

ANTISOCIAL BEHAVIOUR ETC. (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

1. This document relates to the Antisocial Behaviour etc. (Scotland) Bill introduced in the Scottish Parliament on 29 October 2003. It has been prepared by the Scottish Executive to satisfy Rule 9.3.3(c) of the Parliament's Standing Orders. The contents are entirely the responsibility of the Scottish Executive and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 12–EN.

POLICY OBJECTIVES OF THE BILL

2. This Bill introduces a number of measures and changes to tackle antisocial behaviour more effectively. The Bill is intended to support the Executive's strategy to bring about a step change in people attitudes and behaviour, focussing on the four themes of the Executive's strategy on antisocial behaviour. These are:

- protecting and empowering communities;
- preventing antisocial behaviour by working with children and families;
- building safe, secure and attractive communities; and
- effective enforcement.

3. 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 and improving the quality of life of ordinary members of the community.

4. The Bill is divided into Parts which deal with the proposed measures within each of the following categories:

- Part 1 – Antisocial behaviour strategies
- Part 2 – Antisocial behaviour orders
- Part 3 – Dispersal of groups
- Part 4 – Closure of premises
- Part 5 – Noise nuisance
- Part 6 – The environment
- Part 7 – Housing: antisocial behaviour notices

- Part 8 – Housing: registration areas
- Part 9 – Parenting orders
- Part 10 – Further criminal measures
- Part 11 – Fixed penalties
- Part 12 – Children’s hearings
- Part 13 – Miscellaneous and general.

CONSULTATION

5. The Executive published its consultation document *Putting Our Communities First: A Strategy for Tackling Antisocial behaviour* on 26 June 2003. It outlined the Executive’s broad strategy and made a range of policy proposals for legislation and other action. It was sent to a wide range of organisations (over 1500 in total) covering young people and older people's groups, community/tenant groups, registered social landlords (RSLs) and private landlords, professional groups, voluntary organisations, equalities groups, justice based organisations and environmental groups. The consultation document was also made available on the Scottish Executive web site, including Junior Exec (young person's section of the Executive web site) and the older person's web section. Links to the consultation document were also placed on the websites of YouthLink Scotland and Learning and Teaching Scotland.

6. During the consultation period the Executive engaged in a proactive consultation process to encourage responses from as many stakeholders as possible as well as from groups/individuals who would not normally respond to this type of consultation exercise. Ministers visited over 30 communities, at the invitation of local MSPs, to hear from local residents about their experiences of antisocial behaviour and their views on the Executive's proposals. The meetings were attended in the main by local residents but also by representatives from local agencies dealing with antisocial behaviour on a daily basis, for example, police, housing, social work, RSLs etc.

7. Ministers also met with key stakeholder groups during the consultation period and visited several projects that worked with young people to divert them from antisocial behaviour or prevent them from re-offending. In addition, officials attended over 30 meetings/events with local communities and professional organisations to discuss the Executive's proposals. The Executive also funded Youthlink Scotland to hold a consultation event with young people from across Scotland to explore their views on the Executive's proposals. The Scottish Civic Forum also held a series of 6 events, on behalf of the Executive, specifically targeting rural groups.

8. A note of all these meetings/visits were taken and considered as part of the consultation responses which helped inform this Bill. The consultation ended on 11 September. Over 350 responses were received.

PART 1 – ANTISOCIAL BEHAVIOUR STRATEGIES

Policy objectives

9. Antisocial behaviour strategies are intended to provide the basis for promoting joint working and co-ordinating activity to tackle antisocial behaviour locally. The strategies will be consistent with the principles of community planning, which provides the framework in Scotland for bringing agencies and people together to improve local services, to tackle local priorities and to hold agencies accountable to local people. Part 1 of the Bill improves the provisions for antisocial behaviour strategies made by section 83 of the Criminal Justice (Scotland) Act 2003. That section has not been commenced.

10. In taking steps to improve the duty to prepare strategies the Executive is seeking to ensure that community bodies and other bodies or persons the local authority considers appropriate are consulted on the preparation of antisocial behaviour strategies. This will include consultation with bodies and persons representative of those adversely affected by antisocial behaviour. This is likely to include ethnic minority groups and persons who may be victims of antisocial behaviour due to prejudice over their sexual orientation, disability, gender, age or religion. There will also be a specific requirement to consult registered social landlords and the Reporter to the children's panel.

11. Ministers are aware of the importance of integrating registered social landlords in the antisocial behaviour strategy process. For that reason, they have taken a power to direct RSLs – whether on an individual, class or general basis – to work with the appropriate local authority and chief constable in preparing antisocial behaviour strategies.

12. To monitor implementation of antisocial behaviour strategies and ensure relevant authorities are accountable, the Executive is placing a requirement on local authorities to publish reports from time to time on how the authority and the chief constable have implemented the strategy and what the results of that implementation have been. Thus monitoring and evaluation will be part of the strategy process. This will include assessment of the impact on equality groups. A duty is being placed on the police, registered social landlords and the children's reporter to provide such information as required by the local authority to report.

13. One of the main purposes of the duty to prepare strategies is to promote effective information exchange between police and local authorities and other relevant bodies. Authorities can face obstacles to gathering evidence and presenting a strong case due to constraints on information exchange. A balance has to be struck between privacy rights and the need to take legitimate steps to protect the community from crime and disorder. The Executive fully supports efforts to promote good practice in information exchange to tackle antisocial behaviour. The duty on police and local authorities to prepare joint strategies makes clear the strategies should include the commitment to exchange of information between the authority and the police relating to antisocial behaviour.

Alternative approaches

14. An alternative would be to bring section 83 of the Criminal Justice (Scotland) Act 2003 into effect as it stands. However, for the reasons explained above Ministers do not believe

section 83 goes far enough to ensure the preparation of an effective and inclusive strategy to tackle antisocial behaviour.

Consultation

15. There was general support for strengthening the statutory provision for antisocial behaviour strategies in this Bill. Many respondents stressed the importance of the police and local authorities being required to secure the active involvement of local people in the process. The provisions of Part 1 reflect that desire. A majority of those who responded also believed that registered social landlords should be obliged to be involved in preparation of the strategy. The power of direction in relation to responsible social landlords will achieve this.

PART 2 – ANTISOCIAL BEHAVIOUR ORDERS

Policy objectives

16. Antisocial behaviour orders (ASBOs) were introduced by section 19 of the Crime and Disorder Act 1998 and came into effect in April 1999. They are preventative orders that exist to protect the public from behaviour that causes or is likely to cause alarm or distress. A relevant authority can apply to the sheriff court for an order if a person has acted or pursued a course of conduct that has caused or is likely to cause alarm or distress. The applicant should also be satisfied that an order is needed to protect persons from further antisocial conduct. The applicant must consult the police before applying to the court.

17. The Criminal Justice (Scotland) Act 2003 introduced interim ASBOs and extended the power to apply for ASBOs to registered social landlords. Originally, only local authorities could apply for ASBOs in Scotland.

18. The provisions in Part 2 do not alter the substance of the existing legislation on antisocial behaviour orders. The Executive is extending the orders to persons aged 12 to 15 and introducing a number of changes to improve the effectiveness of ASBOs. The provisions in Part 2 replace the existing provisions in the 1988 Act.

