

# **ANTISOCIAL BEHAVIOUR ETC. (SCOTLAND) ACT 2004**

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## **EXPLANATORY NOTES**

### **INTRODUCTION**

1. These Explanatory Notes have been prepared by the Scottish Executive in order to assist the reader of the Act. They do not form part of the Act and have not been endorsed by the Parliament.
2. The Notes should be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

### **THE ACT**

3. This Act introduces a number of measures and changes to tackle antisocial behaviour. It contains a range of provisions in the areas of justice, the environment, housing and child welfare, all of which are linked to tackling antisocial behaviour.
4. The Act is in 13 Parts.
5. These are:

#### **Part 1 – Antisocial behaviour strategies**

Part 1 makes provision for antisocial behaviour strategies, which must be prepared jointly by local authorities and chief constables. The purpose of the strategy is to prevent and deal with antisocial behaviour in the local authority area. Part 1 sets out requirements on content, consultation, publication, monitoring, review and reporting and gives Scottish Ministers powers to secure the participation of registered social landlords where that is considered appropriate.

#### **Part 2 – Antisocial behaviour orders**

Part 2 replaces existing provisions on antisocial behaviour orders in the Crime and Disorder Act 1998. Antisocial behaviour orders are preventative orders to protect people affected by antisocial behaviour from further acts or conduct that would cause them alarm or distress. Breach of an order is a criminal offence. Part 2 extends the orders to 12-15 year olds. It also gives the court new powers to refer such children to the children's hearing system and where appropriate make a parenting order. It introduces other changes such as the introduction of a statutory power of arrest for breach of an order and a requirement on local authorities to keep records of orders.

#### **Part 3 – Dispersal of groups**

Part 3 makes provision for the dispersal by constables of groups of two or more persons whose presence or behaviour is causing or is likely to cause alarm or distress to any members of the public in any public place. Failure to comply with a direction to disperse will be a criminal offence. These powers can only be exercised within a particular locality authorised

by a senior police officer. The senior police officer will only make such an authorisation in a locality within which antisocial behaviour is a significant, persistent and serious problem.

#### **Part 4 – Closure of premises**

Part 4 makes provision for the closure of premises associated with significant and persistent disorder or significant, persistent and serious nuisance to members of the public. A closure notice will only be served on a premises once authorised by a senior police officer. That senior officer will then apply to the sheriff for a closure order, which will prohibit all access to the premises for a specified period (up to a maximum of 6 months, including extension). Failure to comply with a closure order will be a criminal offence.

#### **Part 5 – Noise nuisance**

The noise control provisions in Part 5 are additional and complementary to the existing statutory nuisance regime under Part III of the Environmental Protection Act 1990 (“the 1990 Act”). Local authorities are given the power to implement a noise nuisance service in their area up to 24 hours a day and 7 days a week. In addition, provision is made for fixed penalty notices for noise nuisance and additional powers are introduced for local authority officers to seize noise making equipment.

#### **Part 6 –The environment**

Part 6 makes provision on a range of antisocial environmental offences. It introduces fixed penalty notices for fly-tipping; gives the police powers to issue fixed penalty notices for littering; introduces new powers for the Scottish Ministers to issue directions in relation to clearance of litter; and increases penalties for a range of antisocial environmental offences. In addition, Part 6 gives local authorities a power to serve graffiti removal notices on those responsible for street furniture such as bus shelters, telephone kiosks and utility boxes as well as for property owned or managed by educational institutions and certain statutory transport undertakers, requiring them to remove graffiti from their property. Local authorities will be empowered to remove the graffiti themselves and charge the owner of the property for doing so, if the owner does not comply with the notice within 28 days

#### **Part 7 – Antisocial behaviour notices**

Part 7 provides powers for a local authority to serve an antisocial behaviour notice on a private landlord where an occupant of or visitor to a house let by the landlord engages in antisocial behaviour at or in the locality of the house. The notice specifies actions the landlord must take to address the antisocial behaviour. A landlord who does not carry out the actions in the notice is guilty of an offence and the local authority may also apply to the sheriff court for an order that no rent is payable or for an order transferring management control to the local authority. The local authority may also take steps to deal with the behaviour described in the notice at the landlord’s expense.

#### **Part 8 – Registration of certain landlords**

Part 8 requires each local authority to establish a register under this Part showing registered persons and the houses they let, and make it available for public inspection. Any person can apply to be registered. The local authority must be satisfied prior to registration that the person is fit and proper to act as a landlord, and that any agent declared by a landlord is also fit and proper. The local authority may remove a person who is no longer fit and proper from the register. A private landlord who lets a house without being registered is committing an offence unless he or she has applied for registration and the application has not been determined by the local authority. The local authority may serve a notice that no rent is

payable on such a landlord, and on the tenant and any agent. The notice does not affect other terms of the lease.

### **Part 9 – Parenting orders**

Parenting orders are new civil orders to deal with parents who refuse to engage in voluntary support to prevent crime or antisocial behaviour involving a relevant child or to protect the child's welfare. Breach of an order is a criminal offence. An order will make requirements of that parent and will generally include a duty to attend counselling, guidance or other support.

### **Part 10 – Further criminal measures**

Part 10 contains a number of miscellaneous criminal measures:

- Antisocial behaviour orders on conviction in the criminal court
- Community reparation orders: new sentence for offenders aged 12 and over who are convicted of an offence involving antisocial behaviour.
- Restriction of liberty orders: extension of orders to under 16s as a sentencing option in the criminal court. This will only be available as an alternative to secure accommodation.
- Ban on the sale of spray paint to under 16s
- Seizure of vehicles: power for police to seize vehicles used in a manner causing alarm, distress or annoyance

### **Part 11 – Fixed penalties**

Part 11 gives police powers to issue fixed penalty notices for a range of low-level, antisocial offences, including being drunk and incapable in a public place, vandalism and breach of the peace.

### **Part 12 – Children's hearings**

Part 12 allows children's hearings to impose electronic monitoring as a direct alternative to secure accommodation. In addition, provision is made to ensure a local authority can be held to account where it has not implemented a supervision requirement in relation to a child and where it has not provided appropriate education for children excluded from school.

### **Part 13 – Miscellaneous and general**

Part 13 includes provisions relating to:

- Privacy of certain proceedings in interests of children
- Disclosure and sharing of information
- Equal opportunities
- Interpretation of "antisocial behaviour" and other terms used throughout the Act

6. A definition of "antisocial behaviour" for the purposes of the Act (apart from Parts 7 and 8) is provided at section 143.

## **COMMENTARY ON SECTIONS**

### **PART 1 – ANTISOCIAL BEHAVIOUR STRATEGIES**

#### **Section 1 – Antisocial behaviour strategies**

7. This section places certain duties on local authorities and chief constables in relation to antisocial behaviour strategies. It replaces section 22A of the Crime and Disorder Act 1998 (c.37) which is repealed by schedule 5.

8. Section 1 places each local authority under a duty to prepare, publish and keep under review an antisocial behaviour strategy for its area. The strategy is to be prepared jointly with the “relevant chief constable”, who is defined in subsection (11) as being the chief constable for the police area which forms all or part of the area of the local authority. “Local authority” is defined in section 143 as a council constituted under section 2 of the Local Government etc. (Scotland) Act 1994 and “area”, in relation to a local authority, means the local government area for which the council is constituted.

9. Subsection (3) sets out a number of things which the strategy must contain. The list is not exhaustive. Subsection (3)(c) mentions consulting “community bodies”. “Community bodies” is defined in subsection (11) by reference to section 15(4) of the Local Government in Scotland Act 2003. Section 15(4) of that Act defines “community bodies” as bodies or other groupings, whether or not formally constituted, established for purposes which consist of or include that of promoting or improving the interests of any communities resident or otherwise present in the area of the local authority.

10. Subsections (4) and (5) deal with the review and revision of strategies.

11. Subsection (6) introduces a requirement for the local authority to consult in preparing, reviewing and revising the strategy. The local authority is under a duty to consult the Principal Reporter (as established under section 127 of the Local Government etc (Scotland) Act 1994), registered social landlords which provide or manage property in their area and such community bodies and other persons as they consider appropriate. “Registered social landlord” is defined at section 143(2) as a body registered in the register maintained under section 57 of the Housing (Scotland) Act 2001. Subsection (7) provides that the local authority must seek to include those bodies and persons which are representative of persons adversely affected by antisocial behaviour in considering which persons to consult.

12. Subsection (8) provides that the local authority and chief constable shall have regard to any guidance given by the Scottish Ministers in exercising their functions under this section and in implementing a strategy. Subsection (9) requires Ministers to consult such persons as they see fit before giving any such guidance.

13. Subsection (10) provides that for the purposes of preparing a strategy, the Scottish Ministers may, by directions, require persons who appear to them to hold information relating to antisocial behaviour to supply that information to the appropriate local authority and chief constable.

#### **Section 2 – Reports and information**

14. Subsection (1) requires each local authority to publish from time to time reports on how the authority and chief constable have implemented the antisocial behaviour strategy and what the results of that implementation have been. Subsection (3) provides that the Scottish Ministers may make regulations determining the form, content, frequency and timing of reports made under subsection (1). Before making such regulations, the Scottish Ministers shall consult such associations of local authorities and other persons as they think fit.

Subsection (5) enables the Scottish Ministers to require a local authority to submit reports or information to them on the implementation and results of implementation of the strategy.

15. Subsection (2) places a duty on registered social landlords and the Principal Reporter, as well as the chief constable, to provide such information as the local authority may reasonably require to enable the local authority to comply with the duty under subsection (1).

### **Section 3 – Scottish Ministers’ power to apply sections 1 and 2 to registered social landlords**

16. Section 3 provides that the Scottish Ministers may make regulations to secure the participation of any registered social landlord in the preparation, review or revision of an antisocial behaviour strategy. These regulations are subject to negative resolution procedure.

17. Subsection (2) provides that these regulations may modify subsections (1), (3), (4), (6) and (8) of section 1 and subsection (1) of section 2 for the purpose of ensuring the registered social landlord is appropriately involved in the preparation, review or revision of the strategy. This may be necessary if the requirements in those subsections, which relate to the duty to prepare a strategy and the content, review and consultation requirements relating to a strategy need to be changed in light of the decision to regulate to secure the participation of a registered social landlord.

## **PART 2 – ANTISOCIAL BEHAVIOUR ORDERS**

18. Part 2 makes provision about antisocial behaviour orders. It replaces the existing provision contained in sections 19, 21 and 22 of the Crime and Disorder Act 1998. Those sections are repealed: see schedule 5. Antisocial behaviour orders under Part 2 are civil orders whose purpose is to protect the public from behaviour that causes or is likely to cause alarm or distress. An order contains conditions prohibiting the person named in it from doing anything specified in the order such as verbally abusing named persons or entering defined areas. Breach of an order is a criminal offence.

### **Section 4 – Antisocial behaviour orders**

19. Section 4 enables a sheriff to make an antisocial behaviour order, on the application of a relevant authority as defined in section 18, if the sheriff is satisfied:

- that the person specified in the application is at least 12 years of age;
- that the person specified in the application has engaged in antisocial behaviour towards a person who is a relevant person as defined in subsection (13); and
- that the order is necessary for the purposes of protecting relevant persons from further antisocial behaviour by the specified person.

20. Subsection (4) provides that where the specified person is aged 12-15 years of age, the sheriff shall have regard to advice from a children’s hearing as to whether the condition that the order is necessary to protect relevant persons (as mentioned in subsection 2 (c)) is met. Before determining the application for an order under section 4 the sheriff will have required the Principal Reporter to arrange a children’s hearing for the purpose of obtaining their advice.

21. Subsection (7) extends the classes of persons who can be protected by an antisocial behaviour orders applied for by local authorities by allowing the order to include such additional prohibitions as are necessary for the purpose of protecting persons other than relevant persons (referred to as “affected persons”) from further antisocial behaviour by the

person subject to the order. This enables an order to be made that will protect persons outwith the applicant local authority area. Where an application is made by a registered social landlord, the scope of the conditions are limited to what is necessary to protect relevant persons as defined at section 4(13) (b).

22. Subsection (8) requires the sheriff to explain in ordinary language matters specified in that subsection before making an antisocial behaviour order, where the specified person is in court. However, subsection (9) provides that a failure to comply with this requirement shall not affect the validity of the order.

23. Subsection (11) makes provision as to what consultation or notification is required before an application for an antisocial behaviour order is made. A local authority must consult the police force for its area and, where the application relates to someone under 16, the Principal Reporter. Further, where the application is intended to protect an “affected person” (i.e. one who does not live within that local authority area) then the local authority must also consult the local authority and police for that area. A registered social landlord must consult the police force for the area in which the person who is proposed to be subject to the order resides and, where the application relates to someone under 16, the Principal Reporter and the local authority for the area in which the child resides. Where a registered social landlord is making an application in relation to an adult it is required to notify the local authority for the area in which the adult resides. The registered social landlord must let the local authority know that it is making an application, providing information on who the application relates to. The registered social landlord does not need to seek the views of the local authority on whether an application is appropriate, though it may wish to do so.

24. Schedule 4 includes consequential amendments to the Housing (Scotland) 1987 and the Housing (Scotland) Act 2001 to reflect the fact that section 4 of this Act has replaced provisions on antisocial behaviour orders under section 19 of the Crime and Disorder Act 1998. The amendments also include antisocial behaviour orders made on conviction under section 234AA of the Criminal Procedure (Scotland) Act 1995 – introduced by section 118 of this Act.

### **Section 5 – Antisocial behaviour orders: variation and revocation**

25. Section 5 provides that on the application of the relevant authority that obtained an antisocial behaviour order, or the person subject to the order, the sheriff may vary or revoke the order. The relevant authority must consult the relevant consultees, as defined in section 18, before making such an application. In addition, before making an application under this section, a registered social landlord shall consult the local authority if the specified person is aged 12 to 15, but only has to notify the local authority if the person is aged 16 or over.

### **Section 6 – Appeals: effect on competence of application under section 5**

26. Section 6 provides that a person appealing against the making or variation of an antisocial behaviour order may not make an application to vary or revoke that order before the appeal is determined or abandoned.

### **Section 7 – Interim antisocial behaviour orders**

27. Section 7 makes provision for interim antisocial behaviour orders. Interim orders were introduced by the Criminal Justice Act (Scotland) 2003, which amended the Crime and Disorder Act 1998. Interim orders provide more immediate protection from antisocial behaviour as an interim order can be made by the court before it hears the full evidence in relation to an application where the court considers that an order is needed to protect the public from antisocial behaviour. The provisions in the 1998 Act are being repealed.

