> about litigation risk. Additionally,

---

<sup>160</sup> [2016] EWCA Civ 1029 [2016] HLR 776

<sup>161</sup> [2016] EWCA Civ 1029 [2016] HLR 776 [14]

<sup>162</sup> [2016] EWCA Civ 1029 [2016] HLR 776 [22]

<sup>163</sup> [2016] EWCA Civ 1029 [2016] HLR 776 [22] (Lewison LJ)

<sup>164</sup> [2016] EWCA Civ 1029 [2016] HLR 776 [22] (Lewison LJ)

<sup>165</sup> ASBCPA 2014, s 1

<sup>166</sup> [2016] EWCA Civ 1029 [2016] HLR 776 [22] (Lewison LJ); 2.3.7.1

<sup>167</sup> *Akerman-Livingstone v Aster Communities Limited (formerly Flourish Homes Limited)* [2015] UKSC 15, [2015] AC 1399

<sup>168</sup> *Smith v Contour Homes* (Draft Judgment Manchester County Court 12 May 2016) unreported; accessed via Westlaw 11

June 2016

<sup>169</sup> 1.3.2

while proportionality per *Akerman-Livingstone*<sup>170</sup> forces some attention onto disability rights, the potential of the law to achieve the aims of the social model may be significantly undermined by this approach as the focus may shift from the disabled occupants and their right not to be discriminated against to risks to the landlord. This is because, instead of challenging barriers to disability inequality by granting legal rights to disabled occupants, landlords may be preoccupied with risks to themselves. As Whitty acknowledges, rights compliance may result from managing organisational risks e.g. reputational and legal.<sup>171</sup> While Whitty sees positive consequences flowing from this and that rights are more likely to be upheld, frontline staff like officers may do so with defensive practice, focusing on completing an audit trail of documentation<sup>172</sup> and therefore minimal compliance<sup>173</sup> rather than taking a social model approach that focusses on the effects of the discrimination. Oliver criticises such a tokenistic 'compliance approach'<sup>174</sup> whereby service providers observe the minimum level of legal requirements; support being offered without negotiation<sup>175</sup> and the disabled person's lived experience of support being ignored in favour of the convenience of the support worker.<sup>176</sup> This contrasts sharply with the approach suggested by Williams and Heslop.<sup>177</sup> Moreover, the danger of such a minimally compliant approach is the potential use of further exclusionary interventions, justified where alternatives are seen to have failed. Support may fail due to a lack of co-operation from medico-welfare colleagues. Indeed, support has considerable potential to fail or be flawed due to poor relations with other medico-welfare professionals particularly social workers with whom officers have a long-standing tense relationship.<sup>178</sup> Consequently, front-line officials may be working alone. Further, their exclusion from social model discourse and desire for the ASB to stop may add to the impetus for officers to offer support or other interventions or adjustments with minimal compliance. Thus, the refinement of proportionality in the context of the disability-based challenge may mean social

---

<sup>170</sup> *Akerman-Livingstone v Aster Communities Limited (formerly Flourish Homes Limited)* [2015] UKSC 15, [2015] AC 1399

<sup>171</sup> Noel Whitty, 'Human Rights as Risk: UK Prisons and the Management of Risk and Rights' *Punishment & Society* 123, 123

<sup>172</sup> Richard Mullen, Anita Admiraal and Judy Trevena, 'Defensive Practice in Mental Health' (2008) *The New Zealand Medical Journal* 85; Hickman notes case-law recognising the need for public authorities to maintain an audit trail of decision-making demonstrating consideration of the Public Sector Equality Duty; Tom Hickman, 'Too Hot, Too Cold or Just Right? The Development of the Public Sector Equality Duties in Administrative Law' [2013] *PL* 325, 334

<sup>173</sup> 1.3.2; 6.4.2.4

<sup>174</sup> Mike Oliver, 'The Social Model in Action: If I had a Hammer' in Colin Barnes and Geof Mercer (eds), *Implementing the Social Model of Disability: Theory and Research* (The Disability Press 2004) 18, 30

<sup>175</sup> 6.4.2.1

<sup>176</sup> Mike Oliver, 'The Social Model in Action: If I had a Hammer' in Colin Barnes and Geof Mercer (eds), *Implementing the Social Model of Disability: Theory and Research* (The Disability Press 2004) 18, 30

<sup>177</sup> V Williams and P Heslop, 'Mental Health Support Needs of People with a Learning Difficulty: a Medical or a Social Model?' (2005) 20 *Disability and Society* 231; Introductory Chapter

<sup>178</sup> 1.2.4

landlords take a mere minimal compliance approach, lacking meaningful support and far from the goals of the social model. Thus, proportionality may force consideration of alternative interventions resulting in social inclusion but the potential for success may be limited by minimal compliance or risk considerations which may be particularly likely where the disabled person is a perpetrator of ASB.

**Chapter 6 will analyse the findings to demonstrate officers' awareness or understanding of terminology including "proportionality" may affect their decision-making.**

### 2.3.6 Discrimination Arguments: the Limitations Posed by Causation

Like the DDA 1995, the EA 2010 contains the imperative element of causation, the reason for the unfavourable treatment that relates to the disability. The drafting of the two acts is different<sup>179</sup> but cases decided under the DDA 1995 remain useful in illustrating how the social model objective of focussing on the effects of the discrimination may be obscured.

While medical evidence confirmed Lalli's 'cognitive impairments', which were accepted as a disability, it did not show it caused behavioural problems leading him to act antisocially.<sup>180</sup> Thus, the *causation* required between discrimination and disability required by the DDA 1995 was not made out. Analogies may also be drawn with rent cases where there have been breaks in the causal chain. In *O'Connell v Viridian Housing*,<sup>181</sup> the defendant faced possession proceedings three times, the case spanning both the DDA 1995 and the EA 2010 yet 'there was simply no evidence on which to find a seriously arguable case that the [most recent] arrears... were the consequence of any disability'<sup>182</sup> thus there could be no discrimination and therefore no challenge.

---

<sup>179</sup> DDA 1995, s 24(1)(a), 2.3.1 above cf EA 2010, s 15(1)(a), 2.3.3.1

<sup>180</sup> *Lalli v Spirita Housing Ltd* [2012] EWCA Civ 497, [2012] HLR 477

<sup>181</sup> [2012] EWHC 1389 (QB)

<sup>182</sup> [2012] EWHC 1389 (QB) [27]

A tenant or other occupant may rely on the EA 2010, sections 15 and/or 35 to challenge any ASB proceedings. However, in possession proceedings, if the ASB has been perpetrated by someone other than the defendant occupier e.g. visitor or other member of the household, then the defendant cannot rely on the EA 2010, section 15 to challenge those proceedings because of the lack of causation: the ASB and consequently the unfavourable treatment would not have arisen in consequence of the defendant's disability. This was established in *McMullen*<sup>183</sup> where possession was sought against a tenant based on her son's ASB. He had terrorised neighbours and was the subject of an ASBO.<sup>184</sup> It was accepted that the defendant had a "disability" as a medical report found her to have an IQ of 63, the literacy skills of a nine-year old and described her as an 'immature and vulnerable person [lacking] assertiveness skills'.<sup>185</sup> The effects of the DDA 1995 sections 22(3)(c) and 24(1) were considered.<sup>186</sup> It was found as a fact that the son's behaviour was not, as contended on the defendant's behalf, related to her "disability", mainly because he was 17 at the time most of the ASB was perpetrated (although it is possible to imagine a causal link may be established between a defendant's "disability" and (their failure to control) the behaviour of a younger child). Therefore, *McMullen*<sup>187</sup> illustrates how ASB perpetrated by family members may break the causal chain. Thus, for the argument to succeed, it is imperative to demonstrate that the *defendant's* "disability" – i.e. the impairment – is the cause of the unfavourable treatment i.e. the ASB control. In their consultation on improving protection from disability discrimination, the EHRC were concerned that a requirement for such defendants to establish this causal link may subject them 'to interrogation concerning the nature and impact of their impairment ... contributing to a medical rather than social focus on disability.'<sup>188</sup>

The directness of this causal relationship bars disability-related challenges by tenants facing possession proceedings due to ASB caused by the mental impairments of their child. There are no housing law authorities but analogies with employment law may be drawn. In *Hainsworth v Ministry of Defence*,<sup>189</sup> the Court of Appeal stressed that

<sup>183</sup> [2006] EWCA Civ 539, [2006] 2 P & CR D45

<sup>184</sup> [2006] EWCA Civ 539, [2006] 2 P & CR D45

<sup>185</sup> [2006] EWCA Civ 539, [2006] 2 P & CR D45 [13] (Neuberger LJ)

<sup>186</sup> [2006] EWCA Civ 539, [2006] 2 P & CR D45 [17] - [21]

<sup>187</sup> [2006] EWCA Civ 539, [2006] 2 P & CR D45

<sup>188</sup> Equality and Human Rights Commission, *Response of the Equality and Human Rights Commission to the Office of Disability Issues consultation 'Improving protection from Disability Discrimination'* (EHRC 2009) 3

<sup>189</sup> [2014] EWCA Civ 763, [2014] 3 CMLR 1053

EU law<sup>190</sup> does not require employers to provide reasonable accommodations<sup>191</sup> for employees who care for a disabled person but are not disabled themselves. In the employment context, this rests on the 'assumption that the carer is biologically/medically capable of conforming to normal labour market expectations [and] any departures therefrom must be a matter of choice.'<sup>192</sup> Transferred to the context of ASB policy, the parent seems expected to control their child's behaviour, caused by disability or otherwise. Failure to control may be considered defective parenting or a matter of choice rather than a consequence of the disadvantages of disability. That the non-disabled parent cannot rely on the disability-challenge in resisting possession proceedings seems a rather myopic way of 'perpetuating the social exclusion of disabled children.'<sup>193</sup> By not extending the availability of the challenge to carers may result in them and their families being excluded from social housing. This constrains the potential of disability-challenges and therefore the ability of the law to facilitate social inclusion.<sup>194</sup>

Thus, causation narrows constructions of disability, playing to a medical model, *individualised* approach focussing on the direct relationship between impairment and disadvantage. This ignores the wider causes and consequences of disability and therefore the barriers to inequality that disabled people face themselves or via disadvantages for carers. In limiting the potential of the disability-based challenge, causation like risk poses barriers to the operation of the social model.

***Chapters 5 and 6 will analyse the findings to establish whether officers look for causal explanations of impairment and therefore medically construct relevant perpetrators.***

---

<sup>190</sup> EU Directive 2000/78, Art 5

<sup>191</sup> 2.3.7.1

<sup>192</sup> Charlotte O'Brien, 'Union Citizenship and Disability: Restricted Access to Equality Rights and the Attitudinal Model of Disability' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: the Role of Rights*. (Cambridge University Press 2017)

<sup>193</sup> Charlotte O'Brien, 'Union Citizenship and Disability: Restricted Access to Equality Rights and the Attitudinal Model of Disability' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: the Role of Rights*. (Cambridge University Press 2017)

<sup>194</sup> It may be possible to bring a claim for indirect discrimination under EA 2010, s 19, which neither poses a requirement of causation or consideration of knowledge. However, there are no authorities for use of the provision in cases of ASB.

## 2.3.7 Other Disability Related Challenges and Remedies

### 2.3.7.1 Reasonable Adjustments

As reasonable adjustments may be employed as a solution to ASB, examination of this policy may answer how constructions of those entitled i.e. disabled perpetrators, affect the outcomes of social landlords' practice.

The duty to make reasonable adjustments<sup>195</sup> is imposed on social landlords as controllers of let premises.<sup>196</sup> Where breach of the duty to provide reasonable adjustments can be proved, a claim for discrimination arises under the EA 2010, section 21 and as already argued, may support an argument that a landlord making an ASB claim has not acted proportionately contrary to the EA 2010, section 15(1)(b).<sup>197</sup> Thus they may resist the exclusionary actions against perpetrators with mental impairments. These claims may promote inclusion and like disability discrimination, seek to counteract social stigma and target conduct that contributes to a subordinating system.<sup>198</sup> Yet the drafting of policy, being technically complicated and giving disabled people many obstacles to surmount limits its potential to construct them via the social model and also affect the outcomes of practice.

First, the duty applies where a disabled person (who is a tenant of the premises<sup>199</sup> or is otherwise entitled to occupy them)<sup>200</sup> may be put at a *substantial* disadvantage 'in relation to a relevant matter'<sup>201</sup> i.e.

- (a) the enjoyment of the premises<sup>202</sup>
- (b) the use of a benefit or facility, entitlement to which arises as a result of the letting.<sup>203</sup>

---

<sup>195</sup> EA 2010, s 20

<sup>196</sup> EA 2010, sch 4

<sup>197</sup> 2.3.5

<sup>198</sup> Samuel Bagenstos, *Law and the Contradictions of the Disability Movement* (Yale University Press 2008) 57

<sup>199</sup> EA 2010, sch 4 para 2(4)(a)

<sup>200</sup> EA 2010, sch 4 para 2(4)(b)

<sup>201</sup> EA 2010, s 20(3) and (5)

<sup>202</sup> EA 2010, sch 4 para 2(5)(a)

<sup>203</sup> EA 2010, sch 4 para 2(5)(b)

The substantial disadvantage must be measured 'in comparison with persons who are not disabled'.<sup>204</sup> It may arise from a provision, criterion<sup>205</sup> or practice of the social landlord (which includes a 'reference to a term of the letting')<sup>206</sup> a 'physical feature'<sup>207</sup> or the need 'to provide an auxiliary aid'<sup>208</sup> (which includes an 'auxiliary service').<sup>209</sup>

The EHRC's Code relevant to services and public functions (the most relevant guidance for social landlords).<sup>210</sup> It explains that 'the duty is anticipatory in the sense that it requires consideration of, and action in relation to, barriers that impede people with one or more kinds of disability'.<sup>211</sup> The duty applies 'to disabled people at large regardless of whether the service provider knows that a particular person is disabled'.<sup>212</sup> Save for the limiting explanation of which people face barriers, this approach is largely consonant with the social model in being anticipatory and inclusive of disabled people irrespective of knowledge. However, in the context of premises, the duty only arises where the social landlord 'receives a request from or on behalf of the tenant'<sup>213</sup> to take the relevant steps. Thus, the barrier of identification<sup>214</sup> must be surmounted before the remaining obstacle course is negotiated.<sup>215</sup>

In respect of auxiliary aids, the duty may arise where, 'but for the provision of the aid',<sup>216</sup> a disabled tenant or lawful occupier is put 'at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled'.<sup>217</sup> Here the social landlord would be obliged to take such steps as it is reasonable to have to take to avoid the disadvantage. Auxiliary aids relevant to this thesis include 'the removal, replacement or... provision of any furniture, furnishings, materials, equipment and other chattels...'<sup>218</sup> Thus, landlords may fit carpets which also attenuate noise<sup>219</sup> and

---

<sup>204</sup> EA 2010, s 20(3), (4) and (5)

<sup>205</sup> EA 2010, s 20(3)

<sup>206</sup> EA 2010, sch 4 para 2(3)

<sup>207</sup> EA 2010, s 20(4)

<sup>208</sup> EA 2010, s 20(5)

<sup>209</sup> EA 2010, s 20(11)

<sup>210</sup> There is none on housing *per se* as there had been for the DDA 1995

<sup>211</sup> Equality and Human Rights Commission, *EA 2010 Statutory Code of Practice – Services, Public Functions and Associations* (EHRC 2011) 7.22

<sup>212</sup> Equality and Human Rights Commission, *EA 2010 Statutory Code of Practice – Services, Public Functions and Associations* (EHRC 2011) 7.22

<sup>213</sup> EA 2010, sch 4 para 2(6)

<sup>214</sup> 3.1.1

<sup>215</sup> P W Robson and P Watchman, 'The Homeless Persons' Obstacle Race' (1981) 3 JSWL 1

<sup>216</sup> EA 2010, sch 4, para 5 (4)

<sup>217</sup> EA 2010, sch 4, para 5 (4)

<sup>218</sup> Equality Act 2010 (Disability) Regulations 2010, SI 2010/2128, reg 8(1)(a)

<sup>219</sup> [2016] EWCA Civ 1029 [2016] HLR 776; 2.3.5; 6.3.3.2 - Larry



‘...the replacement, provision or adaptation of any door bell, or any door entry system ...’<sup>220</sup> which may assist hearing disabled people<sup>221</sup> and provide support.<sup>222</sup>

None of the case-law to date on EA 2010, sections 20 or 21 has related to ASB proceedings in social housing. However, *Lalli*,<sup>223</sup> concerned this appellant’s ASB in relation to reasonable adjustments<sup>224</sup> and discrimination arising from disability<sup>225</sup> under the DDA 1995. It was argued that the warning letter and commencement and manner of conducting the injunction proceedings ‘amounted to the adoption of a practice, policy or procedure’<sup>226</sup> which had disadvantaged Lalli, given his functional illiteracy. Thus, the correspondence and proceedings should have been conducted differently to make a reasonable adjustment.<sup>227</sup> It was accepted that Spirita failed to have proper regard to Lalli’s disability when deciding to take the proceedings and therefore failed to make appropriate reasonable adjustments (e.g. by ensuring that Lalli was represented in the proceedings at an earlier stage).<sup>228</sup> However, the sending of the warning letter was held to not place Lalli at a material disadvantage or cause him any adverse detriment<sup>229</sup> as there was evidence he could get assistance reading letters; indeed on this occasion it had lead him to seek legal advice and therefore the question of reasonable adjustment did not arise.<sup>230</sup>

The requirement for an assessment of the degree of disadvantage (similar to the requirements to prove a substantial and long-term impairment)<sup>231</sup> is thus divisive and inconsistent with a social model approach.<sup>232</sup>

The existence of *physical* features i.e. any physical element or quality<sup>233</sup> (but specifically including those ‘arising from the design or construction of a building’,<sup>234</sup> of

---

<sup>220</sup> Equality Act 2010 (Disability) Regulations 2010, SI 2010/2128, reg 8(1)

<sup>221</sup> 6.3.2

<sup>222</sup> 1.2.3.5

<sup>223</sup> *Lalli v Spirita Housing Ltd* [2012] EWCA Civ 497, [2012] HLR 477

<sup>224</sup> DDA 1995, s 21

<sup>225</sup> DDA 1995, ss 21B and 21D

<sup>226</sup> *Lalli v Spirita Housing Ltd* [2012] EWCA Civ 497, [2012] HLR 477 [15]

<sup>227</sup> DDA 1995, s 21

<sup>228</sup> *Lalli v Spirita Housing Ltd* [2012] EWCA Civ 497, [2012] HLR 477 [67]

<sup>229</sup> DDA 1995, s 21B(1)(a)(ii) in *Lalli v Spirita Housing Ltd* [2012] EWCA Civ 497, [2012] HLR 477 [40]

<sup>230</sup> *Lalli v Spirita Housing Ltd* [2012] EWCA Civ 497, [2012] HLR 477; 3.4.3.2

<sup>231</sup> EA 2010, s 6

<sup>232</sup> Sarah Fraser Butlin, ‘The UN Convention on the Rights of Persons with Disabilities: does the Equality Act 2010 Measure up to UK International Commitments?’ (2011) ILJ 428

<sup>233</sup> EA 2010, s 20(10)(d)

<sup>234</sup> EA 2010, s 20(10)(a)

‘an approach to, exit from or access to a building’<sup>235</sup> and ‘a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises’)<sup>236</sup> may lead to the imposition of a duty on a social landlord to make a reasonable adjustment. For this duty to arise, the physical feature must put a disabled tenant or lawful occupier<sup>237</sup> ‘at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled.’<sup>238</sup> Again, the obligation only arises where the social landlord ‘receives a request from or on behalf of a disabled person... to take steps’<sup>239</sup> to make the reasonable adjustment and ‘the steps requested are likely to avoid or reduce the disadvantage’.<sup>240</sup>

The provisions concerning reasonable adjustments extend to a disabled person (‘who is a tenant of the premises’<sup>241</sup> or ‘is otherwise entitled to occupy them’)<sup>242</sup> or in the case of auxiliary aids the ‘disabled tenant or lawful occupier’.<sup>243</sup>

However, the requirement to ‘take a step which would involve the removal or alteration of a physical feature is never reasonable’.<sup>244</sup> Confusingly, steps to remove,<sup>245</sup> alter<sup>246</sup> or provide ‘a reasonable means of avoiding’<sup>247</sup> such physical features<sup>248</sup> may be reasonable adjustments but can be required only in relation to common parts.<sup>249</sup> Common parts of let premises<sup>250</sup> are defined as ‘the structure and exterior of, and any common facilities within or used in connection with, the building or part of a building which includes the premises’.<sup>251</sup> Thus, these requirements, arguably costlier than auxiliary aids, do not apply to the parts of premises exclusively occupied by the tenant or lawful occupier.

---

<sup>235</sup> EA 2010, s 20(10)(b)

<sup>236</sup> EA 2010, s 20(10)(c).

<sup>237</sup> EA 2010, sch 4, para 5 (4)

<sup>238</sup> EA 2010, s 20(4)

<sup>239</sup> EA 2010, sch 4, para 5 (6)(a)

<sup>240</sup> EA 2010, sch 4, para 5 (6)(b)

<sup>241</sup> EA 2010, sch 4 para 2(4)(a)

<sup>242</sup> EA 2010, sch 4 para 2(4)(b)

<sup>243</sup> EA 2010, sch 4, para 5(4)

<sup>244</sup> EA 2010, sch 4 para 1(8)

<sup>245</sup> EA 2010, s 20(9)(a)

<sup>246</sup> EA 2010, s 20(9)(b)

<sup>247</sup> EA 2010, s 20(9)(c)

<sup>248</sup> EA 2010, s 20(10)

<sup>249</sup> EA 2010, sch 4 para 5

<sup>250</sup> Which are not part of commonhold land - EA 2010, s 36(6)(a)

<sup>251</sup> EA 2010, s 36(6)(a)

It should be noted that, in contrast with the provisions about auxiliary aids, those concerning common parts are not yet in force.<sup>252</sup> If they ever are, a reasonable adjustment of sound attenuating insulation could be required where it is perhaps most needed to counter noise-related ASB in e.g. floors between flats or party walls between flats or between semi and terraced houses. However, such soundproofing installed to walls or between floors is expensive and the Code acknowledges the 'financial and other costs of making the adjustment'<sup>253</sup> in determining what is reasonable.

The requirements for reasonable adjustments are thus relatively complex, their potential impact narrowed by requirements of identification, assessments of substantiality and comparisons with persons who are not disabled. This 'focus on the impairment, its consequences and effects',<sup>254</sup> constructs disabled perpetrators in need of reasonable adjustments (to mitigate the effects of their ASB) via a medical model, particularly by its explicit comparison 'with persons who are not disabled.'<sup>255</sup> The social model would not isolate the effects of the impairment. Rather it would focus on the benefits that the adjustment in removing barriers would bring. This medical construction may justify social landlords' refusal of sound insulation on financial grounds, closing the door to alternative and more proportionate means of case-management that avoid litigation.

### 2.3.7.2 The Public Sector Equality Duty ("PSED")

Disability discrimination case-law examined thus far provides little help to perpetrators. A faint light of hope shines from the more positively drafted PSED.<sup>256</sup> This first appeared in the Disability Discrimination Act 2005<sup>257</sup> which imposed *inter alia*

a general duty on every public authority in carrying out its functions to have due regard to the need to take steps to take account of disabled persons' disabilities,

---

<sup>252</sup> With no day yet appointed as at 1.7.18

<sup>253</sup> Equality and Human Rights Commission, *EA 2010 Statutory Code of Practice – Services, Public Functions and Associations* (EHRC 2011) 7.30

<sup>254</sup> Equality and Human Rights Commission, *Response of the Equality and Human Rights Commission to the Office of Disability Issues consultation 'Improving protection from Disability Discrimination'* (EHRC 2009) 16

<sup>255</sup> EA 2010, s 20 subss (3)-(5)

<sup>256</sup> EA 2010, s 149

<sup>257</sup> Inserting s 49A into DDA 1995

even where that involves treating disabled persons *more favourably than other persons*.<sup>258</sup>

Under the EA 2010, disability is a relevant protected characteristic for the purposes of the PSED.<sup>259</sup> This has the potential to provide a successful challenge for the perpetrator because the section imposes a general duty on public authorities<sup>260</sup> including local authorities in the exercise of their functions<sup>261</sup> and persons who are not public authorities but exercise public functions<sup>262</sup> (including other social landlords as per *Weaver*)<sup>263</sup> in the exercise of those functions have due regard to the need to eliminate *inter alia* discrimination.<sup>264</sup> The potential for use of the general duty is very broad: a party may advance it alone or in addition to other heads of discrimination and arguments may concern both a public authority's policy or a particular decision made whether that relates to a policy or not.<sup>265</sup> Where a claimant alleges a decision of a public authority to be discriminatory without raising a PSED argument, the judge can, of their own volition, consider it.<sup>266</sup>

Requirements for specifically positive treatment, which may provide more potential for a social model approach by challenging negative attitudes, include the requirement that the authorities are also, in the exercise of their functions, duty-bound to 'have due regard to the need to advance equality of opportunity'<sup>267</sup> and 'foster good relations between persons who share a relevant protected characteristic and persons who do not share it.'<sup>268</sup> Specific acknowledgement is given to 'the possibility of 'more favourable treatment'.<sup>269</sup> Thus, while section 149 does not explicitly require the promotion of 'positive attitudes towards disabled persons'<sup>270</sup> this is implicit in the drafting which has potential to shape discourse and thereby constructions of disabled people.

---

<sup>258</sup> DDA 1995, s 49A (1)(d) (emphasis added)

<sup>259</sup> EA 2010, s 149(7)

<sup>260</sup> EA 2010, s 150 and sch 19

<sup>261</sup> EA 2010, s 149(1)

<sup>262</sup> EA 2010, s 149(2)

<sup>263</sup> *London and Quadrant Housing Trust v R (on the application of Weaver)* [2009] EWCA Civ 587, [2010] 1 WLR 363

<sup>264</sup> EA 2010, s 149(1)(a)

<sup>265</sup> *Pieretti v Enfield LBC* [2010] EWCA Civ 1104, [2011] 2 All ER 642

<sup>266</sup> Tom Hickman, 'Too Hot, Too Cold or Just Right? The Development of the Public Sector Equality Duties in Administrative Law' [2013] PL 325

<sup>267</sup> EA 2010, s 149(1)(b)

<sup>268</sup> EA 2010, s 149(1)(c)

<sup>269</sup> EA 2010, s 149(6)

<sup>270</sup> DDA 1995, s 49A(1)(a)

Case-law on section 49A<sup>271</sup> remains relevant to the interpretation of section 149.<sup>272</sup> While the PSED has been somewhat inconsistently applied,<sup>273</sup> it has been advanced successfully in numerous cases<sup>274</sup> affecting housing, the most relevant being *Pieretti v Enfield LBC*.<sup>275</sup> This concerned an elderly couple who applied to their local authority to be housed as homeless following eviction from their private sector accommodation. Enfield decided that the Pierettis satisfied all the criteria to be thus housed<sup>276</sup> including priority need (on grounds of vulnerability as a result of their old-age and medical condition(s))<sup>277</sup> but found them to be intentionally homeless. The decision was appealed on the basis that in discharging their duty under the DDA 1995, section 49A, Enfield as decision-maker, was required to consider disability in the context of the homelessness legislation<sup>278</sup> including intentionality. While the decision-maker 'is not invited to consider an *alleged* disability, it would be wrong, in the light of section 49A(1), to say that he should consider disability only if it is *obvious*. On the contrary, he needs to have due regard to the need for him to *take steps* to take account of it'.<sup>279</sup> The consequent need to investigate will be further considered in the next chapter.<sup>280</sup> While attitudinal barriers to the acceptance of mental impairments which may be considered hidden may hinder the will to investigate, it is hypothesised that officers may encounter difficulties with investigations in any event.<sup>281</sup>

*Pieretti*<sup>282</sup> was applied in *Barnsley MBC v Norton & Ors*,<sup>283</sup> where possession was sought of accommodation provided in consequence of the defendant school caretaker's employment once he was dismissed. The defendant's daughter Sam, who lived with him, had learning difficulties and was a wheelchair-user having been born with cerebral palsy. The accommodation had been specifically adapted for her by Barnsley's social services department. It was held that as Barnsley obtaining an order

---

<sup>271</sup> DDA 1995

<sup>272</sup> EA 2010

<sup>273</sup> Particularly in relation to austerity decision-making according to Aileen McColgan, 'Litigating the Public Sector Equality Duty: the Story so Far' (2015) 35 OJLS 453

<sup>274</sup> Tom Hickman, 'Too Hot, Too Cold or Just Right? The Development of the Public Sector Equality Duties in Administrative Law' [2013] PL 325

<sup>275</sup> [2010] EWCA Civ 1104, [2011] 2 All ER 642

<sup>276</sup> HA 1996, s 193

<sup>277</sup> HA 1996, s 189

<sup>278</sup> HA 1996, pt VII

<sup>279</sup> [2010] EWCA Civ 1104, [2011] 2 All ER 642 [32]

<sup>280</sup> 3.1.1

<sup>281</sup> 1.3.3

<sup>282</sup> [2010] EWCA Civ 1104, [2011] 2 All ER 642 [32]

<sup>283</sup> [2011] EWCA Civ 834, [2011] HLR 729

for possession would significantly affect Sam's position, the authority was therefore 'clearly under a duty to have due regard to the need to take steps to take account of her disability'.<sup>284</sup> Barnsley had failed to address the duty before or at any stage during the proceedings and had therefore breached the duty. While not quashing the possession order 'the court made clear that it would not look favourably on any eviction taking place before alternative accommodation was found'<sup>285</sup> and Barnsley submitted evidence outlining the measures it had taken to ensure Sam's needs were met.<sup>286</sup> Thus, the PSED is far more inclusive with its potential for consideration of the discriminatory effects of proceedings on other family members that cannot be stymied by counter-arguments of causation.

