

ANTISOCIAL BEHAVIOUR ETC. (SCOTLAND) ACT 2004

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

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 Those sections are repealed: see schedule 5.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.