

ANTISOCIAL BEHAVIOUR ETC. (SCOTLAND) ACT 2004

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

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 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);

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

- 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.