Neither *Pieretti*<sup>287</sup> nor *Norton*<sup>288</sup> involved ASB. Yet the PSED has been advanced in ASB cases. In *Lalli*,<sup>289</sup> while the perpetrator's case failed on other grounds, Elias LJ accepted that the PSED reinforced Spirita's obligation e.g. to make appropriate reasonable adjustments (e.g. by ensuring that Lalli was represented in the proceedings at an earlier stage).<sup>290</sup> In *Swan Housing Association v Gill*<sup>291</sup> the behaviour complained of was Gill's erection of a gazebo in a passageway next to the demised premises. In his defence against proceedings for an ASBI, Gill who had Asperger's syndrome argued various grounds of disability discrimination including breach of the PSED.

The reasons the PSED argument was unsuccessful in this and other ASB cases will be further considered in the next chapter. So far it may be concluded that the PSED has potential to remove barriers to disability inequality particularly attitudinal ones. Yet attitudes to relevant perpetrators may be resilient to change.

**Chapter 6 will analyse the findings to demonstrate how officers' constructions of perpetrators affected their decision-making regarding adjustments or other positive interventions i.e. outcomes of case-management.**

<sup>284</sup> *Barnsley MBC v Norton & Ors* [2011] EWCA Civ 834, [2011] HLR 729 [34] (Lloyd LJ)

<sup>285</sup> Tom Hickman, 'Too Hot, Too Cold or Just Right? The Development of the Public Sector Equality Duties in Administrative Law' [2013] PL 325, 334

<sup>286</sup> *Barnsley MBC v Norton & Ors* [2011] EWCA Civ 834, [2011] HLR 729 [17]

<sup>287</sup> [2010] EWCA Civ 1104, [2011] 2 All ER 642 [32]

<sup>288</sup> [2011] EWCA Civ 834, [2011] HLR 729

<sup>289</sup> *Lalli v Spirita Housing Ltd* [2012] EWCA Civ 497, [2012] HLR 477 2.3.3

<sup>290</sup> *Lalli v Spirita Housing Ltd* [2012] EWCA Civ 497, [2012] HLR 477 [67] (Elias LJ); 2.3.3

<sup>291</sup> [2013] EWCA Civ 1566, [2014] HLR 210

## **Conclusion**

This chapter has reviewed the defences and challenges to ASB proceedings and discussed their limitations. Within this review, the difficult balance of interests and competing responsibilities in ASB case-management which housing officers must face has been illustrated.

Disability legislation provides for reasonable adjustments, yet the provisions are technically complex. In the context of ASB, the improvement of properties or allocation of tenancies with appropriately constructed or refurbished dwellings could meet the social model goal of social inclusion but would be expensive and may not therefore be reasonable under the EA 2010.<sup>292</sup>

Disability legislation was initially<sup>293</sup> used with success to challenge ASB proceedings with the aim of social inclusion. Thereafter the possibility of realising that social model goal was progressively narrowed by restricted interpretations of disability and discrimination. Thus, the disability-based challenges are particularly limited in that they are modified by considerations of causation and proportionality. While these may give rise to considerations of risk to the perpetrator with *Akerman*<sup>294</sup> providing guidance, there was no ASB in his case. *Akerman*<sup>295</sup> has been applied to perpetrators of ASB but not always successfully, illustrating how assessments of proportionality permit consideration of risks to neighbours.<sup>296</sup> The defence of reasonableness also permits consideration of risk and this may compound construction of the risky subject. Thus, typical of ASB cases, perpetrators advancing proportionality arguments in their disability challenges may receive a very restrictive response from the judiciary, due to lack of causation.

---

<sup>292</sup> EA 2010, s 20

<sup>293</sup> *North Devon Homes Ltd v Brazier* [2003] EWHC 574 (QB), [2003] HLR 905

<sup>294</sup> UKSC [2015] 15, [2015] AC 1399

<sup>295</sup> UKSC [2015] 15, [2015] AC 1399

<sup>296</sup> *Smith v Contour Homes* (Draft Judgment Manchester County Court 12 May 2016) unreported; accessed via Westlaw 11 June 2016

As officers receive training<sup>297</sup> and like judges have wide discretion in their ASB decision-making, it is possible to imagine that in assessing the risks involved in ASB case-management, particularly in anticipation of litigation, the broad concepts of behaviour and disability may affect officers' constructions of perpetrators as risky subjects. In anticipating litigation and disability-based challenges, officers' decision-making in ASB may be simply underpinned by their awareness of broad sounding terms including reasonableness and proportionality. Case-law suggests the defences and other challenges have been unsuccessful or simply untested in ASB cases. However, in anticipation of their possibility, it is hypothesised that officer's decision-making may be affected by their consideration of the risks of them being successful.<sup>298</sup> This may lead to a compliance-based approach that avoids discriminating. This may *prima facie* appear consistent with a social model approach yet may not address fundamental issues e.g. listening to the individual as to their choice of support that may frustrate the success of that intervention. Additionally, it is hypothesised that officers may discriminate between perpetrators depending on their attitudes to known or suspected impairments and this may be affected by moral considerations. Consequently, some perpetrators may be treated more favourably i.e. with more than mere compliance.<sup>299</sup>

Furthermore, despite the law permitting risk assessments of perpetrators, if individual officers are aware of particular cases, where the law appears to have favoured vulnerable perpetrators<sup>300</sup> the risks of litigating may pass into the social landlord's organisational discourse making them wary of pursuing the case to litigation and affecting case-management along the way.<sup>301</sup> Similarly, where the law has permitted assessment of risk to complainants / victims, this may remain in a particular social landlord's organisational discourse and therefore may affect how that organisation will respond.

---

<sup>297</sup> Sadie Parr, 'The Role of Social Housing in the 'Care' and 'Control' of Tenants with Mental Health Problems' (2010) 9 Social Policy and Society 111

<sup>298</sup> Noel Whitty, 'Rights as Risk: Managing Human Rights and Risk in the UK Prison Sector' Published by the Centre for Analysis of Risk and Regulation at the London School of Economics and Political Science, 2010, 2; 1.3.2

<sup>299</sup> Mike Rowe, 'Going Back to the Street: Revisiting Lipsky's Street-level Bureaucracy' (2012) 30 Teaching Public Administration 10, 14; Steven Maynard-Moody and Michael Musheno, *Cops, Teachers, Counsellors: Stories from the Front Lines of Public Service* (University of Michigan Press 2003); 1.3.2; 2.3.5

<sup>300</sup> *Akerman-Livingstone v Aster Communities Limited (formerly Flourish Homes Limited)* [2015] UKSC 15, [2015] AC 1399;

2.3.6

<sup>301</sup> 6.4



Thus, litigation as a mechanism of accountability (either against perpetrators or from victims / complainants)<sup>302</sup> forms part of the pervasive discourse of risk in ASB case-management. This may make officers risk averse both in their own practice and on behalf of their organisations. Such cautionary discourse may also affect perceptions of what constitute ASB risks, making cases of seemingly low risk, low level ASB / neighbour nuisance, the so-called “clash of lifestyles”<sup>303</sup> where the distinction between victim and perpetrator may not be clear and be more difficult to manage.<sup>304</sup> Additionally, this distinction may be blurred by officers’ awareness of and attitudes towards the disproportionate representation of people with physical and mental impairments living in social housing.<sup>305</sup> It is to attitudes and their relationship with evidence of mental impairments that I turn next.

---

<sup>302</sup> 1.3.2

<sup>303</sup> Suzie Scott & Hilary Parkey, 'Myths and Reality: Anti-social Behaviour in Scotland' (1998) 13 *Housing Studies* 325, 353

<sup>304</sup> 6.2.1

<sup>305</sup> Caroline Hunter and others, 'Disabled People's Experiences of Anti-Social Behaviour and Harassment in Social Housing: A Critical Review' (Disability Rights Commission 2007), 14; 1.1.1.3

# CHAPTER 3 Evidence and the Social Construction of Disability in the Context of ASB

## Contents

<b><u>Introduction</u></b>	<b>139</b>
<b><u>3.1 Identity as a Problem of the Social Model</u></b>	<b>141</b>
3.1.1 Problems with Evidence of Disability: Occupants' Problems with Identity and Landlords' Problems with Knowledge	141
3.1.2 The Construction of Perpetrators' Impairments by Housing Officers and Other Professionals	144
<b><u>3.2 Discrimination and Evidence</u></b>	<b>149</b>
3.2.1 Evidence, the Law and how it is Weighed by Professionals	149
<b><u>3.3 Evidence and the Evidential Gap</u></b>	<b>155</b>
3.3.1 Evidence in the Absence of Disclosure: A Needle in a Haystack	155
3.3.2 Knowledge and a Duty to Investigate?	157
<b><u>3.4 Disability as a Moral Issue</u></b>	<b>160</b>
3.4.1 The Social Construction of Mental Impairment and Agency: Pop Psychology and Folk Psychiatry	160
3.4.2 Mental Impairment and Agency	163
3.4.3 Guilt and Responsibility: Morality in Judicial Discourse	166
<b><u>Conclusion</u></b>	<b>175</b>

## **Introduction**

As the conflicted position of social landlords in their control and care for perpetrators of ASB has been established, and explanations of the legal proceedings and challenges provided, this chapter will focus on disclosure of evidence (which also constitutes knowledge and information)<sup>1</sup> of impairment. Assertion of disability rights arguments to challenge ASB proceedings require a perpetrator to provide evidence that they fit within a narrow definition of disability.<sup>2</sup> While risks concerning social landlords' knowledge about perpetrators have already been explained,<sup>3</sup> here evidence of disability is given specific attention as its' absence or late disclosure or discovery may affect the success of some challenges and therefore officers' decision-making may be affected by their assessments of the perceived risks of litigation.

This chapter will continue the previous chapter's analysis of developments in domestic equality law in relation to the social model and the barriers it seeks to address but here consider how the presence or absence of evidence may affect officers' constructions of perpetrators. In analysing the consistency of legal developments with the social model and also considering social constructions of perpetrators, judicial discourse and other sources will be used to illustrate potential attitudinal barriers particularly in relation to evidence and identity: the influence of case-law on the policy discourse and environment in which housing officers manage ASB cases has been noted.<sup>4</sup> Thus, judicial discourse and that of housing professionals may reveal shared concerns<sup>5</sup> reflecting the broader discourse of ASB governance<sup>6</sup> with its responsabilising goals. Moreover, judicial discourse may percolate into housing officer discourse via training.<sup>7</sup>

Therefore, case-law is again analysed to demonstrate how the drafting of legislative provisions permits a narrow, individualised interpretation of disability. It will be argued

---

<sup>1</sup> 1.3.3

<sup>2</sup> EA 2010, s 6

<sup>3</sup> 1.3.3

<sup>4</sup> Introductory Chapter

<sup>5</sup> Everett Cherrington Hughes, *The Sociological Eye: Selected Papers* (Transaction Publishers, 1971)

<sup>6</sup> Judicial cynicism is illustrated in quotes in this chapter e.g. the High Court judge referred to in *Lewisham LBC v Malcolm and another* [2007] EWCA Civ 763, [2008] Ch 129 [84]; HHJ Knowles in *O'Connell v Viridian Housing* [2012] EWHC 1389 (QB) [15]; the recorder in *Croydon LBC v Moody* (1999) 31 HLR 738, 744

<sup>7</sup> 5.3.4; 6.4.2.3

that such narrow focus readily permits categorisation and ensuing assessment of moral agency particularly given the combined dominance<sup>8</sup> of medical model and responsabilising ASB policy discourses. Folk psychiatry<sup>9</sup> is employed to explain how perpetrators may be viewed in the presence or absence of evidence.

It is argued that officers may construct, certain perpetrators as lacking individual moral responsibility by their inability to self-govern. They thus pose the risk identified in Chapter 1: to others and the tenure. Moreover, these constructs may affect the practice of officers illustrating the limitations of domestic law in removing barriers to disability equality and the failure of the law to achieve the aims of the social model. This chapter therefore addresses which model of disability best explains how relevant perpetrators are constructed in policy and hypothesises the potential effect on social landlords' ASB case-management practice and its outcomes.

---

<sup>8</sup> Mike Oliver, *The Individual and Social Models of Disability* (Joint Workshop of the Living Options Group and the Research Unit of the Royal College of Physicians, London July 1990) 5 <http://disability-studies.leeds.ac.uk/files/library/Oliver-in-soc-dis.pdf> accessed 20 February 2017

<sup>9</sup> Nick Haslam, 'Folk Psychiatry: Lay Thinking about Mental Disorder' (2003) 70 *Social Research* 621; Nick Haslam, 'Dimensions of Folk Psychiatry' (2005) 9 *Rev Gen Psychol* 35, 35

### **3.1 Identity as a Problem of the Social Model**

Given social landlords' responsibility to control the risks of ASB and the potentially countervailing risks posed by challenges to any ASB proceedings, it is hypothesised that officers will speculate on any causes of perpetrators' ASB<sup>10</sup> that they may believe relate to mental impairments and search for knowledge (evidence) of same. This evidence may affect officers handling of cases. Yet obtaining this evidence is by no means straightforward.

This section illuminates the opportunities social landlords may have to acquire evidence. Against this, it positions the barriers that occupants may experience to disclosing their impairments. Given that there may be gaps in disclosure of evidence, the section then proceeds to consider how officers may construct perpetrators and their impairments via the models of disability. To do so, it will compare housing with medico-welfare professionals and the judiciary.

#### **3.1.1 Problems with Evidence: Occupants' Problems with Identity and Landlords' Problems with Knowledge**

In many of the cases considered so far, including *Goodwin*,<sup>11</sup> behaviour may be constructed by neighbours and officers alike as not only anti-social but caused by mental impairments. In contemplating legal proceedings, mindful of the challenges they may face, landlords may want evidence of these impairments. How might they obtain this?

A landlord may acquire knowledge of occupants' impairments at numerous points during the lifetime of the legal relationship. While some mental impairments are concealable<sup>12</sup> in some cases considered thus far, officers' knowledge was indisputable from the outset due to their awareness of support being provided by social services<sup>13</sup>

---

<sup>10</sup> 1.2.5

<sup>11</sup> *Goodwin v Patent Office* [1999] ICR 302, 310; Introductory Chapter

<sup>12</sup> Erving Goffman, *Stigma: Notes on the Management of a Spoiled Identity* (Penguin 1990); Introductory Chapter

<sup>13</sup> *Birmingham CC v Stephenson* [2016] EWCA Civ 1029 [2016] HLR 776 [5]

or the nature of accommodation allocated.<sup>14</sup> It has already been explained how legislation regulating access to social housing accords priority to disabled people.<sup>15</sup> Thus, Barber's accommodation had been allocated to him pursuant to Croydon's homelessness duties on account of his vulnerability due to his 'personality and mood disorders'.<sup>16</sup> Additionally, an occupant may have requested or been offered reasonable adjustments<sup>17</sup> either prior to or during the tenancy. Disclosure may be made where the landlord provides assistance with benefit applications or job searches. The landlord may also request disclosure as a matter of local policy e.g. during the tenancy application process<sup>18</sup> and subsequently conduct disability monitoring post commencement of tenancies.<sup>19</sup>

However, disclosure may not be made for a variety of reasons: applicants for social housing may be unaware that disability accords priority need status to those homeless<sup>20</sup> or otherwise.<sup>21</sup> They or another member of their household may have satisfied other priority need<sup>22</sup> or criteria.<sup>23</sup> Thus, disability may not have been the perpetrator's route into social housing and therefore disclosure may not have been made prior to the commencement of the legal relationship with the landlord. Occupants may not have needed or requested assistance with benefits, adaptations or reasonable adjustments during the legal relationship with the landlord.

Furthermore, disclosure is dependent on accepting one has a mental impairment, i.e. *as constructing oneself as such*, as Morrison J in *Goodwin*<sup>24</sup> noted, '

Some disabled persons may be unable or unwilling to accept that they suffer from any disability; indeed, it may be symptomatic of their condition that they deny it'.<sup>25</sup>

---

<sup>14</sup> *Lalli v Spirita Housing Ltd* [2012] EWCA Civ 497, [2012] HLR 477

<sup>15</sup> 1.1.2

<sup>16</sup> *Barber v Croydon LBC* [2010] EWCA Civ 51, [2010] 2 P & CR D25 [13] Patten LJ

<sup>17</sup> Equality and Human Rights Commission, *EA 2010 Statutory Code of Practice – Services, Public Functions and Associations*, 6.15

<sup>18</sup> 5.2.3; fig 5.2

<sup>19</sup> Caroline Hunter and others, *Disabled People's Experiences of Anti-Social Behaviour and Harassment in Social Housing: A Critical Review* (Disability Rights Commission 2007) 44

<sup>20</sup> HA 1996, s 189(1)(c)

<sup>21</sup> HA 1996, s 166(3)(d)

<sup>22</sup> HA 1996, pt VII

<sup>23</sup> HA 1996, pt VI

<sup>24</sup> *Goodwin v Patent Office* [1999] ICR 302

<sup>25</sup> Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 SI 2013/1237 sch 1, para 41

Thus, while for some perpetrators, the behaviour complained of may mark the onset of a mental health issue, they may not accept their diagnosis or it may not yet have been sought or made. Even where a diagnosis has been made, the perpetrator may not accept the diagnosis: Some people with mental health issues are reluctant to identify as disabled, seeing this as relating to tangible impairment;<sup>26</sup> others 'also have (physical) impairments; some persons with physical impairments also have experience as mental health service users'.<sup>27</sup>

Even when people consider themselves to have an impairment and / or identify as disabled, numerous empirical studies<sup>28</sup> evidence that people fear disclosure of their mental health issue beyond those they trust (e.g. close family.)<sup>29</sup> The effects of 'anticipated stigma'<sup>30</sup> may therefore be particularly acute. Anticipated stigma may inhibit disclosure<sup>31</sup> at any stage of ASB control or housing management (including tenancy monitoring)<sup>32</sup> by the chief occupant/tenant of their own disability or of any other member of the household.

Thus, even when the identity is accepted, the barriers to disability equality of stigma and fear of discrimination may prevail.<sup>33</sup> Similarly, anticipated stigma<sup>34</sup> may have prevented identification as disabled and disclosure to neighbours and identification with the community.<sup>35</sup> Thus, anticipated stigma may perpetuate social exclusion by frustrating the possibility of governance of ASB via community participation.<sup>36</sup> In turn,

---

<sup>26</sup> Peter Beresford, Mary Nettle and Rebecca Perring, *Towards a Social Model of Madness and Distress: Exploring What Users Say (Service Users Say (Joseph Rowntree Foundation 2010) www.jrf.org.uk accessed 1 July 2011, 8; Introductory Chapter*

<sup>27</sup> Peter Beresford, Mary Nettle and Rebecca Perring, *Towards a Social Model of Madness and Distress: Exploring What Users Say (Service Users Say (Joseph Rowntree Foundation 2010) www.jrf.org.uk accessed 1 July 2011; Introductory Chapter*

<sup>28</sup> Liz Sayce, *From Psychiatric Patient to Citizen: Overcoming Discrimination and Social Exclusion* (Palgrave Macmillan 2000) 70

<sup>29</sup> V Williams and P Heslop, 'Mental Health Support Needs of People with a Learning Difficulty: A Medical or a Social Model?' (2005) 20 *Disability & Society* 231, 241

<sup>30</sup> Valerie A Earnshaw and Stephenie R Chaudoir, 'From Conceptualizing to Measuring HIV Stigma: A Review of HIV Stigma Mechanism Measures' (2009) 13 *AIDS and Behavior* 1160 <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3666955/#R22> accessed 12 June 2016

<sup>31</sup> Otto F Wahl, 'Mental Health Consumers' Experience of Stigma' (1999) 25 *Schizophrenia Bulletin* 467; Patrick W Corrigan & Alicia K Matthews, 'Stigma and Disclosure: Implications for Coming out of the Closet' (2003) 12 *Journal of Mental Health* 235

<sup>32</sup> Caroline Hunter and others, *Disabled People's Experiences of Anti-Social Behaviour and Harassment in Social Housing: A Critical Review* (Disability Rights Commission 2007) 50

<sup>33</sup> Samuel Bagenstos, *Law and the Contradictions of the Disability Movement* (Yale University Press 2008) 26; Introductory Chapter

<sup>34</sup> Valerie A Earnshaw and Stephenie R Chaudoir, 'From Conceptualizing to Measuring HIV Stigma: A Review of HIV Stigma Mechanism Measures' (2009) 13 *AIDS and Behavior* 1160, 1163 <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3666955/#R22> accessed 12 June 2016

<sup>35</sup> Morag McDermont, 'Housing Associations, the Creation of Communities and Power Relations' (2004) 19 *Housing Studies* 855, 857; 1.2.5

<sup>36</sup> 1.2.5

as a person who anticipates stigma may be inhibited from such social engagement, neighbours may be more likely to perceive them as outsiders and therefore complain about them with social landlords consequently constructing the person as antisocial and risky. From this, discrimination may ensue.

Where disclosure of the health of other occupants of the household is inquired of the tenant, they may simply be unaware of it, may not construct the other occupants as having an impairment or anticipate stigma on their behalf.

Even when people identify as disabled or consider themselves or a co-occupant as having an impairment, it may post-date the commencement of occupancy following which there has been no subsequent monitoring. Whatever opportunities housing management procedures provide for disclosure, landlords' reliance on use of such evidence in ASB case-management, especially litigation, would demand rigorous record-keeping.<sup>37</sup>

### **3.1.2 The Construction of Perpetrators' Impairments by Housing Officers and Other Professionals**

Housing professionals' understandings of perpetrators' impairments are here explained in relation to the models of disability, first by drawing comparisons between housing and medico-welfare professionals and then with the judiciary.

#### **3.1.2.1 The Construction of Perpetrators' Impairments: Housing Officers compared with other Medico-Welfare Professionals**

Despite a common founder with social work<sup>38</sup> the two professions have had a separate development and distinct professional bodies,<sup>39</sup> codes of ethics<sup>40</sup> and education.<sup>41</sup>

---

<sup>37</sup> 5.3.2

<sup>38</sup> David Clapham, 'A Woman of her Time' in John Goodwin and Carol Grant (eds), *Built to Last? Reflections on British Housing Policy* (2<sup>nd</sup> edn, Roof, 1997) 33

<sup>39</sup> <http://www.cih.org> cf <https://www.basw.co.uk/> accessed 20 January 2017

<sup>40</sup> <http://www.cih.org/resources/PDF/Marketing%20PDFs/Code%20of%20ethics%202015.pdf> cf [http://cdn.basw.co.uk/upload/basw\\_95243-9.pdf](http://cdn.basw.co.uk/upload/basw_95243-9.pdf) both accessed 20 January 2017

<sup>41</sup> <http://www.cih.org/charteredmembership/diplomainhousing> cf <https://www.basw.co.uk/social-work-careers/#qualifications> both accessed 20 January 2017



Both BASW and CIH codes of ethics emphasise respect for core social model principles including challenging stereotypes and equality. However, as membership of the CIH is not compulsory<sup>42</sup> adherence to these ideals may be weaker amongst housing professionals. Additionally, their exclusion from social model discourse may result in officers constructing perpetrators narrowly, via the medical model, more affected by the dominant medically-based discourse.<sup>43</sup> This has led professionals to have negative attitudes to people with mental health issues<sup>44</sup> and accordingly this may affect their construction of policy. Such barriers to disability equality could be countered by use of literature based on the social model especially the **Universalist Model** given its wide definition of disability<sup>45</sup> that situates mental distress within a continuum of lived experience avoiding “us” and “them” thinking that can divide service users from... practitioners’.<sup>46</sup> As officers’ professional discourse could be altered, it seems significant that strategic literature influenced by the social model and aimed at shaping discourse is primarily targeted at professionals in social work<sup>47</sup> education<sup>48</sup> and medicine.<sup>49</sup>

There is a dearth of literature relating the social model to housing and what exists largely focusses on physical barriers in the built environment<sup>50</sup> rather than ASB policy. The absence of such literature that could include officers in equality discourse may relate to under-professionalisation, particularly their lack of centralised training.<sup>51</sup> It is therefore hypothesised that, far from situating mental distress on a continuum of lived experience, officers may categorise perpetrators, constructing them as having certain attributes e.g. risky rather than being seen as a whole person; associating certain types of ASB with diagnostic categories of disability; in short, to stereotype.<sup>52</sup>

---

<sup>42</sup> <http://www.cih.org/charteredmembership/diplomainhousing> accessed 20 January 2017; 1.2.4

<sup>43</sup> Mike Oliver, *The Individual and Social Models of Disability* (Joint Workshop of the Living Options Group and the Research Unit of the Royal College of Physicians, London July 1990) 5 <http://disability-studies.leeds.ac.uk/files/library/Oliver-in-soc-dis.pdf> accessed 20 February 2017

<sup>44</sup> Lauren B Gates and Sheila H Akabas. ‘Developing Strategies to Integrate Peer Providers into the Staff of Mental Health Agencies’ (2007) 34 *Adm Policy Ment Health* 293

<sup>45</sup> Introductory Chapter

<sup>46</sup> *Start Making Sense... Developing Social Models to Understand and Work with Mental Distress* (SPN Study Day 11 November 2002, SPN paper 3) 2

<sup>47</sup> Mike Oliver, *Social Work with Disabled People* (Macmillan 1983)

<sup>48</sup> David Race, *Learning Disability: A Social Approach* (Routledge 2002)

<sup>49</sup> Jerome E Bickenbach and others, ‘Models of Disablement, Universalism and the ICIDH’ (1999) 48 *Social Science and Medicine* 1173,1182

<sup>50</sup> Carol Thomas, ‘Disability Theory: Key Ideas, Issues and Thinkers’ in Len Barton, Colin Barnes and Mike Oliver (eds), *Disability Studies Today* (Polity Press 2002) 38; Laura Hemingway, *Disabled People and Housing* (Policy Press 2011)

<sup>51</sup> <http://www.cih.org/charteredmembership/diplomainhousing> accessed 20 January 2017; 1.2.4

<sup>52</sup> 2.3.3

Moreover, exclusion from social model discourse may mean that officers are less likely to be aware of issues of identity, the way an individual may construct their impairment, or the barriers stigma may pose to disclosure.

It is hypothesised that because of under-professionalisation, exclusion from social model discourse and the pressure upon them to manage the risks of ASB cases in the absence of disclosure (knowledge),<sup>53</sup> officers may seek evidence of perpetrators' impairments from medico-welfare professionals with relevant training e.g. social workers and mental health professionals. However, these professionals are notable for their fear of violating the trust of their clients.<sup>54</sup> As Williams and Heslop argue, 'A social model of mental health recognises the importance of trust.'<sup>55</sup> Social workers' particular professional sensibility to trust and the handling of confidential information with its underlying social model rationale is underlined by the BASW code.<sup>56</sup> Such professional ethics and perhaps the fear of disciplinary action may mean social workers and other medico-welfare professionals refuse to share information with others *within* let alone outside their agencies.<sup>57</sup> The exclusion of officers from social model discourse combined with their responsibilities in controlling ASB may, however, lead them to attach less importance to confidentiality and trust being frustrated by medico-welfare colleagues' refusal to share information.

These differences in professional ethics and discourses and the tensions in their relationships between housing and other medico-welfare professionals suggest officers are more likely to construct perpetrators via the medical model.

### 3.1.2.2 Judicial Construction of Perpetrators' Impairments

While officers' constructions of perpetrators may begin in the pre-litigation stages of case-management, in the court room, the judiciary are invited to consciously construct

---

<sup>53</sup> 1.3.3

<sup>54</sup> Lauren B Gates and Sheila H Akabas. 'Developing Strategies to Integrate Peer Providers into the Staff of Mental Health Agencies' (2007) 34 Adm Policy Ment Health 293

<sup>55</sup> V Williams and P Heslop, 'Mental Health Support Needs of People with a Learning Difficulty: A Medical or a Social Model?' (2005) 20 Disability & Society 231, 241

<sup>56</sup> [http://cdn.basw.co.uk/upload/basw\\_95243-9.pdf](http://cdn.basw.co.uk/upload/basw_95243-9.pdf) accessed 20 January 2017

<sup>57</sup> Lauren B Gates and Sheila H Akabas. 'Developing Strategies to Integrate Peer Providers into the Staff of Mental Health Agencies' (2007) 34 Adm Policy Ment Health 293; 1.3.3

these perpetrators. That judicial constructions may tend to fall within the medical model is evident in the following extract from a high court judgement:

I am struggling to envisage a circumstance where a patient detained under section 3 as an inpatient with a diagnosed mental illness has got capacity. It is possible, but I am struggling to imagine how it could happen.<sup>58</sup>

Mostyn J conflates “mental illness” leading to detention with lack of capacity. This is despite the fact that detention was under MHA 1983, which requires a diagnosis of mental disorder but this in itself does not entail assessment of the patient’s capacity; its determination under the rights-based Mental Capacity Act 2005 (MCA 2005) is a separate process and issue specific in any event.<sup>59</sup> While the conflation of “mental illness” that leads to detention with lack of capacity may seem less unreasonable than conflating the “mental illness” of a perpetrator of ASB with their lack of capacity, this nevertheless shows Mostyn J’s construction of “mental illness” to have an individualised focus. Furthermore, that a judge who may be expected to know of the requirements of MCA 2005 but still took this approach supports the argument of Perlin that pervasive prejudice drives “common-sense” decision-making in such cases.<sup>60</sup>

In their contribution to policy discourse development, medically-based judicial constructions have the potential to compound stereotypes and stigmatise. It is hypothesised that the professional discourse of officers may reveal how they, like the judiciary, conflate capacity and mental impairment<sup>61</sup> or fail to understand dual diagnosis.<sup>62</sup> Judicial discourse may also provide insight into officers’ evaluations of perpetrators’ morality:<sup>63</sup> like officers they may rely on “common-sense”<sup>64</sup> in handling housing cases and may share with them constructions of morality. Specifically, the relationship between disability and moral agency may be evident in the discourse of both professional groups. Additionally, for the perpetrator, the outcomes of ASB case-management (whenever that concludes) may be similar.