28. Section 7(2) provides that the sheriff must be satisfied that the person is aged 12 years or more, that *prima facie* the specified person has engaged in antisocial behaviour and that an interim order is necessary for the purpose of protecting relevant persons from further antisocial behaviour.

29. Subsection (3) provides that where the specified person is a child, the sheriff shall have regard to any views expressed by the Principal Reporter in determining whether to make an interim order.

30. By applying section 4(6) and (7) to interim orders as they apply to antisocial behaviour orders, section 7(5) has the effect that the prohibitions imposed in an interim order must be necessary for the purposes of protecting persons from further antisocial behaviour by the specified person.

31. Subsection (6) requires the sheriff to explain in ordinary language matters specified in subsection (6) before making an interim order, where the specified person is in court. However, subsection (7) provides that a failure to comply with this requirement shall not affect the validity of the order.

32. Subsection (8) provides that an interim order can be appealed, though the order will continue to have effect pending the outcome of the appeal due to the ordinary operation of law. This is without prejudice to any power of the court to recall the order.

### **Section 8 – Notification of making etc. of orders and interim orders**

33. Section 8(2) provides that where an antisocial behaviour order is made or varied the clerk of the court by which the order is made or varied shall arrange for a copy of the order to be served on the person subject to the order and given to the relevant authority on whose application the order was made. This also applies where an interim order is made.

34. Subsection (4) provides that where an antisocial behaviour order is revoked or an interim order is recalled, the clerk of the court by which the order is revoked or recalled shall notify the relevant authority on whose application the order was made.

35. Subsection (5) provides that for the purposes of subsection (2)(a), a copy of the order is served on the person subject to the order if it is given to them or sent to them by registered post or the recorded delivery service. Subsection (6) provides that for the purposes of subsection (4)(a) the person subject to the order is notified that the order is varied or revoked if notification is sent to them by registered post or the recorded delivery service. Where the order is sent under subsection (5)(b) or (6), subsection (7) provides that a certificate of posting issued by the postal operator concerned shall be sufficient evidence of the sending of the letter on the day specified on such certificate. In subsection (7), “postal operator” has the meaning given by section 125(1) of the Postal Services Act 2000, which is a person who provides the service of conveying postal packets from one place to another by post or any of the incidental services of receiving, collecting, sorting and delivering such packets.

### **Section 9 – Breach of orders**

36. Subsection (1) provides that breach of an antisocial behaviour order or an interim order without reasonable excuse is a criminal offence

37. Subsection (2) explains that the maximum penalty for breach of an antisocial behaviour order or an interim order is six months imprisonment and a fine on summary conviction and 5 years imprisonment and a fine on conviction on indictment.

38. Subsection (3) provides that where a person in breaching the antisocial behaviour order has also committed a separate offence and that person is charged with that separate offence they will not be liable to be proceeded against for the breach of the order. However, subsection (4) provides that if the person is convicted for the separate offence, the sheriff must have regard to that fact that the person was subject to an ASBO at the time, the number of orders the person was subject to, any previous conviction for breach of an ASBO or interim ASBO and the extent to which the sentence or disposal for any previous breach would have differed but for this subsection.

39. Subsection (5) provides that the fact that the person being prosecuted for a separate offence was subject to an antisocial behaviour order or interim order must be specified on the indictment or, as the case may be, on the summary complaint, to be considered by the court as an aggravating factor. Subsection (6) provides that, unless challenged under criminal procedures as specified, the fact that the separate offence was committed while an ASBO or interim order was in place will be held as admitted.

### **Section 10 – Breach of orders: prohibition of detention of children**

40. Section 10 amends the Criminal Procedure (Scotland) Act 1995 (the 1995 Act) to make clear that where a child is convicted of breach of an antisocial behaviour order or interim order under section 9(1) of the 2004 Act or that section as applied by section 234AA(9) of the 1995 Act, which relates to breach of an antisocial behaviour order made in the criminal court, the child shall not be subject to detention. The 1995 Act includes rules under section 44 and section 208 relating to the detention of children. It is not competent to impose imprisonment on a person under the age of 21 in Scotland.

### **Section 11 – Breach of orders: arrest without warrant**

41. Section 11 introduces a statutory power of arrest for breach of an antisocial behaviour order or interim order. This is without prejudice to any power of arrest conferred by law apart from section 11(1).

### **Section 12 – Sheriff’s power to refer case to children’s hearing**

42. Where an antisocial behaviour order or interim order is granted against a person aged 12 to 15 years, section 12 introduces a power for the sheriff to require the Principal Reporter to refer the case to a children’s hearing.

43. Subsections (3) to (5) make consequential amendments to the Children (Scotland) Act 1995. The effect of these amendments is that where the sheriff exercises the power to require the Principal Reporter to refer the case to the children’s hearing that referral shall be treated as a ground for considering whether the child needs to be placed under compulsory measures of supervision. In such cases the Principal Reporter is required to arrange a children’s hearing. Where a child is already subject to a supervision requirement the decision of the sheriff to require a children’s hearing to be arranged will have the effect of requiring the Principal Reporter to set up a children’s hearing to review existing supervision requirements.

### **Section 13 – Sheriff’s power to make parenting order**

44. Section 13 provides that where a sheriff makes an antisocial behaviour order in civil proceedings in respect of a child, the sheriff may make a parenting order as well if satisfied that the making of the parenting order is desirable in the interests of preventing the child from engaging in further antisocial behaviour and that the Scottish Ministers have notified the court that the relevant authority has made arrangements that would enable the parenting order to be complied with. Provisions on parenting orders are under Part 9 of the Act.



45. Where a court is considering making a parenting order under section 13 it will be obliged to comply with the provisions about procedural requirements in section 108 and the substantive considerations set out in section 109 and 110. The provisions of sections 105, 106 and 107 in relation to review of the order, appeals and failure to comply with the order also apply to a parenting order made under this section. As will the provision made at section 111 which restricts reporting of the proceedings. Section 138 of the Act which makes provision for proceedings to be conducted and determined in private also applies to proceedings under section 13.

#### **Section 14 – Provision of information to local authorities**

46. Section 14 requires that a registered social landlord provides the relevant local authority with a copy of each antisocial behaviour order or interim order it obtains to ensure records of orders maintained by the local authority are up-to-date and comprehensive. The landlord must also copy any orders as varied. Subsection (2) requires the registered social landlord to notify each relevant local authority on the date on which an antisocial behaviour order was revoked, or in the case of interim orders, recalled. Subsection (3) provides the meaning of “relevant local authority” in this context. It means a local authority whose area includes premises provided or managed by the social landlord in relation to any person for whose protection the order was made.

#### **Section 15 – Records of orders**

47. Section 15 places a duty on local authorities to keep records of antisocial behaviour orders made on the application of the authority and of orders in respect of which a copy has been received from a registered social landlord (which is obliged under section 14 to provide such information).

48. Subsection (2) provides that the record shall specify the person in respect of whom the order was made, the prohibitions imposed by the order, the time period of the order (including if the order is indefinite), any variation of the order, the date it is revoked if it is revoked, the date on which an interim order is recalled if it is recalled and any other matters as specified by the Scottish Ministers. These regulations are subject to negative resolution procedure.

49. Subsection (3) makes provision about the disclosure of information contained in the record of orders. The local authority shall, on a request to do so by the Scottish Ministers, the Principal Reporter, another local authority, a chief constable or a registered social landlord, disclose to the person making the request information contained in the record of antisocial behaviour orders.

#### **Section 16 – Guidance in relation to antisocial behaviour orders**

50. Section 16 provides that any person (other than a court) discharging any functions under Part 2 of the Act (other than section 13) shall have regard to guidance issued by the Scottish Ministers on those matters and matters arising in connection with the discharge of those functions.

#### **Section 17 – Arrangement of study into operation of Part**

51. Section 17 requires the Scottish Ministers to arrange for the carrying out of a study into the operation of Part 2 of the Act and to lay the results of that study before the Scottish Parliament within 3 years of the whole of the Part coming into effect.

52. Subsection (2) provides that the Scottish Ministers must make all necessary preparations for the carrying out of the above study so as to allow it to commence as soon as the whole of

the part is in force. This subsection also sets out some of the things that may be included in these preparations.

### **Section 18 – Interpretation of Part 2**

53. Section 18 provides interpretation of a number of expressions used in Part 2.

## **PART 3 – DISPERSAL OF GROUPS**

### **Section 19 – Authorisations**

54. Section 19 allows a senior police officer (that is an officer of or above the rank of superintendent) to issue an authorisation of the exercise of the powers under section 21 in respect of a particular locality within their police area. This can only be done where that senior officer has reasonable grounds for believing that alarm or distress has been caused to members of the public by the presence or behaviour of groups of two or more persons in public places in that locality. That locality is defined as “a relevant locality” for the purposes of Part 3 at subsection (1). Before giving an authorisation the senior officer must also have reasonable grounds for believing that antisocial behaviour is a significant, persistent and serious problem in the relevant locality.

55. Subsection (2) sets out that such an authorisation may last for a specific period and that the authorisation may also choose to refer to times or days within the period: for example to Friday and Saturday nights. Subsection (3) sets out the form in which the authorisation must appear and what it must include (for example when the powers are exercisable). Subsection (4) provides that the senior officer must consult the local authority or authorities whose area includes the whole or part of the relevant locality before giving an authorisation; and subsection (5) that the authorisation shall not exceed 3 months.

### **Section 20 – Authorisations: supplementary**

56. Before the powers under section 21 become exercisable, the senior officer who gave the authorisation is required to ensure that an authorisation notice is published in a newspaper circulating in the relevant locality and that it is displayed in some conspicuous place or places within the relevant locality.

57. Subsection (2) sets out what must be included in an authorisation notice: a statement that the authorisation has been given and specification of the area affected and the period it will last (and any specified times within that period).

58. Subsection (3) makes provision for withdrawal of the authorisation (for example, if the police are satisfied that it is no longer necessary to prevent the occurrence of disorder or serious nuisance). Subsection (4) requires the police officer to consult the relevant local authority or authorities about the proposed withdrawal. Subsections (5) and (6) set out that the withdrawal of an authorisation shall not affect the exercise of any power which occurred before the withdrawal and that the giving or withdrawal of an authorisation shall not prevent the giving of a further authorisation in respect of a locality to which the earlier authorisation relates.

### **Section 21 – Powers exercisable in pursuance of authorisations**

59. Subsection (1) sets out that where a constable has reasonable grounds for believing that the presence or behaviour of a group of two or more persons in any public place in the relevant locality is causing or is likely to cause alarm or distress to any members of the public, the constable may give a direction requiring the persons in the group to disperse. In doing so the constable must have regard to whether the exercise of the power to disperse

would be likely to result in the persons in the group causing less harm or distress to members of the public there than if the power were not exercised, subsection (2).

60. In terms of subsection (3), the constable may also give a direction requiring any of those persons who do not live in the locality to leave it or any part of it; or a direction prohibiting any of those persons who do not live in the area from returning to it or any part of it for a specified period of up to 24 hours. Subsection (4) requires that the constable may require the first two of these directions to be complied with either immediately or at such a time and in such a way as is specified in that direction.

61. Subsection (5) sets out that none of the above directions may be given by a constable in respect of a group of persons who are engaged in conduct which is lawful under section 220 of the Trade Union and Labour Relations (Consolidation) Act 1992. Such conduct is defined as attendance by a person, in contemplation or furtherance of a trade dispute, at or near his own place of work, for the purpose only of peacefully obtaining or communicating information, or peacefully persuading any person to work or abstain from working. If the person is an official of a trade union, then such attendance can take place at or near the place of work of a member of the union whom he is accompanying and whom he represents. Subsection (5) also sets out that none of the above directions may be given by a constable in respect of a group of persons who are taking part in a procession which has been notified in accordance with section 62 of the Civic Government (Scotland) Act 1982 (or which, by virtue of subsection (6) or (7) of that section, does not require to be notified). This Act deals with all processions which take place in a public place, notice of which must be given to the regional or islands council in whose area the procession is to be held.

### **Section 22 – Powers under section 21: supplementary**

62. Subsection (1) sets out that a direction may be given orally; to an individual or to a group; and that it may be withdrawn or varied by the constable who gave it.

63. Subsection (2) sets out that knowingly contravening any direction, without reasonable excuse, will be an offence and could result in a fine, or imprisonment or both. Subsection (3) sets out that where such an offence is being committed the constable may arrest the person without warrant. Subsection (4) provides that subsection (3) is without prejudice to any power of arrest conferred by law apart from that subsection.

### **Section 23 – Guidance in relation to dispersal of groups**

64. Subsection (1) provides that any person exercising any power by virtue of Part 3 of the Act shall, in the exercise of the power, have regard to any guidance given by the Scottish Ministers about the exercise of the power and to any other matter relating to the power. Subsection (2) requires the Scottish Ministers to lay a copy of any such guidance before the Scottish Parliament.

### **Section 24 – Operation of Part: arrangement of study**

65. Subsection (1) sets out that the Scottish Ministers shall arrange for the carrying out of a study into the operation of the dispersal powers and lay a report on the results of the study before the Scottish Parliament within three years of the date on which the whole of Part 3 is first in force.

66. Subsection (2) provides that the Scottish Ministers must make all necessary preparations for the carrying out of the above study so as to allow it to commence as soon as the whole of the part is in force. This subsection also sets out some of the things that may be included in these preparations (for example the instruction of a research team).

### **Section 25 – Interpretation of Part 3**

67. Section 25 provides definitions of some of the expressions used in Part 3.

## **PART 4 – CLOSURE OF PREMISES**

### **Section 26 – Authorisation of closure notice**

68. Section 26 gives senior police officers (that is officers of or above the rank of superintendent) power to authorise service of a closure notice. The effect of such an authorisation is that a constable will serve on the relevant premises a closure notice. A closure notice prohibits access to the premises by any person other than a person who habitually resides in the premises or the owner of the premises. Failure to comply with the notice amounts to an offence under section 37.

69. Subsection (3) sets out that the senior police officer may only authorise service of a closure notice where that officer has reasonable grounds for believing that at any time during the immediately preceding 3 months a person has engaged in antisocial behaviour on the premises; and that the use of the premises is associated with the occurrence of relevant harm, which is defined at section 40 as significant and persistent disorder or significant, persistent and serious nuisance to members of the public.

70. Subsection (4) provides that an authorisation for service of a closure notice may be given orally but if so it must be confirmed in writing as soon as is practicable. Subsection (3)(b) sets out the procedural requirements which must be met before service of a closure notice can be authorised. These requirements include that the local authority must have been consulted about the proposed closure and that all reasonable steps must have been taken to establish the identity of any person who lives on, has control of, or responsibility for, or has an interest in, the premises.