ASBOs for under 16s

19. When ASBOs were introduced they were only available for persons aged 16 or over in Scotland. A variety of alternative approaches have been and will continue to be available to prevent and deal with antisocial behaviour by young people. These include early intervention projects, providing diversionary activities and restorative justice programmes, including reparation and mediation. When it is considered appropriate, a children's hearing may impose compulsory measures of supervision setting out what a young person should do. This may include a requirement on the young person to take up programmes and other support measures aimed at addressing their needs and behaviour, for example cognitive skills and anger management. More intensive programmes are also available to help those who do not respond to lower level interventions. However, there remain a small number of persistently antisocial young people for whom no existing measures are effective. In these cases a court-imposed order may be necessary to make clear that persistent disorderly behaviour will not be tolerated. For this reason, the Executive is extending antisocial behaviour orders to persons aged 12 to 15.

This will improve the range of options available for authorities working to prevent antisocial behaviour. Of course, decisions on what tool is best employed in individual cases will be for the local agencies working with that young person to determine.

20. It is expected that in most cases a young person will be well known to the children's hearing system before an ASBO is applied for. The intervention of the hearings system may not have been successful nor appear likely to succeed. A local authority or RSL may therefore take the view that a court order is necessary to address the young person's behaviour. However, there may be situations where the behaviour of the child is so immediately difficult that an application for an ASBO would be appropriate, even though the child has not been dealt with through the hearings system.

21. In proposing a minimum age of 12, a balance is being struck between the need to prevent persistent antisocial behaviour by young people and the desire to limit the scope for younger children's engagement in court processes. In civil law, a child aged 12 or over is presumed to have legal capacity to instruct a solicitor or to defend in any civil proceedings.

22. For cases involving under-16s, an additional duty is being placed on local authorities and registered social landlords to consult the Reporter before applying for an ASBO. In considering an application, the sheriff would take account of the Reporter's views, what is happening to the child in the hearings system and the best interests of the child. Furthermore, the Executive considers that in cases involving under 16s it is important not only that their "offending behaviour" is tackled by introducing a preventative order but that the child is required to address their behaviour by taking positive steps as well. The children's hearing is the most appropriate forum to consider the broader needs of the child and to decide what support measures should be put in place. For this reason, the court is being given a power to require the Reporter to arrange a children's hearing. The court will have this power in relation to interim ASBOs as well as the full order.

23. The making of either a full ASBO or the interim order will be a trigger for the child coming before a hearing. It will be for the hearing to consider whether to impose a supervision requirement and what that should contain. If the child is already under supervision the Hearing will review the existing requirement and consider whether additional measures are required. As is currently the case, failure to comply with the conditions of a supervision requirement would not be a criminal offence, but would be dealt with through the Hearings System. In this regard, the Executive is taking the opportunity to clarify at section 70(1) of the Children (Scotland) Act 1995 that a supervision requirement can be imposed where an ASBO or an interim ASBO have been made under section 11 of the Bill.

24. Breach of an antisocial behaviour order or an interim order is a criminal offence and will be reported to the Procurator Fiscal. This will be the case for 12 to 15 year olds as it is for adults at present. This sends a clear message that further antisocial conduct will not be tolerated. It will be a matter for the relevant Procurator Fiscal, in consultation with the Reporter, to determine what action is most appropriate in each individual case of breach of an antisocial behaviour order by an under-16. If the case is referred to the children's hearings system, a hearing will take into account what more can be done, including the wider range of disposals we propose elsewhere in the Bill. The hearing may consider that electronic monitoring is required or that secure

accommodation is the most appropriate disposal if it believes that the young person is likely to injure or cause serious harm to themselves or others. However, unlike the sentences available for adults, breach of an ASBO by a young person will not lead to imprisonment where no other offences are involved.

25. It is the Executive's intention that ASBOs for under 16s will be linked to the provisions in the Housing (Scotland) Act 2001 in the same way as ASBOs for over 16s at present. Where an ASBO is granted, a social landlord can convert the tenancy to a short Scottish secure tenancy (SSST). Conversion to a SSST is not available when an interim ASBO is granted. The full order has to be in place.

26. As well as extending ASBOs to under-16s, the Bill introduces a number of legislative changes to make ASBOs more effective.

Statutory power of arrest for breach of an ASBO

27. Section 22 of the Crime and Disorder Act 1998 provides that breach of an ASBO is a criminal offence; but there is no statutory power for the police to arrest without warrant on suspicion of a breach. The police have powers to make an arrest under common law and other statutory provisions, but there is a lack of clarity about whether an arrest should be made in individual cases. To enable the police to act immediately to stop any further antisocial conduct taking place, and clarify the law in this area, the Bill introduces a statutory power of arrest for breach of an ASBO.

Geographic scope of ASBOs

28. At present ASBOs can only be used to protect persons in the area of the local authority from further antisocial acts or conduct. There can be difficulties if the antisocial conduct takes place in the sheriffdom of one local authority while the person whom the ASBO refers to lives in another local authority area or even another neighbouring sheriffdom, or if the sheriffdom has jurisdiction over more than one local authority area. These boundary issues may undermine the effectiveness of ASBOs in some cases where the behaviour does not necessarily fall neatly within one local authority or one sheriffdom. There may therefore be cases where an ASBO ought to extend beyond a particular local authority area or sheriffdom. Potentially, the ASBO may have to cover the whole of Scotland. The Bill extends the potential scope of ASBOs in such a way, while having due regard to the jurisdiction of the court in which the order is made.

Records of ASBOs

29. The Bill imposes a duty on each local authority to establish and maintain a record of all ASBOs granted in their area. That record will include details of ASBOs granted on the application of that local authority but also of ASBOs granted on the application of registered social landlords that relate to that local authority area. Ministers believe that such comprehensive records of ASBOs granted are important in allowing antisocial behaviour to be effectively tackled. For that reason the Bill provides that other local authorities, any police force and any registered social landlord has a right to request the information held on the record of ASBOs. This will allow a landlord or prospective landlord or the police to check whether an

ASBO has been granted in relation to an individual with whom they are dealing. The Bill also provides that Scottish Ministers may request information held on the record. In the past obtaining information about the use of ASBOs across Scotland has been difficult and time consuming. Ministers believe it is important that a national picture of the use of ASBOs can be obtained regularly and this power will make that possible.

Alternative approaches

30. The alternative to extending ASBOs to 12 to 15 year olds would be to introduce new disposals through the children's hearing system. This is being done also, but there is a clear recognition that for some young people disposals through the Children's Hearing System are not effective. The Executive's approach is intended to increase the range of options available and make clear that where disposals through the hearings system are not working, alternatives are available which place a stronger compulsion on the young person.

31. Children's hearings operate within a broader framework than the courts considering the child's life and circumstances in order to assess both the needs and the deeds of the child. Although it is true that decisions made by children's hearings may, for instance, involve the deprivation of liberty in secure accommodation, such action is designed to address the wider needs of the child. While such needs may require the child to be protected, or for the community to be protected from the behaviour of the child, the welfare of the child remains the paramount consideration for the children's hearing.