---

<sup>58</sup> *Re AA* [2012] EWHC 4378 (COP) (In Private) [11] (Mostyn J)

<sup>59</sup> Mental Capacity Act 2005, s 2(1)

<sup>60</sup> Michael L Perlin, ‘You Have Discussed Lepers and Crooks: Sanism in Clinical Teaching’ (2002) 9 *Clinical L. Rev.* 683, 711

<sup>61</sup> HO9 Chapter 6 below is similar to *Re AA* [2012] EWHC 4378 (COP) (In Private) [11] (Mostyn J)

<sup>62</sup> Disability Discrimination (Meaning of Disability) Regulations 1996, SI 1996/1455, reg 3

<sup>63</sup> See also 3.4.1 below

<sup>64</sup> Discussed in 2.1.1; Michael L Perlin, ‘Half-Wracked Prejudice Leaped Forth: Sanism, Pretextuality, and why and how Mental Disability Law Developed as it did’ (1999) 10 *J. Contemp. Legal Issues* 3, 29; 5.4 and Chapter 6

Consequently, analysis of selected case-law is merited. This analysis follows an evaluation of the legislation relevant to evidence of disability in relation to the models as this has a contribution to the discourse.

***Chapter 5 will examine the findings via the models of disability to explain how officers construct disability in the presence or absence of evidence. Do they categorise or make assumptions e.g. conflating capacity with “mental illness” (like Mostyn J).<sup>65</sup>***

---

<sup>65</sup> *Re AA* [2012] EWHC 4378 (COP) (In Private) [11] (Mostyn J); 6.4.2.2 – HM4 and HO9

## **3.2 Discrimination and Evidence**

This section considers which model of disability best explains how relevant perpetrators are constructed in policy. To this end, it examines the barriers the rules of evidence, especially the nature of evidence, pose to occupants in disclosing their impairments in the face of litigation.

With reference to housing case-law, this section then argues that the medical model best explains how the judiciary weigh evidence. This is discussed on the basis that, in their weighing of evidence, officers may make similar assumptions to the judiciary, affecting their subsequent decision-making.

### **3.2.1 Evidence, the Law and how it is Weighed by Professionals**

Although the DDA 1995 did not contain any specific provisions on *knowledge*, this being developed in *Malcolm*,<sup>66</sup> law reports of many pre-EA 2010 cases (*Simmonds*,<sup>67</sup> *Malcolm*)<sup>68</sup> suggest disclosure of disability occurred at a late stage in litigation: often it is only clear that e.g. psychiatric reports were prepared pre-trial<sup>69</sup> accompanying the defence (*Brazier*;<sup>70</sup> *Romano*)<sup>71</sup> or were ordered as a result of the proceedings (e.g. *Moody*)<sup>72</sup> or not (*O'Connell*).<sup>73</sup>

While stigma may provide a barrier to disclosure, the need to claim legal protection may be overwhelming for perpetrators, their backs to the wall.<sup>74</sup> Having broken down the barriers of identifying as disabled, to assert their legal rights in the face of ASB control (and thereby resist potential social exclusion) a perpetrator of ASB also has to accept a medically-based (minority) definition of impairment which, as already explained,<sup>75</sup> is very narrow.

---

<sup>66</sup> *Mayor and Burgesses of the LB of Lewisham (v Malcolm)* [2008] UKHL 43, [2008] 1 AC 1399 [161]-[163] (Lord Neuberger); 3.3.1

<sup>67</sup> *Gloucester CC v Simmonds* [2006] EWCA Civ 254

<sup>68</sup> *Mayor and Burgesses of the LB of Lewisham v Malcolm* [2008] UKHL 43, [2008] 1 AC 1399

<sup>69</sup> *Accent Peerless Ltd (formerly Surrey Heath Housing Association Ltd) v Kingsdon* [2007] EWCA Civ 1314, [2007] All ER (D) 174 (Dec)

<sup>70</sup> *North Devon Homes Ltd v Brazier* [2003] EWHC 574 (QB), [2003] HLR 905; 2.3.2

<sup>71</sup> *Manchester CC v Romano, Manchester CC v Samari* [2004] EWCA Civ 834, [2005] 1 WLR 2775 [63]; 2.3.3

<sup>72</sup> (1999) 31 HLR 738

<sup>73</sup> [2012] EWHC 1389 (QB), [25]

<sup>74</sup> 3.1.1

<sup>75</sup> EA 2010, s 6; Introductory Chapter

Irrespective of the generous interpretation of substantiality,<sup>76</sup> the requirement that impairments are substantial and long-term,<sup>77</sup> place the focus on the individual rather than the barrier – the substance and longevity of the discrimination.<sup>78</sup> These restrictions on identification may explain late disclosure in reported cases.

The requirement for evidence of the disability and the nature of evidence required in litigation creates an opportunity for professionals to adjudicate upon it.

Because of the difficulties they may experience in obtaining evidence and sharing information,<sup>79</sup> officers may make pre-litigation assessments of any evidence about medical conditions even before a medical report is produced. It is hypothesised that as officers are excluded from social model discourse, they may consider medical reports are “robust” carrying the most weight in helping them assess whether a person has control over their behaviour. While these are not obtained until litigation is underway, a perpetrator’s late disclosure of a condition may affect how any subsequent medical evidence about that condition is weighed by the judiciary and housing officers alike. If the first disclosure is the report itself, it may be viewed with scepticism.

### 3.2.1.1 Procedural Rules and Evidence and their Relationship with Disability

As discussed in the Introductory Chapter, having accepted the medically-based (minority) definition of impairment provided in the EA 2010, section 6, a perpetrator must now satisfy the evidential imperative. While it is disempowering for individuals to need to prove their outsider status in order to use the disability-based challenge,<sup>80</sup> in proving the existence of an impairment, *proper* medical evidence<sup>81</sup> must be provided; this amounts to more than mere assertion that the person suffers from a ‘condition’<sup>82</sup> as this cannot ‘amount to evidence of disability as defined by the EA 2010

---

<sup>76</sup> *Goodwin v Patent Office* [1999] ICR 302; EA 2010, s 6(1)(b); Introductory Chapter

<sup>77</sup> s 6(1)(b); Introductory Chapter

<sup>78</sup> cf UNCRPD preamble at e) <http://www.un.org/disabilities/convention/conventionfull.shtml> accessed 30 November 2015; Introductory Chapter

<sup>79</sup> 1.3.3

<sup>80</sup> Samuel Bagenstos, *Law and the Contradictions of the Disability Movement* (Yale University Press 2008)

<sup>81</sup> *Swan Housing Association Ltd v Gill* [2013] EWCA Civ 1566, [2013] 1 WLR 1253 [33] (Lewison LJ)

<sup>82</sup> *Swan Housing Association Ltd v Gill* [2013] EWCA Civ 1566, [2013] 1 WLR 1253 [9] (Coleridge J)

or to evidence of discrimination arising from it'.<sup>83</sup> Morrison J in *Goodwin*<sup>84</sup> explained how the employment tribunal had an inquisitorial role as indicated in its Rules of Procedure<sup>85</sup> to avoid the possibility of a 'Catch 22' situation.[where] [s]ome disabled persons [are] unable or unwilling to accept that they suffer from any disability'.<sup>86</sup> However, in ASB litigation, the court does not have this inquisitorial role<sup>87</sup> and the judge 'is not entitled to become a self-appointed medical expert by e.g. relying on his own medical dictionary to fill in the gaps'.<sup>88</sup> Additionally, to consider a disability argument that has not been advanced by the disabled person could amount to 'serious procedural irregularity'.<sup>89</sup> However, the Civil Procedure Rules (CPR) permit the court to 'control the evidence by giving directions as to the issues on which it requires evidence'.<sup>90</sup>

While neither the EA 2010 nor the CPR specifically requires this, a basic rule of civil evidence is that opinion evidence is admissible when given by a witness on a matter on which she is qualified to give expert evidence.<sup>91</sup> Thus, a person with appropriate medical qualifications may give evidence to confirm the existence of a medical condition based on opinion. This rule is expressly relaxed where a non-expert gives opinion evidence as a means of conveying a fact personally perceived.<sup>92</sup> Thus, as a lay witness, a perpetrator may provide evidence about particular symptoms experienced or exhibited and this is clearly admissible. The use of opinion as a means of conveying this (e.g. 'I felt depressed' and their experience of the consequences of this) would also be admissible. So while the EA 2010 can be criticised for its individualised and therefore minority rights or medical model drafting,<sup>93</sup> rules of admissibility of evidence *prima facie* seem more consistent with the Universalist Social Model, permitting anyone seeking to rely on legal protection to give evidence of the their experiences of how their social/environmental encounters have made their impairments disabling.. However, just because such evidence is admissible does not necessarily mean it will be given any *weight*. Thus, a person's own evidence of their

---

<sup>83</sup> *Swan Housing Association Ltd v Gill* [2013] EWCA Civ 1566, [2013] 1 WLR 1253, 9

<sup>84</sup> *Goodwin v Patent Office* [1999] ICR 302

<sup>85</sup> Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 SI 2013/1237 sch 1, para 41

<sup>86</sup> Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 SI 2013/1237 sch 1, para 41

<sup>87</sup> cf *Pieretti v Enfield LBC* [2010] EWCA Civ 1104, [2011] 2 All ER 642; 2.3.7.2; 3.3.2

<sup>88</sup> *Swan Housing Association Ltd v Gill* [2013] EWCA Civ 1566, [2013] 1 WLR 1253 [9] (Coleridge J)

<sup>89</sup> *Swan Housing Association Ltd v Gill* [2013] EWCA Civ 1566, [2013] 1 WLR 1253 [10] (Coleridge J)

<sup>90</sup> CPR 32.1(1)(a)

<sup>91</sup> Civil Evidence Act 1972, s 3(1)

<sup>92</sup> Civil Evidence Act 1972, s 3(2)

<sup>93</sup> Introductory Chapter

experience may receive little consideration thereby frustrating the operation of a more Universalist and inclusive understanding of disability.

Housing law may be compared with employment law where the Rules of Procedure<sup>94</sup> permit claimants to give evidence of their experiences of how their social and environmental encounters have made their impairments disabling as ‘the Tribunal is not bound by any rule of law relating to the admissibility of evidence in proceedings before the courts’<sup>95</sup> and therefore ‘shall seek to avoid undue formality and may itself question the parties or any witnesses so far as appropriate in order to clarify the issues or elicit the evidence’.<sup>96</sup> This does not mean that employment judges may not interrogate claimants based on medically-based notions, but at least the claimant has the opportunity to provide their *own* evidence of the effect of the impairment on them, thus giving more latitude for a Universalist Social Model approach to the litigation.<sup>97</sup> However, there is no equivalent in housing cases that are bound by the CPR and Civil Evidence Act 1972. Thus, while perpetrators of ASB using a disability-based challenge may include their own evidence about particular symptoms experienced or exhibited in a witness statement, the rules are not specifically relaxed as they are in employment law. Therefore less weight may be attached to the individual’s experience of their impairment and more to expert evidence. This means that an individual wishing to rely on the challenge invites a focus on them fitting within the legal definition of disability supported by expert evidence.

### 3.2.1.2 Weighing of Evidence of Disability in Housing Case-law

Examples of how the judiciary have adjudicated upon evidence in housing cases will now be considered.

That an individual’s evidence of their *experience* of disability on them is insufficient<sup>98</sup> in housing litigation was evident in the rent possession case, *O’Connell v Viridian*

---

<sup>94</sup> Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 SI 2013/1237 sch 1

<sup>95</sup> Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 SI 2013/1237 sch 1 Para 41

<sup>96</sup> Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 SI 2013/1237 sch 1 Para 41

<sup>97</sup> Introductory Chapter

<sup>98</sup> *O’Connell v Viridian Housing* [2012] EWHC 1389 (QB) [11] Tugendhat J



*Housing*.<sup>99</sup> Here, the defendant had inherited a house of substantial value from her mother's estate. This had affected her benefits such that she had fallen into rent arrears. In previous possession proceedings between the parties, a recorder had been satisfied that O'Connell 'suffered physical and mental impairments which together constituted a disability'<sup>100</sup> as defined by the DDA 1995. While aware of O'Connell's own evidence of her impairments in her witness statement that included reference to 'Dr Potter',<sup>101</sup> the judge rather criticised O'Connell for not providing medical evidence. This was despite the fact that in the absence of a request by one of the parties it is possible for the judge to direct that medical reports be obtained, by the appointment of an 'assessor'.<sup>102</sup> While issues will arise as to who pays for an assessor, it is not clear why such appointment was not made, although the inheritance had perhaps precluded O'Connell from obtaining public funding. In contrast, most ASB perpetrators would be legally aided and would therefore not face financial barriers to obtaining medical evidence.

Further, whether an individual has a particular mental impairment or whether particular symptoms are what might be expected to result from that mental impairment are, almost certainly, the province of an appropriate expert witness. Adequate or "proper" evidence of the mental impairment must therefore be in the form of a medical report. Thus, principles concerning admissibility restrict an approach to evidence that is consistent with the medical model.

However, judicial scepticism over medical evidence is not limited to the defendant's own evidence about their health and may extend to the report itself. In *Croydon LBC v Moody*<sup>103</sup> a claim for possession was made on the basis of neighbour nuisance. Both ground 1,<sup>104</sup> breach of a clause in the tenancy agreement that related to neighbour nuisance<sup>105</sup> and ground 2,<sup>106</sup> nuisance were considered. Neither disability discrimination nor illness was pleaded in the defence despite the elderly defendant tenant's GP having referred him to a psychiatrist who considered psychiatric issues

---

<sup>99</sup> [2012] EWHC 1389 (QB)

<sup>100</sup> [2012] EWHC 1389 (QB) [9] Tugendhat J

<sup>101</sup> [2012] EWHC 1389 (QB) [21] Tugendhat J

<sup>102</sup> County Courts Act 1984, s 63 and CPR, 35.15

<sup>103</sup> *Croydon LBC v Moody* (1999) 31 HLR 738

<sup>104</sup> HA 1985, Sch 2

<sup>105</sup> HA 1985, sch 2, Ground 1

<sup>106</sup> HA 1985, sch 2, Ground 2

arising throughout the 3.5-year period during which complaints were made. The recorder ordered a medical report to provide an explanation for the defendant's absence from a pre-trial hearing. A psychiatrist was therefore heard at trial, his report confirming that the defendant was suffering from schizotypal and obsessional personality disorders being provided two days beforehand. The recorder was not convinced that the defendant had 'any condition of mental ill-health',<sup>107</sup> describing the psychiatric evidence as 'to a great extent unsatisfactory'.<sup>108</sup>

While the Court of Appeal held that the recorder was not entitled to reject the medical evidence and possession was resisted, this case and *O'Connell*<sup>109</sup> show that claiming the protection of the legislation involves a focus on the definition of disability, providing protection (rights) for those (minority) falling within narrowly drawn (medically-based) parameters. These cases also suggest that these parameters may, as Bagenstos says, be vigorously policed<sup>110</sup> by the judiciary giving potential for their scepticism.

The potential for housing officers to be sceptical in pre-litigation case-management about evidence was suggested earlier.<sup>111</sup> The language in this example suggested scepticism of a mother's mental impairment and of her refusal to agree to her son becoming party to an ABC because his ADHD would prevent his compliance. It related therefore to both impairments and compliance. Scepticism at both levels seem common in ASB cases where the disability-based challenge has been raised and may be exacerbated by late disclosure, especially once litigation is underway. Thus, scepticism may prevent these professionals from constructing certain perpetrators as disabled and this will be returned to later.<sup>112</sup>

***Chapter 5 will examine the findings to establish whether, similar to judges, officers weigh evidence of perpetrators' impairments via the medical model, perhaps displaying scepticism.***

<sup>107</sup> *Croydon LBC v Moody* (1999) 31 HLR 738 742 (Evans LJ)

<sup>108</sup> *Croydon LBC v Moody* (1999) 31 HLR 738 742 (Evans LJ)

<sup>109</sup> *O'Connell v Viridian Housing* [2012] EWHC 1389 (QB)

<sup>110</sup> Samuel Bagenstos, *Law and the Contradictions of the Disability Movement* (Yale University Press 2008) 46

<sup>111</sup> Conclusion – Chapter 1

<sup>112</sup> 3.4.3

### **3.3 Evidence and the Evidential Gap**

Given all the barriers to identification and disclosure outlined so far, there should be little wonder that perpetrators rarely reveal their impairments. Given social landlords' responsibility to control ASB, and the opposing disability-related challenges, this section considers how policy dictates responses to absences of evidence of disability. It therefore analyses legal requirements that may force officers to address their concerns that mental impairments have caused a perpetrator's ASB. This includes assessment of whether the PSED imposes a duty to investigate and how this relates to other provisions of the EA 2010 where a perpetrator's impairments may have caused their ASB? This analysis raises questions about how policy might affect social landlords' ASB management practice.

#### **3.3.1 Evidence in the Absence of Disclosure: A Needle in a Haystack**

Where disclosure is absent, case-law has long imposed upon social landlords an obligation to search for evidence of mental impairments: *Romano*<sup>113</sup> held that a landlord did not need to be aware of the tenant's disability but at the stage of sending them a warning letter about their conduct, should start to consider obtaining evidence about it.<sup>114</sup> However, in *Malcolm*,<sup>115</sup> the House of Lords held that only where a landlord *knew* of a tenant's mental impairment could they have discriminated in taking possession proceedings thus requiring a conscious decision on the part of the discriminator.<sup>116</sup>

The EA 2010, section 15(2) adopts Lord Neuberger's approach in *Malcolm*<sup>117</sup> that the landlord can escape liability for discrimination<sup>118</sup> by showing that they 'did not know, and could not reasonably have been expected to know, that B had the disability'.<sup>119</sup>

---

<sup>113</sup> *Manchester CC v Romano, Manchester CC v Samari* [2004] EWCA Civ 834, [2005] 1 WLR 2775

<sup>114</sup> *Manchester CC v Romano, Manchester CC v Samari* [2004] EWCA Civ 834, [2005] 1 WLR 2775 [118]

<sup>115</sup> *Mayor and Burgesses of the LB of Lewisham v Malcolm* [2008] UKHL 43, [2008] 1 AC 1399

<sup>116</sup> [2008] UKHL 43, [2008] 1 AC 1399 [18] (Lord Bingham of Cornhill)

<sup>117</sup> *Mayor and Burgesses of the LB of Lewisham v Malcolm* [2008] UKHL 43, [2008] 1 AC 1399 [161]-[163] (Lord Neuberger)

<sup>118</sup> EA 2010, s 15(1)

<sup>119</sup> EA 2010, s 15(2); 1.3.3; 6.4.2.1

Knowledge can, however, be acquired at any stage in the proceedings as eviction is regarded as the whole process<sup>120</sup> that can be broken down into: service of notice, commencement of proceedings and continuing proceedings.<sup>121</sup> Thus, lack of knowledge will not assist a landlord's argument where they first become aware of a perpetrator's impairments when their medical report is submitted in pleadings. This presents the landlord with the dilemma of potentially discriminating if they continue with proceedings which is difficult to discount, making litigation appear all the more risky.<sup>122</sup> Furthermore, the Code states:

It is not enough for the service provider to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it.<sup>123</sup>

In contemplating litigation and anticipating a challenge, it is hypothesised that officers may investigate to the extent of pursuing disclosure of a perpetrator's impairments if only to later argue that this knowledge was absent.<sup>124</sup> However, the pursuit of disclosure in order to assess the risks of using various case-management strategies including litigation and its outcomes including the likelihood of a section 15<sup>125</sup> challenge may, violate the EA 2010, section 19, being indirectly discriminatory.<sup>126</sup>

While information-sharing policies exist,<sup>127</sup> this probing for extra information may infringe privacy rights.<sup>128</sup> Indeed, the Code warns service providers against such infringement in their disability investigations:

A service provider must do all they can reasonably be expected to do to find out if a person has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making inquiries about disability, service

---

<sup>120</sup> *Mayor and Burgesses of the LB of Lewisham v Malcolm* [2008] UKHL 43, [2008] 1 AC 1399

<sup>121</sup> I Alderson and P Burns, 'Recent Developments in Antisocial Behaviour Law: Legislation, Case-law and Tactics' (Northwest Housing Conference: A Region in Change, Liverpool October 2008)

<sup>122</sup> 2.3.5

<sup>123</sup> Equality and Human Rights Commission, Equality Act 2010 Code of Practice – Services, Public Functions and Associations, 6.15

<sup>124</sup> 6.4.2.1

<sup>125</sup> EA 2010

<sup>126</sup> EA 2010, s 19 may prove particularly advantageous to the perpetrator's argument as lack of knowledge provides the landlord with no escape from liability from indirect discrimination of s 15 (2).

<sup>127</sup> 1.3.3

<sup>128</sup> Charlotte O'Brien, 'Equality's False Summits: New Varieties of Disability Discrimination, "Excessive" Equal Treatment and Economically Constricted Horizons' (2011) EL Rev 26

providers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.<sup>129</sup>

While objectivity is called for, the broad meaning of reasonableness<sup>130</sup> combined with the timing and purpose of inquiry - the contemplation of potentially unsuccessful litigation – and related concerns about accountability<sup>131</sup> may lead officers to take a forceful approach.<sup>132</sup> The search may seem even more imperative given the requirements of the PSED.<sup>133</sup>

### 3.3.2 Knowledge and a Duty to Investigate?

In *Pieretti*,<sup>134</sup> Enfield's investigations as to the Pierettis' homelessness did not mean that in every relevant decision<sup>135</sup> active steps have to be taken to inquire into whether the person to be subject to the decision was disabled but to 'have due regard to... the need to take steps to take account'<sup>136</sup> which was held<sup>137</sup> to mean taking 'due steps to take account of disabled persons' disabilities...'<sup>138</sup> This included, 'a conscious approach' and 'in substance, with rigour and with an *open mind*.'<sup>139</sup> Where an applicant appealed against an authority's decision,<sup>140</sup> this required making 'further inquiry in relation to some such feature of the evidence presented to [the reviewing officer] as raised a real possibility that the applicant was disabled'<sup>141</sup> as this was relevant to whether, in terms of deciding whether their homelessness was intentional, they acted 'deliberately'<sup>142</sup> or 'in good faith'.<sup>143</sup> The specific failure therefore was in not making further inquiries relating the appellant's depressive illness (and that of his wife – referred to by the appellant and substantiated by the report of their GP) to their unusual history of payment of rent to their private sector

---

<sup>129</sup> Equality and Human Rights Commission, *EA 2010 Statutory Code of Practice – Services, Public Functions and Associations*, 6.16

<sup>130</sup> 2.1.1

<sup>131</sup> 1.3.2

<sup>132</sup> 1.3.3

<sup>133</sup> 2.3.7.2

<sup>134</sup> *Pieretti v Enfield LBC* [2010] EWCA Civ 1104, [2011] 2 All ER 642; 2.3.7.2

<sup>135</sup> HA 1996, ss 184 (inquiries into homelessness) and 202 (requests for reviews of decisions about homelessness)

<sup>136</sup> *Pieretti v Enfield LBC* [2010] EWCA Civ 1104, [2011] 2 All ER 642

<sup>137</sup> *Pieretti v Enfield LBC* [2010] EWCA Civ 1104, [2011] 2 All ER 642

<sup>138</sup> *Pieretti v Enfield LBC* [2010] EWCA Civ 1104, [2011] 2 All ER 642

<sup>139</sup> *Pieretti v Enfield LBC* [2010] EWCA Civ 1104, [2011] 2 All ER 642 [33] (Wilson LJ) (emphasis added)

<sup>140</sup> HA 1996, s 202

<sup>141</sup> *Pieretti v Enfield LBC* [2010] EWCA Civ 1104, [2011] 2 All ER 642

<sup>142</sup> Within HA 1996, s 191(1)

<sup>143</sup> Within HA 1996, s 191(2)

landlord. Thus, by failing to take account of and adequately investigating the claimant's disability in relation to intentionality, the reviewing officer was in breach of her duty under the DDA 1995, section 49A(1)(d). Such investigation would lead to knowledge for the purposes of the EA 2010, section 15(2). Thus, if an officer investigated and then continued with ASB litigation, they may be discriminating

While this endorsement of inquiry into the nature of disability may have positive outcomes for applicants for social housing seeking to rely on the PSED, it may not be the case for perpetrators of ASB. The Pierettis were, after all, seeking to be housed as homeless because their son's mental health issues and drug addiction a bereavement had caused depression resulting in rent arrears and possession of their home: they could not be *blamed* for annoying or posing any risks to anyone or for causing their own disability. Were Heidi Simmonds<sup>144</sup> seeking to rely on the PSED to challenge a decision concerning her homelessness following her eviction for ASB, i.e. on the same essential basis as the Pierettis this may have led to a far less favourable outcome: just as in the possession case, inquiries would have uncovered her substance misuse which may be considered to have caused her behaviour rather than her disability<sup>145</sup> rendering her intentionally homeless.

Indeed, it seems that complaints of ASB cast a dark shadow over the likely prospects even of PSED arguments: while the PSED was found to apply in *Lalli*,<sup>146</sup> to investigate 'further the nature of [his] disability' when deciding to take proceedings, Lalli's arguments were nevertheless unsuccessful.<sup>147</sup> In *Swan Housing Association Limited v Gill*<sup>148</sup> in defence of proceedings for an ASBI, the argument that Swan should have more thoroughly investigated Gill's disability as per *Pieretti*<sup>149</sup> in relation to application of the PSED was dismissed on appeal; the duty 'to make further inquiries'<sup>150</sup> only applied where 'the applicants were in fact disabled'.<sup>151</sup> It was 'wrenching that statement completely out of context to seek to suggest that the [PSED] is engaged when on the proven facts there is no protected characteristic'.<sup>152</sup>

---

<sup>144</sup> *Gloucester CC v Simmonds* [2006] EWCA Civ 254; 2.3.3

<sup>145</sup> 3.4.3.1

<sup>146</sup> *Lalli v Spirita Housing Ltd* [2012] EWCA Civ 497, [2012] HLR 477 [67]; 2.3.3

<sup>147</sup> *Lalli v Spirita Housing Ltd* [2012] EWCA Civ 497, [2012] HLR 477; 2.3.3

<sup>148</sup> [2013] EWCA Civ 1566, [2014] HLR 210

<sup>149</sup> [2010] EWCA Civ 1104, [2011] 2 All ER 642

<sup>150</sup> [2013] EWCA Civ 1566, [2014] HLR 210

<sup>151</sup> [2013] EWCA Civ 1566, [2014] HLR 210

<sup>152</sup> [2013] EWCA Civ 1566, [2014] HLR 210

Gill gave evidence of how his Asperger's affected his interactions with others but this was ignored: the *lack of evidence* also defeated arguments under the EA 2010, sections 15 and 35, the latter of which was only held to apply 'in the circumstances of this case, to a person who is *actually* disabled. It is conceded that the respondent *is not properly so categorised*'.<sup>153</sup> Judicial discourse in this case again suggests an individualised focus on the perpetrator and therefore construction via the medical model.

Thus, legislation provides many barriers to both perpetrators identifying as disabled and officers' discovery of evidence. Judicial discourse also suggests moral constructions of disability and that theme will be further developed next.

***Chapter 5 will analyse the findings to illustrate how officers handled disclosure of relevant perpetrators' impairments and how their practice may explained via the model of disability***

---

<sup>153</sup> [2013] EWCA Civ 1566, [2014] HLR 210 (emphasis added)

### **3.4 Disability as a Moral Issue**

This section considers the relationship of morality to the models of disability in answering how relevant perpetrators are constructed in policy and therefore how they may also be constructed in social landlords' ASB management practice. It is argued that as ASB policy has a distinct moral framework, designed to encourage perpetrators' self-governance and acceptance of responsibility to mitigate the risks of their behaviour, this may affect officers' understandings of their impairments. This moral understanding relates to problems with disclosure. In the absence of this, it is hypothesised that officers may spend much of case-management reliant on guesswork as to causes of a perpetrator's behaviour. This guesswork about impairments may have the individualised focus of the medical model. However, officers may employ street-level bureaucratic coping mechanisms e.g. stereotyping, intuition and "common-sense" to explain behaviour. "Common-sense" explanations including pop psychology or folk psychiatry may be used to explain behaviour in connection with moral agency, guilt and responsibility. This possibility is explained and then illustrated by reference to case-law, relating in particular to perpetrators using intoxicants and the benefits system. This analysis illuminates the potential for attitudinal barriers to disability equality on grounds of responsibility and this relates to ASB case-management and its outcomes.