71. Subsection (2) provides that the Scottish Ministers can specify by regulations premises or descriptions of premises in respect of which such authorisations may not be given. These regulations are subject to affirmative resolution procedure.

### **Section 27 – Service etc.**

72. Subsections (2), (3) and (5) set out the form a closure notice shall take and the procedure associated with its service. As well as explaining the effects of a closure notice, the notice must contain certain information including specification of such matters about the application for the closure of premises as may be prescribed in rules of court and information about access to advice on housing and legal matters. The notice must be attached to at least one prominent place on the premises, each normal means of access to the premises and any outbuildings that appear to the constable to be used with or as part of the premises. The notice must be served on persons living in, having control of or responsibility for or having an interest in the premises. Under subsection (3), if after making reasonable enquiries the constable believes that the access of any person who occupies any other part of the building or structure in which the premises are situated would be impeded by the making of the order, then the constable must also give a copy of the notice to that person.

73. Subsection (4) sets out that failure on the part of the constable to give a copy of the notice to any of the persons set out above shall not affect the validity of the closure notice.

### **Section 28 – Application to sheriff**

74. Subsections (1) and (2) require that once the police have served the closure notice, a senior police officer must apply to the sheriff for a closure order to be made. Subsection (3)

sets out when the police must make this application and subsection (4) contains a provision for the sheriff to allow late applications. Subsection (5) sets out what is required in an application, which must include a specification of the premises in respect of which the closure order is sought; a statement of the grounds on which the application is made; and supporting evidence.

### **Section 29 – Closure orders**

75. Subsections (1) to (3) set out the scope of a closure order including a limitation that a closure order may be made only in respect of all or any part of the premises that are the subject of a closure notice; and a provision allowing the sheriff to rule on matters of access at the premises specified in the order. The effect of a closure order is that the premises specified in the order are closed to all persons for such period not exceeding 3 months as is specified in the order.

### **Section 30 – Application: determination**

76. This section sets out the process the sheriff must go through before making a closure order in respect of premises.

77. Subsection (2) sets out the conditions that must be met before the sheriff makes an order. The sheriff must be satisfied that a person has engaged in antisocial behaviour on the premises and that the use of the premises is associated with the occurrence of relevant harm; and also that the making of an order is necessary to prevent the occurrence of such relevant harm for the period specified in the order. Relevant harm is defined in section 40 as either significant and persistent disorder or significant, persistent and serious nuisance to members of the public.

78. Subsection (3) sets out that the sheriff must also have regard to two factors in determining whether to make a closure order. First, the ability of any person who habitually resides in the premises to find alternative accommodation. And second, any vulnerability of any such person who has not been engaged in antisocial behaviour which has occurred in the premises.

79. Subsections (4) to (6) set out that the sheriff shall determine the application no later than the second court day after the day on which the application is made; make provision for the sheriff to postpone determination of the application for a period of not more than 14 days, to enable a person to show why a closure order should not be made; and set out who is entitled to attempt to show the sheriff why a closure order should not be made. Those persons are the occupier of the premises specified in the closure notice; any person who has control of or responsibility for those premises; and any other person with an interest in those premises.

80. Subsection (7) provides that where the sheriff postpones determination of an application the sheriff may order that the closure notice continues in effect until the determination of the application.

### **Section 31 – Enforcement**

81. Subsection (1) provides that, after a closure order is made, a constable or any other person authorised in writing by the chief constable (an authorised person) may enter the property in order either to do anything necessary to secure it against entry by any person or to carry out essential maintenance or repairs. Subsection (2) sets out that reasonable force may be used in order to facilitate these activities. Subsection (3) sets out that an authorised person seeking to enter closed premises in order to secure the premises must, if requested to do so by

or on behalf of the owner, occupier or other person in charge of the premises, produce evidence of identity and authorisation.

### **Section 32 – Extension**

82. This section provides that the sheriff may, on the application of a senior police officer and if satisfied that it is necessary to do so to prevent the occurrence of relevant harm, make an order extending a closure order for a further period not exceeding the maximum period; the maximum period for an order to be in force (it cannot exceed 6 months in total); and the conditions that must be met before an application for an extension is allowed by the sheriff. These conditions include that the local authority must first be consulted.

### **Section 33 – Revocation**

83. Subsection (1) provides for revocation of the order, following an application, where the court is satisfied that it is no longer necessary to prevent the occurrence of relevant harm. Subsection (2) sets out who can apply to the sheriff to have the order revoked. Subsection (3) sets out that where any such application is made other than by a senior police officer the sheriff shall order service upon such senior police officer as the sheriff considers appropriate.

### **Section 34 – Access to other premises**

84. This section provides for the court, upon the application of a person who occupies or owns any part of a building or structure in which closed premises are situated and in respect of which the closure order does not have effect, to make an order allowing appropriate access to any part of the building or structure in which the closed premises are located. The subsections set out that such an application can only be made while the closure order has effect; and that any such order may be made notwithstanding any provision made in the original closure order about access to the closed premises.

### **Section 35 – Reimbursement of expenditure**

85. This section makes provision for the sheriff, upon application from a police authority or a local authority, to make an order for the reimbursement, by the owner of the premises that has been or was closed, of expenditure incurred by the applicant in clearing, securing or maintaining the closed premises. Subsection (2) sets out when such an application must be made and subsection (3) the persons on whom the application shall be served.

### **Section 36 – Appeals**

86. This section provides for the making of appeals in respect of orders under Part 4. Subsection (1) sets out that a person who was a party to the proceedings in which the Part 4 order or decision was given may appeal against it. Subsection (2) sets out that appeals under this section are made to the sheriff principal and shall be made within the period of 21 days beginning with the day on which the order or decision appealed against was made. Subsection (3) sets out that on an appeal under this section the sheriff principal may make any order he or she considers appropriate and subsection (4) that any such decision is final.

### **Section 37 – Offences**

87. Subsections (1) to (5) set out that if without reasonable excuse a person remains on or enters premises in contravention of a closure order or notice or obstructs an authorised person who has entered the premises to secure it or carry out essential repairs, they will be guilty of an offence, which could result in a fine, or imprisonment or both. While subsection (2) – setting out that it is an offence to obstruct an authorised person – applies only to an

authorised person, section 41 of the Police (Scotland) Act 1967 protects constables in a similar way.

### **Section 38 – Offences under section 37: arrest without warrant**

88. Subsection (1) sets out that where a constable reasonably believes that a person is committing or has committed an offence under section 37 then the constable may arrest that person without warrant.

### **Section 39 – Guidance in relation to closure of premises**

89. This section provides that a person (other than a court) shall, in discharging functions by virtue of Part 4 of the Act, have regard to any guidance given by the Scottish Ministers about the discharge of those functions or matters arising in connection with the discharge of those functions.

### **Section 40 – Interpretation of Part 4**

90. Section 40 provides definitions of various expressions included in Part 4, including of “relevant harm.”

## **PART 5 –NOISE NUISANCE**

### **Section 41 - Application of noise control provisions to local authority areas**

91. Section 41 enables a local authority to adopt the noise control provisions in Part 5 of the Act.

92. Subsection (1) applies the noise control provisions set out in sections 43 to 47 of the Act to the local authority area if the local authority resolves that the provisions should apply to its area.

93. Subsection (2)(a) provides that if a local authority resolves to apply the noise control provisions to its area, there must be a period of 2 months before the provisions take effect (the “commencement date”). Subsection (2)(b) requires specification of the periods of the week for which noise is to be controlled by the provisions (the “noise control period”).

94. Subsection (3) enables a resolution to specify the whole week as a noise control period, and different noise control periods for different areas, times of the year or other circumstances. Subsection (4) explains that a week begins on Monday. This allows local authorities to choose which periods of the day and night, days of the week, times of the year, and areas in which the noise control provisions will operate. For example, a resolution could specify noise control periods for weekend nights only i.e. on a Friday and Saturday between 7.00pm and 7.00am.

95. Subsection (5)(a) requires a local authority, at least a month in advance of the commencement date, to have a notice published in 2 consecutive weeks in a local newspaper. Subsection (5)(b) requires the local authority to give a copy of the notice to both the Scottish Ministers and neighbouring local authorities, at least one month before the commencement date.

96. Subsection (6) specifies certain things that the notice must state.

97. Subsection (7) requires a neighbouring local authority, which receives a notice under subsection (5)(b)(ii), to take appropriate steps to inform persons in its area of the content of that notice.

## **Section 42 – Revocation or variation of resolution under section 41**

98. Section 42(1) gives local authorities the power by resolution to revoke a resolution under section 41, or to revoke, add or vary a noise control period specified in that resolution. Subsection (2) provides that a resolution must specify the date on which a resolution under subsection (1) shall come into effect (the “effective date”). The effective date must be a date at least 2 months after the passing of the resolution. The notice requirements in subsection (3) are similar to those in section 41(5). The requirements in respect of the content of a notice are set out in subsection (4) and are similar to those in section 41(6), and subsection (5) imposes a requirement on neighbouring local authorities similar to that in section 41(7).

## **Section 43 - Investigation of excessive noise from certain places**

99. Section 43 sets out the duties of a local authority and its officers in relation to the investigation of noise from relevant property.

100. Subsection (1), as read with subsection (3), places a duty on a local authority, where the noise control provisions apply to its area by virtue of section 41., to investigate a complaint of excessive noise from relevant property, and requires an officer of the authority to take reasonable steps to investigate the complaint.

101. Subsection (2) enables a complaint to be made by any means.

102. Subsection (3) enables a local authority officer, having undertaken an investigation under subsection (1), to serve a warning notice under section 44, if the local authority officer is satisfied that noise is being emitted from the offending property during a noise control period, and the noise, if measured from within a relevant place (as defined in section 53), would or might exceed the permitted level.

103. Subsection (4) provides that it is for the local authority officer, when making the assessment under subsection (3), to decide whether any noise, if measured from a relevant place would or might exceed the permitted level. In reaching this decision it is for the local authority officer to decide the place in which to measure the noise, and whether any device should be used for measuring the noise.

104. Subsection (5) makes provision for a situation where one local authority receives a complaint and the offending property is situated in another local authority area. It enables the local authority which receives the complaint to apply the noise control provisions as if the offending dwelling were situated in its area, and therefore act whether or not the noise control provisions apply in the local authority area where the offending property is situated.

## **Section 44 - Warning Notices**

105. Section 44 makes provision for the issue of a warning notice.

106. Subsection (1) requires a notice issued under this section ( a “warning notice”) to state that the local authority officer considers that:

- noise is being emitted from the offending property during a noise control period; and
- the noise exceeds, or may exceed the permitted level, as measured from a relevant place.

107. The notice must also state that any person may be guilty of an offence if that person is responsible for noise emitted from the offending property in the period specified in the notice, and the noise exceeds the permitted level as measured from a relevant place.



108. Subsection (2), as read with subsection (3), provides that the period specified in the warning notice must begin not earlier than 10 minutes after the time when the notice is served, and must end at the relevant time. Subsection (3) defines relevant time as the earlier of the end of the noise control period during which the notice is served or end of the period in which the permitted level applicable during the period in which the notice is served, ceases to apply.

109. Subsection (4) requires a warning notice to be served by delivering it to any person present at, or near, the offending property and appearing to the local authority officer to be responsible for the noise.

110. Subsection (5) requires a warning notice to be served (by leaving it) at the offending property, where it is not reasonably practicable to identify any person present at or near the property as being a person responsible for the noise on whom the notice may reasonably be served. Subsection (6) requires a warning notice to state the time at which it is served.

111. Subsection (7) provides that for the purposes of the noise control provisions, a person is responsible for noise emitted from relevant property if the emission of the noise is wholly or partly attributable to the person's act, failure or sufferance.

#### **Section 45 - Offence where noise exceeds permitted level after service of notice**

112. Section 45(1) provides that an offence is committed, if after service of a warning notice, noise is emitted from relevant property during the period specified in the warning notice and the noise exceeds the permitted level as measured from a relevant place.

113. Subsection (2) provides that a person guilty of an offence is liable on summary conviction to a fine not exceeding level 3 (£1,000) on the standard scale.

114. Subsection (3) provides a defence for a person charged with an offence to show that there was a reasonable excuse for the act, default or sufferance in question. Subsection (4) provides that an accused person will be taken to have shown the defence under subsection (3) where that person adduces sufficient evidence to raise an issue with respect to it, and the prosecution does not prove the contrary beyond reasonable doubt.

115. Subsection (5) provides that in proceedings for an offence under this section, evidence of the measurement of a level of noise is only admissible if the measuring device is approved and any conditions subject to which the approval was given are satisfied.

#### **Sections 46 - Fixed penalty notices**

116. Section 46 make provision for the issue of fixed penalty notices ("FPNs").

117. Subsection (1) provides that where a relevant officer has reason to believe that a person is committing or has just committed an offence under section 45, the relevant officer may serve on that person a FPN, thereby offering that person the opportunity of discharging any liability to conviction for that offence by paying a fixed penalty. Subsection (2) defines "relevant officer" as an authorised officer of a local authority or a constable.

118. Subsection (3) provides that only one FPN may be issued to a person in respect of noise emitted from a property during the period specified in the warning notice.

119. Subsections (4) and (5) allow a FPN to be given to a person by delivering the FPN to that person. If it is not reasonably practicable to deliver the FPN to the person, the FPN may be addressed to the person, and left at the offending property.

120. Subsection (6) requires a FPN to set out the circumstances alleged to constitute the offence as are necessary to give reasonable information about the offence.

121. Subsection (7) requires the FPN to state:

- the period during which proceedings will not be taken for the offence. In accordance with section 51(2)(a) this must be a period of at least 28 days beginning with the date on which the FPN is served;
- the amount of the fixed penalty, and
- the person to whom and the address at which the penalty must be paid.

122. Subsection (8) makes provision for the methods of paying the fixed penalty. These include by means of pre-paying in cash (or otherwise), and posting to the person and the address specified in the notice.

123. Subsection (9) provides that if payment is made by the method specified in subsection (8), payment is to be deemed to have been made at the time when the payment would be delivered in the ordinary course of post.

124. Subsection (10) sets the fixed penalty at £100.

125. Subsection (11) provides that the FPN be payable to the local authority whose officer issued the warning notice and resulting FPN.

#### **Section 47- Powers of entry and seizure of equipment used to make noise unlawfully**

126. Subsections (1) and (2) provides an authorised officer of a local authority with powers to seize and remove any equipment which appears to have been used in the emission of noise, where a warning notice has been served on an offending property. Subsection (3) provides for an authorised officer, if required to do so, to produce that officer's authority in the form of a warrant.