32. Children's hearings are designed to engage and directly challenge children and families taking decisions to impose compulsory measures of supervision where needed. They could not therefore be given the power to impose an ASBO, or any other court order, without changing fundamentally the ethos and nature of proceedings, e.g. by introducing full legal representation for all parties - which would necessarily dilute the engagement with the child. The Executive is committed to the care and welfare principles of the children's hearing system. The forthcoming review of the hearings system will hold onto those principles whilst looking to ensure that the system has the right set up and adequate resources to ensure it does the best job to protect children.

33. Where an ASBO is made in relation to a person aged under 16, the Executive consulted on a proposal that the court should consider imposing a support order in conjunction with the ASBO. This would require the individual concerned to take positive steps to prevent any repetition of the kind of behaviour which led to the ASBO. As set out above, the intention now is that the affirmative aspects such as these are best dealt with through the children's hearing system.

34. Consideration was given to the option of referring a breach of an ASBO by an under 16 year old to a youth court. The Executive made a commitment in *A Partnership for a Better Scotland* to roll out youth courts where they are needed, subject to any necessary evaluation of the pilot in Hamilton. At present, the youth court pilot targets all 16 and 17 year olds with a history of having offended three or more times within the previous six months, with flexibility to deal with some 15-year-old offenders. The Bill does not preclude the use of youth courts to deal with breaches of ASBOs by under 16s.

Consultation

35. A majority of those who responded to the consultation paper supported the introduction of ASBOs for under-16s. That was also the strong view that Ministers heard when visiting constituencies over the summer. Many commentators stressed the value of the children's hearing system in dealing with difficult behaviour of those under-16. They argued that, in most cases, the children's panel will remain the most appropriate forum for dealing with such cases and that ASBOs for under-16s should be an action of last resort. Ministers have much sympathy for this view. They expect that most under-16s who are the subject of an application for an ASBO will have been involved in the hearings system. The duty on applicants for ASBOs for under-16s to consult the Reporter before making such an application reflects this.

36. Most who expressed a view also supported Minister's proposals that 12 should be the lower age limit for ASBOs. Support was also strongly expressed in favour of the view that for an ASBO in respect of a young person to be successful it would, in most situations, require to be set in the context of a broader package of support. At the same time, however, many argued that a support order in relation to an ASBO that was separate from a supervision requirement imposed by a children's hearing might lead to confusion and duplication of effort. For that reason, Ministers decided not to pursue the idea of individual support orders imposed by the court. Instead, the Bill makes provision for a sheriff granting an ASBO in respect of an under-16 to refer the young person to the Reporter. In that situation, the Reporter would be obliged to convene a hearing to discuss what wider support or intervention was required to assist the young person to comply with the terms of the ASBO and address any other concerns in his or her life.

37. A number of respondents were concerned about the ability of registered social landlords to apply for ASBOs in relation to under-16s. Ministers understand that concern. It will be important that any applicant for an ASBO in relation to an under-16 is fully aware of the child's circumstances. Ministers believe that the requirement on an RSL to consult the police, the Reporter and the local authority before making an application will ensure that is the case. Moreover, excluding RSLs from being able to make applications for ASBOs would, they believe, unnecessarily prohibit access to a useful tool for tackling antisocial behaviour from an increasingly important partner in community management in Scotland.

38. A large majority of those who responded supported all Ministers' proposals to make ASBOs more effective. There was also majority support for retaining the position whereby local authorities and RSLs were the only bodies authorised to apply for ASBOs. All the other proposals are taken forward in the Bill with the exception of the proposal to enable a court to grant an ASBO in related civil proceedings. Having considered this matter carefully Ministers believe that introducing such a provision would cause unnecessary complexities in our civil courts.

PART 3 – DISPERSAL OF GROUPS

Policy objectives

39. Communities across Scotland have said they want action to tackle the persistent antisocial behaviour perpetrated on communities by gangs of mainly young people. Innocent members of the community are subjected to noise, intimidation, fear, and harassment from which

sometimes there appears to be no respite. Their use of public facilities such as parks, cash point machines and residential streets can be disrupted or spoiled. They may also become prisoners in their own homes. Many residents say they have had enough.

40. Shop-owners too can find their legitimate business disrupted. Customers and deliveries may be put off by the presence of these groups - the cost implications for the business, including making good any damage, can be significant.

41. Local authorities and the police are called on to make difficult judgements to balance the rights of the wider community and these groups. Of course, most young people are decent and law abiding. However, there is a small but significant minority who are not. These people have a wholly unacceptable impact on their local areas. And they give teenagers and young people generally a bad name.

42. The police already have general powers to tackle this destructive antisocial behaviour and to disperse the troublemakers. But the Scottish Ministers feel it appropriate to provide explicit powers of dispersal. The aim of Part 3 of the Bill, therefore, is to provide the police with the authority to designate an area where antisocial behaviour is a significant and persistent problem and where groups have caused alarm or distress. The police would then have the power, in that designated area, to disperse those groups whose presence or behaviour continues to cause alarm or distress to any members of the public. The groups can as a result be excluded from a specified area for up to 24 hours.

Authorisation

43. Designation of an area will only occur where an authorisation has been made by an officer of at least the rank of superintendent. Before giving an authorisation, the officer must be satisfied that serious and persistent antisocial behaviour has occurred in the locality and that alarm or distress has been caused to members of the public by the presence or behaviour of groups in that locality. The senior officer must also first consult the local authority. The authorisation will last for a specific period, which may not exceed 3 months. The authorisation may also choose to refer only to times or days within the period: for example to Friday and Saturday nights when antisocial behaviour in an area might be a particular problem.

44. Before the beginning of the authorised period the police have to display in a conspicuous place in the area, and publish in a locally circulating newspaper, the authorisation notice. In this authorisation notice the police must specify the area affected and the period it will last (and any specified times within that period). Provision is also made for withdrawal of the authorisation (for example, where the police are satisfied that it is no longer necessary to prevent the occurrence of disorder or serious nuisance). Again there will be a requirement to consult the relevant local authority about the proposed withdrawal.

Directions to disperse

45. In the designated area the police will have a power to disperse groups of two or more people where their presence or behaviour has resulted, or is likely to result, in a member of the public being alarmed or distressed. The groups can then be excluded from a specified area for

up to 24 hours. Knowing contravention of an authorisation will be an offence and could result in a fine, or imprisonment, or both.

Guidance and directions

46. The Bill will give the Scottish Ministers powers to issue guidance in relation to how the police use these powers - and to any other matters relating to these powers. The police will have to have regard to this guidance and the Scottish Ministers may revise the guidance from time to time. The Bill will also give the Scottish Ministers the power to give directions, which must be complied with, to those exercising these powers.

Alternative approaches

47. The police already have a number of powers contained in the Civic Government (Scotland) Act 1982 allowing them to tackle a variety of forms of antisocial behaviour. The common law also provides a number of offences such as breach of the peace, or mobbing and rioting.

48. It has been suggested that deploying more police officers under existing legislation would also provide a solution. However, police officer numbers have been at record levels since March 2001, with the latest total at June 2003 some 410 higher than in March 2001.

49. The development of youth shelters is a good example of providing dedicated facilities where young people can gather socially. Investing in restorative justice, where young people are encouraged to face up to the consequences of their actions and the impact that can have on others, is another approach which delivers good results. However, it is clear that there are circumstances where persistent antisocial behaviour causes continual distress and other options are failing to provide the necessary relief for those living in such communities.