#### **3.4.1 The Social Construction of Mental Impairment: Pop Psychology and Folk Psychiatry**

Pop psychology may be defined as laypeople's use of 'simple or fashionable ideas from psychology in order to understand or explain'<sup>154</sup> human emotions and problems. Horowitz considered how the judiciary utilise pop psychology, a "common-sense" coping mechanism<sup>155</sup> through which their individual personal beliefs and morals may rationalise their decision-making in probation cases in the absence of evidence particularly from experts.<sup>156</sup> It has already been argued that the absence of disclosure

---

<sup>154</sup> <http://www.oxfordlearnersdictionaries.com/> accessed 6 June 17

<sup>155</sup> 1.2.4

<sup>156</sup> Andrew Horwitz, 'Coercion, Pop-Psychology, and Judicial Moralizing: Some Proposals for Curbing Judicial Abuse of Probation Conditions' (2000) 57, 1 Wash & Lee L Rev, 75



means that officers, also laypeople in understanding causes of behaviour and so their constructions of perpetrators, are likely to be similarly influenced by “common-sense” knowledge based on experience of handling previous cases<sup>157</sup> and the dominant discourses of medicine<sup>158</sup> and ASB.<sup>159</sup>

Although not specifically considering either profession, Haslam’s folk psychiatry with its moral aspect<sup>160</sup> may aid an understanding of how officers construct perpetrators in the presence or absence of disclosed evidence as it explains how laypeople interpret ‘mental disorder.’<sup>161</sup> These layperson constructions are ‘driven by beliefs about the nature of disorder’<sup>162</sup> and may be understood via the medical model as they place focus on the individual and their behaviour. Haslam positions behaviours along four dimensions relating to the cognitive process in construction of the behaviour. Under the first, pathologising, behaviour is judged ‘deviant or abnormal’<sup>163</sup> but this dimension offers no causal explanation for behaviour. That is found in the three remaining dimensions: medicalising, moralising and psychologising all of which relate to moral agency, responsibility and intention.<sup>164</sup>

While all three dimensions have causal explanations, there is more reasoning in ‘moralising’.<sup>165</sup> Thus, the layperson assesses abnormal or deviant behaviour to be within the person’s intentional control, therefore having ‘a reproachable perversity or weakness of will’<sup>166</sup> attributed to it. Haslam typifies the layperson as having emotional and evaluative responses of anger and blame.<sup>167</sup> Assessment of a perpetrator’s intentional control of their behaviour permits adjudication of their moral agency and responsibility for its consequences. In some cases, it may also permit assessment of what Edward Mitchell calls “meta-responsibility”. This means their responsibility for the causes of a condition and consequent behaviour e.g. responsibility for one’s

---

<sup>157</sup> Simon Halliday, ‘Institutional Racism in Bureaucratic Decision-Making: A Case Study in the Administration of Homelessness Law’ (2000) 27 J.L.Soc’y 449; 1.2.4

<sup>158</sup> Mike Oliver, ‘*The Individual and Social Models of Disability* (Joint Workshop of the Living Options Group and the Research Unit of the Royal College of Physicians London, July 1990) 5 <http://disability-studies.leeds.ac.uk/files/library/Oliver-in-soc-dis.pdf> accessed 20 February 2017; Introductory Chapter

<sup>159</sup> 1.1.2.1

<sup>160</sup> Nick Haslam, ‘Folk Psychiatry: Lay Thinking about Mental Disorder’ (2003) 70 Social Research 621, 626

<sup>161</sup> Nick Haslam, ‘Folk Psychiatry: Lay Thinking about Mental Disorder’ (2003) 70 Social Research 621

<sup>162</sup> Nick Haslam, ‘Dimensions of Folk Psychiatry’ (2005) 9 Rev Gen Psychol 35, 35

<sup>163</sup> Nick Haslam, ‘Folk Psychiatry: Lay Thinking about Mental Disorder’ (2003) 70 Social Research 621, 624

<sup>164</sup> Nick Haslam, ‘Folk Psychiatry: Lay Thinking about Mental Disorder’ (2003) 70 Social Research 621

<sup>165</sup> Nick Haslam, ‘Folk Psychiatry: Lay Thinking about Mental Disorder’ (2003) 70 Social Research 621, 626

<sup>166</sup> Nick Haslam, ‘Dimensions of Folk Psychiatry’ (2005) 9 Rev Gen Psychol 35, 36;

<sup>167</sup> Nick Haslam, ‘Dimensions of Folk Psychiatry’ (2005) 9 Rev Gen Psychol 35, 41

intoxicant consumption and consequent cause or exacerbation of [a] ‘condition’<sup>168</sup> and therefore their behaviour.<sup>169</sup> This may include their substance misuse (dual diagnosis)<sup>170</sup> which may affect ‘the anti-social symptoms of a psychiatric condition’ or their failure ‘to engage with support or treatment programs offered’<sup>171</sup> to them.

Haslam’s “medicalising” and ‘psychologising’<sup>172</sup> dimensions are linked to moral considerations and distinguish between behaviour attracting moral responsibility and that which does not: “medicalising” has a somatic explanation e.g. a disease like Alzheimer’s that permits the removal of assumed intention and responsibility. “Psychologising” explains “abnormality” ‘with causal reference to psychological disturbances — mentalistic but not fully intentional’.<sup>173</sup> Both dimensions reduce attribution of the moral consideration of responsibility although only medicalising does this fully.

In managing ASB cases in the absence of more robust evidence, officers as laypeople may be almost reliant on folk psychiatry.<sup>174</sup> Yet the concomitant moral adjudication cannot, as Cobb argues, solely ‘be based upon the expertise of a housing provider...’<sup>175</sup> rather being conducted:

through negotiation with medico-welfare professionals, who are inevitably better placed to assess an individual’s capacity for moral responsibility in light of their disorder... The exchange of knowledge through partnership is a necessary basis for meaningful governance of the mentally disordered subject through conditionality.<sup>176</sup>

---

<sup>168</sup> E Mitchell, *Self-Made Madness: Rethinking Mental Illness and Criminal Responsibility* (Ashgate 2003) in N Cobb, ‘Patronising the Mentally Disordered? Social Landlords and the Control of Anti-social Behaviour under the Disability Discrimination Act 1995’ (2006) 26 LS 238, 251

<sup>169</sup> Similar to the explanation in 2.3.3

<sup>170</sup> 3.4.3.1

<sup>171</sup> E Mitchell, *Self-Made Madness: Rethinking Mental Illness and Criminal Responsibility* (Ashgate 2003) in N Cobb, ‘Patronising the Mentally Disordered? Social Landlords and the Control of Anti-social Behaviour under the Disability Discrimination Act 1995’ (2006) 26 LS 238, 251; 3.4.2

<sup>172</sup> Nick Haslam, ‘Folk Psychiatry: Lay Thinking about Mental Disorder’ (2003) 70 Social Research 621, 627

<sup>173</sup> Nick Haslam, ‘Dimensions of Folk Psychiatry’ (2005) 9 Rev Gen Psychol 35, 36

<sup>174</sup> Nick Haslam, ‘Dimensions of Folk Psychiatry’ (2005) 9 Rev Gen Psychol 35

<sup>175</sup> N Cobb, ‘Patronising the Mentally Disordered? Social Landlords and the Control of Anti-social Behaviour under the Disability Discrimination Act 1995’ (2006) 26 LS 238, 251

<sup>176</sup> N Cobb, ‘Patronising the Mentally Disordered? Social Landlords and the Control of Anti-social Behaviour under the Disability Discrimination Act 1995’ (2006) 26 LS 238, 251

Here, Cobb stresses the connection between knowledge and the governance of ASB and its risks. Housing officers may seek to displace responsibility to individual perpetrators for controlling the risks of their behaviour. However, in practical terms and in the absence of disclosure, knowledge of which perpetrators have the capacity for self-governance and which do not, rather depends on the effective functioning of multi-agency partnerships. Such effectiveness may, as discussed, be undermined by the tensions between housing officers and social workers<sup>177</sup> and other medico-welfare professionals' fear of breaching confidentiality.<sup>178</sup>

***Chapters 5 and 6 will analyse the findings to illustrate how officers' constructions of perpetrators are affected by pop psychology or folk psychiatry and relatedly the models of disability and the impact these constructions have on their case-management.***

### 3.4.2 Mental Impairment and Agency

Having considered how folk psychiatry may enable a construction of moral agency, moral agency itself is now given further attention. Moral agency may be something in the mind of an officer throughout case-management as all ASB interventions aim to responsabilise via self-governance. In choosing an intervention, an officer may estimate its prospects of success and this assessment will be inextricably linked to their construction of that perpetrator and their impairment.

Kate Brown<sup>179</sup> refers to the tendency for the *vulnerable* 'to be constructed in policy and social welfare practice as those who are less accountable for their circumstances or actions and as those who have less agency in the development of perceived difficulties in their lives'.<sup>180</sup> People with mental impairments may be constructed as vulnerable.<sup>181</sup> Indeed, they may be viewed by reference to Talcott Parsons' sick role, being 'excused ordinary social responsibility for the duration of the illness,'<sup>182</sup> so long as they comply

---

<sup>177</sup> 1.2.4; 1.3.3

<sup>178</sup> 3.1.2.1

<sup>179</sup> Kate Brown, 'Re-moralising 'Vulnerability' (2012) 6 People, Place & Policy Online 41, 42

<sup>180</sup> Kate Brown, 'Re-moralising 'Vulnerability' (2012) 6 People, Place & Policy Online 41, 42

<sup>181</sup> HA 1996, s 189 specifically refers to this – 1.1.1.2

<sup>182</sup> Talcott Parsons, *The Social System* (Psychology Press 1991) 428-479

with the care and control of professionals who treat them.<sup>183</sup> However, as mental impairments may impede moral agency, ASB seems an inappropriate process for bringing within social control 'categories of people ('not fully regarded as adult') and behaviour'.<sup>184</sup>

Used successfully, equality arguments may permit the removal of blame and facilitate social inclusion for the perpetrator. By thus contesting barriers to equality, the disability-based challenges appear underlined by the social model. Conversely, using a biological explanation for the perpetrator's behaviour that 'locates problems or difficulties in individual deficit or what is wrong with'<sup>185</sup> them is an argument sitting squarely within the medical model. Indeed, as Cobb argues the protective approach of the challenge as used successfully in *Brazier*,<sup>186</sup> exculpates perpetrators by incorporating 'into law the medical model's assumption of non-responsibility.'<sup>187</sup>

However, Cobb argues that just because someone has a mental impairment does not mean they entirely lack moral agency and contends that 'a particular mental disorder must render an individual either incapable of controlling his behaviour or else unable to rationalise what he is doing.'<sup>188</sup> While as Tew notes<sup>189</sup> a diagnosis of Anti-Social Personality Disorder mitigates offenders' moral responsibilities, it is only the insanity defence in criminal proceedings that suggests a person's whole judgement is nullified just because they have a 'diagnosis of mental ill-health.'<sup>190</sup> By contrast, as explained above, ASB has a far wider definition: its occurrence requires a mere civil standard of proof and no determination of intention, despite the reference to guilt in the grounds for possession.<sup>191</sup> Thus, a broad range of mental impairments that may cause ASB may carry with them varying degrees of agency and relatedly responsibility.

---

<sup>183</sup> Samuel Bagenstos, *Law and the Contradictions of the Disability Movement* (Yale University Press 2008) 57

<sup>184</sup> Kevin J Brown, 'It Is Not as Easy as ABC': Examining Practitioners' Views on Using Behavioural Contracts to Encourage Young People to Accept Responsibility for their Anti-Social Behaviour' (2012) 76 JCL 53

<sup>185</sup> Peter Beresford, Mary Nettle and Rebecca Perring, *Towards a Social Model of Madness and Distress: Exploring What Users Say (Service Users Say (Joseph Rowntree Foundation 2010) www.jrf.org.uk accessed 1 July 2011; Introductory Chapter*

<sup>186</sup> *North Devon Homes Ltd v Brazier* [2003] EWHC 574 (QB), [2003] HLR 905

<sup>187</sup> N Cobb, 'Patronising the Mentally Disordered? Social Landlords and the Control of Anti-social Behaviour under the Disability Discrimination Act 1995' (2006) 26 LS 238, 264

<sup>188</sup> N Cobb, 'Patronising the Mentally Disordered? Social Landlords and the Control of Anti-social Behaviour under the Disability Discrimination Act 1995' (2006) 26 LS 238, 205

<sup>189</sup> Jerry Tew, *Social Approaches to Mental Distress* (Palgrave Macmillan 2011)

<sup>190</sup> Halsbury's Laws of England/ Criminal Law (Volume 25 (2016), Paras 1-418; Volume 26 (2016), Paras 419-860)/1.

Principles of Criminal Liability/(3) General Defences To Crime/32. Insanity

<sup>191</sup> HA 1985, sch 2, Ground 2; HA 1988, sch 2, Ground 14; 1.2.2; 1.2.3.2

In considering which impairments may affect moral agency, Cobb cites Bjorklund's argument that individuals with 'personality disorders suffer from absolutely no impairment of either their volition or cognition, and as such are fully responsible for their behaviour'.<sup>192</sup> Conversely, as for Mostyn J, 'mental illness',<sup>193</sup> may be constructed as equivalent to incapacity; therefore where mental health issues render a person incapacitated they may be deemed to lack moral agency and the disability-based challenge deemed appropriate for them.

However, few

'mental disorder[s]... fully exculpate... instead... the process of moral adjudication is inherently subjective and, as such, constantly contested, with the outcome dependent upon the adjudicator, the particular subject and all the circumstances within which the judgement is made.'<sup>194</sup>

In pre-litigation ASB case-management, the adjudicators are officers. In this context, Kevin Brown found that officers referred to adolescent perpetrators of ASB 'accepting responsibility', 'taking ownership' and 'choosing to change'.<sup>195</sup> Similarly, officers may view relevant adult perpetrators as *rational* actors with moral agency able to *choose* whether or not to engage in such behaviour in the future or with interventions including support. Such equal treatment of perpetrators suggests that use of the disability-based challenge cannot protect them from moral condemnation as officers may construct anyone committing ASB, to be culpable. Indeed, Alison Brown argued that ASB control is solely concerned with behaviour and therefore 'unconcerned with mitigating factors such as mental health problems'.<sup>196</sup>

---

<sup>192</sup> P Bjorklund, "There but for the Grace of God": Moral Responsibility and Mental Illness' (2004) 5 Nursing Philosophy 188 in N Cobb, 'Patronising the Mentally Disordered? Social Landlords and the Control of Anti-social Behaviour under the Disability Discrimination Act 1995' (2006) 26 LS 238

<sup>193</sup> *Re AA* [2012] EWHC 4378 (COP) (In Private) [11] (Mostyn J)

<sup>194</sup> N Cobb, 'Patronising the Mentally Disordered? Social Landlords and the Control of Anti-social Behaviour under the Disability Discrimination Act 1995' (2006) 26 LS 238, 251

<sup>195</sup> Kevin J Brown, 'It Is Not as Easy as ABC': Examining Practitioners' Views on Using Behavioural Contracts to Encourage Young People to Accept Responsibility for their Anti-Social Behaviour' (2012) 766 JCL 53, 59

<sup>196</sup> Alison P Brown, 'Anti-Social Behaviour, Crime Control and Social Control' (2004) 43 The Howard Journal of Criminal Justice 203, 206

While managing cases, officers may envisage litigation, no matter how distant that prospect may be. It is hypothesised that far away arguments of reasonableness<sup>197</sup> and proportionality may nevertheless invite officers to adjudicate on perpetrators' moral agency, guilt and responsibility. Considering both officers and judges are laypeople in relation to mental impairments and given that both are involved in ASB case-management and discourse, albeit at different stages, case-law will next be examined. This illustrates how the judiciary adjudicate on these matters and postulates that officers may take a similar view.

### 3.4.3 Guilt and Responsibility: Morality in Judicial Discourse

Judicial discourse in ASB case-law is here qualitatively analysed to reveal how perpetrators may be scrutinised as to the blameworthiness behind their behaviour.<sup>198</sup> Where these cases involve disability-based challenges, judicial scrutiny may reveal how perpetrators' intentions and therefore moral agency are constructed. Such individualised examination may also reveal restrictive interpretation or disregard of evidence of impairment to impute guilt or responsibility.<sup>199</sup> Judicial discourse therefore suggests success of the disability-based challenge must be resisted in the face of ASB risks. Thus, beneath the veneer of legal positivism lies a deeply ingrained morality.

In *Moody*,<sup>200</sup> this discourse revolved around the perpetrator's meta-responsibility for his behaviour, which the recorder considered he could control. In ignoring the medical report, the recorder, referred to the 'speciousness of the defendant's assertions about his medical history'<sup>201</sup> thus casting doubt on Moody's experience of his own disability. This doubt seems specifically about Moody's physical impairment as while

One got the impression that he was so incapacitated that he could do virtually nothing... it would appear from his diary... that little as regards his social life was denied him.<sup>202</sup>

---

<sup>197</sup> 2.1.1

<sup>198</sup> Caroline Hunter and Judy Nixon, 'Taking the Blame and Losing the Home: Women and Anti-Social Behaviour' (2001) 23 JSWFL 395,402

<sup>199</sup> E.g. *Gloucester CC v Simmonds* [2006] EWCA Civ 254; *Viridian Housing v O'Connell* [2012] EWHC 1389 (QB)

<sup>200</sup> *Croydon LBC v Moody* (1999) 31 HLR 738

<sup>201</sup> *Croydon LBC v Moody* (1999) 31 HLR 738, 744 (Evans LJ)

<sup>202</sup> *Croydon LBC v Moody* (1999) 31 HLR 738, 745 (Evans LJ)

Perhaps the recorder's scepticism about the evidence of Moody's physical health affected their interpretation of its account of his mental impairments also. As to this, the recorder was concerned about the connotation of responsibility for behaviour in the word 'guilt' found in Ground 2.<sup>203</sup> The recorder regarded the defendant's behaviour deliberate with an intention to 'get his own way'<sup>204</sup> considering other people's feelings and opinions 'irrelevant'.<sup>205</sup> Furthermore, he commented:

The medical evidence does not persuade me any way that the defendant does not know precisely how his actions affect other people... He may well have a personality disorder and it may well be treatable. Applying a certain degree of robustness, it might well be said that a little of self-discipline, coupled with a good deal of consideration for other people's feelings, would be appropriate. But I strongly feel that that is an impossible outcome to this case.<sup>206</sup>

Thus, the recorder in his reasoning determined Moody's meta-responsibility for his actions and thus assessed his moral agency.

### 3.4.3.1 Substance Misuse and Meta-Responsibility

The relationship between a perpetrator's substance misuse and meta-responsibility for their behaviour may receive judicial attention. However, this relationship is not as morally straightforward as suggested by Cobb.<sup>207</sup> This is because a perpetrator may have:

- i. a primary mental illness precipitating or leading to substance misuse;
- ii. a substance misuse worsening or altering the course of a mental illness;

---

<sup>203</sup> HA 1985, sch 2, Ground 2. However, the Court of Appeal held guilt to be irrelevant as HA 1985, sch 2, Ground 1 which was also referred to makes no reference to this factor merely breach of the terms of the tenancy agreement

<sup>204</sup> *Croydon LBC v Moody* (1999) 31 HLR 738, 744

<sup>205</sup> *Croydon LBC v Moody* (1999) 31 HLR 738, 744

<sup>206</sup> *Croydon LBC v Moody* (1999) 31 HLR 738, 744 (Evans LJ)

<sup>207</sup> N Cobb, 'Patronising the Mentally Disordered? Social Landlords and the Control of Anti-social Behaviour under the Disability Discrimination Act 1995' (2006) 26 LS 238, 251

- iii. intoxication and/or substance dependence leading to psychological symptoms;
- iv. substance misuse and/or withdrawal leading to psychiatric symptoms or illnesses;<sup>208</sup>
- v. two initially unrelated disorders (a mental illness and a substance misuse problem) that interact with and exacerbate each other;
- vi. other factors that are causing mental illness and substance misuse, including physical health problems.<sup>209</sup>

Furthermore, these official explanations do not prevent a person with dual diagnosis from being detained under MHA 1983. While a person with a substance addiction alone cannot be detained under MHA 1983 because 'dependence on alcohol or drugs is not considered to be a disorder or disability of the mind',<sup>210</sup> a perpetrator of ASB with drug-related psychosis could nevertheless be admitted to hospital under MHA 1983, sections 2 or 3 whether the cause of his psychosis was related to his consumption of crack cocaine or not.

The EA 2010 is subject to similar exceptions (identical to those under the DDA 1995):

[Addictions] to alcohol, nicotine or any other substance... originally the result of administration of medically prescribed drugs or other medical treatment... to be treated as not amounting to a disability for the purposes of the Act.<sup>211</sup>

However, as for the MHA 1983, a person dually diagnosed as having a mental disorder and an addiction may have a disability for the purposes of the Act. Thus, the perpetrator with *dual diagnosis* may be detained under MHA 1983 and may have the protection of the EA 2010 open to them in ASB proceedings (and would have done

---

<sup>208</sup> Graham Noyce, 'The Mental Health Act: Dual Diagnosis, Public Protection and Legal Dilemmas in Practice', in Aaron Pycroft and Suzie Clift (eds), *Risk and Rehabilitation: Management and Treatment of Substance Misuse and Mental Health Problems in the Criminal Justice System* (Policy Press 2012)

<sup>209</sup> National Institute For Health and Care Excellence Guideline Scope, *Severe Mental Illness and Substance Misuse (Dual Diagnosis): Community Health and Social Care Services* <https://www.nice.org.uk/article/pmg20/chapter/2-the-scope> accessed 22 January 2016

<sup>210</sup> MHA 1983, s 1(3)

<sup>211</sup> Equality Act 2010 (Disability) Regulations 2010, SI 2010/2128, reg 3



under the DDA 1995) regardless of whether they are deemed responsible<sup>212</sup> for their substance abuse. While the court noted that *Lalli's* cognitive impairment<sup>213</sup> was caused by his alcohol misuse, reference was made to authority<sup>214</sup> 'the cause of the disability is irrelevant, even if it is alcoholism which is not itself a disability'.<sup>215</sup> Thus, in ASB cases, responsibility for the cause of the disability should not be adjudicated upon and a perpetrator's substance abuse should not necessarily prevent a disability challenge.

However, in *Simmonds*<sup>216</sup> a possession order had been made on grounds of nuisance including thirty-five reported incidents of banging, shouting, loud music and smashing furniture and windows often for prolonged periods late at night in breach of an ASBI and spanning an eighteen-month period. At first instance, the Court had accepted the defendant's medical evidence that confirmed she suffered from a 'mental impairment comprising an emotionally unstable personality disorder'<sup>217</sup> of which poor impulse control was a symptom. *Simmonds* misused intoxicants but this was not discussed as either a cause or effect of her personality disorder. However, the judge found the defendant's conduct related to her addiction to drink and drugs that he considered deliberate and which the regulations<sup>218</sup> specifically excluded from the definition of disability severing the causal link with discrimination. On appeal, the defence argued that this finding was perverse; there was no evidence of alcohol abuse and that the judge should have accepted the psychiatric evidence that the tenant's poor impulse control was a feature of her disability. The Court of Appeal however held that the trial judge's finding could not be considered perverse: there was medical evidence to suggest the tenant's use of alcohol (liver damage) and recreational drugs and there was not sole reliance on arguments about alcohol abuse. Thus, the substance misuse was separated from the impairment, establishing the former as the cause of the ASB without relation to the latter. By exempting intoxicant misuse from the definition of disability, the legislation encourages the establishment of a causal chain and a search for evidence of intoxicant misuse which will break it. However, this binary approach

---

<sup>212</sup> N Cobb, 'Patronising the Mentally Disordered? Social Landlords and the Control of Anti-social Behaviour under the Disability Discrimination Act 1995' (2006) 26 LS 238, 264

<sup>213</sup> *Lalli v Spirita Housing Ltd* [2012] EWCA Civ 497, [2012] HLR 477 [11] Elias LJ

<sup>214</sup> *Power v Panasonic UK Ltd* (2002) EAT 747/01, [2003] IRLR 151

<sup>215</sup> *Lalli v Spirita Housing Ltd* [2012] EWCA Civ 497, [2012] HLR 477 [36] Elias LJ

<sup>216</sup> *Gloucester CC v Simmonds* [2006] EWCA Civ 254

<sup>217</sup> *Gloucester CC v Simmonds* [2006] EWCA Civ 254 [8] Tuckey LJ

<sup>218</sup> Disability Discrimination (Meaning of Disability) Regulations 1996, SI 1996/1455, reg 3

denies a medical cause of behaviour that would remove responsibility from the perpetrator. Thus, the severance of the causal link<sup>219</sup> provided a way of responsabilising the defendant – the medical evidence was read so as to focus on the intoxicant dependency exclusively thereby making a moral judgement that ignored other psychiatric factors, which could have linked the behaviour to the impairment and so to the discriminatory treatment. It also overlooked the six potential relationships between substance misuse and “mental illness” explained above,<sup>220</sup> let alone wider structural factors affecting intoxicant misuse. Thus, a focus on evidence of causation making or breaking the links in the causal chain lends itself to the medical model. Yet this focus on medical evidence in turn, lends itself to moralisation: moral decisions may be made as to who is entitled to protection of the law (the chain being made) and who is not (the chain being broken).

Even where the causal chain is not severed, the effects of substance misuse may trump decision-making. In *Smith v Contour Homes*,<sup>221</sup> the defendant misused intoxicants (known to exacerbate his impairment) as a means of coping with his bereavement. However, he also lapsed in compliance with antipsychotic medication (which made him feel ‘trapped in his own mind’).<sup>222</sup> In addition to the potential for failure in the support system,<sup>223</sup> the possibility of intoxicant misuse and non-compliance with prescribed medication meant the risks posed by Smith’s resulting aberrant behaviour<sup>224</sup> were too great for his neighbours. Thus, morality entered into the judgement: Smith’s own meta-responsibility<sup>225</sup> for his risky behaviour (intoxicant misuse and non-compliance with medication) was relevant in determining the proportionality of his landlord’s response.<sup>226</sup>

Alongside substance misuse, further excepted from definition of disability in the EA 2010 are tendencies to set fires,<sup>227</sup> steal,<sup>228</sup> the physical or sexual abuse of other

---

<sup>219</sup> 2.3.6

<sup>220</sup> Pages 171-172. Perhaps because neither the defendant’s representative or their evidence referred to dual diagnosis

<sup>221</sup> Draft Judgment Manchester County Court (April 2016) accessed via Westlaw 11 June 2016; 2.3.5

<sup>222</sup> Draft Judgment Manchester County Court (April 2016) accessed via Westlaw 11 June 2016 [42]

<sup>223</sup> Draft Judgment Manchester County Court (April 2016) accessed via Westlaw 11 June 2016 [44]

<sup>224</sup> 2.3.5

<sup>225</sup> N Cobb, ‘Patronising the Mentally Disordered? Social Landlords and the Control of Anti-social Behaviour under the Disability Discrimination Act 1995’ (2006) 26 LS 238; 3.4.2

<sup>226</sup> 2.3.5

<sup>227</sup> Equality Act 2010 (Disability) Regulations 2010, SI 2010/2128, Reg 4 (a)

<sup>228</sup> Equality Act 2010 (Disability) Regulations 2010, SI 2010/2128, Reg 4 (b)

persons,<sup>229</sup> or exhibitionism<sup>230</sup> and voyeurism.<sup>231</sup> The behaviour in these exceptions may constitute criminal and / or serious ASB but also suggest e.g. some 'learning disabilities'<sup>232</sup> that, with proper or robust evidence satisfy the definition in which case, perpetrators with such diagnoses would have an argument. Nevertheless, the exceptionalism in the drafting of the EA 2010 confirms the foundation of its definitions on the medical model. As Plumb argues, legislation operating 'vague, slippery and elusive'<sup>233</sup> exceptionalist criteria hampers Universalist approaches to human rights<sup>234</sup> and enable discriminatory practices informed by moral judgements. This is borne out in analysis of judicial discourse that reveals a restricted availability of the challenges for those perpetrators of ASB whose mental health issues have been affected by their substance misuse.

### 3.4.3.2 Scepticism in Judicial Decision-Making: Manipulation of the Benefits System

The restrictive interpretation of evidence and definitions and the reliance on exceptions resulting from the seepage of morality into decision-making extend beyond assessments of the cause of behaviour: scepticism (which may even be regarded as cynicism) of adequate medical evidence is displayed in judicial decisions that suggests social housing tenants have manipulated the system to access or retain housing, essentially a welfare right.<sup>235</sup> This morality extends beyond ASB cases: *O'Connell's* lack of motivation<sup>236</sup> may have been constructed as inertia, laziness or lack of responsibility as she did not work; her claim for housing benefit and even her occupation of social housing was a drain on state benefits from a person of apparent wealth. These facts may have had some bearing on the outcome. Scepticism was evident in Viridian's submission that O'Connell had not taken the opportunity to explain in her witness statement why she had not instructed a solicitor earlier, 'nor any

---

<sup>229</sup> Equality Act 2010 (Disability) Regulations 2010, SI 2010/2128, Reg 4 (c)

<sup>230</sup> Equality Act 2010 (Disability) Regulations 2010, SI 2010/2128, Reg 4 (d)

<sup>231</sup> Equality Act 2010 (Disability) Regulations 2010, SI 2010/2128, Reg 4 (e)

<sup>232</sup> A learning disability may be considered to be a mental disorder if associated with abnormally aggressive or seriously irresponsible conduct – Mental Health Act 1983, s 1(2A).

<sup>233</sup> Anne Plumb, 'Incorporation, or not, of Mental Health Survivors into the Disability Movement' in J Anderson, B Sapey and H Spandler (eds), *Distress or Disability?* (Lancaster University, November 2011) 20, 21

<sup>234</sup> Anne Plumb, 'Incorporation, or not, of Mental Health Survivors into the Disability Movement' in J Anderson, B Sapey and H Spandler (eds), *Distress or Disability?* (Lancaster University, November 2011) 20, 21

<sup>235</sup> 1.2.5

<sup>236</sup> *O'Connell v Viridian Housing* [2012] EWHC 1389 (QB)

evidence of her then being under a disability or such evidence at the time of the hearing of this application',<sup>237</sup> her witness statement instead illustrating 'a considerable ability to deal with solicitors and the benefits system'<sup>238</sup> thus emphasising her manipulation of the same. HHJ Knowles agreed with the argument that the defendant had given no evidence of 'disability' by this third claim for possession,<sup>239</sup> but would, 'no doubt... wish to rely again on her disability'<sup>240</sup> as this has been disclosed in the previous possession proceedings. There is a moral overtone in the choice of words 'no doubt' and 'again' suggesting the defendant's serial manipulation. Similarly, the High Court judge in *Malcolm*,<sup>241</sup> listed his ability to, *inter alia*:

- (c) instruct solicitors about his right to buy;
- (d) sign various benefits application forms;
- (f) instruct agents to let his flat;
- (g) negotiate an increase in the sub-tenant's rent.<sup>242</sup>

This, the judge sceptically stated, was all in spite of his paranoid schizophrenia, overlooking the substantiality test in *Goodwin*.<sup>243</sup>

While it is hard to argue such decisions clearly illustrate 'deep veins of prejudice against psychiatric illness' that sway judges<sup>244</sup> they do rather evidence some scepticism about social housing tenants, who may appear:

*morally irresponsible*; personally blameworthy for their failure to take responsibility for their conduct' or other obligations under their tenancy

---

<sup>237</sup> [2012] EWHC 1389 (QB) [25]

<sup>238</sup> [2012] EWHC 1389 (QB) [25]

<sup>239</sup> [2012] EWHC 1389 (QB) [20]

<sup>240</sup> [2012] EWHC 1389 (QB) [15]

<sup>241</sup> *Lewisham LBC v Malcolm and another* [2007] EWCA Civ 763, [2008] Ch 129 [84]

<sup>242</sup> *Lewisham LBC v Malcolm and another* [2007] EWCA Civ 763, [2008] Ch 129 [84]

<sup>243</sup> *Goodwin v Patent Office* [1999] ICR 302 considered in *Lewisham LBC v Malcolm and another* [2007] EWCA Civ 763, [2008] Ch 129 [72],[73],[127],[130]

<sup>244</sup> Liz Sayce, *From Psychiatric Patient to Citizen: Overcoming Discrimination and Social Exclusion* (Palgrave Macmillan 2000)

agreement 'and, as such, undeserving of the benefit of occupation within the sector.'<sup>245</sup>

This is consistent with the situation of the risks of ASB in the tenure of social housing and its occupants, which need to be controlled with morality-based welfare conditional policies that seek to responsabilise occupants: If the disability-based challenge fails, social exclusion may arise via a possession order or injunction. Thus, a consequence of rejection of medical evidence is to responsabilise those relying on the challenge via potential social exclusion. Evidence may thus be morally weighed to justify exclusionary or inclusionary decision-making.

