

# **Explanatory Notes to Antisocial Behaviour etc (Scotland) Act**

## **2004 Chapter 8**

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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*

### **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).