Consultation

50. It is clear from the responses to the consultation that the presence of any group of young people can be seen as intimidating and can contribute to the fear of crime. Consultees argued that we must look to the range of options available to address those fears and build stronger communities where people of all ages can live safely and confidently. A majority of the respondents to the consultation argued that the police already have sufficient powers to deal with antisocial behaviour amongst groups. However, Ministers believe the new power is a reasonable and balanced approach to what is a serious problem in a number of communities in Scotland. This power will only be employed where there has been a history of groups of people causing significant problems in an area. It is also time limited and requires consultation in advance with the local authority for the area concerned.

PART 4 – CLOSURE OF PREMISES

Policy objectives

51. In some communities there are particular premises which are a constant focus for antisocial behaviour and the associated disorder and disturbance that is generated. For those

living nearby, their lives are made miserable. They live in fear and have little or no respite day or night.

52. The aim of Part 4 of the Bill is to provide the police and courts with powers to seal off premises swiftly where other measures to tackle antisocial behaviour have failed.

53. This part of the Bill grants the police the power to close down premises where at any time during the preceding 3 months a person has engaged in antisocial behaviour on the premises and where the use of the premises is associated with the occurrence of significant and persistent disorder or significant, persistent and serious nuisance. It is intended that service of a closure notice will close the premises to the public until a sheriff court decides whether to make a closure order. The court must consider the notice within two court days. If it is satisfied, it can make a closure order which closes the premises altogether for a period of up to 3 months, with a possible extension to a maximum of 6 months.

Closure notice

54. A superintendent of police must be satisfied that certain measures have been taken before she or he can authorise the issue of a closure notice. The local authority must be consulted about the proposed closure and all reasonable steps must have been taken to inform those living in or operating from the premises, or any part of them where the premises have shared access, of the intention to serve a closure notice immediately and to make application to the court for a closure order.

55. The closure notice must contain certain information including details of the court hearing. The notice must be attached to prominent places on and around the premises and served on persons living in, having responsibility for or having an interest in the premises.

Closure order

56. Once the police have served the closure notice, they must apply to the sheriff court for a closure order to be made. The court must be satisfied that a person has engaged in antisocial behaviour on the premises; that the use of the premises is associated with the occurrence of disorder and serious nuisance to members of the public; but also that the making of an order is necessary to prevent future significant and persistent disorder or significant, persistent and serious nuisance. Once an order has been granted the police or a person authorised by the police will secure the closed premises against entry by any person and will be responsible for any essential maintenance and repairs during the period of the closure order. If without reasonable excuse a person remains on or enters premises in contravention of a closure order or notice they will be guilty of an offence, which could result in a fine, or imprisonment, or both.

Extension, revocation and appeal

57. A closure order may be extended for a further period not exceeding three months. An order cannot exceed 6 months in total. Provision is also made for revocation of the order where the court is satisfied that it is no longer necessary to prevent the occurrence of significant and persistent disorder or significant, persistent and serious nuisance. An appeal procedure is also provided for.

Alternative approaches

58. The aim is to provide quick and effective relief from the significant, persistent and serious nuisance and significant and persistent disorder associated with premises where there is antisocial behaviour at the most serious level. This could include the dealing or use of illegal drugs or the persistent disorder that can occur around drinking dens. There are existing legislative and regulatory provisions, for example health and safety and building control, which can be used to close premises, or housing legislation which can evict tenants, but these are limited and can take a considerable time to bring into effect. Ministers do not believe therefore that these can fulfil the policy objective.

Consultation

59. There was a wide range of opinion on the new powers. Police bodies were receptive to the idea of closure notices but felt that the new power might be better conferred on local authorities. Local authorities had mixed views on closure notices but were broadly in favour of the new powers. Tenants and housing associations were almost unanimously agreed that there should be new power to close premises, although there was some disagreement as to whether this power should apply also to residential premises.

PART 5 – NOISE NUISANCE

Policy objectives

60. A *Partnership for a Better Scotland* included two commitments in relation to noise nuisance. These were part of the Executive's broad commitment to social justice, and in particular to ensuring that everyone in Scotland can enjoy a decent quality of life. These commitments were :

- to give local authorities additional powers to deal with noise nuisance;
- to tackle the problem of night noise in domestic dwellings.

61. Scottish Ministers wish to give local authorities the power to implement a noise nuisance service in their area up to 24 hours a day, 7 days a week. Furthermore the Scottish Executive envisage that local authority officials, (i.e. environmental health officers and community wardens) together with the police, will have the power to issue warning and fixed penalty notices, and where there is failure to comply with a warning notice an offence will be committed. This proposal would bring Scotland into line with England, Wales and Northern Ireland where the Noise Act 1996, ("the 1996 Act") applies. Nevertheless the proposal would go further by extending the provision to 24 hours, as opposed to the current night-time noise nuisance provisions (operative between 11pm and 7am), available under the 1996 Act.

62. Ministers believe that existing legislation does not adequately deal with the problem of noise emitted from domestic dwellings. Their intention therefore, is to give local authorities the power to implement a noise nuisance service for up to 24 hours a day, 7 days a week. Local authorities would have discretion to adopt such a service and, if adopted, would have the power to set the times and days on which such a service would operate. In addition, local authorities

would be under a duty to take reasonable steps to investigate complaints of excessive noise and to take any appropriate enforcement action, in accordance with any adopted scheme.

63. In practice, it is envisaged that either an environmental health officer, or community warden employed by the local authority and the police would be given the role of investigating such complaints and taking appropriate enforcement action. This would include noise emitted from a dwelling including noise from any land pertaining to the dwelling.

64. Scottish Ministers will be given a general power of direction to set permitted levels of noise. This power of direction will set permitted levels for night-time noise (i.e. between 11pm and 7am) and levels for day-time (i.e. between 7am and 11pm).

Warning notice

65. The Bill allows the officer of the authority to issue a warning notice where satisfied in consequence of an investigation that excessive noise is being emitted from the dwelling. A person upon whom such a notice is served would be required to abate the noise from the period specified in the notice, which would be at least ten minutes after the notice has been served.

66. Scottish Ministers will have powers to approve noise measurement devices for use by local authority officers under these provisions, and for certification of noise measurements for the purpose of enforcement.

Fixed penalty notice (FPN)

67. If the responsible person ignores a warning notice then it is envisaged that the local authority officer, or police officer would have the power to serve on the responsible person a FPN requiring payment of a maximum fine of £100, to be payable within 28 days of the FPN having been served. Nevertheless, Scottish Ministers have the power to prescribe a different level of penalty.

Offence where noise exceeds permitted level after service of a notice

68. Where a person is responsible for noise which has exceeded the permitted level, and in addition a warning notice has already been served upon that person, then that person commits an offence. A person who has not paid a fixed penalty, and is subsequently prosecuted is liable on summary conviction to a penalty not exceeding level 3 on the standard scale (currently £1,000).