While the court should not question the substantiality of impairment once the disability is established by evidence, it seems it may be indirectly. Lalli<sup>246</sup> was not provided with a reasonable adjustment to assist him with reading the warning letter concerning his behaviour. Lalli's "cognitive impairment" did not prevent him seeking assistance with reading letters.<sup>247</sup> This resourcefulness was considered in relation to whether his landlord's failure to provide the adjustment put him at a material disadvantage. Thus, the extent of his disability was not only medically but also morally weighed. As Lalli was held not to be put at a disadvantage, his own responsible behaviour ironically counted against him!

Weighing of evidence by the judiciary thus appears to be affected by negative attitudes (including scepticism, suspicion and perhaps even cynicism) towards relevant perpetrators. Given the pervasiveness of medically-based discourse<sup>248</sup> which may affect both professions given that they are laypeople in terms of mental impairments,<sup>249</sup> there is potential for such attitudes to extend to officers especially as they are excluded from social model and disability equality discourse,<sup>250</sup>. Such attitudes may impact upon social landlords' use of ASB control yet this is difficult to discern from disability statistics. The numerous problems in the collection of statistics

---

<sup>245</sup> N Cobb, 'Patronising the Mentally Disordered? Social Landlords and the Control of Anti-social Behaviour under the Disability Discrimination Act 1995' (2006) 26 LS 238, 239

<sup>246</sup> *Lalli v Spirita Housing Ltd* [2012] EWCA Civ 497, [2012] HLR 477

<sup>247</sup> *Lalli v Spirita Housing Ltd* [2012] EWCA Civ 497, [2012] HLR 477 [34] Elias LJ

<sup>248</sup> Sara Goering 'Revisiting the Relevance of the Social Model of Disability' (2010) 10 (1) *The American Journal of Bioethics* 54, 54; Introductory Chapter

<sup>249</sup> Introductory Chapter

<sup>250</sup> 3.1.2

on<sup>251</sup> and monitoring<sup>252</sup> of disability have been noted. The extent to which ASB interventions disproportionately affect relevant perpetrators is unknown because this data is not centrally collected<sup>253</sup> and the evidence that does exist is patchy.<sup>254</sup> However, the studies summarised in Table 1.1 suggest that for individuals<sup>255</sup> there is a disproportionate representation of relevant perpetrators affected by ASB interventions, being higher than 20% i.e. the estimated percentage of the population that are disabled.<sup>256</sup> Additionally, given the disproportionate representation of disabled people in social housing<sup>257</sup> and social landlords' responsibilities to control ASB it seems likely that there is potential for a disproportionate impact of negative attitudes on relevant perpetrators.

**Chapters 5 and 6 will analyse the findings to illustrate how officers' construct matters related to perpetrators' moral agency (guilt or intention; responsibility; use of intoxicants; manipulation of social housing as a type of welfare benefit) and how these affect their practice.**

---

<sup>251</sup> 1.2.3.5

<sup>252</sup> 1.3.3; 3.1.1.

<sup>253</sup> Sadie Parr, 'The Role of Social Housing in the 'Care' and 'Control' of Tenants with Mental Health Problems' (2010) 9 Social Policy and Society 111, 115

<sup>254</sup> 1.2.3.5, Table 1.1

<sup>255</sup> For households, comparisons are not possible as the households in Table 1.1 had differing compositions

<sup>256</sup> <http://www.papworthtrust.org.uk/sites/default/files/Disability%20Facts%20and%20Figures%202016.pdf> accessed 23 November 2017 accessed 28 February 2018 NB mental and physical included

<sup>257</sup> 1.1.2

## **Conclusion**

While it may be argued that the EA 2010 was founded on the social model, this chapter has illustrated how, in practice, the drafting limits the removal of barriers to disability equality. The fixed definition of disability that sets a high standard with which individuals are forced to identify to assert their legal rights and thereby retain resources that will meet their needs. Here the resource is social housing and the need is a permanent and stable home and thereby social inclusion.

Case-law on ASB control shows how the social model objective of disability equality is undermined by domestic equality legislation with its exceptionalist criteria, qualifications and narrow drafting capable of restrictive judicial interpretation indicative of a traditional anti-discrimination approach.<sup>258</sup> Perpetrators face many barriers to identifying as disabled or disclosing evidence of same. While the preference for expert evidence accords with the medical model, late disclosure may give rise to scepticism or even cynicism from housing officers and the judiciary, suggesting a moral judgment. At trial, the judge's rejection of evidence will floor the perpetrator's disability argument most likely leading to an order against them. This may in turn lead to loss of the home and social exclusion. This seems particularly likely where perpetrators seemed blameworthy or morally at fault such as *Moody*<sup>259</sup> and *Simmonds*.<sup>260</sup>

In spite of the possibility of committing indirect discrimination, the risks of litigation and PSED provide impetus for officers to investigate or binge on information (evidence). However, the inclusive approach to disability equality afforded by the PSED has only been successfully argued<sup>261</sup> in cases not involving ASB.

While changing attitudes may be effected by a more generous definition of disability and discrimination, the focus of the thesis remains with definitions from domestic equality legislation.<sup>262</sup> This is because the research questions revolve around the decision-making of housing officers and the UNCRPD has thus far had no application

---

<sup>258</sup> Introductory Chapter

<sup>259</sup> *Croydon LBC v Moody* (1999) 31 HLR 738

<sup>260</sup> *Gloucester CC v Simmonds* [2006] EWCA Civ 254

<sup>261</sup> [2010] EWCA Civ 1104, [2011] 2 All ER 642

<sup>262</sup> EA 2010, s 6 - DDA 1995, s 1 was identically worded

in ASB cases. Restrictive interpretations of evidence or disability or their dismissal altogether on the basis of other blameworthy behaviour may not be the sole province of the judiciary: Indeed, the case-law suggests negative attitudes and these may be replicated in officers' pre-litigation case-management discourse. Thus, officers' constructions of disability may be evident in the judgments they make about perpetrators of ASB who may seek to rely on such legislation. In the absence of evidence of disability and in their search for the cause of ASB, it is hypothesised that officers may use folk psychiatry or "common-sense" stereotypes to categorise perpetrators. In weighing evidence, they may also morally adjudicate as to perpetrators' intentions, responsibility for their behaviour and meta-responsibility for their impairments. They may thus construct perpetrators as having mental impairments yet see their ASB as unrelated because they have capacity, misuse substances, are not welfare compliant or worse still manipulate the system. Such perpetrators may be constructed as riskier than others e.g. who are welfare compliant or do not misuse substances. These moral concerns and assessments of risk may also affect how these street-level bureaucrats exercise their wide discretion in responding to a complaint and the choice of intervention.<sup>263</sup>

The findings from the empirical research will be analysed in Chapters 5 and 6 to explain how officers exercise their discretion in case-management. This explanation will address the issues raised and highlighted in boxes in this and the two preceding chapters. These will be summarised in the following chapter which also explicates how the data was gathered and justifies the analytical approach employed.

---

<sup>263</sup> 1.2.3.5



# CHAPTER 4 Methodology

## Contents

<b>Introduction</b>	<b>178</b>
<b>4.1 Epistemology</b>	<b>179</b>
4.1.1 Research Aims, Questions and Hypotheses	180
<b>4.2 Research Methods and Design Appropriateness</b>	<b>183</b>
4.2.1 Research Stages	184
<b>4.3 Trustworthiness (Dependability and Reliability) of Data</b>	<b>187</b>
4.3.1 Sampling and Recruitment of Organisations	188
<b>4.4 Ethics: Informed Consent and Confidentiality</b>	<b>196</b>
4.4.1 Data Protection	196
4.4.2 Negotiating and Maintaining Access	197
<b>4.5 Instrumentation</b>	<b>201</b>
4.5.1 Piloting	201
4.5.2 Case File Analysis	202
4.5.3 Interviews	204
4.5.4 Focus Groups	209
<b>4.6 Reflexivity</b>	<b>218</b>
<b>4.7 Data Analysis</b>	<b>221</b>
<b>Conclusion</b>	<b>233</b>

## **Introduction**

This chapter outlines the epistemological approach to the empirical research for this thesis that was based on a small-scale qualitative study of social landlords, conducted from initial contact in October 2012 to completion of the fieldwork on 9<sup>th</sup> September 2013. It includes a review of the research methodology and design appropriateness analysed in relation to the epistemological and theoretical background set out thus far. It traces the research stages, development of research questions and instrumentation and the piloting of same. This is followed by a rationale for the samples of landlords, their employees (individual officers) and case files. It considers the practical matters of negotiating and maintaining access to organisations and officers. Additionally, this chapter outlines ethical considerations including the informed consent and assurance of confidentiality (data protection & anonymity) in the recruitment of landlords. It explains the researcher's reflexivity and the data collection stages and dependability of the data generated in the study. This chapter concludes with an explication of the approach to data analysis.

## **4.1 Epistemology**

This section relates the research aims, questions and hypotheses of the thesis to both the methods chosen and the underlying epistemological position.

This thesis takes a weak social constructionist position to examine social landlords' ASB management. This epistemology recognises that there is a reality of social landlords' ASB management of perpetrators with known or suspected mental impairments. However, it contends that examination of the discourse of policy and practice can only discern an approximation of that reality.<sup>1</sup>

In addressing the aim of the *thesis* i.e. the reality of how social landlords manage ASB cases where occupant perpetrators have known or suspected mental impairments, the three theoretical frameworks are employed to conceptualise that reality. The first is the models of disability. In social landlords' management of ASB, is disability conceptualised via a medical lens which conflates it with impairment and focusses on the individual or via a social lens that shifts the focus to the barriers to disability equality? This is tested against as against the two other theoretical frameworks: risk and housing professionalism.

Further research questions stated in the introduction are founded upon the three theoretical frameworks. My view as to issues relevant to these questions was affected initially by continuing to research literature, policy and case-law relevant to housing management, ASB and disability throughout the collection and analysis of data. The review of these sources in Chapters 1-3 enabled the development of tentative hypotheses as to influences on officers in their day-to-day decision-making. These influenced the sub-research questions highlighted throughout those chapters and summarised in the next section.

These research and sub-research questions attend to relevant discourses. The research instruments were developed to use ethnographic methods to address the questions relating to practice. While these instruments especially the vignettes reflect

---

<sup>1</sup> Introductory Chapter

my experience of knowledge and evidence, these instruments have enabled to production of thick descriptions *of practice* and the thematic analysis of this aims to reveal the reality of practice.

#### 4.1.1 Research Aims, Questions and Hypotheses

The aim of the thesis, to find how social landlords manage ASB cases where occupant perpetrators have known or suspected mental impairments, can be divided into the following questions:

- Which model of disability best explains how occupant perpetrators of ASB with known or suspected mental impairments (“relevant perpetrators”) are constructed:
  - in policy and
  - by social landlords in their ASB case-management practice?
- How do the following affect officers in their day-to-day decision-making:
  - understandings of risk
  - their professional role and their understanding of it?
- What are the outcomes of social landlords’ ASB case-management practice?
  - Can they be explained via a model of disability?
  - How are they affected by officers’ constructions of perpetrators and risk?
  - How are they affected by officers’ professional role and their understanding of it?

As officers are front-line decision-makers, their understanding of and attitudes towards disability in their exercise of discretion in ASB control is an important consideration to be addressed, as their views will influence their operation of policy. Given the broad language of policy (ASB,<sup>2</sup> disability)<sup>3</sup> susceptible to highly subjective interpretation affected by the conflicting objectives of the ASB and equality policy agendas, the *empirical research* aims to examine officers’ practice in exercising discretion in this

---

<sup>2</sup> 1.2.2

<sup>3</sup> 3.4.1

context. As attitudinal barriers<sup>4</sup> may prevent achievement of the social model goal of disability equality,<sup>5</sup> the empirical research seeks to illuminate them.

The issue of evidence is fundamental to the research aim because of the potential for case-management to result in litigation. Thus, I wanted to discover how officers become aware or gain knowledge of perpetrators' impairments and respond to them.<sup>6</sup>

These issues and hypotheses emphasised in boxes in the preceding chapters are summarised in Table 4.1 below.

<b>Table 4.1 Summary of Issues &amp; Hypotheses Raised in the Preceding Chapters</b>	
<b>1.</b>	<b>How do officers gather and evaluate evidence of perpetrators' mental impairments?<sup>7</sup></b>
<b>2.</b>	<b><u>Officers may medically construct perpetrators</u></b> Evidence of stereotyping <sup>8</sup> (categorisation <sup>9</sup> and risky subjects); <sup>10</sup> considerations of causation, <sup>11</sup> comparators <sup>12</sup> use of pop psychology, <sup>13</sup> folk psychiatry. <sup>14</sup>
<b>3.</b>	<b><u>Officers may morally construct perpetrators</u></b> Considering moral agency (consequently assessing perpetrator's guilt <sup>15</sup> or intention; <sup>16</sup> compliance with conditions, <sup>17</sup> acceptance of responsibility; <sup>18</sup> use of intoxicants; <sup>19</sup> manipulation of the system by fabricating impairments to provide a challenge to ASB control) <sup>20</sup>
1-3 relate to which model of disability best explains how officers view perpetrators of ASB, how their attitudes may affect this	

<sup>4</sup> Lauren B Gates and Sheila H Akabas, 'Developing Strategies to Integrate Peer Providers into the Staff of Mental Health Agencies' (2007) 34 Adm Policy Ment Health 293

<sup>5</sup> Introductory Chapter and 2.3.3 refer to the UNCRPD (preamble at (e))

<sup>6</sup> 5.2; 5.3

<sup>7</sup> 1.3.3; 3.3

<sup>8</sup> Introductory Chapter (particularly the street-level bureaucracy literature); 2.3.3; 3.1.2.1

<sup>9</sup> As critiqued by Samuel Bagenstos, *Law and the Contradictions of the Disability Movement* (Yale University Press 2008) 26; Introductory Chapter

<sup>10</sup> Case-law in 2.3.5

<sup>11</sup> Case-law in 2.3.6

<sup>12</sup> Case-law in 2.3.4

<sup>13</sup> 3.4.1

<sup>14</sup> 3.4.1

<sup>15</sup> *Croydon LBC v Moody* (1999) 31 HLR 738, 745

<sup>16</sup> Nick Haslam, 'Dimensions of Folk Psychiatry' (2005) 9 Rev Gen Psychol 35, 41

<sup>17</sup> 1.2.5

<sup>18</sup> John Flint, 'Social Housing Agencies and the Governance of Anti-social Behaviour' (2002) 17 Housing Studies 621

<sup>19</sup> *Gloucester CC v Simmonds* [2006] EWCA Civ 254

<sup>20</sup> *Croydon LBC v Moody* (1999) 31 HLR 738

<p>4.</p>	<p><b><u>Constructions of perpetrators may affect subsequent case-management up to and including litigation i.e. the outcomes of social landlords' ASB management practice</u></b></p> <p>Thus, they may affect choice of interventions / adjustments and sanctions for perpetrators.<sup>21</sup></p>
<p>5.</p>	<p><b><u>Officers' decision-making may be affected by professional issues</u></b></p> <p>Organisational policy;<sup>22</sup> officers' constructions of their roles and professional identity;<sup>23</sup> work with other medico-welfare professionals;<sup>24</sup> training;<sup>25</sup> pressure of work;<sup>26</sup> understanding of law<sup>27</sup></p>
<p>6.</p>	<p><b><u>Officers' decision-making may be affected by officers' constructions of risk<sup>28</sup></u></b></p> <p>May depend on: to whom and what do they consider risks are posed; use of risk assessment tools; secondary risk of litigation via effects of accountability.<sup>29</sup> May lead to outcome focus.<sup>30</sup></p>

<sup>21</sup> 1.2.2

<sup>22</sup> *Barber v Croydon LBC* [2010] EWCA Civ 51, [2010] 2 P & CR D25; 1.2.3.5; 2.2.1

<sup>23</sup> 1.2.4

<sup>24</sup> 1.2.4

<sup>25</sup> 1.2.4

<sup>26</sup> Street level bureaucracy literature

<sup>27</sup> Sadie Parr, 'The Role of Social Housing in the 'Care' and 'Control' of Tenants with Mental Health Problems' (2010) 9 Social Policy and Society 111; 1.2.4

<sup>28</sup> 1.3.1; 1.3.3; case-law in 2.3.3

<sup>29</sup> 1.3.2

<sup>30</sup> Nicola Glover-Thomas, 'The Age of Risk: Risk Perception and Determination Following the Mental Health Act 2007' (2011) 19 Med L Rev 581; 1.3.1

## **4.2 Research Methods and Design Appropriateness**

The empirical research was undertaken with an inductive approach to describe social landlords' practices in the control of ASB perpetrated by occupants with mental impairments and build theory from this. The approaches of officers, how they are influenced by their understanding of risk and relatedly ASB, their professional role and how they construct disability and perpetrators may be revealed by an examination of their discourse.

Qualitative and ethnographic approaches are suited to investigating such practices and the interactions of subjects in everyday life,<sup>31</sup> describing practices and building theory upwards from that rather than formally testing a hypothesis.<sup>32</sup> The hypotheses and issues in Table 4.1 could all be positively framed to be tested. Similarly, the first general research questions above could also be reframed as a hypothesis "policy and landlords' practice reflect the medical model". While reading literature and policy and my professional background as a practising solicitor<sup>33</sup> led to hypotheses, it is not assumed that housing practice will perfectly fit within an existing theoretical framework. Focussed and directive questions could indeed be developed from the issues and hypotheses in Table 4.1. However, such design would undermine the social constructionist epistemology underlying the study.

Quantitative methods were rejected as unsuitable to address the aims and questions posed: the research aims of the present study cannot be tested by exploring numerical data. Examination of attitudes justified a qualitative approach as honest answers may not be given to a survey. Qualitative and ethnographic methods were therefore chosen over positivist methods as they align with this epistemology, being interpretive and placing greater emphasis 'on the meaning of social actions to social actors and on their detailed understandings of particular social contexts'.<sup>34</sup>

---

<sup>31</sup> Uwe Flick, *An Introduction to Qualitative Research* (4<sup>th</sup> edn, Sage 2009) 15

<sup>32</sup> A Bottoms, 'The Relationship Between Theory and Research in Criminology' in R D King and E Wincup (eds), *Doing Research on Crime and Justice* (OUP, 2000) 30

<sup>33</sup> Introductory Chapter; 4.1, 4.6

<sup>34</sup> Satnam Choongh, 'Doing Ethnographic Research: Lessons from a Case Study' in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press 2007) 70

Brewer distinguishes ethnography from participant observation<sup>35</sup> as 'a style of research rather than a single method'<sup>36</sup> which he defines as:

[T]he study of people in naturally occurring settings or 'fields' by means of methods which capture their social meanings and ordinary activities, involving the researcher participating directly in the setting, if not also the activities, in order to collect data in a systematic manner but without meaning being imposed on them externally.<sup>37</sup>

Ethnography so defined may use various data collection methods which:

permit access to people's social meanings and activities and involve close association and familiarity with the social setting. This does not necessarily mean actual participation in the setting.<sup>38</sup>

Furthermore, financial and temporal constraints detracted from participant observation and towards a detailed, multi-method qualitative approach to allow insights of one approach to inform the others.<sup>39</sup> Moreover, the sensitivity of the issue to be explored justified an in-depth approach and for this reason 'in-depth interviews... personal documents (case files) and [focus groups lead by] vignettes'<sup>40</sup> were used.

### 4.2.1 Research Stages

The research questions and some of the hypotheses were further broken down into data collection questions appropriate to three stages of the research and research instruments.<sup>41</sup>

The stages of research were as follows:

---

<sup>35</sup> Cf Alan Bryman, *Social Research Methods* (4th edn, OUP 2012) 432

<sup>36</sup> John Brewer, *Ethnography* (McGraw-Hill Education 2000) 10

<sup>37</sup> John Brewer, *Ethnography* (McGraw-Hill Education 2000) 10

<sup>38</sup> John Brewer, *Ethnography* (McGraw-Hill Education 2000) 10

<sup>39</sup> Laura Beth Nielsen, 'The Need for Multi-Method Approaches in Empirical Legal Research' in Peter Cane and Herbert Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (OUP 2012) 967

<sup>40</sup> John Brewer, 'Ethnography' in Catherine Cassell and Gillian Symon (eds), *Essential Guide to Qualitative Methods in Organizational Research* (Sage 2009) 312

<sup>41</sup> These are in the research instruments in the appendices



**1) Management / Organisational:** This stage is to address the landlord's operational approach to ASB case-management. In this first stage, data was collected in two phases:

- i. Collection and analysis of policies relevant to research questions, i.e. the landlords' policies on:
  - a. ASB
  - b. Social inclusion
  - c. Safeguarding adults / vulnerable people
  - d. Discrimination / Equality legislation (in relation to ASB)
- ii It was anticipated that policy would not reveal the reality of the organisational approach. Therefore, semi-structured interviews<sup>42</sup> with that landlord's senior representative - the ASB manager (or an equivalent role) were chosen to explore each landlord's organisational approach to ASB, disability and social inclusion and the rationale behind it.

**2) Approach in practice:** This stage is to address the reality of operational ASB case-management i.e. its *de facto* policy or policy as practice.

Data at this stage was gathered using vignettes to guide discussions of focus groups<sup>43</sup> of officers from within each organisation who had handled ASB cases.

**3) Front-line officer decision-making.**

- i. A pro-forma was drafted to record the data from case files<sup>44</sup> up until the date it was most recently handled by the organisation. In ASB case-management, officers maintain these personal documents i.e. individual files for each property and its inhabitants, containing evidence of officers' knowledge of disability<sup>45</sup> and

---

<sup>42</sup> Schedules at Appendix 6

<sup>43</sup> Appendix 7

<sup>44</sup> Appendix 8

<sup>45</sup> 1.3.3

its source; case-management decisions taken which may also have a rationale suggesting the reasonableness and proportionality<sup>46</sup> of such decisions should legal proceedings ultimately be pursued. For this reason, documentary analysis of such case files was also chosen.

- ii Finally, semi-structured, in-depth, one-to-one interviews were conducted with the officer(s)<sup>47</sup> handling each case to elicit officers' attitudes towards perpetrators. The data collection questions in the interview schedule were complimentary to the pro-forma described in 3) i. and provided a background on which to tailor questions about the case.

While some policies referred to at 1)i were acquired during initial enquiry stage, most were obtained with the rest of the data during the period of fieldwork which took place between 10<sup>th</sup> April and 9<sup>th</sup> September 2013.

Questions about risk assessment were asked in interview as they emerged as an obvious issue from the literature: ASB may be risky *per se*. However, while literature and my own predispositions<sup>48</sup> suggest the relevance of these matters, asking focussed and directive questions on them would again undermine the social constructionist epistemology underlying the study.

---

<sup>46</sup> 2.3.6

<sup>47</sup> Appendix 9

<sup>48</sup> Introductory Chapter, 4.3, 4.5.1 and 4.7

### **4.3 Trustworthiness (Dependability and Reliability) of Data**

Social constructionism asserts there are multiple accounts of social reality, rather than one objective reality. Therefore, like any interpretive study in-depth understanding, rather than validity, is sought.<sup>49</sup> The reliability and generalisability of data produced using qualitative methods are more difficult to ascertain and for this reason the term “trustworthiness” is preferred. “Trustworthiness” includes:<sup>50</sup>

- **Credibility.** Acknowledging my role in the creation of accounts of social reality is important in achieving credibility and this is discussed at 4.6. Further to the assurance of credibility is the researcher’s role in presenting an account which is acceptable to others. Trustworthiness of data analysis was therefore partly assisted by presenting research papers on my findings at conferences<sup>51</sup> and use of alternative analyses from fellow delegates and also my supervisors.
- **Triangulation,** a term borrowed from surveying, meaning viewing from three points<sup>52</sup> was attempted at several stages.<sup>53</sup> As Denzin argues ‘The goal of multiple triangulation is a fully grounded interpretive research approach and this is particularly important in a small scale study. The data collected was methodologically triangulated thus:<sup>54</sup>

By examining each landlord’s policy and interviewing the ASB manager and a focus group of housing officers to understand each organisation’s approach. By finding similar examples of text in the transcripts of focus groups and interviews.

In-depth understanding of officers’ decision-making and their attitudes was sought from analysis of case file analysis, focus groups and interviews with officers.

Further, the questions asked at the different stages of research followed the same issues e.g. knowledge, risk assessment and case-management (use of

---

<sup>49</sup> Norman K Denzin, *The Research Act* (3<sup>rd</sup> edn, Prentice Hall 1989) 246

<sup>50</sup> Alan Bryman, *Social Research Methods* (4th edn, OUP 2012) 393

<sup>51</sup> Declaration above page 18

<sup>52</sup> Marilyn Lichtman, *Qualitative Research for the Social Sciences* (Sage 2013) 150

<sup>53</sup> 4.3; 4.5; 4.5.3.2

<sup>54</sup> Pat Bazeley, ‘Issues in Mixing Qualitative and Quantitative Approaches to Research’ in R Buber, J Gadner and L Richards (eds), *Applying Qualitative Methods to Marketing Management Research* (Palgrave Macmillan 2004) 141

intervention: support / control). This approach was taken to demonstrate 'consistency in overall patterns of data from different sources, and reasonable explanations for differences in data from divergent sources'<sup>55</sup> and therefore credibility in the findings.

- Lincoln and Guba consider the thick descriptions<sup>56</sup> produced by qualitative research 'provide a database for the **transferability** of findings to other contexts'.<sup>57</sup> The essential aim of the study was not to produce findings statistically generalisable to an entire population (i.e. all social landlords) but to find meanings (e.g. of disability), providing insight into how relevant policy is implemented which may be generalisable and therefore transferable to other settings (i.e. other social landlords). Yin calls this 'analytic generalisability'.<sup>58</sup>
- **Dependability** is evidenced by the 'complete records kept of all phases of the research'.<sup>59</sup>
- **Confirmability** has been attempted by trying to not allow my values to intrude to a high degree. My predispositions (theoretical commitments) have already been noted<sup>60</sup> and are further developed below.<sup>61</sup>

### 4.3.1 Sampling and Recruitment of Organisations

'Sampling is taking any portion of a population or universe as representative of that population or universe.'<sup>62</sup> To be useful, the sample 'should reflect the similarities and differences found in the total group'.<sup>63</sup>

The population or universe of units<sup>64</sup> from which the sample was to be taken consisted of social landlords<sup>65</sup> in England of which there are currently 1674 of varying sizes and

---

<sup>55</sup> Pat Bazeley, 'Issues in Mixing Qualitative and Quantitative Approaches to Research' in R Buber, J Gadner and L Richards (eds), *Applying Qualitative Methods to Marketing Management Research* (Palgrave Macmillan 2004) 141

<sup>56</sup> Clifford Geertz, 'Thick Description: Toward an Interpretive Theory of Culture' in *The Interpretation of Cultures: Selected Essays* (Basic Books 1973) 310

<sup>57</sup> EG Guba and YS Lincoln, 'Competing Paradigms in Qualitative Research' in NK Denzin and YS Lincoln (eds), *Handbook of Qualitative Research* (Sage 1994) 105 in A Bryman, *Social Research Methods* (4<sup>th</sup> edn, OUP 2012) 392

<sup>58</sup> Robert K Yin, *Qualitative Research from Start to Finish* (The Guildford Press 2011) 100

<sup>59</sup> Catherine Cassell and Gillian Symon (eds), *Essential Guide to Qualitative Methods in Organizational Research* (Sage 2009) 333

<sup>60</sup> Introductory Chapter; 4.1.1; see 4.7 below

<sup>61</sup> 4.6

<sup>62</sup> <http://www.uic.edu/classes/socw/socw560/Sampling1.htm> accessed 27 September 2013

<sup>63</sup> <http://www.uic.edu/classes/socw/socw560/Sampling1.htm> accessed 27 September 2013

<sup>64</sup> A Bryman, *Social Research Methods* (4<sup>th</sup> edn, OUP 2012) 714

<sup>65</sup> Introductory Chapter; 1.2.3.3

types.<sup>66</sup> Within the participating landlords, the officers and case files of that organisation were also populations.

Purposive sampling is not based on probability. The decisions concerning the units to be sampled 'are taken by the researcher, based upon a variety of criteria which may include specialist knowledge of the research issue, or capacity and willingness to participate in the research'.<sup>67</sup> The basic units to be sampled were the landlords, and the officers and case files within each participating landlord. The original sample of landlords invited to take part in the research were in the North of England and sampled purposively (based on my knowledge of individual organisations which in turn resulted from my involvement in housing law advice and teaching) to allow insight into a range of approaches.<sup>68</sup>

The purpose of sampling different organisations with different profiles was not for comparison. However, organisations which I knew to have different profiles were purposively sampled to allow for examination of contextual factors and, it was anticipated, a broader range of different approaches. Thus, I identified twelve landlords that had a variety of profiles: four large housing associations created consequent upon a LSVT, one traditional housing association which was a recipient of a LSVT, three medium-sized traditional housing associations, three housing associations which were part of larger groups of housing associations and one small housing association (i.e. owning / managing less than one thousand units).<sup>69</sup> It was considered that twelve would be too large a sample but anticipated that not all twelve would agree to participate in the study. Thus, organisations were "over-recruited" to ensure that ultimately at least three organisations took part.