127. Subsection (4) gives a sheriff or justice of the peace the power to grant a warrant under subsection (3), on being satisfied by evidence on oath that a warning notice has been served, the noise emitted from the relevant property has exceeded the permitted level during the period specified in the warning notice as measured from a relevant place, and that entry to the property has been refused, refusal is apprehended, or request for entry would defeat the object of entry.

128. Subsection (5) sets out the powers that may be exercised pursuant to a warrant issued under section 47. These include power to enter an offending property for the purpose of seizing and removing equipment used in the emission of noise and power to open lockfast places on the property for this purpose.

129. Subsection (6) provides for the authorised officer with an authorising warrant to enter premises accompanied by such persons as may be necessary to take equipment, and if that property is unoccupied on the officer's leaving, to leave it as effectively secured as it was when the officer entered it.

130. Subsection (7) provides that a person who wilfully obstructs an officer exercising the power of a warrant, shall be guilty of an offence. Subsection (8) provides that a person guilty of such an offence shall be liable on summary conviction to a fine not exceeding level 3 (£1,000) on the standard scale.

131. Subsection (9) gives effect to schedule 1, which makes further provision in relation to anything seized and removed by virtue of this section.

## **Schedule 1 (introduced by section 47)**

### **Powers in relation to equipment seized under Section 47**

132. Paragraph 1 contains the definitions of noise offence, seized equipment, related equipment and responsible local authority in relation to seized equipment.

133. Paragraph 2 sets out the circumstances in which seized equipment may or may not be retained.

134. Paragraph 3 gives the court the power to make a forfeiture order of any related equipment on a conviction for a noise offence.

135. Paragraph 4 makes provision in the event of a forfeiture order having been made under paragraph 3. For example, the court can order delivery of the equipment to anyone claiming to be the rightful owner on an application made by the latter within 6 months of the forfeiture order. But this is without prejudice to anyone else claiming to be its rightful owner from seeking its recovery from the person in possession of it within 6 months. Finally, a local authority can dispose of the equipment if, after a period of six months no order for delivery has in fact been made.

136. Paragraph 5 enables the court to give directions as it thinks fit as to the return, retention or disposal of equipment.

137. Paragraph 6 sets out the requirements of a responsible local authority in respect of the return or disposal of seized equipment, and the recovery of any reasonable charges in respect of the seizure, removal and retention of the equipment.

### **Section 48 -Permitted level of noise**

138. Section 48 makes provision for the setting of the permitted level.

139. Subsection (1) gives the Scottish Ministers the power to make regulations which will be subject to negative resolution procedure, to prescribe the maximum level of noise which may be emitted from relevant property (“the permitted level”).

140. Subsection (2) provides that the permitted level is that level applicable to noise measured from a relevant place. The level of noise is to be measured by an approved device used in accordance with any conditions subject to which the approval was given.

141. Subsection (3) enables different permitted levels to be prescribed for different periods of the week, areas, times of the year, or other circumstances. The permitted level may be determined partly by reference to other levels of noise.

### **Section 49- Approval of measuring devices**

142. Section 49 gives the Scottish Ministers the power to make regulations which will be subject to negative procedure, to approve any type of device used for the measurement of the noise. The approval may be given subject to conditions relating to the purposes, manner and circumstances in which devices are to be used.

### **Section 50 –Power to provide funds to local authorities**

143. Section 50 gives the Scottish Ministers the power to make payments to local authorities, in respect of the discharge of their functions under Part 5.

### **Section 51 –Fixed Penalty Notices: supplementary**

144. Section 51 contains supplementary provisions concerning FPNs.

145. Subsection (1) enables the Scottish Ministers by order, which will be subject to negative resolution procedure to specify the form in which a FPN must be issued.

146. Subsection (2) provides that proceedings for an offence cannot be instituted before the end of a period of 28 days following the date of service of the notice, and the person cannot be convicted of the offence if the person pays the fixed penalty before the end of that period. A person may be convicted of a further offence under section 45 in respect of noise emitted from relevant property after the FPN is served but before the end of the period specified in the warning notice.

147. Subsection (3) would apply in the event of proceedings for an offence under section 45. It enables evidence of the payment or non-payment of a fixed penalty before the end of any period to be produced by way of a certificate purporting to be signed by or on behalf of the person responsible for the financial affairs of the local authority, and which states that payment was made on any date or was not received before the end of that period.

148. Subsection (4) enables the Scottish Ministers by order, which will be subject to negative procedure to amend section 46(10) so as to change the amount of the fixed penalty payable. Subsection (5) limits any change to an amount not exceeding level 2 (£500) on the standard scale.

149. Subsection (6) provides that any payment received by a local authority under section 46 shall be treated a fine imposed by a district court.

#### **Section 52- Guidance in relation to this Part**

150. Section 52 provides a person other than a court shall, when discharging any functions under Part 5, have regard to any guidance given by the Scottish Ministers about the discharge of those functions, and any matters arising in connection with the discharge of those functions.

#### **Section 53 – Meaning of “relevant place” and “relevant property”**

151. Section 53 contains the definitions of “relevant property” and “relevant place”. Any such other place may also be prescribed as meaning either a relevant place or property by Scottish Ministers by order, which will be subject to affirmative resolution procedure.

#### **Section 54- Interpretation of Part 5**

152. Section 54 contains the definitions of other expressions used in Part 5.

### **PART 6 – THE ENVIRONMENT**

#### **Section 55 – Contraventions of section 33(1)(a) and (c) of 1990 Act: fixed penalty notices**

153. Section 33 of the 1990 Act is the statutory provision criminalising fly-tipping, and sets out penalties for that offence.

154. The 1990 Act envisages only pursuit through the prosecution system as a penalty for fly-tipping. Section 55 of the Act, which inserts a new section 33A into the 1990 Act, makes provision for the payment of a fixed penalty fine as an alternative to prosecution for fly-tipping offences.

155. Under subsection (1) of the new section 33A of the 1990 Act, as read with subsection (13), an authorised officer of a local authority, a police constable or an officer of SEPA (as the waste regulation authority), on having reason to believe that a fly-tipping offence has been committed (the “relevant offence” in terms of subsection (2)), has the power to give the

offender a notice inviting the offender to pay a fixed penalty. The “relevant offences”, as set out in section 33(1)(a) and (c) of the 1990 Act, concern respectively depositing waste, or knowingly causing or permitting the depositing of waste, without a licence to do so, and to treating, keeping or disposing of controlled waste in a manner likely to cause pollution of the environment or harm to human health. These offences are commonly referred to as “fly-tipping”.

156. Subsections (4) to (7) of section 33A set out the procedure for issuing a fixed penalty notice. In terms of subsection (4), where a fixed penalty notice is given by a police constable, or an officer of SEPA, a duplicate of the notice is given to the local authority in whose area the offence occurred and it is the latter which is responsible for the further administration of it, such as collection of the fixed penalty. If payment is made within 14 days then, in terms of subsection (5), no further proceedings will be instituted in relation to that offence. Subsection (6) makes provision for what the fixed penalty notice must contain and, as read with subsection (7), for the payment of the fixed penalty to which the notice relates. Subsection (8) permits the Scottish Ministers to prescribe by order the form of fixed penalty notices. The effect of subsection (12) is that the local authority keeps the proceeds of fixed penalties, as occurs at present in the case of fines imposed by the district courts. These regulations are subject to negative resolution procedure.

157. If the fixed penalty is not paid, the alleged offender will be reported to the procurator fiscal for consideration of prosecution. Subsection (11) establishes that a certificate purporting to be signed by the proper officer concerning the payment or non-payment of a fixed penalty shall satisfy the relevant evidential requirements in any proceedings, which would include, for example, a prosecution for a fly-tipping offence where the opportunity to pay a fixed penalty fine had not been taken.

158. In terms of subsection (9) of section 33A, the level of fixed penalty will initially be £50. However, the Scottish Ministers have the power, under subsection (10), to vary this amount by order, up to level 2 on the standard scale (currently £500). These regulations are subject to negative resolution procedure.

159. The definition of “authorised officer” in subsection (13) of section 33A, as read with subsection (1), seeks to ensure that it is the authorised officer of the local authority in the area where the offence is committed who has the power to issue the fixed penalty notice. The “proper officer” in terms of the Local Government (Scotland) Act 1973 is the individual who has financial oversight of the relevant local authority’s affairs.

### **Section 56 – Litter: power of constables to issue fixed penalty notices**

160. The existing regime which permits fixed penalty notices to be issued for littering offences (on which the regime for fly-tipping offences above is modelled) is set out in section 88 of the 1990 Act. Until now it has given authorised officers of local authorities, only, the power to issue fixed penalty notices to individuals who commit litter offences, which are described in section 87 of the 1990 Act as an alternative to being reported to the procurator fiscal for prosecution. Section 88 of the 1990 Act, as amended by section 56 of the Act, now gives police constables, as well as authorised officers of the local authority, the power to issue fixed penalty notices in respect of littering offences. The subsequent administration will remain exactly as it is at present. However, subsection (6) restricts the power of the Scottish Ministers to vary the level of the fixed penalty by order to an upper limit of level 2 on the standard scale (currently £500), consistent with the limit on the fixed penalty fine for fly-tipping.

### **Section 57 – Directions in respect of duty under section 89 of 1990 Act**

161. Under section 89(1) and (2) of the 1990 Act a number of bodies have duties in respect of litter clearance. Bodies or individuals responsible for “relevant land” must clear it of litter, so far as is practicable. “Relevant land” includes public open spaces, roads, railways, the grounds of educational institutions, areas of Crown land, and other areas which local authorities designate as part of litter control areas. In this explanatory note such bodies are referred to as “duty bodies”. In discharging their duties, duty bodies must have regard to a code of practice prepared by Ministers under section 89(7).

162. Subsection (2) of section 57 of the Act, which inserts new subsections (6A) to (6D) into section 89 of the 1990 Act, gives the Scottish Ministers the power to supplement the existing code of practice with specific directions (see the new subsection (6A)) to duty bodies for the purpose of securing compliance with those duties. The new subsection (6B) requires those bodies to comply with any such directions. The new subsection (6C) permits the directions to address particular litter problems, or particular areas, in detail, thus enabling them to give more focussed guidance in the performance of the litter clearance duty than the code of practice is able to. The new subsection (6D) provides for publication of any directions the Scottish Ministers may make, and for making them available to the public.

163. Under section 91 of the 1990 Act, any person aggrieved by the defacement by litter or refuse of relevant land may, having given notice to the relevant duty body, apply to the sheriff court for a litter abatement order instructing that body to carry out its duty by clearing the litter or refuse away. Moreover, under section 92 of that Act, a local authority (as the litter authority) may issue a litter abatement notice to any other duty body, where the local authority feels that duty is not being adequately performed, requiring it to do so. Non-compliance with a section 91 litter abatement order or a section 92 litter abatement notice is an offence. Subsections (3) and (4) of section 57 of the Act, through amendment of sections 91(11) and 92(8) of the 1990 Act, enable any directions issued under section 89(6A) to be admissible in evidence in these proceedings.

### **Section 58 – Power of local authority to serve notice about graffiti**

164. Section 58 provides local authorities with a power to serve a notice requiring the person upon whom it is served to remove, clear or otherwise remedy the graffiti described in the notice (called a “graffiti removal notice”). Subsection (1) provides that a local authority can exercise this power where it appears to it that the graffiti is either offensive or detrimental to the amenity of the locality. Examples of graffiti which is offensive include graffiti which is racially or sexually offensive, homophobic or defamatory. Graffiti which is not offensive may nonetheless be detrimental to the amenity of the locality in which it occurs and a local authority should take into consideration the extent to which the amenity of an area would be improved if the particular graffiti to which the notice relates were removed. The persons on whom a graffiti removal notice can be served are those responsible for relevant surfaces. Subsection (3) provides a definition of a “relevant surface” and subsection (9) provides a definition of “graffiti” and “responsible persons”.

165. Subsection (2) provides that a graffiti removal notice must give at least 28 days in which to remove the graffiti. .

166. Subsection (3) defines a ‘relevant surface’ as either the surface of a public road or any building, structure, apparatus, plant or other object on such a road or, where subsection (4) or (5) applies, the surfaces of property or land owned, occupied or controlled by a relevant body. Definitions of ‘road’ and ‘relevant body’ are contained at subsection (9). Subsection (7)

empowers a local authority to withdraw a graffiti removal notice it has issued. Subsection (8) provides that a local authority's use of its power at subsection (7) shall not affect its power to issue a further graffiti removal notice in respect of the defacement described in the notice which has been withdrawn.

167. Subsection (9) defines a 'relevant body' as being an educational institution or a statutory undertaker.

168. An 'educational institution' is defined by section 98(3) of the 1990 Act as meaning:

- (a) any university within the meaning of the Education Reform Act 1988 funded by the Universities Funding Council under section 131 of that Act;
- (b) the Open University; (c) any educational establishment (not being a school) within the meaning of section 135(1) of the Education (Scotland) Act 1980 for the provision of any form of further education for the management of which establishment an education authority is responsible;
- (cc) any college of further education within the meaning of Section 36(1) of the Further and Higher Education (Scotland) Act 1992 managed by a board of management established under Part 1 of that Act;
- (d) a designated institution within the meaning of Part II of the Further and Higher Education (Scotland) Act 1992;
- (da) any institution within the further education sector within the meaning of section 91(3) of the Further and Higher Education Act 1992;
- (e) a technology academy within the meaning of section 68(1) of the Self-Governing Schools (Scotland) Act 1989;
- (f) a public school as defined in Section 135(1) of the Education (Scotland) Act 1980 ("the 1980 Act");
- (g) a grant-aided school as defined in section 135(1) of the 1980 Act; (h) a self-governing school within the meaning of section 1(3) of the 1989 Act".

169. A 'statutory undertaker' is defined as having the meaning given by section 98(6) of the 1990 Act – "(a) Any person authorised by any enactment to carry on any railway, light railway, tramway or road transport undertaking; (b) any person authorised by any enactment to carry on any inland navigation, dock, harbour or pier undertaking; or (c) any relevant airport operator (within the meaning of the Part V of the Airports Act 1986)."

170. 'Road' is defined by reference to section 151(1) of the Roads (Scotland) Act 1984. Section 151 provides that a road is "any way (other than a waterway) over which there is a public right of passage (by whatever means and whether subject to a toll or not) and includes the road's verge and any bridge (whether permanent or temporary) over, or tunnel through which, the road passes; and any reference to a road includes a part thereof".

### **Section 59– Power to modify meaning of "relevant surface"**

171. This section provides the Scottish Ministers with a power to modify by order the definition of "relevant surface" contained in the Act, and so alter the surfaces in respect of which a graffiti removal notice may be served. Any order proposing such changes would be subject to affirmative resolution by the Scottish Parliament.