Powers of entry and seizure

69. Ministers recognise that although the police have sufficient powers of entry and seizure under the Civic Government (Scotland) Act 1982, as amended by section 24 of the Crime and Disorder Act 1998, current powers given to local authority officials under the Environment Protection Act 1990 are not clear. Therefore the Bill gives new powers for local authority officials to seize sound producing devices.

Alternative approaches

70. There are two alternative approaches. Either do nothing, by relying on existing provisions, or adopt the Noise Act 1996 on a compulsory basis, enforcing local authorities to introduce a noise nuisance service, which may not be feasible or realistic and beyond what is required by the specific circumstances within that local authority area. The existing provisions, which are mainly within the Environmental Protection Act 1990 work at times, but in reality the issuing of abatement notices is a lengthy process, and there is a perceived reluctance for subsequent prosecution action for non-compliance. The new proposals offer an immediate deterrent system which can be adopted by the local authority according to local circumstances and that is complimentary to the existing provisions. The proposals also give new and unambiguous powers to local authority officials to seize sound producing devices.

Consultation

71. The problem of noise nuisance was recognised by all as a serious issue. Most consultees supported the proposal to introduce a night time noise service although others argued that existing powers were sufficient and that enforcement was the real problem. Ministers believe the new powers will be useful in tackling the problem of noise nuisance. A significant number of respondents, particularly from the local authority sector, argued that the power should be framed on an enabling basis, allowing individual authorities to determine how best to deal with the problem in their area. Ministers believe there is weight in that argument and the Bill's provisions have been framed accordingly.

72. There was also majority support for the introduction of fixed penalty notices for noise nuisance. Some expressed concern about community wardens being given this power. The Bill is not prescriptive on this issue. It will be for local authorities to determine whether community wardens in their area would profit from having this power or not. On the other hand, most respondents argued that the present standard of proof for noise offences was appropriate. The Bill does not make any change in this regard.

PART 6 – THE ENVIRONMENT

Policy objectives

73. The Scottish Executive has been concerned to ensure that forms of antisocial behaviour such as littering and fly-tipping (of which abandoning vehicles is a particular manifestation) should be more effectively controlled.

74. In the light of the recent review of the litter and fly-tipping provisions of the Environmental Protection Act 1990, and further public comment, *A Partnership for a Better Scotland* made a number of commitments in relation to litter and flytipping. These were part of the Executive's broad commitment to social justice, and in particular to ensuring that everyone in Scotland can enjoy a decent quality of life. In terms of the subject of this Part, the following commitments are relevant:

- we will...support minimum standards for the removal of...litter...;
- we will increase, and encourage enforcement of, penalties for litter...; and

- we will strengthen local authority powers of enforcement to tackle fly-tipping and double the level of fines.

Fixed penalty notices

75. The review noted that there was a considerable degree of overlap between the offences of littering and fly-tipping. The more serious manifestations of the problem are generally thought of as fly-tipping.

76. Nevertheless there are circumstances where an offence which could be prosecuted as fly-tipping could not be prosecuted as littering. The offence of littering applies only to restricted categories of, mainly public, land. Thus if rubbish is dumped on private land the perpetrator can usually only be proceeded against under fly-tipping provisions.

77. In the more serious cases the full weight of the fly-tipping provisions is appropriate. However, there may be instances when small quantities of non-dangerous waste is tipped on private land and, if the perpetrator is caught, the authorities must either take no prosecution action, or prepare a report for the local Procurator Fiscal with a view to prosecution under the normal fly-tipping regime. By making the same fixed penalty powers as are applicable to littering offences available to the authorities in fly-tipping cases, the anomaly whereby dropping rubbish on private land may go unpunished is avoided. An effective, proportionate means of dealing with lesser fly-tipping offences becomes available.

78. The proposal is to award these powers not only to authorised officers of the local authority (as is currently the case for litter fixed penalties), but also to police officers and authorised officers of the “waste regulation authority”, which is the Scottish Environment Protection Agency (SEPA). The power to issue fixed penalty notices for fly-tipping is being offered to SEPA since that organisation is heavily involved in efforts to counter fly-tipping. At present most fly-tipping cases reported to the Procurators Fiscal are reported by SEPA.

79. At the same time the existing power to issue fixed penalty notices for littering, currently enjoyed only by authorised local authority officers, is being extended to the police. It is not being extended to SEPA since SEPA has no functions with respect to litter.

80. As at present, the payment of a fixed penalty fine on receiving a notice, whether from a local authority officer, a SEPA officer, or a constable would discharge the payer from any further proceedings on the matter. Its payment is an alternative to prosecution. Where a fixed penalty notice remains unpaid the procedure in respect of non-payment is to submit a report to the relevant Procurator Fiscal for consideration of prosecution. Reporting cases and collection of fixed penalty fines would be the function of local authorities in the same way as littering fixed penalty notices are administered at present. This would not be a matter for SEPA or the police.

81. The suggestion that constables should have the power to issue fixed penalty notices for littering was one of the recommendations of the review. Giving these powers to police would assist with two aspects:

- it would be easier to deal with littering offences which took place outside local authorities’ normal working hours; and

- local authorities may not demand names and addresses from individuals caught littering, whereas constables have the power to do so.

Directions in respect of duties to keep land and highways clear of litter

82. The Environment Protection Act 1990, at section 89, lays statutory duties on local authorities and other, generally public, authorities (which include the Scottish Executive), to clean litter. The discharge of this duty is governed by a code of practice, which provides practical guidance on the performance of these duties. The code of practice is necessarily a general document which must be written to have a wide application. Consequently the duty to observe it may not be useful in specific situations, or in relation to specific sets of indicators.

83. The Scottish Ministers therefore consider it would be useful to take a power of direction specifically in relation to clearing litter. By exercising this power, they would be able to request the duty bodies to clear up specific areas to specific standards, where the code was otherwise either silent or insufficiently detailed. A power of direction would also give the flexibility for quick action.

84. Supplementing the code by a power of direction would entail amendments to further provisions to deal with litter in the 1990 Act. Under section 91, a sheriff court may, at the instance of any person aggrieved by a lack of action to clear litter, issue a “litter abatement order” to those bodies given clearance duties by section 89 requiring them to clean litter. Under section 92 of the 1990 Act, the local authority may issue “litter abatement notices” requiring other bodies with a duty to clear up litter to do so, where the local authority believes that a problem exists on the land of those bodies. The code of practice is currently admissible in evidence in proceedings relating to these proceedings. The change proposed here would make a direction from the Scottish Ministers admissible evidence in the same way.

Penalties for certain environmental offences

85. Environmental crime is particularly antisocial, in that its victim is always the community. The community may be a street evacuated because of the faulty operation of a major industrial plant, the users of a stretch of road blighted by fly-tipping or large towns whose water supply may have been spoiled by the dumping of rubbish or pollutants in their reservoir. In most cases of these offences, it is the community’s taxes and charges which pay for necessary restitution.

86. The environmental offences listed in schedule 2 are potentially particularly damaging to the community. In recognition of this, unlimited fines (as well as significant periods of imprisonment) may be imposed on those convicted if the case has been brought on indictment (that is, before the High Court, or a sheriff sitting with a jury). Most environmental cases, however, are brought through the simpler summary procedure, through the district court, or in front of a sheriff sitting without a jury.