The research objectives justified this small purposive sample of organisations as opposed to the statistical probability of selection. Purposive sampling permitted the choice of organisations large enough to have a sufficient number of cases to generate

---

<sup>66</sup> <https://www.gov.uk/government/publications/current-registered-providers-of-social-housing> accessed 17 March 2019

<sup>67</sup> <http://srmo.sagepub.com/view/the-sage-dictionary-of-social-research-methods/n162.xml> accessed 15 November 2013

<sup>68</sup> Joanne Bretherton, Caroline Hunter and Sarah Johnsen, "You Can Judge them on how they Look...": Homelessness Officers, Medical Evidence and Decision-Making in England' (2013) 7 *European Journal of Homelessness* 70

<sup>69</sup> Housing Corporation, *Provision of Support and Guidance for Small Housing Associations* (March 2008) 3

[https://www.campbelltickell.com/images/publications/uk\\_government/Support\\_and\\_Guidance\\_full\\_report.pdf](https://www.campbelltickell.com/images/publications/uk_government/Support_and_Guidance_full_report.pdf) accessed 1 October 2017

sufficient in-depth data per organisation from which analytic generalisations could be drawn. Findings from purposive samples fit with general constructs rather than statistical generalisations. Additionally, as Firestone<sup>70</sup> argues, such ‘sampling can provide the opportunity to select and examine observations of generic processes which are key to our understanding of new or existing theory about the phenomenon being studied’ i.e. landlords and their case-management. Thus, ‘the careful examination of the cases may lead to elaboration or reformulation of theory’<sup>71</sup> consistent with the inductive approach outlined above. Due to convenience sampling,<sup>72</sup> no local authority was approached to take part in the study.

#### 4.3.1.1 Recruitment of Participant Organisations

The greatest potential risk to the study – that organisations might be unwilling to participate given the sensitivity of the issues to be explored, and the need for participating organisations’ staff to assist – was overcome using draft in-principle’ agreements, draft consent forms and detailed draft information sheets.<sup>73</sup> These documents were sent by attachment to email to the managers of the twelve originally purposively sampled landlords in October and November 2012.

The manager of Org.1 (“HM1”) responded quickly and once a relationship had been established with them, they acted as a lynchpin, putting me in contact with colleagues in three other housing associations in similar roles to themselves thus smoothing the remaining steps of the research by providing access to these organisations. Three of these organisations were part of the original purposive sample who had not responded to my attempts to contact them. Thus, the sampling of organisations was effectively, although unintentionally, ‘snowball’.<sup>74</sup>

---

<sup>70</sup> W Firestone, ‘Alternative Arguments for Generalizing from Data as Applied to Qualitative Research’ (1993) 22 (4) Educational Researcher 16 in Sarah Curtis and others, ‘Approaches to Sampling and Case Selection in Qualitative Research: Examples in the Geography of Health’ (2000) 50 Social Science & Medicine 1001

<sup>71</sup> Sarah Curtis and others, ‘Approaches to Sampling and Case Selection in Qualitative Research: Examples in the Geography of Health’ (2000) 50 Social Science & Medicine 1001, 1002

<sup>72</sup> 4.3.1.2

<sup>73</sup> Final versions in appendices 2-5

<sup>74</sup> Alan Bryman, *Social Research Methods* (4th edn, OUP 2012)<sup>75</sup> M Hammersley and P Atkinson, *Ethnography: Principles in Practice* (3rd edn, Taylor & Francis 2007) in Ellen L Rubenstein, ‘Researcher Subjects: Gaining Access and Building Trust in an Online Breast Cancer Support Group’ [www.ideals.illinois.edu/.../Rubenstein\\_i-conference\\_2010\\_FINAL.pdf](http://www.ideals.illinois.edu/.../Rubenstein_i-conference_2010_FINAL.pdf) accessed 18 July 2013

Additionally, in November 2012, I attended a conference with delegates from many social landlords. I distributed my business cards amongst potential participants. Here, I met ASB managers from other landlords with whom I had made contact through HM1 (including the ASB manager at Org.2). This was important in gaining the trust of the individual participants and organisations which ethnographers note as difficult.<sup>75</sup> I also met representatives of one other landlord that had not responded to my email and obtained the direct contact details of a senior officer of that organisation (3) who facilitated access.

Initial discussions continued throughout October 2012 - January 2013 using telephone conversations with managers at five organisations (1-5) and the small housing association. However, the small housing association was unwilling to take part in the study on the basis that they did not have sufficient experience of the types of cases under examination. From this, it was generalised that other similarly sized associations were likely to have insufficient experience. Follow up recruitment interviews took place at organisations 1, 3, 4 and 5 and in-principle agreements were reached with these landlords and organisation 2.

Of the original twelve purposively sampled<sup>76</sup> organisations, four refused to take part and responses were not forthcoming from or contact ultimately lost with another four. Thus, eventually, four landlords became the final sample "organisations 1-4". Two were traditional housing associations, each having approximately 3,500 properties in the area. The other two were stock transferees, one having approximately 3,500 properties and the other having approximately 15,000 in the area. Thus, the original purpose in sampling, to obtain organisations of different size, experience and approaches was achieved. As data collection progressed it became clear that sufficient data would be generated by the four participant organisations.

---

<sup>75</sup> M Hammersley and P Atkinson, *Ethnography: Principles in Practice* (3rd edn, Taylor & Francis 2007) in Ellen L Rubenstein, 'Researcher Subjects: Gaining Access and Building Trust in an Online Breast Cancer Support Group' [www.ideals.illinois.edu/.../Rubenstein\\_i-conference\\_2010\\_FINAL.pdf](http://www.ideals.illinois.edu/.../Rubenstein_i-conference_2010_FINAL.pdf) accessed 18 July 2013

<sup>76</sup> 4.3.1

#### 4.3.1.2 Convenience Sampling

A convenience sample is one that is 'available to the researcher by virtue of its accessibility'.<sup>77</sup> While Krueger criticises convenience sampling as a threat to quality,<sup>78</sup> it was ultimately, used at all stages: In the selection of organisations being located within reasonable travelling distance of my home and work. This dictated the sample of managers as there was only one ASB manager at each organisation. More problematic was the convenience sampling of focus groups participants who were staff chosen by the manager. This gave rise to a significant risk of social desirability bias<sup>79</sup> (i.e. subjects' representation of themselves or their organisations in a good light).

Similarly problematic was the convenience sampling of perpetrators' case files from each of the four organisations. It was originally planned that a significant, purposive sample of the most recent decisions would be made. However, confidential materials in the files and data protection gave managers at each organisation concerns that threatened to prevent access to the cases entirely. As a result, and despite the significant risk of social desirability bias (of the subjects in their representations of themselves, their organisation and their handling of cases) officers and / or their managers (not the same person in each organisation) were allowed to sample cases from occupants of their stock<sup>80</sup> on criteria summarised in the figure below:

---

<sup>77</sup> Alan Bryman, *Social Research Methods* (4th edn, OUP 2012) 201

<sup>78</sup> Richard A Krueger, 'Quality Control in Focus Group Research' in David L Morgan (ed), *Successful Focus Groups: Advancing the State of the Art* (Sage 1993) 72

<sup>79</sup> Melinda Collins, Mona Shattell and Sandra P Thomas, 'Problematic Interviewee Behaviors in Qualitative Research' (2005) 27 *West J Nurs Res* 188

<sup>80</sup> For the most part the research concentrates on "principal" occupiers (usually tenants) who are adults with mental impairments who perpetrate ASB. However, it may also include cases where the ASB is perpetrated by family members or visitors who may also have a mental disability. This is because possession may be sought against the tenant where such other persons have committed the ASB (HA 1985, sch 2, Ground 2; HA 1988, sch 2, Ground 14; 1.2.3.2. Further, other controls are not tenure specific – 1.2



**Figure 4.1 Empirical Study – Background & Methodology**

- Qualitative, interpretive
- Sample: 4 Social Landlords
- Examination of all relevant policy
- Interview with manager of each SL (policy and organisational approach) (av 1 hr 35 mins)
- Focus Group at each (4 vignettes: one sensory, 3 mental impairment; average 2 hours)
- Analysis of 23 case files
- 15 individual interviews with officers about those cases (average 1 hour and 5 mins)
- Thematic analysis of transcribed interviews

**SAMPLE of case files**

- I. aware of the impairment at the outset
- II. **suspect** there is an impairment as the case progresses and this is **confirmed** by the perpetrator or a 3<sup>rd</sup> party
- III. **suspect** there is an impairment as the case progresses and this is **NOT confirmed**
- IV. do not suspect there is an impairment but this is later disclosed by the perpetrator or a 3<sup>rd</sup> party

The rationale for the sample of cases was based on the law reports which confirm my experience of practice that disclosure happens late on in proceedings often well into litigation.<sup>81</sup> Knowledge was relevant to the sample: disability was employed in arguments concerning reasonableness long before discrimination was given legislative footing or it was held that a landlord could not discriminate if they lacked knowledge of the disability.<sup>82</sup> Thus, throughout the period from which cases were sampled, there have been legal reasons driving an officer's need to know the reasons behind a perpetrator's behaviour, if not a curiosity driven by sheer humanity.<sup>83</sup> In asking for cases based on suspicion and disclosure I hoped that the data would reveal how officers constructed disability.

Organisations were specifically asked for cases where some (although not all) had progressed to litigation. This was to enable an understanding of case-management to different outcomes and employing different ASB interventions including adjustments such as support as this could reveal a more inclusionary approach more consistent with the social model. I hoped that those proceeding to eviction would be the most

<sup>81</sup> 3.1.1

<sup>82</sup> *Mayor and Burgesses of the LB of Lewisham (Appellants) v Malcolm (Respondent)* [2008] UKHL 43, [2008] 1 AC 1399 [161]-[163] (Lord Neuberger); given legislative footing in EA 2010, s 15(2); 1.3.3; 3.3.1

<sup>83</sup> 3.3.1

recent cases to reflect reasonably up-to-date legal advice and therefore hopefully current law. I thought that they would also show the toughest cases leading to the harshest interventions in ASB control, given that once disability is known, continuing with proceedings is potentially discriminatory.<sup>84</sup> Neither assumption proved correct. There were roughly equal numbers of cases which did and did not progress to a court order.<sup>85</sup>

The reasons for allowing convenience sampling of cases were threefold:

1. Case-law suggests that ASB cases concerning perpetrators with physical or sensory impairments are uncommon<sup>86</sup> and I could not, without spending considerable time at the organisations search for such cases. Given the problems of access I experienced, this request may also have been denied and even if it had not been, there were temporal constraints.
2. To develop trust<sup>87</sup> and thereby retain access.
3. The cases were chosen within purposeful guidelines.<sup>88</sup>

Case file analysis or the subsequent interviews clarified the nature of the perpetrator's impairments. It was impossible to find cases where the perpetrator had physical or sensory impairment alone and most of the cases provided were based on officers' suspicions of mental impairments. Thus, the small number of available cases to be sampled mitigated against Krueger's concerns about convenience sampling and social desirability bias in terms of the sample of officers taking part in the interviews (the sample of files dictated the sample of officers), and the types of cases or disabilities put forward.<sup>89</sup> Furthermore, permitting the choice of cases revealed how they constructed ASB, as I was asked if hoarding and condition of property cases could be included. As the sample was specifically of cases where mental impairments were suspected but not disclosed, permitting the choice of cases also allowed officers to reveal how they constructed disability. It should also be noted that all occupants in

---

<sup>84</sup> *Mayor and Burgesses of the LB of Lewisham (Appellants) v Malcolm (Respondent)* [2008] UKHL 43, [2008] 1 AC 1399 [161]-[163] (Lord Neuberger); 3.3.1

<sup>85</sup> Table 5.3

<sup>86</sup> Chapter 2

<sup>87</sup> 4.4.2

<sup>88</sup> Appendix 1 for initial contact email

<sup>89</sup> Richard A Krueger, 'Quality Control in Focus Group Research' in David L Morgan (ed), *Successful Focus Groups: Advancing the State of the Art* (Sage 1993) 72

the sample had assured tenancies therefore none having the probationary starter tenancy and no demotion orders had been made. This would not have made any difference to their reliance on equality arguments but would mean that they used reasonableness arguments rather than public law challenges.<sup>90</sup>

---

<sup>90</sup> 2.2

## **4.4 Ethics: Informed Consent and Confidentiality**

Informed consent is widely considered ‘a core element of ethical practice, alongside related concerns such as the avoidance of deception, harm and exploitation, and the principles of confidentiality and anonymity’.<sup>91</sup> Thus, information sheets and consent forms<sup>92</sup> inviting participants to give informed consent were written in plain English to ensure maximum accessibility and specifically requested consent to digitally record contributions.

As an essential matter of ethics, consent forms<sup>93</sup> were signed prior to interview: While the consent forms made clear that consent could be withdrawn at any time, it is more difficult to withdraw consent than to withhold it.<sup>94</sup>

### **4.4.1 Data Protection**

Names and medical information of perpetrators in case files were sensitive data per DPA 1998, s 2 (e),<sup>95</sup> remain protected by DPA 2018 and may also contain confidential information. Moreover, participating officers and managers and their organisations (and their respective contributions to interviews and focus groups) needed to be disguised as any breaches of legislation discovered could lead to embarrassment for the organisations if not complaints or litigation against them.

To ensure anonymity, each organisation was numbered 1-4. Managers correspondingly became HM 1, 2, 3 and 4 (on transcribed interviews) irrespective of actual job titles. Contributing officers’ and managers’ names were recorded by initials as against notes of case files and focus group discussions (to enable the transcriber to distinguish between contributors). On transcriptions of interviews and focus groups, the officers were coded by number. To enable officers to remember the case when

---

<sup>91</sup> Sue Heath and others, ‘Informed consent, Gatekeepers & Go-Betweens’ (Sixth International Conference on Social Science Methodology, Amsterdam, The Netherlands, August 2004)

<sup>92</sup> Appendices 2-5

<sup>93</sup> Appendix 5

<sup>94</sup> Satnam Choongh, ‘Doing Ethnographic Research: Lessons from a Case Study’ in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press 2007) 76

<sup>95</sup> In force at the time the data was collected

interviewed, notes of addresses were recorded as an identifier. All notes were destroyed, and no indicators have been published.

Throughout the interviews (managers' and officers') language used was sometimes formal and technical although officers gave narratives of cases which contained colloquial language. To further ensure anonymity and thereby confidentiality, any such language indicating local dialect, appearing in the transcripts and extracted and reproduced in the thesis was altered to more formal language. Any extracts which included mention of names of organisations, colleagues, occupants or their addresses were similarly anonymised. All perpetrators were given pseudonyms. This proved difficult as the only records retained of perpetrators' names were those mentioned by officers in the recorded interview. These perpetrators were given popular but different names. Where, as for most of the perpetrators, no name had been recorded, unusual names were given.

#### **4.4.2 Negotiating and Maintaining Access**

The information sheets and initial emails aimed to "sell" the research by also stating that I was a solicitor, naming my supervisors and giving an offer of training to the organisation. Judging by the number of times "training" was discussed with me by the managers and also because I overheard the manager at Org.4 mention it to their staff (trying to coax them into the focus group) it seemed critical to obtaining access.<sup>96</sup> The offer of training and awareness of my professional qualification had a downside: While attending organisations' offices, I was frequently asked for advice on current developments in live cases.

Dobbert describes 'good informants' as relaxed i.e.

comfortable and unstrained in interactions with the researcher; they are generally open and truthful although they may have certain areas about which they will not speak or where they will cover up; they provide solid answers with good detail;

---

<sup>96</sup> However misinterpreted – 4.6

they stay on the topic or related important issues; they are thoughtful and willing to reflect on what they say.<sup>97</sup>

As the analysis chapters reveal, for the most part language used by participants / interviewees suggest open and genuine responses especially as they were sometimes emotional.

**Gaining trust** was critical in enabling full access to organisations and case files. As Brewer explains, 'honesty, friendliness, reciprocity, openness, communication and confidence building'<sup>98</sup> is essential to the development of trust in all human relationships. Building of trust may be undermined where employees are suspicious of the management's reasons for allowing access.<sup>99</sup>

I did not have much time for 'hanging around', as Brewer<sup>100</sup> recommends although I did spend on average four days in each organisation's offices to conduct case file reviews and take notes. This gave me the opportunity to ask for further documents and information about these files and gain a degree of trust which was important because **gaining access is not a singular event**.<sup>101</sup> I needed to maintain access to case files<sup>102</sup> and to get individual officers to speak to me about those files in interview.

My overall approach in correspondence and during the fieldwork was to be punctual, professional, polite, honest, open and friendly with one aim being to gain the confidence and trust of the organisation and individual participants. In gaining trust I aimed to relax individual participants and to further this, I explained the purpose of the research prior to each interview and focus group. For the latter, I read the short speech I had drafted to explain the background to the vignettes.<sup>103</sup>

Although the overall research strategy had been explained to ASB managers at the outset, after conducting focus groups and interviewing managers, I contacted them

---

<sup>97</sup> M Dobbert, *Ethnographic Research* (Praeger 1982) in K Louise Barriball and Alison White, 'Collecting Data Using a Semi-Structured Interview: A Discussion Paper' (1994) 19 *Journal of Advanced Nursing* 328, 353

<sup>98</sup> John Brewer, *Ethnography* (McGraw-Hill Education 2000) 316

<sup>99</sup> 4.6

<sup>100</sup> John Brewer, *Ethnography* (McGraw-Hill Education 2000) 316

<sup>101</sup> Satnam Choongh, 'Doing Ethnographic Research: Lessons from a Case Study' in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press 2007) 70

<sup>102</sup> 4.6

<sup>103</sup> Appendix 7

again requesting case files to review and to arrange interviews with officers responsible for those cases. At this point each manager raised concerns, as HM1 said in email e.g.

[H]ighly confidential information on some files which may include third party/DPA issues that would require express consent from the other agencies [which they did] not have permission to share.

HM1 suggested that I spoke to an ASB officer who had been assigned to a particular case which lead to eviction and therefore minimised 'the risk and harm/distress caused by the perpetrator'. It was suggested that

[T]his "tester/control" [case] may give [me] the most appropriate direction to access info on case files [and would provide an understanding of] what info can be shared and what can't.

Despite assurances that I would anonymise the data of perpetrators, participants, the organisation and its geographical location, the ASB officer was, however, not prepared to discuss the test case with me at all, saying it was a breach of the DPA 1998.

However, having clarified in writing how I would anonymise data, when I later spoke to HM1 in person they said they now understood what I was trying to achieve and was given almost free access to the files they had sampled. HM1 predicted correctly that the other landlords would 'be in the same boat': Org.4 required me to sign a protocol (confidentiality) agreement before permitting me full access. I had a similar experience in Org.3.

My presence and overall approach at Org.2's offices seemed to gain me a considerable amount of trust.<sup>104</sup> Org.2 gave me the complete printouts of their electronic records relating to all of the files that I was reviewing.

---

<sup>104</sup> John Brewer, *Ethnography* (McGraw-Hill Education 2000) 20

## CHAPTER 4 Methodology

To maintain maximum access with participating organisations and individuals, interviews and focus groups were conducted at the organisation's premises, usually the place of work of the interviewee. This was to ensure that neither organisations nor participants were inconvenienced and further relax participants.<sup>105</sup> Meeting rooms were used for privacy and to avoid excessive background noise as all interviews and focus groups were digitally recorded.

The trust I gained was initially with managers rather than officers who, in some cases were merely told to attend the interview or focus group (Org.4), or had it put in their diaries (Orgs1, 2 and 3.) Although I was clearly in the position of visitor, by the end of the focus groups / interviews, I felt most participants were relaxed<sup>106</sup> which I also attribute to my overall approach. At Org.1, HO3 said of themselves,

'It's interesting when you talk about it. You don't realise the hours you spend.'

---

<sup>105</sup> M Dobbert, *Ethnographic Research* (Praeger 1982) in K Louise Barriball and Alison White, 'Collecting Data Using a Semi-Structured Interview: A Discussion Paper' (1994) 19 *Journal of Advanced Nursing* 328, 353

<sup>106</sup> M Dobbert, *Ethnographic Research* (Praeger 1982) in K Louise Barriball and Alison White, 'Collecting Data Using a Semi-Structured Interview: A Discussion Paper' (1994) 19 *Journal of Advanced Nursing* 328, 353



## **4.5 Instrumentation**

The research instruments are reproduced in appendices 6-9.

After the design and method had been selected, research instruments were drafted to reflect the research questions and hypotheses that I wished to explore<sup>107</sup> which focussed ‘on how participants described and made sense of particular element(s) of their lives’.<sup>108</sup> Considerable time was taken to avoid faults in the drafting and development of these to avoid distorting the final results.<sup>109</sup> The original drafts of the interview schedules (for both the ASB manager and officers) and also the vignettes were developed from instruments my principal supervisor used in research on officers.<sup>110</sup> Great care was taken not to draft questions in a way that reflected only the hypotheses arising from the literature, my own presuppositions or constructions<sup>111</sup> e.g. I would ask of managers, “When will you consider re-housing?” rather than a leading question: “Will you only consider rehousing perpetrators you know to have learning difficulties or sensory or physical impairments?” Such modifications were made in response to extensive discussions with my supervisors in person and in correspondence about early drafts. Mann refers to this as ‘internal testing’<sup>112</sup> - a preliminary assessment in which ‘ambiguities, leading questions and general criticisms are discussed and corrected’<sup>113</sup> which aims to make the ensuing data more trustworthy.<sup>114</sup>

### **4.5.1 Piloting**

A pilot may be defined as an ‘experimental undertaking carried out prior to some full-scale project or activity.’<sup>115</sup> All instruments were piloted with Org.1. Development of

---

<sup>107</sup> 4.2.1

<sup>108</sup> Positioned throughout chapters 1-3

<sup>109</sup> Norman K Denzin, *The Research Act* (3rd ed, Prentice Hall 1989)

<sup>110</sup> Joanne Bretherton, Caroline Hunter and Sarah Johnsen, “You can judge them on how they look...’: Homelessness Officers, Medical Evidence and Decision-Making in England’ (2013) 7 *European Journal of Homelessness*

<sup>111</sup> Nigel King, ‘The Qualitative Research Interview’ in Catherine Cassell and Gillian Symon (eds), *Essential Guide to Qualitative Methods in Organizational Research* (Sage 2009) 16, 18; My own predispositions – Introductory Chapter, 4.1, 4.3, 4.6 and 4.7

<sup>112</sup> P H Mann, *Methods of Social Investigation* (Blackwell 1985) in K Louise Barriball and Alison White, ‘Collecting Data Using a Semi-Structured Interview: A Discussion Paper’ (1994) 19 *Journal of Advanced Nursing* 328, 333

<sup>113</sup> P H Mann, *Methods of Social Investigation* (Blackwell 1985) in K Louise Barriball and Alison White, ‘Collecting Data Using a Semi-Structured Interview: A Discussion Paper’ (1994) 19 *Journal of Advanced Nursing* 328, 333

<sup>114</sup> Marilyn Lichtman, *Qualitative Research for the Social Sciences* (Sage 2013); 4.3

<sup>115</sup> <http://www.oxforddictionaries.com/definition/english/pilot?q=pilot> accessed 15 November 2013

instruments following analysis of sets of results was not possible due to work and time constraints. However, clarification of some interview questions for managers and in particular the vignettes was noted<sup>116</sup> and used with subsequent manager interviews and focus groups where necessary.

## 4.5.2 Case File Analysis

It was anticipated that although case files would provide evidence of how officers had handled cases, they would not provide complete information about a case (e.g. on the issue of knowledge). They were therefore not intended to be the sole source of data on cases and but would inform subsequent semi-structured in-depth interviews with the officer(s) handling each case and the analysis of transcripts which would in turn increase the trustworthiness<sup>117</sup> of the research results through triangulation.<sup>118</sup>

### 4.5.2.1 Case File Analysis - Instrumentation

A case file analysis pro-forma<sup>119</sup> was designed to ensure that each file was examined to find data that corresponded with the data collection questions in the schedules for interviews with officers thereby providing a basis for matters for discussion. E.g. nature of ASB; disclosures (evidence); correspondence with other agencies; interventions employed.

### 4.5.2.2 Case file analysis - Piloting

Ultimately, twenty-three case files were analysed and these varied in size considerably. It became apparent early in the case file reviews (with Org.1) that the pro-forma did not provide enough space to include sufficient detail about e.g. the officer's concern for the occupant perpetrator that I wished to refer to in the interviews. The design of the pro-forma was not altered, and it became used as an aide memoire for the reviews, during which detailed notes were taken building a narrative of the case.

---

<sup>116</sup> 4.5.4.2

<sup>117</sup> YS Lincoln and EG Guba, *Naturalistic Enquiry* (Sage 1985)

<sup>118</sup> 4.3

<sup>119</sup> Appendix 8

My supervisors and I had considered that paper and electronic case files may provide varying amounts of detail. Additionally, the manager at Org.1 suggested I compare the paper file records with the IT system records 'as this may also throw up some nuances/differences' in dealing with relevant perpetrators' cases.

However, having spent time with IT support of Org.1 looking at their electronic case-management system, I decided not to view electronic records of individual files as it did not appear that they would contain any information which could not be found from the (paper) house file. Other organisations' house files included print outs from their electronic files (organisations 2 and 3) and it was useful to see both formats but the composite file provided a complete record.

It was originally hoped that examining case files, i.e. authentic 'personal documents'<sup>120</sup> may provide some data evidencing thought processes in decision-making allowing for an ethnographic analysis. However, this proved unsuccessful as the files captured few 'social meanings',<sup>121</sup> although there was occasional evidence of emotion (e.g. concern for Ken, Org.1; fear of Harry, Org.3 and frustration caused by the depth and duration of investigations)<sup>122</sup> the evidence was not consistent across organisations. In approximately half of the cases, I did not see complete files relating to the cases, due to archiving and loss of documentation following organisational decisions to move to electronic filing as HO1 explained:

[W]hen we moved offices they... Cleansed [the files]... the only people who have got files now are... like me... I had to fight for them... but a lot went missing...

Furthermore, as officers were involved in sampling cases, they were able to select what to present.<sup>123</sup> Thus, HO13 and HO16 provided me with incomplete files. Ethnographic Content Analysis<sup>124</sup> was therefore abandoned. However, documents on

---

<sup>120</sup> John Brewer, 'Ethnography' in Catherine Cassell and Gillian Symon (eds), *Essential Guide to Qualitative Methods in Organizational Research* (Sage 2009) 312

<sup>121</sup> John Brewer, 'Ethnography' in Catherine Cassell and Gillian Symon (eds), *Essential Guide to Qualitative Methods in Organizational Research* (Sage 2009) 312

<sup>122</sup> 6.3.3.1

<sup>123</sup> 4.3.1.2 convenience sampling

<sup>124</sup> David L. Altheide, 'Reflections: Ethnographic Content Analysis' (1987) 10 *Qualitative Sociology* 65.

file such as letters and email print-outs indicated officers' efforts at communication in some cases.<sup>125</sup>

### 4.5.3 Interviews

Semi-structured interviews typically use a series of questions in the form of a schedule to guide the interview giving the interviewer freedom to ask 'further questions in response to... significant replies'.<sup>126</sup> Semi-structured in-depth interviewing was chosen for its potential 'to generate rich data.'<sup>127</sup> Such interviews were deemed appropriate with both ASB managers and officers as the study focuses 'on the meaning of particular phenomena to the participants.'<sup>128</sup> and because 'the research is primarily focused in gaining insight and understanding' and 'depth of meaning'.<sup>129</sup> The flexibility of this method allowed interviewees great opportunity for response to focus on what they saw as important in explaining the case file under discussion. Semi-structured interviews also give interviewers some choice in the wording of questions and opportunities to explore sensitive issues<sup>130</sup> and to probe into contexts and 'relational aspects' which may be 'significant to understanding others' perceptions'.<sup>131</sup>

As Flick notes, expert interviews are used with staff and those targeted have 'a specific function and a specific (professional) experience and knowledge'.<sup>132</sup> In the present study, the managers were experts on the organisation and the officers were experts on the cases.

---

<sup>125</sup> 6.3.3.1

<sup>126</sup> Alan Bryman, *Social Research Methods* (4th edn, OUP 2012) 212

<sup>127</sup> Nigel King, 'The Qualitative Research Interview' in Catherine Cassell and Gillian Symon (eds), *Essential Guide to Qualitative Methods in Organizational Research* (Sage 2009) 16

<sup>128</sup> Nigel King, 'The Qualitative Research Interview' in Catherine Cassell and Gillian Symon (eds), *Essential Guide to Qualitative Methods in Organizational Research* (Sage 2009) 16

<sup>129</sup> Nigel Newton, 'The Use of Semi-Structured Interviews in Qualitative Research: Strengths and Weaknesses' *Exploring Qualitative Methods* (2010)

[http://www.academia.edu/1561689/The\\_use\\_of\\_semi-structured\\_interviews\\_in\\_qualitative\\_research\\_strengths\\_and\\_weaknesses](http://www.academia.edu/1561689/The_use_of_semi-structured_interviews_in_qualitative_research_strengths_and_weaknesses) accessed 19 September 2013

<sup>130</sup> R M Nay-Brock, 'A Comparison of the Questionnaire and Interviewing Techniques in the Collection of Sociological Data' (1984) 2 *Australian Journal of Advanced Nursing* 14; EW Treece and JW Treece, *Elements of Research in Nursing* (4th edn, CV Mosby 1986) in K Louise Barriball and Alison White, 'Collecting Data Using a Semi-Structured Interview: A Discussion Paper' (1994) 19 *Journal of Advanced Nursing* 328, 353

<sup>131</sup> Nigel Newton, 'The Use of Semi-Structured Interviews in Qualitative Research: Strengths and Weaknesses' *Exploring Qualitative Methods* (2010)

[http://www.academia.edu/1561689/The\\_use\\_of\\_semi-structured\\_interviews\\_in\\_qualitative\\_research\\_strengths\\_and\\_weaknesses](http://www.academia.edu/1561689/The_use_of_semi-structured_interviews_in_qualitative_research_strengths_and_weaknesses) accessed 19 September 2013

<sup>132</sup> Uwe Flick, *An Introduction to Qualitative Research* (4<sup>th</sup> edn, Sage 2009) 166

#### 4.5.3.1 Interviews - Instrumentation

Two standard interview schedules containing data collection questions were drafted: one for use with the four managers and one for use with the fifteen officers. Data collection questions needed to be at once exploratory to elicit attitudes and also standardised. For the managers<sup>133</sup> standardisation aimed to discover the operational details of each organisation; for the officers<sup>134</sup> it aimed to discover standard information about each case.

