

ANTISOCIAL BEHAVIOUR ETC. (SCOTLAND) ACT 2004

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

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.

*These notes relate to the Antisocial Behaviour etc. (Scotland)
Act 2004 (asp 8) which received Royal Assent on 26 July 2004*

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.