87. Whether a case proceeds by way of summary or solemn procedure is a matter solely with the discretion of officials of the Crown Office and Procurator Fiscal Service. However, Scottish Ministers wish to ensure that the simpler summary procedure should still be able to lead to severe punishment for what are potentially especially antisocial offences. Scottish Ministers

believe it would be appropriate to double the maximum fine which may be imposed on summary conviction, for all these offences, to £40,000.

88. Penalties for offences affecting the natural heritage are not being considered in relation to this Bill. They are more appropriate for consideration in the Nature Conservation (Scotland) Bill.

Alternative approaches

89. The alternative to offering fixed penalty notice provisions in respect of littering and fly-tipping is not to do so. This would not meet the policy objective of encouraging enforcement, since the only enforcement route would be prosecution through the courts. An alternative to offering fixed penalty powers for fly-tipping similar to those applicable to littering would be to offer a different regime of fixed penalty powers. The Scottish Executive feels it is preferable to build on an existing system whose working is well understood, and to avoid multiplying fixed penalty notice regimes.

90. The alternative to extending fixed penalty notice powers to the police (and to SEPA in the case of fly-tipping) would be not to do so. Again, this would not meet the policy objective of encouraging enforcement.

91. The alternative to the Scottish Ministers taking a power of direction for litter clearance would be to continue to provide guidance to the various bodies charged with clearing litter through the code of practice only. For the reasons outlined above, while the code is a valuable instrument it may not be sufficiently flexible, and is potentially difficult to apply in detail. The policy objective is to improve methods to control the effects of littering and thus contribute to a better environment: the flexibility of directions is therefore considered desirable.

92. There are alternatives to doubling the maximum fines on summary conviction for antisocial environmental offences. One would be to leave legislation as it is. However, this would not meet the policy objective of marking the seriousness with which society viewed such offences. Another possibility would be not to increase the level of fine, but increase the tariff of imprisonment. There are two reasons why this approach would not be likely to be effective. The first is that the use of imprisonment for such environmental offences is very rare. The second is that the culprits in this kind of antisocial behaviour are often corporate bodies, to which imprisonment would not be appropriate.

Consultation

93. The proposals to introduce simplified means of penalising fly-tipping, similar to those existing for litter, and to award these powers to police officers, were included in the consultation document *Putting Our Communities First*, launched in June 2003. The responses to the consultation paper (including those from bodies representing the police) generally favoured these proposals.

94. The sufficiency of current powers to clear litter was also considered in the consultation paper *Putting Our Communities First*. Responses to the consultation were evenly balanced as to whether sufficient powers existed, but even those responses which felt the powers were

sufficient felt they were insufficiently used. A number of respondents suggested areas in which the powers to clear litter are insufficient. Several of these suggested that there were difficulties in terms of Crown land, and that of statutory undertakers. The Scottish Ministers understand these concerns, and feel that a power of direction could help both where sufficient powers were insufficiently used, and where a difficulty is perceived.

95. The consultation paper *Putting Our Communities First* specifically requested views on the doubling of the fine available through summary proceedings to £40,000, in respect of fly-tipping. This was strongly supported by the responses.

96. However, in setting the context for this question, the paper suggested that doubling the potential fine for a range of serious environmental offences would provide a more effective deterrent. The Scottish Ministers feel that it is desirable to double the fine available for these offences (all of which, like fly-tipping, currently attract a maximum fine on summary conviction of £20,000) rather than that for fly-tipping alone. In the first place, it would be difficult to argue that fly-tipping is necessarily more antisocial than, for example, an offence under Control of Pollution Act 1974 which involved poisoning a reservoir. In the second place, if the fly-tipping fine alone among this category of offences had the relevant fine doubled from the existing £20,000 to £40,000, this would be anomalous. The Bill therefore proposes to double the maximum fines on summary conviction for a range of antisocial environmental offences.

PARTS 7 AND 8 – HOUSING: ANTISOCIAL BEHAVIOUR NOTICES AND REGISTRATION AREAS

Policy objectives

97. The Executive's policy objective in Parts 7 and 8 of the Bill is to provide a means for ensuring that landlords take reasonable steps to manage or alleviate antisocial behaviour in relation to the properties they let. The Scottish Ministers consider that landlords, together with every other member of society, have a responsibility to do what they can to reduce antisocial behaviour. Alongside that responsibility, landlords have the potential to influence the behaviour of people who lease or occupy their property through the medium of a lease or occupancy arrangement and Ministers wish landlords to use that influence in connection with antisocial behaviour.

98. The Bill deals with private landlords, whether under an assured or short assured tenancy or under a more informal occupancy arrangement. It does not cover the public sector landlords regulated by Communities Scotland, landlords of properties regulated by the Scottish Care Commission and certain other minor categories.

99. The Partnership Agreement *A Partnership for a Better Scotland* includes a commitment to support standards for the voluntary accreditation of private landlords, which would relate to the physical standard of the property and to all aspects of the landlord-tenant relationship, of which the management of antisocial behaviour is a part. It is expected that any local authority powers to regulate for these broad purposes would be provided in a future Housing Bill. Ministers consider that, in the meantime, it is desirable to provide for the regulation where necessary of that aspect of management that relates to antisocial behaviour, as part of the package of measures to deal with antisocial behaviour contained in this Bill.

100. Ministers accept that the majority of private landlords are responsible citizens who do what they can to address antisocial behaviour related to their houses. The Bill focuses on property where there is evidence of antisocial behaviour or which is in an area where such behaviour is prevalent. Such situations are, on the face of it, an indication that there may be a management failure on the part of the landlords concerned, and are therefore the trigger for the powers in the Bill.

101. The local authority is in the best position to decide when action is appropriate. It can balance the various interests in the local community and take account of local circumstances. It has a strategic responsibility in connection with antisocial behaviour in its area and it is able to co-ordinate any action against landlords with other actions it is able to take against antisocial individuals. The powers that Parts 7 and 8 of the Bill give to local authorities are intended to complement the other powers that they have at their disposal to deal with antisocial behaviour.

102. Although there has been no specific research about the extent to which management failure by private landlords contributes to antisocial behaviour in Scotland, there is sufficient anecdotal evidence, combined with evidence of the dynamics of certain housing markets in Scotland and England, to know that it is a real problem and one which, if unchecked, can in some market conditions feed on itself and contribute to a spiral of social decline.

103. At the worst, a landlord may buy cheap houses in low demand areas, possibly to launder the proceeds of crime, and let at high rents with the minimum of services to tenants who have little choice because they have been evicted from elsewhere or are living in the sub-economy. The financial strategy is to maximise income, possibly by use or abuse of housing benefit, and to avoid investment in repairs or maintenance to a declining capital asset. Such a landlord will have no incentive to take action against antisocial behaviour as it does not threaten his or her income or the availability of tenants. It may be in such a landlord's interest to collude in antisocial behaviour so that neighbours move away and further properties become available for the same purposes. Such failures to manage antisocial behaviour should be subject to criminal sanctions.

104. Another situation is where a person has bought or inherited a house, often purchased at some stage under the right to buy, and decides to let it either as a source of income or because it is proving difficult to sell at an acceptable price. The person may have no experience of being a landlord and may be unaware of the responsibilities that entails. If such persons are advised of appropriate action on antisocial behaviour but fail to take it, Ministers consider that they should be subject to sanctions which may include criminal sanctions because their failure may exacerbate a situation that has serious consequences for the community.