During interviews with managers, questions were tailored, as appropriate, to the organisation's polic(y)ies. Thus, each organisation was, on occasion, asked slightly different questions based on the content of their policy. E.g. I see you say X in your policy. Drafting of the schedule for use with officers was broad to encompass all possible occurrences in the case which seemed relevant to the research questions. The order of the data collection questions approximated to a likely chronology of such occurrences. As for the interviews with managers, the schedule had to be tailored, this time to the factual findings from the case file analysis. With reference to each case, these data collection questions could be asked with reasonable consistency allowing exploration of knowledge e.g. officers' construction of disability. Decision-making at the point when the landlord suspected or became aware of a relevant mental impairment may demonstrate use of the models of disability in approaches to provision of support, risk assessment, withdrawal or continuance of legal proceedings. Thus, the cases sampled may have evidenced social inclusion or different types of discrimination (direct,<sup>135</sup> indirect,<sup>136</sup> disability,<sup>137</sup> housing management,<sup>138</sup> failure to provide reasonable adjustments).<sup>139</sup>

As the research was conducted prior to the royal assent of ASBCPA 2014, questions about the use of positive injunctions e.g. attendance at alcohol awareness classes<sup>140</sup> were not used.

---

<sup>133</sup> Appendix 6

<sup>134</sup> Appendix 9

<sup>135</sup> EA 2010, s 13; Introductory Chapter

<sup>136</sup> EA 2010, s 19

<sup>137</sup> EA 2010, s 15; 2.3.5

<sup>138</sup> EA 2010, s 35; 2.3.4.1

<sup>139</sup> EA 2010, s 21; 2.3.7.1

<sup>140</sup> 1.2.3.3

Interviews with officers included directive questions e.g. 'What are your views on the perpetrator's (non) compliance?' followed by probes on their views as to the risk of further incidents or compliance. Thus, officers were asked to recount their experiences of the cases they had handled and, in some cases volunteered experiences of other similar cases by way of contrast or comparison.

#### 4.5.3.2 Interviews - Piloting and Beyond

Although in semi-structured interviews, 'there is no formal schedule of questions to be asked word-for-word in a set order... [rather an] Interview guide [which] lists topics the interviewer should attempt to cover in the interview',<sup>141</sup> my interview guides were more structured having detailed lists of directive questions with many probes.

Mann recommends 'that respondents should be considered throughout the construction of an interview schedule',<sup>142</sup> as participants do the work 'by supplying the answers to the questions'.<sup>143</sup> As Barriball and White note:

It is easy for researchers, however, to lose sight of the respondent and fail to assess whether, for example, a question is ambiguous or too complex or whether the question sequence is likely to correspond logically with respondents' experiences.<sup>144</sup>

What became clear very early from the pilots of both types of interview was that sticking to the schedules of interview questions was too rigid an approach: the guides I had drafted were too structured. However, in preparation for interviews with officers, I made notes on the schedules based on the notes from case files' reviews. This allowed interview schedules to be tailored to each sampled file<sup>145</sup> enabling

---

<sup>141</sup> Nigel King, 'The Qualitative Research Interview' in Catherine Cassell and Gillian Symon (eds), *Essential Guide to Qualitative Methods in Organizational Research* (Sage 2009) 16

<sup>142</sup> P H Mann, *Methods of Social Investigation* (Blackwell 1985) in K Louise Barriball and Alison White, 'Collecting Data Using a Semi-Structured Interview: A Discussion Paper' (1994) 19 *Journal of Advanced Nursing* 328, 353

<sup>143</sup> P H Mann, *Methods of Social Investigation* (Blackwell 1985) in K Louise Barriball and Alison White, 'Collecting Data Using a Semi-Structured Interview: A Discussion Paper' (1994) 19 *Journal of Advanced Nursing* 328, 353

<sup>144</sup> K Louise Barriball and Alison White, 'Collecting Data Using a Semi-Structured Interview: A Discussion Paper' (1994) 19 *Journal of Advanced Nursing* 328, 353

<sup>145</sup> 4.2.1; 4.5.3.1

triangulation.<sup>146</sup> However, once onto a topic (e.g. knowledge), the manager and officers often answered questions before they had even been asked.

All interviews with officers and managers were face-to-face. The techniques of recapping, reflecting and paraphrasing were employed to ensure questions allowed consistency of method for the sake of trustworthiness but continued to be open as far as possible.

Furthermore, not sticking rigidly to the schedule allowed managers and officers to talk as freely as possible enabling fluidity and therefore a more genuine response.<sup>147</sup> As Hutchinson and Skodol note, in qualitative research a good interviewer is flexible 'pursuing leads and cues from informants that allow them to formulate additional relevant questions'<sup>148</sup> and flexibility also relaxes participants.<sup>149</sup> Furthermore, the pilot suggested questions and prompts in the officers' schedules were too complex and to allow them to recount their experiences. I had also noticed in the pilot that, with officers, I merely had to mention the case and they would give me a narrative account. Thus, in the field I adopted the technique of opening each interview by asking 'give me your recollections of the case.' This provided a more naturalistic, relaxed and detailed response rendering many questions unnecessary. The interview schedules nevertheless retained standardised questions and prompts which ensured each interview covered the same "territory" again for the sake of trustworthiness. The schedules thus acted as effective aide memoires for me and were not amended because of the pilot.

Sometimes my understanding of events recorded on the case file required clarification, and this was usually given although sometimes officers' memories were vague. Poor recall of participants in qualitative research can be a potent argument undermining the trustworthiness of the data. However, bearing in mind the research questions, what is more important in qualitative analysis is the attitudes revealed. Thus, while probing

---

<sup>146</sup> 4.3

<sup>147</sup> 4.4.2

<sup>148</sup> S Hutchinson and S K Wilson, 'Validity Threats in Scheduled Semi-Structured Research Interviews' (1992) 41 Nursing Research 117

<sup>149</sup> M Dobbart, *Ethnographic Research* (Praeger 1982) in K Louise Barriball and Alison White, 'Collecting Data Using a Semi-Structured Interview: A Discussion Paper' (1994) 19 Journal of Advanced Nursing 328; 4.4.2

in such cases may be criticised for being directive, it may prove illuminating, revealing how officers essentially construct perpetrators:

HO15: I gave [Noelle]... so many chances... but... she just could not maintain that tenancy

Interviewer: Yes, she did have depression, I've just got to that bit; there was GP evidence.

HO15: Right, I don't remember that

Interviewer: She was on anti-depressants. You don't remember that?

HO15: I can't remember

There was clear evidence of depression on file, but HO15, who had handled the case for over five years only remembered Noelle's intoxicant misuse. Thus, HO15 constructed Noelle as alcohol dependent not having mental impairment.<sup>150</sup> Probing in such cases therefore contributed to reliability of the data in its revelation of attitudes.

Counter-allegations making cases look like clashes of lifestyle were not anticipated when drafting the research instruments but emerged as an important finding in the case file reviews at the pilot stage. One officer at Org.1 commented that she thought it was wrong that they had to react so quickly to complaints and assume the complainant is correct. This gave rise to questions for future interviews with officers concerning management of cases with counter-allegations, approximately half of all cases sampled. While there were directive questions on risk assessment in the schedules, there were none on the meaning of risk. Clash of lifestyles cases illustrated how officers construct risk, i.e. they discussed this issue without being asked.

As a qualitative study progresses, it is possible for questions to emerge or evolve<sup>151</sup> after an interview has been completed. It occurred to me at the pilot stage in interviews (and focus groups) that compliance of the perpetrator with whatever support was offered was key to how they would be further treated by the landlord. Furthermore, knowledge of prescribed medication used by perpetrators seemed to influence some

---

<sup>150</sup> 6.3.3.4

<sup>151</sup> John W Creswell, *Research Design: Qualitative, Quantitative and Mixed Methods Approaches* (3<sup>rd</sup> edn, Sage 2009) 207



officers. Literature on leverage in English mental health care<sup>152</sup> was therefore reviewed but as this occurred late in the interviewing process, managers were emailed:

Where a perpetrator is on prescribed medication, would their compliance with that medication or alternative medication prescribed for the same condition be monitored or expected by your organisation?

Unfortunately, only HM3 replied and their response was very cautious and so this line of enquiry was abandoned.

#### 4.5.4 Focus Groups

Focus groups may be defined as 'group interviews'<sup>153</sup> with emphasis on a particular topic and upon interaction within the group.<sup>154</sup> They were used as they 'can be seen and used [to simulate] everyday discourses and conversations or as a quasi-naturalistic method for studying the generation of social representations or social knowledge in general'.<sup>155</sup> A further advantage of focus groups is that they 'give rise synergistically to insights and solutions which would not come about without them'.<sup>156</sup>

Moreover, as Madriz notes focus groups can 'correct the individualistic bias in social research by offering a unique opportunity to study individuals in their social contexts, by generating high quality interactive data [and] by contributing to the social construction of meaning'.<sup>157</sup>

Fuller argues that it is undesirable that group members are known to each other before discussions as they may be reluctant to share their views and information.<sup>158</sup> This

---

<sup>152</sup> Tom Burns and others, 'Pressures to Adhere to Treatment ('Leverage') in English Mental Healthcare' (2011) 199 *British Journal of Psychiatry* 145, 150

<sup>153</sup> David Silverman, *Interpreting Qualitative Data: A Guide to the Principles of Qualitative Research* (4<sup>th</sup> edn, Sage 2011)

<sup>154</sup> Alan Bryman, *Social Research Methods* (4<sup>th</sup> edn, OUP 2012) 112

<sup>155</sup> Peter Lunt and Sonia Livingstone, 'Rethinking, the Focus Group in Media and Communications Research' (1996) 46 *Journal of Communication* 79 in Uwe Flick, *An Introduction to Qualitative Research* (4<sup>th</sup> edn, Sage 2009) 204

<sup>156</sup> John Seely Brown, Allan Collins and Paul Duguid, 'Situated Cognition and the Culture of Learning' (1989) 18 *Educational Researcher* 32, 40

<sup>157</sup> E Madriz, 'Focus Groups in Feminist Research' in NK Denzin and YS Lincoln (eds), *Handbook of Qualitative Research* (2<sup>nd</sup> edn, Sage 2000) 383

<sup>158</sup> Theodore D Fuller and others, 'Using Focus Groups to Adapt Survey Instruments' in David L Morgan (ed), *Successful Focus Groups: Advancing the State of the Art* (Sage 1993) 95

may be particularly the case where, as in some of the focus groups in the present study, participants are staff of differing 'ranks'<sup>159</sup> within the same organisation. Members of such groups may also react to the ideas expressed and the people expressing them<sup>160</sup> making it impossible to determine the personal and therefore undesirable elements.

However, as the focus group in the field setting 'can provide greater depth of understanding about the field'<sup>161</sup> context, their aim in the present study was to explore, in greater depth each organisation's operational approach to ASB case-management of relevant perpetrators. I hoped that interaction between officers already known to each other in each organisation would develop ideas and reveal whether they shared views as to case-management strategies and perpetrators i.e. similar social constructions.

Vignettes – short written fictional scenarios intended to elicit responses to typical situations<sup>162</sup> - 'have been widely used as a complementary technique alongside other data collection methods'.<sup>163</sup> These were used to guide focus group discussions. Whilst usually used in individual interviews and surveys,<sup>164</sup> vignettes have been successfully employed in focus groups, reportedly encouraging 'quiet' members to voice an opinion.<sup>165</sup> This method was employed to open up dialogue and provide a positive grounding for the individual interviews with officers and further triangulation.<sup>166</sup>

Vignettes may aid interaction, develop ideas and argument where focus groups are composed of employees within the same organisation who may fear judgement of their colleagues and be inhibited from speaking due to conformity to organisational norms and cognitive blocking. The fictional nature of vignettes may be perceived as less

---

<sup>159</sup> Richard A Krueger and Mary Anne Casey, *Focus Groups: a Practical Guide for Applied Research* (4<sup>th</sup> edn, Sage 2009) 186

<sup>160</sup> Richard A Krueger and Mary Anne Casey, *Focus Groups: a Practical Guide for Applied Research* (4<sup>th</sup> edn, Sage 2009) 186

<sup>161</sup> James H Frey and Andrea Fontana, 'The Group Interview in Social Research' in David L Morgan (ed), *Successful Focus Groups: Advancing the State of the Art* (Sage 1993) 32

<sup>162</sup> Malcolm Hill, 'Research Review: Participatory Research with Children' (1997) 2 *Child and Family Social Work* 171

<sup>163</sup> C Barter and E Renold, 'The Use of Vignettes in Qualitative Research' (1999) 25 *Social Research Update* 1 <http://sru.soc.surrey.ac.uk/SRU25.html> accessed 13 November 2013

<sup>164</sup> Tim Aubry, Bruce Tefft and Raymond F Currie, 'Public Attitudes and Intentions Regarding Tenants of Community Mental Health Residences who are Neighbours' (1995) 31 *Community Ment Health J* 39; Sally Anne M Ingamells and others, 'The Influence of Psychiatric Hospital and Community Residence Labels on Social Rejection of the Mentally Ill' (1996) 35 *British Journal of Clinical Psychology* 359

<sup>165</sup> C Maclean, *Children, Family, Community and Work: An Ethnography of the Oil and Gas Industry in Scotland* (Department of Management Studies, 1999) in C Barter and E Renold, 'The Use of Vignettes in Qualitative Research' (1999) 25 *Social Research Update* 1 <http://sru.soc.surrey.ac.uk/SRU25.html> accessed 13 November 2013

<sup>166</sup> 4.3

threatening<sup>167</sup> as they minimise the risk of airing personal viewpoints or experiences in a focus group setting, and therefore undesirable consequences. Additionally, vignettes are recognised as having immense value in studies examining sensitive issues<sup>168</sup> including the acceptance of 'mentally-ill people residing in the community'<sup>169</sup> and 'mental-illness stigma'.<sup>170</sup> Thus, vignettes are suitable to reveal officers' attitudes towards relevant perpetrators of ASB. In conjunction with focus groups, this non-threatening method aimed to explore how officers would handle particular cases and to provide a more detailed understanding of the operational approach of the organisation i.e. its policy as practice.

#### 4.5.4.1 Focus Groups –Vignettes - Instrumentation

Four vignettes were used to represent a variety of mental impairments and one sensory impairment<sup>171</sup> and aimed to answer the research questions specifically how officers acquired knowledge of perpetrators' impairments and constructed perpetrators in its presence and absence. The relationship this has with social landlords' control of the risks of ASB is an important part of governance as explained earlier.<sup>172</sup> To ensure they were effective they needed to appear plausible (allowing the data produced to be valuable and the findings transferable)<sup>173</sup> as to how officers make their decisions, they had to be as close as possible to real life situations.<sup>174</sup> Although hypothetical, the scenarios used were loosely based on 'real' (anonymised) cases drawn from reported cases and my experience as a practising housing solicitor.<sup>175</sup>

---

<sup>167</sup> N Rahman, 'Caregivers' Sensitivity to Conflict: the Use of the Vignette Methodology' (1996) 8 *Journal of Elder Abuse & Neglect* 35, 36

<sup>168</sup> C Barter and E Renold, 'The Use of Vignettes in Qualitative Research' (1999) 25 *Social Research Update* 1 <http://sru.soc.surrey.ac.uk/SRU25.html> accessed 13 November 2013; N Rahman, 'Caregivers' Sensitivity to Conflict: the Use of the Vignette Methodology' (1996) 8 *Journal of Elder Abuse & Neglect* 35, 36; N E Schoenberg and H Ravdal, 'Using Vignettes in Awareness and Attitudinal Research' (2000) 3 *International Journal of Social Research Methodology* 63

<sup>169</sup> Tim Aubry, Bruce Tefft and Raymond F Currie, 'Public Attitudes and Intentions Regarding Tenants of Community Mental Health Residences who are Neighbours' (1995) 31 *Community Ment Health J* 39; Sally Anne M Ingamells and others, 'The Influence of Psychiatric Hospital and Community Residence Labels on Social Rejection of the Mentally Ill' (1996) 35 *British Journal of Clinical Psychology* 359

<sup>170</sup> Bruce G Link and others, 'Measuring Mental Illness Stigma' (2004) 30 *Schizophrenia Bulletin* 511, 511

<sup>171</sup> Appendix 7

<sup>172</sup> 1.3.3

<sup>173</sup> C Barter and E Renold, 'The Use of Vignettes in Qualitative Research' (1999) 25 *Social Research Update* 1 <http://sru.soc.surrey.ac.uk/SRU25.html> accessed 13 November 2013

<sup>174</sup> N Rahman, 'Caregivers' Sensitivity to Conflict: the Use of the Vignette Methodology' (1996) 8 *Journal of Elder Abuse & Neglect* 35, 36

<sup>175</sup> 4.2.1; 4.3; 4.6

My interest in the research project was initially sparked by a client very similar to the Lorraine Jones vignette. I took responsibility for this client's case at around the time *North Devon Homes v Brazier*<sup>176</sup> was reported. Brazier and my client had similar impairments and behaviour. This client made no admission as to any medical problems she had, would not allow the release of her medical records and would not engage with statutory services making it very difficult to prepare a defence. This experience helped formulate some of my research and data collection questions concerning knowledge: if I could not find out this information, how would the officers fare? This issue of knowledge and disclosure was common to the vignettes. Thus, my writing of them and the prompts for use in the focus groups reflects my experience and this in turn affects the social constructs officers made in the focus groups.

Sharon Adams is loosely based on *Knowsley Housing Trust v McMullen*.<sup>177</sup> Sharon bears similarity with many clients I had represented in practice, although the majority had problems with rent arrears. Tom Mayhew is loosely based on *Croydon v Moody*<sup>178</sup> and another case which I was involved in at the time of *Brazier*.<sup>179</sup> This elderly single man bereaved of his parents and living alone was a hoarder, an increasingly common profile brought to public attention by television media like Richard Wallace pictured below.<sup>180</sup>

---

<sup>176</sup> *North Devon Homes Ltd v Brazier* [2003] EWHC 574 (QB), [2003] HLR 905

<sup>177</sup> *Knowsley Housing Trust v McMullen* [2006] EWCA Civ 539, [2006] 2 P & CR D45; 2.3.5; 6.4.2.2

<sup>178</sup> *Croydon LBC v Moody* (1999) 31 HLR 738

<sup>179</sup> *North Devon Homes Ltd v Brazier* [2003] EWHC 574 (QB), [2003] HLR 905

<sup>180</sup> BBC1, *Britain's Biggest Hoarders* <http://www.bbc.co.uk/programmes/b01xq2c5> accessed 2 October 2017



Illustration 4.1 Richard Wallace, subject of Channel 4 Documentary 'Obsessive-Compulsive Hoarder: The Big Clear Out' part of their '4 goes Mad' season, broadcast July 2012<sup>181</sup>

The vignette concerning Maria Thompson, a perpetrator with a sensory impairment, was not based on a real client or reported case. Moreover, there were no perpetrators in the sampled files who only had physical or sensory impairments with symptoms which may lead to behaviour perceived as antisocial. I drafted this vignette in anticipation of this. I that ensuing focus group discussions would enable comparisons with mental impairments. I conducted Internet research to find a cause of hearing impairment and found **Ménière's** disease. All four vignettes were checked for medical accuracy by two dual-qualified registered mental health and general practice nurses.

Each vignette was divided into several stages, each stage followed by a series of open-ended and semi-structured follow-up questions and probes (e.g. 'What would you do now?', "Would you seek any further information? If so, where from?", "How would you respond to this?", "How would you view this medical evidence?", "What further steps would you take at this stage?", "Why would you take these steps?") based

<sup>181</sup>

<https://www.bing.com/images/search?view=detailV2&ccid=FIT%2bWD66&id=897A9C9269DB3F68A2171B4743108F9337060934&thid=OIP.FIT-WD66HVfKTCEU0jOB6QHaEx&q=The+Worst+Cases+of+Hoarding&simid=608036245891975783&selectedIndex=133&ajaxhist=0> accessed 22 February 2018

on the research questions. Thus, they were designed to be non-directive to enable the officers to explain how they made sense of their experience of case management and specifically, understood cases and perpetrators' impairments.<sup>182</sup> The questions were designed to highlight officers' perceptions, practices and attitudes and possibly evidence different types of discrimination (direct, indirect, disability, housing management, failure to provide reasonable adjustments). Participants often drew upon their own experiences in responses to hypothetical scenarios,<sup>183</sup> but the vignette method gave them control over whether, and if so at what point, they do so – thus making the experience less threatening than more 'direct' questioning.

There was some ambiguity in some of the facts in the vignettes which was intended to give rise to discussion. As West argues, such ambiguity can be considered both a strength giving 'the respondent... a measure of control over the definition of the situation'.<sup>184</sup> Ambiguity has been used in studies of attitudes towards disabled people.<sup>185</sup> Such ambiguity led to discussions within the groups about the perpetrators and what further enquiries may be made. Analysis therefore revealed the reality of case-management and their roles in relation to other professionals as well as how they constructed the character in the vignette. This was especially useful given the infrequency of disclosure of disability in the case files. Their control over the realistic content of the vignettes was also facilitated by the unintended consequence of misunderstanding and misinterpretation, considered next.

#### 4.5.4.2 Focus groups – vignettes - piloting and beyond

As noted above<sup>186</sup> participants at all organisations were aware from their managers or the information sheets sent in advance that I would be training them. Unfortunately, some members of the focus group at Org.1 seemed to be of the impression I was training them *at the very time of* conducting the focus group rather than returning to

---

<sup>182</sup> N Rahman, 'Caregivers' Sensitivity to Conflict: the Use of the Vignette Methodology' (1996) 8 Journal of Elder Abuse & Neglect 35, 46

<sup>183</sup> 6.3.33 elderly siblings

<sup>184</sup> Patrick West, 'Reproducing Naturally Occurring Stories: Vignettes in Survey Research' (May 1982) MRC Social & Public Health Sciences Unit Working, Paper (May 1982) 5

<sup>185</sup> M MacLean and M Jeffreys, 'Disability and Deprivation' in *Poverty, Inequality and Class Structure* (Cambridge University Press 1974) 165 in Patrick West, 'Reproducing Naturally Occurring Stories: Vignettes in Survey Research' (May 1982) MRC Social & Public Health Sciences Unit Working, Paper 4

<sup>186</sup> 4.4.2

provide training based on the results of the research. I deduced this because one member of that group kept suggesting the drafting of the vignettes was unrealistic:

[Y]ou're sitting here trying to work out? You wouldn't have got to that stage. You just wouldn't have got to the 20<sup>th</sup> call?? It's difficult to analyse a case presented to you like that.

The unrealistic drafting nevertheless generated great discussion which clarified the speed of response and how risk was constructed. The wording of the vignettes was therefore not altered, and this was justified by the amount of discussion with similar responses in all organisations i.e. that they would have responded more quickly in that case (Lorraine Jones) and not as quickly in other cases (e.g. the letter to Tom Mayhew) the lack of amendment was justified.

As the focus groups each lasted on average two hours, any further information leading to more discussion would have been impracticable as I was already taking time out of their busy working days. In any event, the deliberate vagueness in the drafting of the vignettes was effective. Another problem was the misinterpretation of the Maria Thomson vignette whose ASB (the sounds of her shouting) were misinterpreted as domestic violence. However, the data can be analysed to reveal how officers constructed risk and relatedly ASB.

### *Quality Control*

The majority of quality control issues occurred in the pilot group: Org.1 and lessons learned there determined how certain stages of vignettes were introduced (e.g. the vignette may say 20 calls but tell me how many there would have been before there was a response) and how probes were used in subsequent focus groups (to see if domestic violence was a common perception of Maria's case).

Focus groups involved on average six participants but did not have the same composition in terms of roles within the organisation. Org.1 was composed of three assistant managers, two senior officers, one ASB officer and two support workers.

Org.2 was composed of four ASB officers as generic officers did not handle ASB work, save at the earliest stages; Org.3 was composed of three generic officers (as this organisation had no specialist ASB officers) and one support worker; Org.4 was composed of one support worker and five generic officers. Org.4 had specialist ASB officers, but they were all involved in court work on the day of the focus group. Thus, Org.1 was the only one with hierarchical differences who may have worked 'within the chain of command'<sup>187</sup> which Krueger considers compromises the quality of focus groups, but they were effectively the pilot organisation.<sup>188</sup> The impact of the seemingly flawed composition of focus groups in terms of comparative seniority of staff within each group was minimised by the fact that all participants had experience as front-line officials.

Three of the organisations had in-house support workers who took part in the groups. Support workers provide help to occupants to enable them to manage daily living and maintain tenancies.<sup>189</sup> The impact of the seemingly flawed composition of focus groups in terms of support workers contributing to discussions, there being none at Org.2 was reduced by the minimal contribution such participants made to discussions.

As Bryman notes<sup>190</sup> focus groups are difficult to organise and staff availability on the day determined group membership militating against Krueger's concerns that convenience sampling of participants by managers<sup>191</sup> who may select individuals 'outside the mainstream'<sup>192</sup> to present a certain image of the organisation, essentially a desirability bias.<sup>193</sup> However, Org.2's group was postponed due to all four potential participants taking leave or being off sick on the day originally scheduled. Fortunately, the manager could not compromise quality by exercising any social desirability bias via convenience sampling because the four participants were the only officers who could possibly have taken part. At Org.1 and Org.4, several potential participants were unable to attend at the scheduled time as they were delayed working out on their patch or in court. However, substitutes were called in at the last minute ensuring the

---

<sup>187</sup> Richard A Krueger, *Moderating Focus Groups* (Sage 1998) 44

<sup>188</sup> 4.5.1

<sup>189</sup> 1.2.3.5

<sup>190</sup> Alan Bryman, *Social Research Methods* (4th edn, OUP 2012) 517

<sup>191</sup> 4.4.2

<sup>192</sup> Richard A Krueger, 'Quality Control in Focus Group Research' in David L Morgan (ed), *Successful Focus Groups: Advancing the State of the Art* (Sage 1993) 72; 4.5.4.2

<sup>193</sup> 4.3.1.2



manager had minimal choice over participants. In Org.3, several attempts were made to organise the group that was ultimately composed of the only staff available to attend. Again, this countered Krueger's argument that convenience sampling may permit the presentation of a certain image.<sup>194</sup>

One practical problem that affected the dynamic of two of the groups was staff leaving before the discussions were concluded. In Org.1, three participants, all assistant managers, left before discussing the final case, Tom Mayhew and two other members of staff left during these discussions (although one of those remained almost until the end). This left four behind, two of whom were support workers who then contributed more to the discussion. Their lack of previous contribution may therefore have been affected by the 'chain of command'.<sup>195</sup> Fortunately, this was the pilot group and this problem did not recur.

Despite me asking them not to, members of the groups typically<sup>196</sup> spoke at the same time. More problematically, in Org.1, one member tended to dominate group discussion. I did, as Krueger recommends,<sup>197</sup> remind participants that all views were welcomed, and tried to gain the views of other participants. To take control over timing and to prevent the discussion from being dominated by one member or wandering off on a tangent or rambling, I read out each stage of each vignette.

---

<sup>194</sup> Richard A Krueger, 'Quality Control in Focus Group Research' in David L Morgan (ed), *Successful Focus Groups: Advancing the State of the Art* (Sage 1993); 4.5.4.2

<sup>195</sup> Richard A Krueger, 'Quality Control in Focus Group Research' in David L Morgan (ed), *Successful Focus Groups: Advancing the State of the Art* (Sage 1993); 4.5.4.2

<sup>196</sup> Alan Bryman, *Social Research Methods* (4th edn, OUP 2012) 517

<sup>197</sup> Richard A Krueger, *Moderating Focus Groups* (Sage 1998) 59

## **4.6 Reflexivity**

In this section, I aim to explain my reflexivity i.e. my awareness of how I influenced the study.<sup>198</sup> Its need for explication derives from social constructionism and the reality this seeks to reveal.<sup>199</sup> To be reflexive I must explain my role in the research process and how my views were challenged in the research process. This forefronts the relevance of my construction of reality and influence on the way subjects construct it also, although, as the next section acknowledges, discourse created in the dynamic between interviewer and interviewee is not analysed.

My 'insider'<sup>200</sup> experience of practice,<sup>201</sup> working for both "sides" (i.e. for both firms who acted for occupants and those who act for landlords) influenced the drafting of the instruments especially the vignettes (although as already explained,<sup>202</sup> these were based on instruments used by my principal supervisor). Although the research approach was not autoethnographic,<sup>203</sup> I explained to some of the officers I met or interviewed that I had worked on real cases like the vignettes, especially Lorraine Jones. I explained this to present my 'authentic self',<sup>204</sup> nurture the relationship with participants<sup>205</sup> and demonstrate some sympathy with the officers' difficulties in their jobs especially ASB and gaining evidence of their occupants' medical conditions. To achieve some rapport (and avoid hostility) I explained to participants that I had worked for both "sides". While this seemed to work with most participants and facilitated the growth of trust, it failed to persuade the difficult ASB officer at Org.1 into being interviewed by me.<sup>206</sup> The lack of trust<sup>207</sup> would mean responses would not be given freely giving less than optimum data for analysis. As the researcher has to be adaptable,<sup>208</sup> I found another willing officer who had been involved in the same case and interviewed them instead.

