

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

---

## **EXPLANATORY NOTES**

### **COMMENTARY ON SECTIONS**

#### **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.