105. It is only reasonable to apply sanctions if it is clear to the landlord what is expected and if the landlord then fails to meet those expectations. The Bill therefore provides mechanisms for the local authority to define clearly to the landlord the actions that it expects the landlord to take and then to seek court sanctions by application to the local sheriff court if they are not taken. Part 7 provides a mechanism for use in connection with individual properties and Part 8 a mechanism for use on an area basis. The local authority can decide which of these mechanisms to use in the light of the local situation and of its antisocial behaviour strategy.

106. The actions open to a private sector landlord for the better management of antisocial behaviour include, for example, enforcing terms in the tenancy agreement, setting clear standards, advising tenants (for example on reducing noise nuisance), investigating complaints, requesting the local authority to initiate an ASBO, providing information in support of ASBO proceedings, seeking an interdict, seeking possession at the end of the term of the tenancy or seeking possession on the grounds of antisocial behaviour. The Bill removes a barrier to the latter in the case of assured and short assured tenancies. Whether or not a landlord engages an agent to manage the property on the landlord's behalf, the landlord still remains responsible for these actions.

Part 7 – Housing: antisocial behaviour notices

107. Part 7 allows the local authority to serve an antisocial behaviour notice on a landlord specifying action that the landlord must take and a period within which it must be taken. The notice must be in response to antisocial behaviour by the tenant, or by an occupant of or visitor to the house, at or in the locality of the house. Ministers accept that similar behaviour outside the locality is not the concern of the landlord in terms of the letting of the property.

108. The local authority does not require to prove the culpability of tenants, occupiers or visitors for the antisocial behaviour in order to take steps to ensure that the landlord uses appropriate management measures in relation to antisocial behaviour. The local authority or the police may, at the same time, take separate action against the individual perpetrators of the antisocial behaviour using the range of other powers at their disposal.

109. Where the landlord does not take the actions required by the notice, the local authority can apply to the sheriff for one or both of two possible sanctions:

- cessation of the occupier's liability to pay rent;
- transfer of management control of the property to the local authority.

The objective is to encourage the landlord to take the specified actions as quickly as possible and if necessary for the local authority to take those actions in the landlord's place.

110. Income from the property is normally the main reason for letting, and sanctions which affect the flow of income or increase costs will be an incentive to take the actions required in the notice. Cessation of rental liability means that the landlord will not legally be able to pursue the tenant for rent arrears for the period when the sanction is in force, because no rent is due for that period whatever the terms of let may provide. Where the tenant receives housing benefit (including where it is paid direct to the landlord), entitlement will cease because the tenant does not have a rent liability.

111. Where the landlord does not take the actions required by the notice, the local authority can also charge the landlord for expenses it incurs in consequence of that failure, such as the cost of investigation or the employment of professional witnesses to gather evidence which might reasonably have been made available by the landlord.

112. Where the landlord will not or cannot manage antisocial behaviour effectively, either directly or through an agent, the local authority can apply to take control of the property in order

to do so itself. The management control order is not a financial penalty and so rent is collected and paid to the landlord net of the authority's reasonable administrative costs. It is expected that the landlord will apply to the sheriff for the order to be revoked once the actions in the notice have been taken.

113. The management control order gives the local authority the rights and obligations under existing tenancies or occupancy arrangements. It would be perverse if, for example, one of several tenants in a house in multiple occupation left while the house was subject to a management control order and the landlord replaced that tenant with a person who had a record of antisocial behaviour. The landlord therefore requires the approval of the local authority for any new leases or occupancy arrangements in the house while a management control order is in force.

114. The Bill also makes it a criminal offence for the landlord to fail to take the action specified in an antisocial behaviour notice. The penalty is a fine not exceeding level 5, which Ministers consider to be appropriate in the light of penalties relating to comparable situations, most particularly the penalty for letting a house in multiple occupation without a licence.

Part 8 – Housing: registration areas

115. Part 8 allows a local authority to designate, after consultation, one or more registration areas where there are persistent problems of antisocial behaviour associated with private rented housing and use of the registration powers is likely to resolve or reduce those problems.

116. The need for registration to continue must be kept under review, and when the designation is no longer needed it must be revoked. Ministers are aware that registration is a potential burden on the landlords affected, particularly when it is applied in only some geographical parts of the private rented housing market. Where the circumstances which justify registration cease, it should be removed.

117. Ministers are aware that registration may result in some landlords leaving the market. This is likely to involve landlords who are least able or willing to manage their properties to acceptable standards, and so is a short-term consequence that Ministers are prepared to accept.

118. The absence of current information on the identity and contact details of the landlord has been frequently identified as a barrier to effective action on antisocial behaviour by neighbours, the community and local authorities. This information is therefore required from the landlord and is included in the public register.

119. Ministers recognise that landlords of houses in multiple occupation (HMOs) will have had to pay for a licence and satisfy management conditions. HMO licence holders are expected to register to ensure a consistent approach to handling antisocial behaviour and so that the register is complete, but they are not required to pay the registration fee.

120. Because circumstances vary widely local authorities determine conditions for registration which are appropriate to the designated area and which must relate to the management of antisocial behaviour. Because particular measures may be needed to deal with antisocial

behaviour in relation to individual properties within the designated area, the local authority may also make specific directions to the landlords concerned. The conditions and specific directions define what is expected of the landlord, who is required to comply with them.

121. The local authority may refuse to register a property if it believes that the landlord will fail to comply with registration conditions or specific requirements. It would be wasteful and an unnecessary delay if the landlord were to go through the registration process before the local authority could act on that belief, and the landlord's position is protected by a right of appeal to a sheriff against the decision.

122. The Bill makes it a criminal offence to knowingly let an unregistered property which should be registered unless the landlord is taking all reasonable steps to withdraw from letting. The Bill also makes it a criminal offence to fail to comply with a registration condition or a specific direction. The penalty for these offences is a fine not exceeding level 5, which Ministers consider to be appropriate in the light of penalties relating to comparable situations, most particularly the penalty for letting a house in multiple occupation without a licence.

123. While the property is let without being registered or while there is a failure to comply with conditions or specific directions, the sanction that rent is not payable applies, in the same way and with the same effect as described in paragraphs 109 and 110.

124. The Bill provides for appeal to the sheriff against a decision to refuse registration or against the terms of a specific direction, since either of these can lead to sanctions. The sheriff may suspend the effect of those sanctions while the appeal is in progress, but in order to avoid the use of appeals simply to delay, the suspension is not mandatory.

Alternative approaches

125. One alternative to the provisions in the Bill for addressing poor management of antisocial behaviour by private landlords would be to seek to strengthen the ability of individual neighbours to take direct legal action. In the worst cases this could expose the individual to personal risk in addition to the cost and effort involved in dealing with what would normally be a situation affecting the local community as a whole. Although private individuals should be prepared to take such action where necessary, it would not be appropriate to rely on this route to deliver the policy objective.