---

<sup>198</sup> Robert K Yin, *Qualitative Research from Start to Finish* (The Guildford Press 2011) 11

<sup>199</sup> Rachael Dobson, 'Insiderness' 'Involvement' and Emotions: Impacts for Methods, 'Knowledge' and Social Research' (2009) 3 *People, Place & Policy* 183, 188

<sup>200</sup> Rachael Dobson, 'Insiderness' 'Involvement' and Emotions: Impacts for Methods, 'Knowledge' and Social Research' (2009) 3 *People, Place & Policy* 183

<sup>201</sup> Introductory Chapter, 4.2.1 and 4.3

<sup>202</sup> 4.5

<sup>203</sup> Marilyn Lichtman, *Qualitative Research for the Social Sciences* (Sage 2013) 142-144

<sup>204</sup> Robert K Yin, *Qualitative Research from Start to Finish* (The Guildford Press 2011) 119

<sup>205</sup> Marilyn Lichtman, *Qualitative Research for the Social Sciences* (Sage 2013) 33

<sup>206</sup> 4.4.2

<sup>207</sup> 4.3.1.2

<sup>208</sup> Satnam Choongh, 'Doing Ethnographic Research: Lessons from a Case Study' in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press 2007) 84

I was conscious that my greater sympathy towards tenants, in part due to my longer experience representing them and in opposition to landlords may affect my design and conduct of the research. Keen to avoid imposing my 'assumptions and values uncritically on the research',<sup>209</sup> I attempted *critical subjectivity*<sup>210</sup> i.e. not suppressing this experience of representing tenants but trying not to let it dominate my experience of the fieldwork nor the analysis. It was nevertheless used constructively as 'part of the enquiry process'<sup>211</sup> and analysis. Firstly, the decision to open interviews with officers asking about their recollections of the case proved so effective and allowed them to convey their version of reality which would have been impeded had I interrogated them on my understanding of the case file. Secondly, as I recall telling my supervisors, I found myself gaining sympathy with officers and the difficulties of their jobs especially the clash of lifestyles and hoarding cases that seemed to endure with no easy means of resolution. Finally, and relatedly, I needed to be aware of the past experience and not let it dominate my analysis of the data. Some officers indeed reminded me of those I had met as their opponent in court, particularly HO15 and HO1 (who had even described themselves as cynical).<sup>212</sup> Given that they dominated Org.1's focus group this could have skewed the findings. However, I found many more officers sympathetic and empathic with their clients.<sup>213</sup> The analysis of the findings therefore gives recognition to the difficulties and pressures of officers' work which exemplify them as street level bureaucrats, and how this affects their understanding of risk and consequent practice. The acknowledgement is more important still because as will be seen in the chapters which follow it shapes the moral filter.

The reliance in the thesis on the theoretical frameworks, especially disability and housing professionalism reveal two further issues which need to be addressed. My practice as a solicitor led me to a concern that there may be some discriminatory attitudes in ASB case management<sup>214</sup> and to believe that the provision of stable accommodation is an important step in removing barriers to disability equality. This is

---

<sup>209</sup> Joseph A Maxwell, 'Designing a Qualitative Study' in Leonard Bickman and Debra J Rog (eds), *The Sage Handbook of Applied Social Research Methods* (2<sup>nd</sup> edn Sage 2008) 225

<sup>210</sup> Peter Reason (ed), *Human Inquiry in Action: Developments in New Paradigm Research* (Sage 1988) 12

<sup>211</sup> Peter Reason (ed), *Human Inquiry in Action: Developments in New Paradigm Research* (Sage 1988) 12

<sup>212</sup> 5.4.5.1

<sup>213</sup> HO14 in particular but also HO13, 16, 20

<sup>214</sup> Introductory Chapter

a social model construction. Examining policy and its operation as to whether the goals of the social model have been achieved or whether the focus of the medical model (which seeks to cure and care for individuals) dominates invites an assessment of housing practitioners. In analysing the discourse of policy and practice via the models, it assesses the effectiveness of policy and calls for reform.<sup>215</sup> This justifies the favour of the social model. Additionally, the trustworthiness strategies<sup>216</sup> and my reflexivity in approaching the research<sup>217</sup> further mitigates against the effects my individual views on the research.

A criticism of reflexivity is that like social constructionism, it results in infinite circles of realities. A way to counter this is the rigour of thematic analysis<sup>218</sup> and this is considered next

---

<sup>215</sup> Martyn Hammersley, 'What's Wrong with Ethnography?' (1990) 24 *Sociology* 597

<sup>216</sup> 4.3

<sup>217</sup> 4.6

<sup>218</sup> Rachael Dobson, 'Insiderness' 'Involvement' and Emotions: Impacts for Methods, 'Knowledge' and Social Research' (2009) 3 *People, Place & Policy* 183, 189

## **4.7 Data Analysis**

The complete body of data for analysis comprised:

- Original digital recordings of one-to-one interviews with managers and officers and focus groups.
- Verbatim transcripts of these recordings aimed to produce an accurate data set.
- Notes from case file reviews (used to clarify points in the transcripts but not analysed any further)

The data sets for analysis comprised printed transcripts of the interviews and focus groups. Units of data consisted passages of text.

As a preliminary step, data was organised into a table including details of dates and lengths of interviews, codes for the recordings and interviews (and typist) and indicator for individual occupants' files. This formed the basis of the Moral Filter Table 5.3.

Thematic analysis was employed to draw generalisations from the data sets. Such analysis allows the researcher to combine the systematic examination 'of the frequency of codes with the analysis of their meaning in context enabling the subtlety and complexity of a truly qualitative evaluation'.<sup>219</sup> Thematic analysis is theoretically flexible<sup>220</sup> but has scope for taking a constructionist stance.<sup>221</sup> This was appropriate for the present study as the analysis sought to interpret the language interviewees used to express their experiences, cognitions,<sup>222</sup> 'perceptions and values'<sup>223</sup> and attitudes towards the perpetrators of ASB and to understand how ASB, risk and

---

<sup>219</sup> Helene Joffe and Lucy Yardley, 'Content and Thematic Analysis' (2004) 56 *Research Methods for Clinical and Health Psychology* 68 in Joanne Bretherton, Caroline Hunter and Sarah Johnsen, "You Can Judge them on how they Look...": Homelessness Officers, Medical Evidence and Decision-Making in England' (2013) 7 *European Journal of Homelessness* 70, 77

<sup>220</sup> Veronica Braun and Victoria Clarke, 'Using Thematic Analysis in Psychology' (2006) 3 *Qualitative Research in Psychology* 77

<sup>221</sup> Veronica Braun and Victoria Clarke, 'Using Thematic Analysis in Psychology' (2006) 3 *Qualitative Research in Psychology* 77

<sup>222</sup> J Schilling, 'On the Pragmatics of Qualitative Assessment' (2006) 22 *European Journal of Psychological Assessment* 28, 30

<sup>223</sup> Nigel Newton, 'The Use of Semi-Structured Interviews in Qualitative Research: Strengths and Weaknesses' *Exploring Qualitative Methods* (2010) from [http://www.academia.edu/1561689/The\\_use\\_of\\_semistructured\\_interviews\\_in\\_qualitative\\_research\\_strengths\\_and\\_weaknesses](http://www.academia.edu/1561689/The_use_of_semistructured_interviews_in_qualitative_research_strengths_and_weaknesses) accessed 15 November 2013

disability were constructed. Similar to judicial discourse, analysis revealed a medical model understanding of capacity and disability.<sup>224</sup>

The discourse analysed was that of the interviewees or focus group participants as individuals and the act of construction took place in the interview<sup>225</sup> or focus group. While interactions between officers in focus groups may reveal they share social constructions, the discourse created in the dynamic between participants or interviewer and interviewee was not analysed. As data sets did not contain naturally occurring speech,<sup>226</sup> no notes were taken describing style and tone of speaker.<sup>227</sup>

An inductive or free approach to coding the data was attempted i.e. avoiding fitting it into a pre-existing coding frame derived from the literature or my analytic preconceptions<sup>228</sup> (although both are evident in the research questions and hypotheses).<sup>229</sup> Themes are 'patterns in the information that at minimum describe and organise the possible observations and at maximum interpret aspects of the phenomenon.'<sup>230</sup> Grounded theory conventions<sup>231</sup> were used to inductively draw codes from the data which drove their thematic arrangement. While the data was thus analysed latently, it is accepted that no theme can be entirely inductively data driven since knowledge from the literature<sup>232</sup> and predispositions<sup>233</sup> (theoretical commitments) inevitably affects the identification of themes.<sup>234</sup> Additionally, policy influenced the subthemes of identity, morality and the meaning of ASB. Thus, data was not coded in a vacuum.<sup>235</sup>

---

<sup>224</sup> *Re AA* [2012] EWHC 4378 (COP) (In Private) 11 (Mostyn J); 3.1.2.2

<sup>225</sup> Craig M Gurney, 'Lowering the Drawbridge: A Case Study of Analogy and Metaphor in the Social Construction of Home-Ownership' (1999) 36 *Urban Studies* 1705 in Annette Hastings, 'Stigma and Social Housing Estates: Beyond Pathological Explanations' (2004) 19 *Journal of Housing and the Built Environment* 233

<sup>226</sup> Alan Bryman, *Social Research Methods* (4th edn, OUP 2012) 526

<sup>227</sup> Alan Bryman, *Social Research Methods* (4th edn, OUP 2012) 527

<sup>228</sup> Veronica Braun and Victoria Clarke, 'Using Thematic Analysis in Psychology' (2006) 3 *Qualitative Research in Psychology* 77, 83

<sup>229</sup> 4.2.1

<sup>230</sup> Richard E Boyatzis, *Transforming Qualitative Information: Thematic Analysis and Code Development* (Sage 1998) 4

<sup>231</sup> Veronica Braun and Victoria Clarke, 'Using Thematic Analysis in Psychology' (2006) 3 *Qualitative Research in Psychology* 77

<sup>232</sup> cf Veronica Braun and Victoria Clarke, 'Using Thematic Analysis in Psychology' (2006) 3 *Qualitative Research in Psychology* 77, 90

<sup>233</sup> Introductory Chapter, 4.2.1, 4.3, 4.5.1 and 4.6

<sup>234</sup> Helene Joffe and Lucy Yardley, 'Content and Thematic Analysis' (2004) 56 *Research Methods for Clinical and Health Psychology* 68 in J Bretherton, C Hunter and S Johnsen, "'You can judge them on how they look...': Homelessness Officers, Medical Evidence and Decision-Making in England' (2013) 7 *European Journal of Homelessness* 70

<sup>235</sup> Veronica Braun and Victoria Clarke, 'Using Thematic Analysis in Psychology' (2006) 3 *Qualitative Research in Psychology* 77, 90

Braun and Clarke prefer the idea that themes are given voice to rather than emerging from the data<sup>236</sup> as this would deny that questions are determined *a priori* relating to the aims of the research. The analysis endeavoured to avoid the pitfall of using the data collection or research questions as the themes that are reported - this shows that no analytic work<sup>237</sup> has taken place. However, while direct questions were asked about risk assessment, as noted<sup>238</sup> it was evident that risk was also constructed by officers.<sup>239</sup>

Braun and Clarke's 6 steps were followed to analyse the data:

### Step one

As most transcripts were produced by a third party I needed to fully familiarise myself with the data. I read each transcript (listening to the original audio recordings for accuracy where necessary) and freely coded them. Thus, passages of text (units of data) were highlighted with corresponding handwritten noted ideas for coding (i.e. about what is in the data and what is interesting about them) to be revisited at subsequent phases.

These initial units of data ranged from phrases including key one or two-word mnemonics<sup>240</sup> to larger passages in either case retaining sufficient surrounding text to retain context<sup>241</sup> and avoid fragmentation that may cause loss of interviewee's meaning.<sup>242</sup>

---

<sup>236</sup> Veronica Braun and Victoria Clarke, 'Using Thematic Analysis in Psychology' (2006) 3 *Qualitative Research in Psychology* 77

<sup>237</sup> Veronica Braun and Victoria Clarke, 'Using Thematic Analysis in Psychology' (2006) 3 *Qualitative Research in Psychology* 77

<sup>238</sup> 4.5.3.2; 4.5.4.2

<sup>239</sup> 6.2.3 - HO29

<sup>240</sup> Patricia Ewick and Susan S Silbey, *The Common Place of Law: Stories from Everyday Life* (University of Chicago Press 1998) 255

<sup>241</sup> Veronica Braun and Victoria Clarke, 'Using Thematic Analysis in Psychology' (2006) 3 *Qualitative Research in Psychology* 77, 98

<sup>242</sup> W Holloway and T Jefferson, *Doing Qualitative Research Differently: Free Association, Narrative and the Interview Method* (Sage 2000) in Helene Joffe and Lucy Yardley, 'Content and Thematic Analysis' (2004) 56 *Research Methods for Clinical and Health Psychology* 68 in Joanne Bretherton, Caroline Hunter and Sarah Johnsen, 'You Can Judge them on how they Look...': Homelessness Practitioners, Medical Evidence and Decision-Making in England' (2013) 7 *European Journal of Homelessness* 70

Step two

Step one was repeated digitally in Microsoft Word: the data and notes were thus re-read with an open-minded approach to generate initial codes identifying (some) manifest and (mainly) latent<sup>243</sup> features of the data. Pertinent extracts of data were highlighted, and codes were noted on digital copies of the transcripts using “comments” (review tab) in Microsoft Word. As these efforts<sup>244</sup> became more distinct, they were given an initial coding given in Table 4.2. This is a crude analysis of not only the evidence that presented itself but of language suggesting how officers “assessed” or constructed perpetrators:

Table 4.2 Factors Indicating Assessment of Perpetrators (“FIAPs” or “factors”).

- |   |   |
|---|---|
| 1. Family (pop psychology – medical model)  | 15. Past litigation (alcohol dependent woman org.1)                               |
| 2. (Unusual) wealth (welfare conditionality)  | 16. Categories of disability /known diagnosis                                     |
| 3. Rejection by agencies  | 17. Own research (e.g. googling the meds)   |
| 4. Hygiene good / poor (Octavia Hill – traditional)   | 18. Other pop psych e.g. anti-authoritarian; obsess                               |
| 5. Intoxicant misuse (welfare conditionality)   | 19. (Lack of) Intention   |
| 6. Dress / lack of (pop psychology - med)   | 20. Just the way they are e.g. loud but not nasty; nasty                          |
| 7. Speech (regional accent / none - “posh”) (welfare conditionality)                              | 21. Knowledge of medication   |
| 8. Intelligence and education / educational aspirations   | 22. Talking to self; howling; hearing voices; Delusional; shouting(?); suspicious |
| 9. Church / religious belief  | 23. Unpredictable / aggressive (risk)   |
| 10. Age   | 24. Physical  |
| 11. Rejection of support  | 25. Reclusive/lonely/solitary/refused to let HO in                                |
| 12. Truth / honesty; integrity; validity or exaggeration of condition; manipulation of the system | 26. Learning disability   |
| 13. Name calling accusations  | 27. Taking medication   |
| 14. Sexual abuse / deviance (gender)  | 28. Intellectual / coping / capacity  |
|   | 29. Décor   |

Additionally, once repetition of certain words was noticed (risk, capacity, issues, problems, obviously (which suggests the use of “common-sense”))<sup>245</sup> they were searched for using control F and underlined to highlight their frequency.

- A) As many potential themes/patterns as possible were coded for
- B) Individual extracts were given as many codes as they fitted into

<sup>243</sup> Richard E Boyatzis, *Transforming Qualitative Information: Thematic Analysis and Code Development* (Sage 1998) in Veronica Braun and Victoria Clarke, ‘Using Thematic Analysis in Psychology’ (2006) 3 *Qualitative Research in Psychology* 77

<sup>244</sup> 5.3

<sup>245</sup> Stuart Hall and Alan O’Shea, ‘Common-sense Neoliberalism’ (2013) 55 *Soundings* 9, 10; 1.2.2



- C) Visual representations<sup>246</sup> i.e. charts, mind maps and tables (including tables 4.2 - 4.5) were drafted illustrating the initial set of themes and data patterns and links between them
- D) Accounts which departed from the dominant themes were retained

Trustworthiness was maintained by use of words suggestive of alternative codes<sup>247</sup> synonyms and antonyms, similes and metaphors and attributes which were highlighted. This led to the creation of new codes and removal or renaming or clarification of others;<sup>248</sup> some codes were collapsed into others or expanded into several.<sup>249</sup> Much of this took place in preparation for delivery of conference papers on the initial findings.

Initially a six-stage approach to case-management was identified as common across all four organisations. This approach emerged from the analysis of the data in the transcriptions of interviews and focus groups and is explained in 5.1 with a detailed discussion of stage 3 in 6.1. It is *de facto* policy as practice i.e. practice *becoming* policy and as such mostly unwritten.

---

<sup>246</sup> Matthew B Miles and A Michael Huberman, *Qualitative Analysis: An Expanded Sourcebook* (Sage 1994)

<sup>247</sup> J Saldana, P Leavy and N Beretvas, *Fundamentals of Qualitative Research* (OUP 2011) in Marilyn Lichtman, *Qualitative Research for the Social Sciences* (Sage 2013) 319

<sup>248</sup> Marilyn Lichtman, *Qualitative Research for the Social Sciences* (Sage 2013) 330

<sup>249</sup> Patricia Ewick and Susan S Silbey, *The Common Place of Law: Stories from Everyday Life* (University of Chicago Press 1998) 254

<b>Table 4.3</b> Six-Stage Approach to Case-management	
<b>Stage 1</b>	<b>Investigation</b> which is usual in housing management e.g. allocation <sup>250</sup> being informed by housing management norms and organisational policy. Following complaints of ASB, officers would investigate a case regardless of their speculations as to the perpetrator's impairment; failure to act having accountability implications.
<b>Stage 2</b>	Contemporaneous with stage 1) the officer's <b>assessment of the perpetrator</b> : i) <u>Further investigation</u> to confirm their suspicions that the perpetrator's behaviour is caused by a mental impairment. Investigation may include checking the organisation's records for any disclosures of disability; seeking disclosure from the perpetrator or their family, other agencies or conducting their own research. In the absence of any disclosure, officers looked for other clues. Relevant extracts of data evidencing clues and disclosure were coded as per Table 4.2. ii) <u>Truth and honesty</u> . This relates to the truth of the allegations of ASB and also of disclosures of impairments. Such weighing of "evidence" may lead to scepticism about the perpetrator, complainant / victim or their representatives and their manipulation of the system.
<b>Stage 3</b>	<u>Risk assessment</u> . The risks of ASB evident from the data analysis were multifarious, covert and overt and included <i>inter alia</i> : A <u>    </u> The present risk posed by the ASB <i>per se</i> . B <u>    </u> <u>Future risk assessment</u> – the risk of ASB <i>continuing</i> .
<b>Stage 4</b>	<u>Support offered</u> routinely in all cases regardless of suspicions.
<b>Stage 5</b>	Use of <u>possible sanctions</u>
<b>Stage 6</b>	The alternative to sanctions was a <u>more conciliatory approach</u> .

Aside from this policy as practice approach, the overriding consideration emerging as a theme in this six-stage process was the search for evidence and simultaneous assessment of perpetrators as against that evidence. While the search for evidence was continuous throughout the life of a case, stages 1 and 2 relate most directly to this and are considered in Chapter 5. This observation resonated with the literature: In Chapter 1 the relationship between evidence and knowledge was noted as was the argument that knowledge may be theorised as risk.<sup>251</sup> Stages 3-6 relate most directly to risk although it is a wider construction than just assessment becoming a

<sup>250</sup> David Cowan, Christina Pantazis and Rose Gilroy, 'Risking Housing Need' (1999) 26 J L & Soc'y 403

<sup>251</sup> 1.3.3

theme dealt with in Chapter 6. A perpetrator’s disclosure of their disability therefore seems key, and its frequency in cases was noted. Barriers to disclosure have been discussed<sup>252</sup> and further reading of the data suggested appeared that even when made, officers may be sceptical about them. Truth and honesty of disclosures were combined in FIAP12 with “manipulation of the system.”

While the observation of a six-stage approach was considered significant, more important was that case-management was reflective<sup>253</sup> in the assessment of perpetrators (evidence and the construction of objects of ASB control i.e. the perpetrators) and the use of interventions (affecting the outcomes of ASB control).

Factors influencing officers were identified and these undertook the most significant change. One factor included the types of ASB in the cases:

Type of ASB	Perpetrators
To staff	Arthur; Stark
Aggressive / excessive (counter) complaining/ reprisal; Clash of lifestyle	Marchmains; Eric; Dale and Emma; Cary and Dee
Domestic Violence	Ben and Christine
(Dismissive) live and let live / not ASB	Pye; Ben and Christine
Noise	Ivan; Pye; Larry, Annabelle; Ben and Christine; Zac; Walter, Marvin; Percy; Stark; Ben and Christine
Stereotypical; Aggressive ASB	Stark; Walter; Wyatt; Ivan
Racial	Beatrice (victim); Larry
Hoarders / condition of property (including damage)	Ken; Harry; Jeremy; Alicia; Noelle; Beatrice; Cary; Sandra; Zarine; Arthur
Criminal (cannabis farm; drugs)	Wyatts; Walter; Zarine; Sandra
Pets	Walter; Alicia; Noelle; Dale
Sexual	Cary; Harry

As the typology was not a construction of the officers, rather my own they were not considered further for analysis.<sup>254</sup>

<sup>252</sup> 3.1.1

<sup>253</sup> 5.1

<sup>254</sup> cf Tables 4.1 and 4.2

Many factors (codes) related to officers' emotional responses and included within the initial subtheme of professionalism.

### Step 3

Codes (accompanied by brief descriptive notes) and data extracts were collated together and further organised by amending or creating further visual representations. These were employed to show the relationship between codes and initially identified (potential) themes and between different levels of themes e.g. 'main overarching theme and sub-themes within them'.<sup>255</sup> The validity of codes was tested by re-reading for disconfirming evidence. Codes were clustered into categories and some fused together.

For example, the following FIAPs were initially coded separately:

- Other pop psych e.g. anti-authoritarian; obsessive
- Talking to self; howling; hearing voices; Delusional; shouting; suspicious
- Unpredictable / aggressive (risk)

These were all merged within "other" as all behaviour suggested unpredictability.

Elitism as a factor affecting officers' assessments *in general* became merged with FIAPs including: dress, speech, intelligence and education or educational aspirations church / religious belief although the final one was also coded as suggesting mental impairment.

Own research (e.g. googling the meds) was initially coded as a FIAP but eventually presented as an example of officers need to find robust medical evidence in case-management.

"Truth and honesty of disclosures" combined with "manipulation of the system" in FIAP12 but later fell within the subtheme of scepticism.

---

<sup>255</sup> Veronica Braun and Victoria Clarke, 'Using Thematic Analysis in Psychology' (2006) 3 Qualitative Research in Psychology 77, 89-90

Table 4.5 initial grouping of Factors Indicating Assessment of Perpetrators (FIAPs or “factors”)	
Medical	Non medical (eventually moral)
<p><b>1. Making Sense of Behaviour (eventually Folk Psychiatry)</b>                      e.g. pop psychology (eventually folk psychiatry); Other  <b>Own research</b> (e.g. Annabelle, Org 1 googling the meds)</p>	<p><b>2. Responsibilisation</b>                      Rejection by agencies (no fault)                      Hygiene good / poor (Octavia Hill – trad) links to conditionality and risk                      Intoxicant misuse                      Rejection of support (fault)</p>
<p><b>3. (Clearly) Medical</b>                      e.g. intoxicant misuse                      Disclosed diagnosis or                      Disclosed medication</p>	<p><b>4. Elitism; socio – economic; eventually social-class based</b>                      e.g. speech, dress, education</p>

In the medical groups (1 and 3), officers attributed behaviour to an obvious cause. Disclosed diagnosis and disclosed medication are included within “(clearly) medical” because they derive from the initial open coding and because they fit squarely within the medical model of disability.

The influences on how officers deduced the FIAPs were noted as these related to the literature on professionalism which was an initial subtheme:

- a) Training on impairments and behaviours
- b) Observation (medication; mobility)
- c) “Common-sense”, professional intuition and gut instinct
- d) Folk Psychiatry or stereotyping; of observations

Codes that related to a perpetrator’s intention or lack thereof or being blamed or held responsible (or not) for their behaviour were grouped together. So too were codes that perpetrators were compliant or non-compliant with support offered; that they were welfare dependent or manipulated the system or were aspirational or other elitist constructions.

The FIAPs were eventually grouped as having a medical or moral basis and thus falling within these subthemes. Thus, 1 and 3 were merged as were 2 and 4. Some codes changed along the way: intoxicant misuse was originally categorised as falling within both medical and moral FIAPs but eventually within the latter.

Other codes did not belong anywhere and fell into a miscellaneous theme e.g. FIAP 22 which were eventually considered together and related to risk.<sup>256</sup>

Step 4: The integrity of the candidate themes was reviewed with some not proving coherent and others collapsing into each other. For example, codes suggesting officers' emotional responses had initially found their way into the early subtheme of professionalism as these responses relate to how officers construct themselves.

Officers' feelings of fondness, sympathy and empathy<sup>257</sup> for perpetrators or victims, seeing either as vulnerable<sup>258</sup> resonated with literature,<sup>259</sup> suggesting some housing professionals regard themselves as caring whereas others consider themselves to conduct their work with objectivity.<sup>260</sup> Feelings of blame (or lack thereof) and frustrations with perpetrators or medico-welfare professionals and anxiety and guilt about their actions also resonated with literature. While frustration with other professionals remained in this subtheme, feelings of being threatened,<sup>261</sup> anxious<sup>262</sup> uncomfortable, or embarrassed<sup>263</sup> were eventually categorised within the theme of risk. While the subtheme of professionalism remained, some emotional aspects also fell within the separate medical and moral subthemes as themes and subthemes became refined and more clearly defined.

Step five: the themes were defined and further refined in preparation for presentation of analysis.

---

<sup>256</sup> 6.1.3

<sup>257</sup> Contrast with objectivity below step 4

<sup>258</sup> 5.3.1 HO10 and Ben

<sup>259</sup> Rionach Casey, 'On Becoming a Social Housing Manager: Work Identities in an 'Invisible' Occupation' (2008) 23 Housing Studies 761; 1.2.4; 5.2

<sup>260</sup> 5.2, HO15 and the swinging brick

<sup>261</sup> 6.1.3 – HO14 and HO16 on Harry

<sup>262</sup> 6.4.2.4 – HO16 on Harry

<sup>263</sup> 6.1.3 HO29 on Cary

The refining process was commenced by reviewing the entire dataset to ensure all data had been coded within the themes just in case any had been missed at an earlier reading. The data extracts gathered per theme were organised into logical and essentially homogenous groupings. The extracts were re-read to assess whether they formed a coherent pattern within the theme or whether and whether some data extracts needed to be placed with other themes or discarded along with the themes.<sup>264</sup>

Alternative themes and ways of organising and analysing the data were considered for the sake of trustworthiness.<sup>265</sup> The visual representations were further developed so that data within themes meaningfully cohered together and clear distinctions between themes were identified. They were then checked to ensure they reflected the dataset<sup>266</sup> and refinements did not add anything substantial.

Themes and subthemes were identified along and the essence of each theme (i.e. what is interesting about them why) was defined. A name was given to each theme (for the final analysis; to replace any name already given) along with a short description of the scope and content of each theme. This process demonstrated the 'hierarchy of meaning within the data' related to the broader overall narrative of the thesis.<sup>267</sup>

Two main themes emerged:

1. Knowledge (evidence)

The search for evidence reveals how perpetrators are constructed via the medical lens and moral filter. Thus, medical and moral are subthemes. Within the moral are further categories:

- Scepticism – this reveals the moral filter – do the officers believe the “evidence” including disclosures of disability?

---

<sup>264</sup> Veronica Braun and Victoria Clarke, 'Using Thematic Analysis in Psychology' (2006) 3 *Qualitative Research in Psychology* 77

<sup>265</sup> 4.3

<sup>266</sup> Veronica Braun and Victoria Clarke, 'Using Thematic Analysis in Psychology' (2006) 3 *Qualitative Research in Psychology* 77

<sup>267</sup> Veronica Braun and Victoria Clarke, 'Using Thematic Analysis in Psychology' (2006) 3 *Qualitative Research in Psychology* 77, 92

- Conditionality - This essential part of responsabilisation became a category within morality. This was relevant to both the construction of evidence (FIAPs with welfare orientation)<sup>268</sup> and case-management.

## 2. Risk

- Wide range of situations and behaviour identified and assessed as risky, reflecting responsibilities on officers
- Constructions of the perpetrator affect the progress of case-management including choice of solution (intervention). Both are at once assessed in terms of risk; the assessment of appropriate solution requires an assessment of risk (what will work).

The two themes are related to and by the subtheme of housing professionalism.

### Step Six: Producing the Report (thesis)

The themes identified in stage 5 were the basis of division of content for the analysis Chapters 5 and 6. This analysis sheds new light on substantive processes: in managing ASB cases, housing officers construct both risks associated with this process and relevant perpetrators in a certain way and these constructions affect how they operationalise policy, particularly the intervention(s) used and speed with which they progress to litigation. These findings may be generalised to officers working for other social landlords managing ASB cases. It may be concluded that the productiveness of the report<sup>269</sup> lies in its potential to illuminate the practices of those social landlords.

---

<sup>268</sup> Table 5.2

<sup>269</sup> Annette Hastings, 'Stigma and Social Housing Estates: Beyond Pathological Explanations' (2004)19 Journal of Housing and the Built Environment 233



## **Conclusion**

The empirical part of this thesis aims to discover how social landlords manage ASB cases where occupant perpetrators have known or suspected mental impairments. The research questions focus on housing officers' understandings of disability, risk and their professional role and their effect on case-management. Uncovering such understanding relies on a social constructionist epistemology and qualitative methodology. This interpretive approach affected the choice of methods: analysis of local policy and case files followed by interviews and vignette led focus groups. As the study is small scale, a three stage, multi-method approach was taken. Detailed data was produced which was analysed to reveal two main themes: evidence and risk. Officers' understandings of both were wider than anticipated: evidence of disability was understood in medical and moral terms; risks were understood as posed to individuals including victims, perpetrators and officers, but also of the whole ASB management process of litigation and to the reputation of the organisation. While the methodology may be criticised in terms of transferability given the small sample size, the richness of data generated, and consistency of themes revealed counter this. The study may also be criticised for the duration of its production and the changes in law that have occurred since the empirical data was gathered.<sup>270</sup> However, far more important are these findings which illustrate how ASB cases are managed at this conflicted policy intersection.

---

<sup>270</sup> DDA 1995 then EA 2010 were in force throughout the period the sampled case files dated from. ASBCPA 2014 came into force after the gathering of data was completed.