## **Section 60 – Graffiti removal notice: content and service**

172. This section sets out the matters that should be included in a graffiti removal notice and the manner in which that notice should be served. Subsection (1) requires that a graffiti removal notice shall explain the effect of sections 61, 63 and 64. Section 61 sets out a local authority's powers where a person fails to comply with a graffiti removal notice. Section 63 provides for a person on whom a graffiti removal notice has been served to appeal against that notice. Section 64 provides that, where a person has failed to comply with a graffiti removal notice and a local authority serves a notice seeking to recover the cost of removing the graffiti from the person upon whom the notice was served, they may appeal against that notice on the grounds that the expenditure the local authority seeks to recover is excessive.

173. Subsection (2) provides that, subject to subsection (3), a graffiti removal notice shall be treated as if it is a notice served under subsections 160(2) to 160(5) of the 1990 Act.

174. Section 160(2) of the 1990 Act states that a notice shall be regarded as having been served on a person by delivering it to him in person, by leaving it at his proper address or by sending it by post to him at that address. Section 160(3) states that in the case of a body corporate, a notice may be served on the secretary or clerk of that body and in the case of a partnership it may be served on a person having control of the partnership or business. Section 160(4) states that the proper address of a person on whom a notice is to be served shall be his last known address except: in the case of a body corporate where it should be sent to the address of the registered or principal office of that body and; in the case of a partnership where it shall be the principal office of that partnership. In the case of a body whose principal or registered office is outside the UK, their principal office shall be their principal office within the UK. Section 160(5) states that if a person to be served with a notice has specified an address in the UK other than his proper address as defined by subsection 160(4) as that at which he or someone on his behalf will accept notices of a particular type (e.g. graffiti removal notices) then this address should be treated as his principal address for such purposes.

175. Subsection (3) makes provision for service of the notice in cases where a local authority are unable to establish the name or proper address of the person on whom the graffiti removal notice is to be served. Subsection (4) provides that 'proper address' shall be read in accordance with section 160(4) of the 1990 Act.

## **Section 61 - Non-compliance with graffiti removal notice**

176. Section 61 provides that a local authority may take action to deal with the graffiti where the person on whom the graffiti removal notice is served fails to comply with that notice. Subsection (2) enables the local authority or a person authorised by the authority to deal with the graffiti and to enter onto any land where appropriate in order to deal with that graffiti.

177. Subsection (3) empowers a local authority to recover any expenditure reasonably incurred in dealing with the graffiti under subsection (2) from the person responsible for the surface. Subsection (4) provides that before doing so, a local authority must serve on the responsible person a notice setting out the amount and details of the expenditure it proposes to recover. Subsection (5) provides that subsections 160(2) to 160(5) of the 1990 Act apply in relation to the service of a notice mentioned in subsection (4).

## **Section 62 – Guidance to local authorities about graffiti removal functions**

178. This section provides that a local authority shall have regard to any guidance given by the Scottish Ministers in carrying out its functions under sections 58, 60 and 61.



### **Section 63 – Appeal against graffiti removal notice**

179. Section 63 provides for the circumstances in which a person can appeal a graffiti removal notice. Subsection (5) provides that where a person has appealed against a graffiti removal notice, it shall have no effect pending the determination or withdrawal of that appeal. A local authority cannot therefore proceed to remove the graffiti from the surface named in the notice while an appeal remains outstanding.

### **Section 64 – Appeal against notice under section 61(4)**

180. Section 64 provides a person on whom a notice has been served by the local authority seeking to recover the costs of removing graffiti from a surface a right to appeal against the notice on the grounds that the expenditure which the local authority proposes to recover is excessive. The sheriff, if satisfied that this is the case, may make an order substituting a lower amount. Subsection (2) provides that such an appeal must be made within 21 days, beginning with the day on which the notice was served.

### **Section 65 – Graffiti removal notices: exemptions from liability**

181. Section 65 provides the local authority, its employees and persons authorised by the local authority (and their employees) under section 61 with exemption from legal liability to responsible persons. This is in cases where the liability would arise from actions or omissions in connection with the exercise of powers under section 60(3) or 61(2). Subsection (3) provides that this exemption from liability does not apply where the act or omission is shown to have been in bad faith or in respect of a liability arising out of a failure to exercise due care and attention.

### **Section 66 and schedule 2 – Increase in penalties for certain environmental offences**

182. Schedule 2, which is given effect by section 66, contains amendments relating to penalties for certain environmental offences. They relate to:

- offences under the Sewerage (Scotland) Act 1968, involving harm to, or impairment of, the working of sewerage or sewage treatment;
- offences causing or allowing the water environment to become polluted (these offences are currently set out in the Control of Pollution Act 1974, which will be superseded in due course by a new regulatory framework under the Water Environment and Water Services (Scotland) Act 2003);
- offences under the Water (Scotland) Act 1980 involving pollution of drinking water sources;
- offences involving harm to the general environment under the 1990 Act or giving rise to a statutory nuisance;
- failing to observe regulations for industrial pollution control under the Pollution Prevention and Control Act 1999 and the associated Pollution Prevention & Control (Scotland) Regulations 2000;
- offences under the Landfill (Scotland) Regulations 2003 concerning the operation of a landfill.

183. The maximum fine currently applicable to any of the above on summary conviction, is £20,000. The effect of the amendments to those provisions in schedule 2 to the Act is to increase the fine on summary conviction for all these offences to £40,000.

## **PART 7 - HOUSING: ANTISOCIAL BEHAVIOUR NOTICES**

### **Section 68 – Antisocial behaviour notices**

184. Section 68 permits a local authority to serve an antisocial behaviour notice on the landlord of a relevant house if any person who occupies the house under a tenancy or occupancy agreement or visits the house is engaging in antisocial behaviour which causes or is likely to cause alarm, distress, nuisance or annoyance at or in the locality of the house. The relevant house must be in the local authority's area but the interpretation section (section 81) excludes houses which are owned by a local authority, a registered social landlord or Scottish Homes; which are in specified categories regulated by the Scottish Commission for the Regulation of Care under the Regulation of Care (Scotland) Act 2001; which are used by a religious order; or which are the subject of a local authority control order in terms of section 178 of the Housing (Scotland) Act 1987.

185. Under subsection (3) of section 68 the antisocial behaviour notice must describe the antisocial behaviour which has led to the serving of the notice and require the landlord to take specified action within a specified period. The subsection requires the notice to state the consequences of a failure to take the action, and to inform the landlord of the right to request a review.

186. Subsection (4) requires the local authority to send a copy of the notice to any known agent of the landlord. Subsection (5) provides for the local authority to publish the notice where it cannot identify the landlord. Where it can identify the landlord but does not have a current address it may serve the notice on the landlord by sending it to the landlord at the house and at the landlord's last known address if known.

187. Subsection (6) allows the Scottish Ministers to modify Part 7 of the Act by order in such ways as they consider to be necessary or expedient in order to apply the powers to houses which are used for holiday purposes. There is the potential for antisocial behaviour in holiday accommodation but the short-term nature of the occupation may make it difficult to implement the antisocial behaviour notice procedure effectively. This subsection allows the provisions to be modified to suit the circumstances of holiday lets should this prove necessary. The order making power is subject to affirmative resolution procedure.

### **Section 69 – Review of antisocial behaviour notices**

188. Section 69 gives the landlord a right for the notice to be reviewed by the local authority provided the landlord applies for a review within 21 days of the service of the notice or such longer period as the local authority may allow.

### **Section 70 – Internal procedure on review**

189. Section 70 sets out the arrangements for ensuring that the local authority's internal review is carried out independently of the initial decision. It provides that the review must be conducted by a person who was not involved in the decision to serve the notice and who is senior to the person who made that decision. The reviewer may confirm, vary or revoke the notice and may suspend the notice pending completion of the review. The local authority must give the landlord reasons for the decision taken on review.

### **Section 71 – Failure to comply with notice: order as to rental income**

190. Section 71 provides that the sheriff may make an order that no rent or other consideration shall be payable or exigible for occupation of the house if the local authority applies for such an order and the sheriff is satisfied both that the landlord has failed to

comply with the antisocial behaviour notice and that it would not have been unreasonable for the landlord to have done so. The sheriff can also make incidental orders if necessary.

191. Subsections (3) and (4) require the local authority to give a copy of the order to any tenant and any agent, provided the local authority is aware of their name and address. Subsection (5) provides that apart from the effect of the order no other aspect of the lease is affected by the operation of Part 7. This means that, for example, the landlord is still able to take action under the lease to deal with a tenant's antisocial behaviour, and that the tenant retains all obligations (other than rent liability) and protections under any lease or occupancy agreement.

### **Section 72 – Appeals against orders under section 71**

192. Section 72 provides that an appeal against a decision by a sheriff on an application for an order as to rental income shall be made to the sheriff principal within 21 days, and that the sheriff principal's decision is final. Where a landlord appeals against a decision to make an order, the landlord must give notice to the tenant of any matters which are prescribed by the Scottish Ministers in regulations. If the landlord does not give such notice, or in other circumstances which may be specified by the Scottish Ministers in regulations, the sheriff principal must not require the tenant to pay any sums which would have been due but for the making of the order. The regulations may include provisions as to procedures and may also impose obligations on landlords. These regulations are subject to negative resolution procedure.

### **Section 73 – Orders under section 71: revocation and suspension**

193. Section 73 allows the sheriff to revoke or suspend an order as to rental income made under section 71 on application by the local authority or the landlord, if the sheriff is satisfied either that the action specified in the antisocial behaviour notice has been taken or that it is otherwise unreasonable for the order to continue. Subsection (3) provides that the revocation or suspension does not have retrospective effect, and subsection (4) requires the local authority to give a copy of the order revoking or suspending the order as to rental income to any tenant and any agent, provided the local authority is aware of their name and address..

### **Section 74 – Failure to comply with notice: management control order**

194. Section 74 provides for the sheriff to make, in like manner as for an order as to rental income under section 71, a management control order which transfers to the local authority for a period not exceeding 12 months the rights and obligations of the landlord under the tenancy or occupancy arrangements existing at the time of the order. Subsection (4) allows the local authority to recover from the landlord any sums that should have been paid to it in terms of the management control order but were instead paid to the landlord. The section also provides for the sheriff to make incidental orders, and gives effect to schedule 3.

### **Schedule 3 – Management control orders**

195. Schedule 3 makes detailed provision for management control orders in connection with the effect on tenants and occupants, the keeping of accounts by the local authority, the making of regulations to govern expenditure recoverable by the local authority from the landlord, the recovery of rent arrears from the tenant, the delegation by the local authority of management functions to third parties and the requirement for the landlord to obtain the local authority's approval to re-let part of shared accommodation while it is subject to an order. These regulations are subject to negative resolution procedure.

**Section 75 – Management control order: notification**

196. Section 75 requires the local authority to inform both the landlord if practicable and the tenant, or the occupant under an occupancy arrangement, of the making of the order and to give a copy to any known agent.

**Section 76 – Management control order: revocation**

197. Section 75 allows the sheriff to revoke a management control order in like manner as for the revocation of an order as to rental income under section 73 if either the action specified in the antisocial behaviour notice has been carried out by the landlord or the local authority or it would in all the circumstances be unreasonable for the notice to continue to have effect.

**Section 77 – Management control order: notification of revocation**

198. Section 77 requires that when a management control order is revoked, the party which applied for the revocation (which could be the local authority or the landlord) notifies the other party and the occupiers as soon as practicable after the revocation.

**Section 78 – Failure to comply with notice: action by authority at landlord's expense**

199. This section provides that where a landlord fails to comply with an antisocial behaviour notice the local authority may take steps that it feels are necessary to deal with the antisocial behaviour described in the notice. It also provides that the landlord shall be liable for the local authority's expenditure of a description and in circumstances prescribed by the Scottish Ministers in regulations. The regulations may also provide for the notification and collection of such expenditure and for the settling of related disputes. These regulations are subject to negative resolution procedure.

**Section 79 – Failure to comply with notice: offence**

200. Section 79 provides that a landlord who has failed without reasonable excuse to comply with an antisocial behaviour notice shall be guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale (currently £5,000).

**Section 80 – Regulations about advice and assistance: Part 7**

201. Section 80 gives the Scottish Ministers powers to make regulations requiring local authorities to provide advice and assistance in connection with Part 7 of the Act. These regulations are subject to negative resolution procedure.

**Section 81 – Interpretation of Part 7**

202. Section 81 defines landlord, occupancy arrangement and relevant house so that the provisions in this Part relate to houses which are the subject of formal tenancies and the full range of formal and informal occupancy arrangements including shared accommodation. However, as indicated in the introductory paragraph it excludes houses which are owned by a local authority, a registered social landlord or Scottish Homes; which are in specified categories regulated by the Scottish Commission for the Regulation of Care under the Regulation of Care (Scotland) Act 2001; which are used by a religious order; or which are the subject of a local authority control order in terms of section 178 of the Housing (Scotland) Act 1987. It also sets out what is meant by engaging in antisocial behaviour for the purposes of this Part of the Act.

## **PART 8 - HOUSING: REGISTRATION OF CERTAIN LANDLORDS**

### **Section 82 – Registers**

203. Section 82 requires each local authority to prepare and maintain a register for the purposes of Part 8 and to make it available for public inspection at all reasonable times.

### **Section 83 – Application for registration**

204. Section 83 requires that an application for registration must specify the applicant's name and address, the address of any house in the local authority's area that the applicant lets other than to members of his family, the name and address of any agent for such houses and any further information that the Scottish Ministers may prescribe by regulations, which are subject to negative resolution procedure. Subsections (2) and (3) provide for the application to be accompanied by a fee but give the Scottish Ministers power to prescribe fees, how they are to be arrived at and in what cases no fee is payable. This means that Scottish Ministers will be able, for example, to set maximum fees or methods for their calculation to ensure that reasonable fees are charged. The regulations under subsection (3) are subject to negative resolution procedure. Subsections (4) and (5) make it an offence punishable by a fine up to level 3 on the standard scale (currently £1,000) to omit information or provide false information in an application.

205. Subsection (6) excludes from the requirement to be included in the application any house which is: regulated by the Scottish Commission for the Regulation of Care under the Regulation of Care (Scotland) Act 2001; used by a religious order for defined purposes; the subject of a local authority control order in terms of section 178 of the Housing (Scotland) Act 1987; or used for holiday purposes. Subsection (7) allows the Scottish Ministers to modify subsection (6), by order subject to affirmative resolution procedure. Subsection (8) provides that Part 8 does not apply to local authorities, registered social landlords or Scottish Homes and that the letting of houses only to family members is disregarded.

### **Section 84 – Registration**

206. Section 84 requires the local authority to enter the applicant in the register for a period of three years if it is satisfied that the applicant is a fit and proper person to act as landlord under a lease or occupancy arrangement (whether the applicant is currently acting in that capacity or not) and that any agent specified in the application is a fit and proper person to act for the landlord. The local authority is also required to enter the details required by section 83 (but not further information required by regulations under that section) in the public register.

### **Section 85 – Section 84: considerations**

207. Section 85 specifies material to which the local authority shall have regard (in addition to other things it may consider) when deciding whether an applicant or an applicant's agent is a fit and proper person for the purposes of section 84. The material specified is: whether the person has committed certain types of offence, practised unlawful discrimination or contravened housing law or landlord and tenant law; actions or failures to act in relation to antisocial behaviour affecting a house let by the applicant or for which the applicant was an agent; and other material considered by the local authority to be relevant.

### **Section 86 – Notification of registration or refusal to register**

208. Section 86 requires the local authority as soon as practicable after a decision on an application for registration is made, to notify the applicant of the outcome of his or her application and, where the application is refused, to send notice of the refusal to the address of any house and any agent specified in the application.

### **Section 87 - Duty of registered person to provide information to local authority**

209. Section 87 requires a registered person to give the local authority written notification of any change in the information supplied in terms of section 83 (or any information supplied in terms of this section) as soon as practicable after that change. Subsections (3) and (4) provide for a fee to be payable and give the Scottish Ministers power to prescribe fees, how they are to be arrived at, or instances where no fee is to be paid. The regulations under subsection (4) are subject to negative resolution procedure. Subsections (5) and (6) make it an offence punishable by a fine up to level 3 on the standard scale (currently £1,000) to fail to give notice of relevant information changes without reasonable excuse.

### **Section 88 – Registered person: appointment of agent**

210. Section 88 requires a registered landlord who appoints an agent to notify the local authority in writing and for the local authority to consider whether the agent is a fit and proper person to act for the landlord. If the local authority is satisfied that the agent is fit and proper it must confirm the landlord's registration in writing. The existing registration period continues, and does not start again. If the local authority considers that the agent is not a fit and proper person it must remove the landlord from the register.

### **Section 89 – Removal from register**

211. Section 89 requires the local authority to remove a person from the register if it is satisfied that the person, or the person's agent where applicable, is no longer fit and proper in terms of section 84.

### **Section 90 – Notification of removal from register: registered person**

212. Section 90 provides that if a local authority removes a person from the register under section 88 or 89 it must notify that person by recorded delivery to that person's address as it appears on the register as soon as practicable.

### **Section 91 – Notification of removal from register: other persons**

213. Section 91 provides that when a local authority removes a person from the register it must give notice of the removal to the address of each house registered in relation to that person and to any known agent of that person.

### **Section 92 – Appeal against refusal to register or removal from register**

214. Section 92 provides for a person whose application for registration is refused or who is removed from the register to appeal to the sheriff, who can require the local authority to enter the person in the register. Any appeal against the sheriff's decision has to be made to the sheriff principal within 21 days of the decision, and the sheriff principal's decision is final.

### **Section 93 – Offences**

215. Section 93 provides that a person who is not registered and who lets a house or takes active steps to do so while not registered is committing an offence which is punishable by a fine up to level 5 on the standard scale (currently £5,000). It is a defence to show reasonable excuse. An offence is not committed if the person has applied for registration and the application has not been determined.

### **Section 94 – Circumstances in which no rent to be payable**

216. Section 94 permits a local authority to serve a notice on the landlord, tenant and any agent if the landlord is not registered and is letting or allowing occupation of a house and it is appropriate to serve a notice in all the circumstances. The effect of the notice is that no rent

or other payment is payable under the tenant's lease or occupancy arrangement from a specified date. No other aspect of the lease or occupancy arrangement is affected. A notice cannot be served if the person has applied for registration and the application has not been determined. The section also provides for notification arrangements where the landlord's identity or current address is unknown.

#### **Section 95 – Notices under section 94: revocation**

217. Section 95 requires the local authority to revoke a notice under section 94 where the landlord registers, stops letting or the notice is no longer appropriate. Subsection (3) makes it clear that revocation does not have retrospective effect with regard to liability for rent during the period in which the revoked notice was in force.

#### **Section 96 – Notification of revocation of notice**

218. Section 96 makes provision for the notification by the local authority to the landlord, tenant and any agent of the revocation of a notice under section 94 that no rent or other consideration is payable.

#### **Section 97 – Appeals**

219. Section 97 allows a person who has been served with a notice that no rent is payable under section 94 or whose application for the revocation of such a notice has been refused to appeal to the sheriff within 21 days. The appellant must give notice to the tenant of any matters which the Scottish Ministers may prescribe by regulations. If the appellant does not give such notice, or in other circumstances which may be specified by the Scottish Ministers in regulations, the court which hears the appeal must not require the tenant to pay any sums which would have been due but for the making of the order. The regulations may include provisions as to procedures and may also impose obligations on landlords. All the regulations under section 97 are subject to negative resolution procedure.

#### **Section 98 – Grants to local authorities**

220. Section 98 gives the Scottish Ministers powers to pay grant, with such conditions that they may determine (including conditions in which repayment may be required), to local authorities in connection with their costs incurred in connection with Part 8 of the Act.

#### **Section 99 – Regulations about advice and assistance: Part 8**

221. Section 99 gives the Scottish Ministers powers to make regulations requiring local authorities to provide advice and assistance in connection with Part 8 of the Act. These regulations are subject to negative resolution procedure.

#### **Section 100 – Amendment of Housing (Scotland) Act 1988**

222. Section 100 ensures that landlords can seek possession of houses let under assured tenancies on the grounds of antisocial behaviour whether or not the terms of the tenancy allow for it to be brought to an end on that ground.

#### **Section 101 – Interpretation of Part 8**

223. Section 101 defines house. In a house in which there are dwellings which share toilet, washing or cooking facilities, those dwellings are taken to form a single house. It defines occupancy arrangements so that this Part relates to formal tenancies and the full range of formal and informal occupancy arrangements including shared accommodation. It also defines family and defines antisocial behaviour as, for the purposes of this Part, affecting persons at or in the locality of the relevant house. Anti social behaviour is construed for the

purposes of Part 8, as it is for Part 7, as behaviour which causes or is likely to cause alarm, distress, nuisance or annoyance at or in the locality of the house.

## **PART 9 – PARENTING ORDERS**

### **Section 102 – Applications**

224. Section 102 provides that a parenting order may be made by a court on the application of the Principal Reporter or the local authority for the area in which the child of the parent normally resides. Subsection (1) provides that a court may not make a parenting order until it has been notified by the Scottish Ministers that the local authority has put in place the necessary arrangements for the operation of parenting orders in that area.

225. Subsection (2) provides that a local authority may apply for a parenting order on one of two grounds. The first ground is that the child has engaged in antisocial behaviour and that the order is desirable in the interests of preventing further such antisocial behaviour by the child. The second is that the child has engaged in criminal conduct and that the order is desirable in the interests of preventing further such criminal conduct by the child.

226. Subsection (3) provides that the Principal Reporter may apply for a parenting order on one of three grounds: the two grounds set out above on which a local authority may apply plus another ground that the order is desirable in the interests of improving the welfare of the child.

227. Subsection (8) provides that an application for a parenting order shall be made by summary application to the sheriff court for the area in which the parent normally resides.

228. Subsection (9) requires the Principal Reporter and the local authority to consult the other before making an application for a parenting order.

### **Section 103 – Parenting orders**

229. Section 103 provides for the effect of a parenting order. An order will direct a parent as to how he or she should behave in respect of their child. A parenting order may last for up to 12 months and the parent subject to the order must comply with the requirements of it for that whole period. Further, an order will include a requirement to attend counselling or guidance as directed by a local authority supervising officer for a maximum period of 3 months during the period of the order unless the parent has previously been the subject of a parenting order in respect of the same child. In that situation the guidance/counselling requirement is not mandatory. Schedule 4, paragraph 1(a)(i) makes a consequential amendment to the Social Work (Scotland) Act 1968 to ensure services are available for parenting orders.

230. Subsection (3) gives the Scottish Ministers the power to amend by order the number of months which the requirements of the order must not exceed. This order is subject to affirmative resolution procedure.

### **Section 104 – Notification of making of order**

231. Section 104 provides for the arrangements for notification of the making of an order to the parent. The order can either be given to the parent or sent to them by registered post or recorded delivery.

232. Subsection (2) provides that an acknowledgement or certificate of posting issued by the postal operator shall be sufficient proof of the proper delivery of the order.



233. Subsection (3) provides that ‘postal operator’ in this context means a person who provides the service of conveying postal packets from one place to another by post or any of the incidental services of receiving, collecting, sorting and delivering such packets.

### **Section 105 – Review of order**

234. Section 105 sets out the arrangements for review of a parenting order. Subsection (1) provides that on application for a review the court may revoke the order or vary it by deleting or adding any requirement it contains. This power to vary also includes the power to amend the time during which a parent must undertake counselling or guidance, subject to the maximum period of 3 months set out in section 103.

235. Subsection (2) provides that the parent, the child or the local authority for the area in which the parent ordinarily resides (which will be the authority supervising the order) may apply for a review.

236. Subsection (3) provides that before making an application to vary or revoke a parenting order, the local authority shall consult the Principal Reporter.

237. Subsection (5) provides for the situation where a parent moves to another part of Scotland outwith the jurisdiction of the sheriff court which made the parenting order. In that situation, and if it is appropriate to do so, the court may specify another sheriff court as the court which will deal with applications for review or revocation of the order.

### **Section 106 – Appeals**

238. Section 106 sets out the arrangements for appeals in relation to certain decisions made in relation to parenting orders. It provides that an interlocutor varying or refusing to vary a parenting order or making a parenting order in the course of proceedings for an antisocial behaviour order under section 13 is an appealable interlocutor. The effect of this is that where the sheriff makes decisions which vary or refuse to vary a parenting order or make an order under section 13 those decisions of the sheriff may be appealed to the sheriff principal. In general the terms of section 27 and 28 of the Sheriff Courts (Scotland) Act 1907 will apply to decisions made by the sheriff in relation to parenting orders including the making of an order under section 102. These provisions generally set out the circumstances in which an appeal against the decision of the sheriff can competently be appealed to the sheriff principal or the Court of Session.

### **Section 107 – Failure to comply with order**

239. Section 107 provides that failure without reasonable excuse to comply with a parenting order is an offence and that the penalty for that offence shall be a fine not exceeding level 3 on the standard scale (currently £1,000). This section should be read in conjunction with the amendments to the Criminal Procedure (Scotland) Act 1995 in schedule 4 which provide that if a fine imposed under this section is not paid a court shall impose a supervised attendance order. Only where that supervised attendance order is breached will the court have its normal powers of sentence – including imprisonment – available to it.

240. Subsection (3) requires the court to take into account the welfare of any child of the parent subject to the order in determining what sentence to impose for failure to comply with a parenting order.

### **Section 108 – Procedural requirements**

241. Section 108 regulates the procedure the court must follow in determining an application for a parenting order or an application for variation or revocation of that order. It requires the

court to give the parent and child – where that is appropriate given his or her age and maturity – an opportunity to express their views about the application. Where the parent is present it provides that the court must explain in ordinary language the effect of the order as well as the consequences of breaching the order and the opportunities in relation to review and appeal of the order. Subsection (4) provides that a failure to comply with the requirements to explain in ordinary language shall not affect the validity of the order made. The court must also obtain information about the family and the likely effect of the order on it.

### **Section 109 – General considerations relating to making, varying and revoking order**

242. Section 109 provides for the considerations the court must take into account when deciding whether to make a parenting order and what the content of the order should be. Subsection (1) provides a court's paramount consideration in determining whether to make, vary or revoke a parenting order should be the welfare of the child concerned. Subsection (2) provides that the court must have particular regard to any views expressed by the child and the information it gained about the circumstances of the family. The court must also consider the behaviour of the parent who is proposed to be subject to the order. This provision will allow the court to take into account whether a parent has been offered and engaged with relevant voluntary support in relation to their parenting skills and any other behaviour of the parent that appears to the court to be relevant.

243. In determining whether to vary or revoke a parenting order, subsection (3) provides that a court shall have regard to the views of the child, any information about the family circumstances of the parent and any behaviour of the parent that appears to be relevant.

244. Subsection (4) provides the interpretation of 'relevant voluntary steps' in subsection (2)(c). In determining whether to make a parenting order the court will take account of voluntary steps intended to prevent the child engaging in antisocial behaviour, criminal conduct and in the interests of improving the welfare of the child, depending on the type of application being considered.

### **Section 110 – Account to be taken of religion, work and education**

245. Section 110 provides that as far as practicable, a court shall ensure the requirements of a parenting order avoid conflict with the religious beliefs of the person specified in the order and any interference with their work or educational commitments. Subsection (2) places these requirements on the supervising officer appointed by a local authority in giving directions to implement the parenting order.

### **Section 111 – Restriction on reporting proceedings relating to parenting orders**

246. Section 111 makes it a criminal offence to publish, anywhere in the world, matters in respect of proceedings relating to parenting orders which are intended, or likely to, identify the parent, their address, the child concerned or any other child as specified at subsection 1(d), including information in respect of a relevant child's address or school.

247. Subsection (2) provides that a court may, in the interests of justice, order that the restriction on publicity provided for in subsection (1) shall not apply.

248. Subsection (5) provides that Section 46 of the Children and Young Persons (Scotland) Act 1937 applies to proceedings in relation to parenting orders only in respect of persons who are witnesses in such proceedings. Section 46 of the 1937 Act provides that a court may direct that no reports which identify parties under the age of 17 to any proceedings (including witnesses) may be made. The application of section 46 of the 1937 Act to witnesses in

parenting order proceedings allows a court to protect child witnesses. Children involved in any other capacity are protected by the other provisions of section 111.

249. Subsection (6) provides that a child in whose interest a parenting order has been made shall be regarded as a person who falls within subsection (1)(a) of section 47 of the Criminal Procedure (Scotland) Act 1995 for the purposes of the application of that section to proceedings for breach of a Parenting Order under section 107(1). Section 47(1)(a) of the 1995 Act provides that where a person under the age of 16 is a person in respect of whom proceedings are taken then no newspaper report of the proceedings shall identify that child. The effect of subsection (6) is that reports of proceedings for breach of a parenting order may not identify, or contain information calculated to identify, the child in whose interest the parenting order was originally granted.

### **Section 112 – Conduct of proceedings by reporters**

250. Section 112 gives the Scottish Ministers the power to make regulations empowering a children's reporter, whether or not the reporter is an advocate or solicitor, to conduct proceedings before a sheriff in respect of applications for the making, variation or revocation of a parenting order. The reporter can also be empowered to conduct proceedings before a sheriff principal in respect of an appeal. These regulations are subject to negative resolution procedure.

251. Subsection (2) describes the type of requirements Ministers may prescribe in regulations for the reporter to be empowered under section 112.

### **Section 113 – Initial investigations by Principal Reporter**

252. Section 113 confers on the Principal Reporter power to make such investigations as he or she considers appropriate to determine whether to make an application for a parenting order under section 102. Subsection (2) places requirements on the local authority to provide a report on specified matters to assist those investigations where that has been requested by the Principal Reporter.

### **Section 114 – Power of court to direct Principal Reporter to consider application for parenting order**

253. Section 114 provides that in any proceedings, except applications for antisocial behaviour orders or for a parenting order itself, a court may require the Principal Reporter to consider whether to apply for a parenting order under this Part. The court would do so where it appears to the court from those proceedings that a parenting order might be appropriate.

### **Section 115 – Guidance about parenting orders**

254. Section 115 provides that any person or body, other than a court, discharging any functions in relation to parenting orders shall have regard to guidance given by the Scottish Ministers.

### **Section 116 – Power of hearing to direct Principal Reporter to consider application for parenting order**

255. Section 116 provides for a new section to be added to the Children (Scotland) Act 1995. The effect of that new section is to allow a children's hearing, when considering the case of a child referred to it or when considering a review of a supervision requirement, to require the Principal Reporter to consider whether to apply for a parenting order in relation to a parent or parents of the child concerned.

256. Subsection (3) of the new section provides that the children's hearing must, when making such a requirement of the Reporter, specify the parent or parents in respect of whom it might be appropriate for the order to be made and which of the three grounds for parenting orders an application should be based upon.

### **Section 117 – Interpretation of Part 9**

257. Section 117 provides for the meaning to be given to various expressions used in the rest of Part 9. It provides that a child in relation to Part 9 is a person under the age of 16. It also provides that a parent for the purposes of Part 9 – i.e. those in respect of whom a parenting order is competent – is a relevant person as defined in section 93(2)(b) of the Children (Scotland) Act 1995. This includes unmarried fathers and others persons where they have day to day care of the child (other than by reason of their employment).

## **PART 10 – FURTHER CRIMINAL MEASURES**

### **Section 118 – Antisocial behaviour orders**

258. Section 118 inserts a new section 234AA into the Criminal Procedure (Scotland) Act 1995 to allow a criminal court to impose an antisocial behaviour order on conviction. The section provides that a court may impose an antisocial behaviour order instead of, or in addition to any sentence where the person is convicted of an offence involving antisocial behaviour. The court must be satisfied, on the balance of probabilities, that the making of an antisocial behaviour order is necessary for the purpose of protecting other persons from further antisocial behaviour by the offender and that the offender was aged 12 years or more at the time of the offence.

259. The definition of antisocial behaviour inserted at section 234AA(3) of the Criminal Procedure (Scotland) Act 1995 is the same as the definition used in the general interpretation section of the Act (section 143(1)).

260. Subsection 11 involves a consequential amendment listed at Schedule 4, paragraph 5(2). This amends the Criminal Procedure (Scotland) Act 1995 to ensure section 9(6) of this Act applies in criminal antisocial behaviour orders.

261. Section 118 also inserts section 234AB to the Criminal Procedure (Scotland) Act 1995 to make provision on notification of antisocial behaviour orders made in the criminal court. Section 234AB provides that where an antisocial behaviour order is made or varied the court by which the order is made or varied shall arrange for a copy of the order to be served on the offender and given to the local authority it considers most appropriate. In this section "offender" means the person in respect of whom the antisocial behaviour order was made.

262. Section 234AB(4) provides that a copy of the order is served on the offender if it is given to them or sent to them by registered post or the recorded delivery service.

### **Section 119 – Record of antisocial behaviour orders made in criminal courts**

263. Section 119 places a duty on local authorities to keep records of antisocial behaviour orders made under section 234AA of the 1995 Act (i.e. orders made following conviction) in respect of which a copy has been received from the court by virtue of subsection (1)(b) of section 234AB of the 1995 Act. Similar provision is made as respects the content of such a record, the disclosure of information and guidance concerning record-keeping as is made by section 15 for orders made in the civil courts. The regulations under subsection (2)(f) are subject to negative resolution procedure.

## **Section 120 – Community reparation orders**

264. Section 120 inserts a new section 245K into the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”), to make available a new sentence to be known as a community reparation order. The new order will be confined to summary proceedings, where the offender is aged at least 12 and where the offence contains an element of antisocial behaviour as defined in subsection (3). An order will require the offender to carry out such tasks as the supervising officer, who will be appointed by a local authority, may direct for a specified number of hours (between 10 and 100 hours). Courts will require to explain in ordinary language the purpose and effect of the order, including the consequences of non-compliance. The supervising officer will require to ensure that the offender’s religious beliefs and employment (including any voluntary work) or educational needs are not prejudiced. Tasks undertaken by offenders subject to an order fall into two categories. These are activities designed to enable reparation to be made for antisocial behaviour or activities designed to reduce the future likelihood of persons engaging in antisocial behaviour. The regulations under subsections (5) and (6) are subject to negative resolution procedure.

265. New section 245L sets out the arrangements for notification to the offender and the local authority of details of the order. New section 245M makes provision for continuation of the order where it has not been completed within the normal 12 months period. New section 245N gives courts powers, where it appears that non-compliance has occurred, to cite the offender to appear in court or to order a warrant for his or her arrest. New section 245P sets out the power of courts in relation to extending, varying or revoking the order. The court will have the ability to extend the normal period of 12 months for completion of the order, to vary the number of hours specified, to revoke the order or to sentence the offender in any manner which would have been available to the court at the time of imposing the order. Schedule 4 of the Act makes amendments to the Social Work (Scotland) Act 1968, amongst other matters, it provides powers for the Scottish Ministers to make regulations requiring local authorities to consult on the nature of community reparation order schemes. These regulations are subject to negative resolution procedure.

## **Section 121 – Restriction of liberty orders**

266. Section 245A of the Criminal Procedure (Scotland) Act 1995 makes provision for the court to impose a Restriction of Liberty Order (RLO). An order may require an offender to be restricted to a specified place for up to 12 hours per day or restricted from a specified place for up to 24 hours per day, or both, for a maximum period of 12 months. Compliance with a restriction of liberty order is monitored electronically. Section 50(3) of the Criminal Justice (Scotland) Act 2003 amended the 1995 Act so as to enable a restriction of liberty order to be imposed as a direct alternative to custody.

267. Section 245A(1) presently provides that an RLO may not be imposed on an under 16. Subsection (2) removes that age limit. But subsection (3) inserts a new subsection (11A) which requires the court to obtain a report from the local authority, detailing the support to be provided to the offender, if under the age of 16, during the period of the RLO. The court will need to be satisfied that the local authority will provide services for the individual offender’s support and rehabilitation before it can impose an RLO. This will ensure that, where such support is not available, the court may not impose an RLO. However it will also give the court the flexibility to deal with each case on an individual basis.

268. Paragraph (1)(a)(ii) of schedule 4 amends section 27 of the Social Work (Scotland) Act 1968 (functions of local authorities in relation to persons appearing before courts, under supervision of court orders etc.) to ensure that the local authority has the power to provide a

service for the supervision of, and the provision of advice, guidance and assistance to young people under 16 years old who are subject to an RLO.

269. Paragraph 5(7) of schedule 4 makes consequential amendments to section 245D of the 1995 Act. It is necessary to amend section 245D(1)(b) and (3) because a drug treatment and testing order may only be imposed on an over 16. So it is only in the case of an RLO being imposed on someone of that age or over that the question of imposing the two orders together is relevant and needs to be catered for.

270. Paragraph 5(8) of schedule 4 amends section 245E(1)(b) of the 1995 Act to insert the word “apply” after the word “court” where it first occurs. This word was omitted by a previous amendment to this section effected by section 43(3) of the Criminal Justice (Scotland) Act 2003.

271. Paragraph 5(9) of schedule 4 amends section 245G(2) of the 1995 Act to insert the word “of” after the word “disposing”. This word was omitted by a previous amendment to this section effected by paragraph 4 (2) of Schedule 6 to the Crime and Disorder Act 1998.

272. Paragraph 5(10) of schedule 4 amends section 245H(1)(b) to substitute the word “offender” for the words “person subject to the order” to ensure consistency with other references to “offender” in sections 245A to 245I.

### **Section 122 – Offence of selling spray paint to child**

273. Section 122 introduces a new criminal offence of selling a spray paint device to a person under the age of 16. The maximum penalty for a person guilty of an offence under section 90(1) shall be a fine not exceeding level 3 on the standard scale, which is currently £1,000. The offence will be dealt with on a summary basis. Subsection (4) provides that it shall be a defence for a person charged with the offence to show they took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.

### **Section 123 – Requirement to display warning statement**

274. Section 123(1) introduces a requirement on retailers to display a notice stating that “It is illegal to sell a spray paint device to anyone under the age of 16.” Subsection (3) gives the Scottish Ministers to prescribe in regulations the dimensions of the notice and the size of the statement. These regulations are subject to negative resolution procedure. Subsection (4) introduces a new criminal offence for a failure to fulfil the requirement at subsection (1). The maximum penalty for the offence under subsection (4) is a fine not exceeding level 2 on the standard scale, which is currently £500. The offence will be dealt with on a summary basis.

### **Section 124 – Offences under sections 122 and 123: enforcement**

275. Section 124 places a duty on local authorities to enforce, within its area, the ban on the sale of spray paint to under 16s and the requirement to display warning statement in premises at which spray paint devices are sold by retail. Subsection (2) provides that the local authority is not authorised to institute proceedings for an offence under section 122(1) or 123(4). Trading standards officers will be primarily responsible for enforcing the ban as part of their duties.

### **Section 125 – Offences under section 122 and 123: powers of entry, inspection and seizure**

276. Section 125 confers statutory powers of entry, inspection and seizure on an authorised officer of a local authority for the purpose of enforcing the offences under sections 122(1) and 123(4). Subsection (2) provides that an “authorised officer” in relation to a local

authority, means an officer of the authority authorised in writing by it for the purposes of this section.

### **Section 126 – Vehicles used in manner causing alarm, distress or annoyance**

277. This section gives the police new powers to deal with the antisocial use of motor vehicles on public roads or off-road. It includes (under subsections (1) and (3)) powers to stop and to seize and to remove motor vehicles. This can be done in two cases. First, where such vehicles are being or have been driven off-road contrary to section 34 of the Road Traffic Act 1988. Second, where such vehicles are being or have been driven on the public road or other public place without due care and attention or reasonable consideration for other road users, contrary to section 3 of the 1988 Act (as substituted by section 2 of the Road Traffic Act 1991). A constable must also, in both of these instances, have reasonable grounds for believing that a motor vehicle is being, or has been used, in a manner which is likely to cause alarm, distress or annoyance to members of the public.

278. By virtue of subsection (1)(a), these new police powers will not be exercisable until regulations under section 127 are in force. These regulations, which are subject to negative resolution procedure, concern the removal, retention, release or disposal of motor vehicles seized in accordance with this section.

279. Subsection (3) provides that an officer may enter premises, other than a private dwelling house, for the purpose of exercising these powers.

280. Under subsection (6) it is an offence for a person to fail to stop a vehicle when required to do so by a police officer acting in accordance with this section. The offence is punishable, on summary conviction, by a fine not exceeding level 3 on the standard scale.

281. Subsection (4) requires the officer to warn the person before seizing the vehicle, to enable its antisocial use to be stopped. By virtue of subsection (5), the requirement to give prior warning does not apply where it is impracticable to do so or where a warning has previously been given.

### **Section 127 – Retention etc. of vehicles seized under section 126**

282. This section confers on the Scottish Ministers power to make regulations relating to the removal, retention, release or disposal of motor vehicles seized in accordance with section 126. The regulations may include, amongst other things, the procedures for notifying the owner of a vehicle that has been seized, and the circumstances in which the owner will be liable to meet the costs arising from the removal and retention of the vehicle.

## **PART 11 – FIXED PENALTIES**

283. Part 11 gives police powers to issue fixed penalty notices for a range of low-level, antisocial offences, including being drunk and incapable in a public place, vandalism and breach of the peace. If the fixed penalty is paid that is the end of the matter. However, the alleged offender may challenge the fixed penalty notice in which case the police will submit a report to the Procurator Fiscal for consideration of prosecution. The Lord Advocate will provide guidance to the police on the operation of the scheme, which will be piloted.

### **Section 128 – Fixed penalty offences**

284. Section 128 sets out those offences, both statutory and at common law, which are fixed penalty offences and may therefore be the subject of a fixed penalty notice. The Scottish Ministers are empowered to amend the table of offences by order. This order making power is subject to affirmative resolution procedure.

### **Section 129 – Fixed penalty notices**

285. Section 129 provides that a police constable may issue a fixed penalty notice to a person aged 16 or over whom he or she believes has committed a fixed penalty offence in a prescribed area. It further provides that a fixed penalty notice offers the opportunity to pay a fixed penalty – a set monetary amount – to discharge any liability to be convicted of the offence to which the notice relates. In addition, Ministers have a regulation making power to prescribe an area or areas where the powers apply. This ensures that fixed penalty notices can be piloted. These regulations are subject to negative resolution procedure.

### **Section 130 – Amount of fixed penalty and form of fixed penalty notice**

286. Section 130 sets out that the Scottish Ministers may set out the amount of the penalty payable for a fixed penalty offence by order. Subsection (2) provides that the amount must not exceed level 2 on the standard scale (currently £500).

287. Subsection (3) sets out what the fixed penalty notice must contain. This includes the details of the offence, the amount of the fixed penalty, where it should be paid, the fact that the person has a right to dispute his or her guilt by asking to be tried for the offence and the period during which the fixed penalty may be paid or the person should exercise their right to ask to be tried. The regulations under section 130 are subject to negative resolution procedure.

### **Section 131 – Effect of fixed penalty notice**

288. Section 131 sets out what happens if a fixed penalty notice is issued but not paid within 28 days beginning on the day on which the fixed penalty notice is given. Unless a person who has been issued with the fixed penalty notice asks to be tried for the alleged offence by giving a notice (in the manner specified in the fixed penalty notice) within the specified time, proceedings may not be brought against the person subject to the fixed penalty notice. If the person asks to be tried, it is a matter for the procurator fiscal to determine whether a prosecution is in the public interest.

289. Subsections (5) and (6) provide that if the penalty is not paid within the specified time and a request to be tried is not received, then the person issued the fixed penalty notice will be liable to pay a sum 50% more than the amount of the fixed penalty and that increased amount will be treated as if it is a fine imposed by the district court.

### **Section 132 – Payment of fixed penalty**

290. Section 132 makes provision in relation to payment of fixed penalties. Subsection (1) provides that the fixed penalty should be paid to the clerk of the court set out in the notice.

291. Subsection (2) provides that payment may be made by posting a letter containing cash – or other form of payment – for the required amount to the proper address. Subsection (7) provides that the proper address is the address described in the fixed penalty notice.

292. Subsection (3) and (4) provide that, where a person claims to have paid the penalty by post in terms of subsection (2) and he or she is able to show evidence that the letter was posted, then the payment will, unless the contrary is proved, be treated as having been made at the time at which the letter would be delivered in the ordinary course of post.

293. Subsection (5) provides that provision for payment by post in terms of subsection (2) does not preclude payment by other means.



### **Section 133 – Revocation of fixed penalty notices**

294. Section 133 makes provision for revocation of a fixed penalty notice in certain circumstances. Subsection (2) provides that these circumstances are that a police officer believes that either the offence to which the notice relates was not in fact committed or that the notice was issued to the wrong person.

295. Subsection (3) provides that where a fixed penalty notice is revoked then no money shall be payable in terms of that notice and any money that has already been paid shall be refunded.

### **Section 134 – Interpretation of Part 11**

296. Section 134 provides for the meaning to be given to “fixed penalty notice” and “fixed penalty offence” where they appear in Part 11.

## **PART 12 – CHILDREN’S HEARINGS**

### **Section 135 – Supervision requirements: conditions restricting movement**

297. Section 135 amends section 70 of the Children (Scotland) Act 1995 to enable children’s hearings to impose, as a condition of a supervision requirement, a “movement restriction condition”, the meaning of which it sets out in subsection (4), which inserts new subsection 11. Subsection (2) amends section 70(9) of the Act to enable a children’s hearing to provide for a child to be kept in secure accommodation or alternatively to impose a movement restriction condition. In either case the hearing must be satisfied that the child is otherwise likely to abscond, with risk to his welfare, or is likely to injure himself or others, and also that it is necessary to proceed in such manner. Consequential amendments to the Children (Scotland) Act 1995, which arise from the introduction of tagging through the hearings, are set out in Schedule 4, paragraph 4 (1) to (5).

298. Section 135 makes further amendments to section 70 of the 1995 Act. These include a new subsection(13), providing for the making of regulations by the Scottish Ministers. These may include provision to prescribe how monitoring of movement restrictions will operate, including specification of the devices which may be used and who may carry out the monitoring. Subsection (15) provides how the Scottish Ministers may provide the monitoring service, which may be by contract or otherwise. The regulations introduced under section 135 are subject to negative resolution procedure.

### **Section 136 – Supervision requirements: duties of local authorities**

299. Section 136 places a new duty on local authorities to implement decisions of children’s hearings contained in supervision requirements and empowers hearings to require the Reporter to apply for an order from the sheriff court requiring a local authority in breach of its duty to perform that duty. The section also sets out the procedures to be observed.

300. Subsection (1)(a) states that a hearing may impose duties on the local authority and that these duties may include the securing or facilitating of services other than those provided by the local authority.

301. Subsection (1)(b) sets out the procedure to be observed. In new subsection (7A), where the Reporter is required to send the notice to any person appointed under section 41 of the 1995 Act. This may be a safeguarder, a curator ad litem or a legal representative appointed under the Children’s Hearings (Legal Representation) (Scotland) Rules 2002.

302. Section 71 of the Children (Scotland) Act 1995 places a duty on the local authority to give effect to a supervision requirement. Section 136(2) introduces an additional requirement that where a hearing imposes duties on a local authority in the context of a supervision requirement, the local authority must perform these duties.

303. Section 136(3) introduces a new section into the 1995 Act to specify the procedures and circumstances in which the Reporter may apply to the sheriff principal for an order and that the sheriff principal's decision shall be final.

### **Section 137 – Failure to provide education for excluded pupils: reference**

304. Section 137 gives the Reporter and a children's hearing power to refer a child who has been excluded from school to the Scottish Ministers if it appears that the local authority concerned has failed to comply with its duty under section 14(3) of the Education (Scotland) Act 1980 to provide education to a pupil excluded from school.

305. Subsection (2) deals with children who are referred to the Reporter but not to a hearing. Subsection (3) concerns those children who are referred to a hearing.

## **PART 13 – MISCELLANEOUS AND GENERAL**

### **Section 138 – Privacy of certain proceedings**

306. Section 138(1) provides that certain court proceedings in terms of various provisions of the Act shall be held in private and that no persons other than those necessary for the proper consideration of those proceedings shall be present during them. Those proceedings are:

- applications for an antisocial behaviour order in respect of someone under 16 in terms of section 4(1);
- for variation or revocation of such orders under section 5(1);
- for a parenting order under section 102(1); and, for variation or revocation of a parenting order under section 105(1);
- to determine whether to make an interim antisocial behaviour order under section 7(2) in respect of someone under 16; or to recall such an interim antisocial behaviour order;
- to require the Principal Reporter to refer a child's case to a children's hearing under section 12(1) where he or she has made an antisocial behaviour order or interim antisocial behaviour order in respect of that child;
- to make a parenting order under section 13(1) where he or she has made an antisocial behaviour or interim antisocial behaviour order in respect of a child; and
- to make an order under section 105(5) to specifying the sheriff of another sheriffdom as the court that may entertain application for review of a parenting order under section 105(1).

307. An appeal arising from any of these proceedings is subject to the same privacy restriction.

### **Section 139 – Disclosure and sharing of information**

308. Section 139 makes provision on the disclosure to and sharing of information with a relevant authority. It provides a legal protection for those who disclose information to a relevant authority where the disclosure of information is necessary or expedient for the

purposes of any provision of the Act, or any other enactment the purpose of which is in connection with, antisocial behaviour or its effects. However, a person disclosing information and relying on this protection will have to consider other potentially relevant rules of law.

309. Subsection (3) provides that where a person discloses information to a relevant authority under section 139 which is confidential, and where they inform the authority of the breach of that confidentiality on disclosing the information, the authority must respect that confidentiality. Subsection (4) provides an exception to this is in cases where the disclosure by the recipient is permitted or required by law.

310. Subsection (5) provides the interpretation of “relevant authority” in sections 139. For the purposes of this section a relevant authority is a local authority, a chief constable, the Principal Reporter, a registered social landlord, any authority administering housing benefit and other specified persons providing services relating to housing benefit. The Scottish Ministers have the power under subsection (7) to modify the meaning of “relevant authority” by order. This order making power is subject to affirmative resolution procedure.

311. Subsection (6) provides that any person providing or receiving information by virtue of this Act shall have regard to any relevant guidance from the Scottish Ministers.

#### **Section 140 – Equal opportunities**

312. Section 140 provides that any person or body discharging a function in terms of the Act is required to do so in a manner that promotes equal opportunities and the equal opportunity requirements. Section L2 of Part II of Schedule 5 to the Scotland Act 1998 provides that equal opportunities means the prevention or elimination of discrimination between persons on grounds of sex or marital status, on racial grounds, or on grounds of disability, age, sexual orientation, language or social origin, or of other personal attributes, including beliefs or opinions, such as religious beliefs or political opinions.

#### **Section 141 – Orders and regulations**

313. Section 141 provides that powers to make orders or regulations in the Act shall be exercisable by statutory instrument.

314. Subsection (3) provides that except where otherwise provided the statutory instruments containing such orders or regulations shall be subject to negative resolution procedure in the Scottish Parliament. Subsections (3) and (4) provide that the following orders or regulations shall be the subject of affirmative resolution procedure:

- regulations under section 26(2) to specify premises in respect of which the closure of premises provisions (Part 4) do not apply;
- an order made under section 53(1) to further prescribe the meaning of ‘relevant place’ and ‘relevant property’ for the purposes of the Part 5 (noise nuisance);
- an order under section 59(1) to modify the meaning of ‘relevant surface’ for the purposes of the graffiti provisions in Part 6;
- an order under section 68(6) for the purpose of applying Part 7 (housing: antisocial behaviour notices) in relation to houses used for holiday purposes;
- an order under section 83(7) to modify subsection 83(6) which describes those types of housing to which Part 8 (housing: registration of certain landlords) does not apply

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which received Royal Assent on 26 July 2004*

- an order under section 103(3) varying the maximum length of a parenting order and/or the maximum period in a parenting order during which the requirement to attend counselling or guidance can subsist;
- an order under section 128(2) amending, adding, or removing an entry in the table under that section which specifies those offences which are fixed penalty offences; and
- an order under section 139(7) which modifies the meaning of ‘relevant authority’ set out in subsection (5) of that section, which relates to the disclosure and sharing of information.

### **Section 142 – Directions**

315. Section 142 makes provision for the giving of directions by the Scottish Ministers under the Act. It provides that any power to give directions includes a power to vary or revoke the direction and that any direction shall be in writing.

### **Section 143 – Interpretation: “antisocial behaviour” and other expressions**

316. Section 143 provides for the meaning to be given to antisocial behaviour for the purposes of the Act (other than Parts 7 and 8). It also supplies definitions for certain other expressions used in the Act.

### **Section 144 – Minor and consequential amendments and repeals**

317. Section 144 subsection (1) provides that schedule 4 of the Act shall have effect. The main provisions of schedule 4 have been explained at the relevant place in these notes.

318. Subsection (2) provides that the enactments set out in schedule 5 are repealed.

### **Section 145 – Short title and commencement**

319. This section provides a short title to the Act: it may be cited as the Antisocial Behaviour etc. (Scotland) Act 2004

320. Only section 141 (which provides powers in relation to orders and regulations) and this section come into force on Royal Assent. The remaining provisions of the Act will come into force on a date (or dates) appointed by the Scottish Ministers by means of a commencement order or orders.

## **PARLIAMENTARY HISTORY**

321. The following table sets out, for each Stage of the proceedings in the Scottish Parliament on the Bill for this Act, the dates on which the proceedings at that Stage took place, the references to the Official Report of those proceedings and the dates on which Committee Reports and other papers relating to the Bill were published, and references to those Reports.

<b>Proceedings and Reports</b>	<b>Reference</b>
<b>Introduction</b>	
29 October 2003	SP Bill 12, 2003

## **Stage 1**

### **(a) Communities Committee**

1 <sup>st</sup> Report, 2004	5 March 2004(vol 1) (vol 2)
8 <sup>th</sup> Meeting, 2003	<u>12 November 2003. col 176-182</u>
9 <sup>th</sup> Meeting, 2003	<u>19 November 2003 col 184-220</u>
10 <sup>th</sup> Meeting, 2003	<u>3 December 2003, col 221-272</u>
11 <sup>th</sup> Meeting, 2003	<u>10 December 2003. col 274-318</u>
12 <sup>th</sup> Meeting, 2003	<u>17 December 2003, col 321-372</u>
1 <sup>st</sup> Meeting, 2004	<u>7 January 2004, col 373-428</u>
2 <sup>nd</sup> Meeting, 2004	<u>14 January 2004, col 429-474</u>
3 <sup>rd</sup> Meeting, 2004	<u>21 January 2004, col 475-542</u>
4 <sup>th</sup> Meeting, 2004	<u>28 January 2004, col 543-596</u>
5 <sup>th</sup> Meeting, 2004	<u>3 February 2004, col 597-650</u>

### **(b) Justice 2 Committee**

14 <sup>th</sup> Meeting, 2003	<u>11 November 2004, col 207-217</u>
15 <sup>th</sup> Meeting, 2003	<u>25 November 2004, col 233-259</u>
17 <sup>th</sup> Meeting, 2003	<u>16 December 2004, col 304-355</u>
1 <sup>st</sup> Meeting, 2004	<u>6 January 2004, col 357-442</u>
2 <sup>nd</sup> Meeting, 2004	<u>13 January 2004, col 443-502</u>

### **(c) Local Government and Transport Committee**

8 <sup>th</sup> Meeting, 2003	<u>11 November 2003, col 158-203</u>
9 <sup>th</sup> Meeting, 2003	<u>25 November 2003, col 224-271</u>

### **(d) Finance Committee**

17 <sup>th</sup> Meeting, 2003	<u>9 December 2003, col 708-730</u>
2 <sup>nd</sup> Meeting, 2004	<u>20 January 2004, col 815-849</u>

### **(e) Subordinate Legislation Committee**

4 <sup>th</sup> Meeting, 2004	<u>27 January 2004, col 283-297</u>
6 <sup>th</sup> Meeting, 2004	<u>10 February 2004, col 311-297</u>
7 <sup>th</sup> Meeting, 2004	<u>24 February 2004, col 329-330</u>

### **Consideration by the Parliament**

Stage 1 Debate and Parliamentary vote	<u>10 March 2004, col 6438-6478</u>
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## **Stage 2**

### **(a) Communities Committee**

12 <sup>th</sup> Meeting, 2004	<u>17 March 2004, col 718-726</u>
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*These notes refer to the Antisocial Behaviour etc. (Scotland) Act 2004 (asp 8)  
which received Royal Assent on 26 July 2004*

15 <sup>th</sup> Meeting, 2004	<u>21 April 2004, col 793-838</u>
16 <sup>th</sup> Meeting, 2004	<u>28 April 2004, col 861-890</u>
17 <sup>th</sup> Meeting, 2004	<u>5 May 2004, col 897-946</u>
18 <sup>th</sup> Meeting, 2004	<u>12 May 2004, col 950-1025</u>
19 <sup>th</sup> Meeting, 2004	<u>13 May 2004, col 1025-1056</u>
20 <sup>th</sup> Meeting, 2004	<u>13 May 2004, col 1057-1116</u>
21 <sup>st</sup> Meeting, 2004	<u>26 May 2004, col 1117-1200</u>

***(b) Subordinate Legislation Committee***

20 <sup>th</sup> Meeting, 2004	<u>8 June 2004, col 1117-1200</u>
26 <sup>th</sup> Report 2004: Bill as amended at Stage 2	<u>15 June 2004</u>

***Stage 3***

***Consideration by Parliament***

Stage 3 Debate and Parliamentary vote	<u>17 June 2004, col 9164-9226</u>
	<u>17 June 2004, col 9261-9385</u>

Royal Assent – 26 July 2004

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