126. Another alternative would be to establish a statutory code for the management of antisocial behaviour by private landlords, and to create an offence of failing to comply with that code. This would focus on punishing the worst landlords, but it is considered that this alone would not be sufficient for the broader purpose of ensuring that private landlords take reasonable steps to manage antisocial behaviour. The Bill provides for offences but also includes other measures designed to ensure direct practical intervention in a range of cases, including inadequate landlords as well as the worst landlords intent on abusing their position.

127. The Bill provides for a range of actions that can be triggered if there is evidence that antisocial behaviour has taken place. An alternative would be to anticipate the emergence of antisocial behaviour by specifying social or other criteria for designating registration areas or

intervening directly in individual cases. It is considered that in principle it would be very difficult to devise criteria that would predict future antisocial behaviour linked to the landlord's approach to management, and that in practice local authorities would be more likely to intervene informally through the provision of advice where they suspect that management practices are inadequate. It is thought that criminal sanctions based on the likelihood that antisocial behaviour will follow from the landlord's action or inaction would be disproportionate.

128. Another alternative would be to require all private landlords to register and to meet conditions relating to the physical and management standards of their property. This second approach would relate to Ministers' Partnership Agreement objective to deliver good quality, sustainable and affordable housing for all. The effective management of antisocial behaviour would be part of the intended outcome. These issues were addressed by the work of the Housing Improvement Task Force and Ministers are currently considering the results of consultation on the Task Force's recommendations. If a national scheme is considered the right way forward, the normal approach would be for the provisions to form part of a future Housing Bill and the present Bill currently focuses on that aspect of management which relates specifically to antisocial behaviour.

129. Concerns have been expressed that where a landlord has an antisocial tenant who is entitled to housing benefit the landlord may at the same time be failing to manage antisocial behaviour adequately and benefiting financially from the state through housing benefit, often paid direct. The administration of housing benefit is a reserved matter and the Parliament would not be able to legislate to change the eligibility or payment rules for housing benefit. However, if rent is not legally payable for whatever reason then housing benefit is in turn not payable. The proposals in the Bill allow for the tenant's liability for rental to be interrupted, so that the landlord's right to income from the property ceases for that period, whether or not that income has been underpinned by housing benefit up to that point. This approach avoids the wider implications of prohibiting the landlord from letting.

Consultation

130. The essence of the proposals in Parts 7 and 8 was included in the consultation paper *Putting Our Communities First*. The written comments, comments made at public meetings and comments made at meetings with stakeholder representatives on the paper as a whole have included reference to these proposals. There have also been specific discussions on these proposals with representatives of landlords' and letting agents' organisations.

131. Comment from the public and other general stakeholders has generally supported the introduction of the measures described in the consultation paper. Particular emphasis was placed on the issue of housing benefit and concern that some landlords' income was being supported by housing benefit while they were inactive and uncooperative over their tenants' behaviour. Comments also emphasised the difficulty of obtaining information about the identity and whereabouts of landlords in order to complain about and seek action on tenants' antisocial behaviour.

132. Landlords' and letting agents' organisations agreed that they did not represent the 'bad' landlords most likely to be affected by the proposals. They were concerned that if they were

required to take firmer action against some antisocial tenants they could be faced with an escalation of antisocial behaviour and property damage. Opinion on registration was divided. Some saw it as an additional burden which would encourage some landlords to invest instead in other activities, reducing supply. Others saw national registration as a helpful move, identifying landlords and encouraging and reinforcing higher standards in the private rented market.

PART 9 – PARENTING ORDERS

Policy objectives

133. Parenting orders recognise the importance of the quality of parenting a child receives in determining his or her future. It is clear that poor parenting can have a significantly detrimental effect on a child. Children who are the subject of inadequate parenting are more likely to be placed at risk, to offend and behave in an antisocial manner. Parenting orders will introduce compulsory measures designed to improve the parenting skills of those identified as having poor parenting skills. A ‘parent’ for the purposes of parenting orders is someone who has parental responsibilities in terms of Part I of the Children (Scotland) Act 1995. A ‘child’ for these purposes is someone under the age of 16. Before an order can be granted, parents must have refused to engage voluntarily in supports offered to them to help improve their parenting.

134. In that situation Scottish Ministers believe that an order granted by a court requiring the parent to change their behaviour in respect of their child may be appropriate. Such an order – a parenting order – will be granted by the sheriff court. A parenting order will last for a maximum of 12 months, unless extended, and will require the parent to comply with the requirements set out in it. These requirements will seek to require them to exercise control over their child’s behaviour and to ensure their child is properly cared for. This might include ensuring the child attends school, is properly clothed and fed, receives appropriate medical attention, avoids contact with other disruptive children or is at home and effectively supervised at particular times. A parenting order will also normally require the parent to attend counselling or guidance as required for a maximum of 3 months in the course of the order.

135. An application for a parenting order will be made by summary application and may be made on either offending/antisocial behaviour or welfare grounds. Where a child has been engaging in antisocial behaviour or criminal behaviour an application may be made by either the local authority in whose area the child lives or by the Principal Reporter. Ministers are of the view that only these agencies have sufficient information about the child and its family to determine whether a parenting order would be in the best interests of the child. The sheriff hearing an application may make a parenting order where he or she is satisfied that the child has engaged in antisocial behaviour or criminal conduct, that the order would be helpful in preventing further such behaviour and that the parent has failed to engage with help and support offered on a voluntary basis. The sheriff would also require to be satisfied that the parenting order would be in the child’s best interests.

136. Where a child has been referred to a Reporter because of concerns about their welfare or the quality of care they receive from their parents the Principal Reporter may make an application for a parenting order. This would allow the Reporter to make an application in respect of any child referred to him or her where that appears to be in the best interest of the child. Ministers believe that a parenting order that aimed to deal with poor parenting of a child

should not be limited to those children who have exhibited antisocial behaviour. Effective intervention to improve the quality of parenting at an early stage may be a very useful tool in avoiding antisocial and offending behaviour by the child later in its life.

137. The role of the Reporter in relation to parenting orders is an important one. Ministers believe it is appropriate that the Reporter has the ability to apply for a parenting order where he or she believes that is in the best interests of the child. However, where a children's hearing has discussed a child's case it will be important that the hearing itself is able to initiate an application for a parenting order where that appears to be appropriate. For that reason, Ministers propose to allow a hearing to direct the Reporter to make an application for a parenting order.

138. In order to ensure that a fully informed decision is taken about whether to apply for a parenting order Ministers intend to provide that a local authority making an application must consult the Reporter and vice versa. Ministers have also decided that parenting orders should be restricted to those with full parental rights and responsibilities in respect of a child. This would mean that parents or guardians would be potentially subject to a parenting order but that others with more short-term care of children – babysitters or foster carers for example – would not be subject to a parenting order.

139. As well as allowing for direct applications to the sheriff court for a parenting order, Ministers also believe that it would be helpful to allow our courts to consider whether a parenting order may be in the best interests of a child in other proceedings in which a child is involved. For that reason, Ministers propose to allow any court in any proceedings, where it appears it might be appropriate for a parenting order to be made, to require the Reporter to consider whether an application for a parenting order would be appropriate. Moreover, where a civil court makes an antisocial behaviour order in respect of a child, it is proposed that a court may make a parenting order in respect of the parents at the same time when that is desirable in preventing further antisocial behaviour by the child.

140. Central to the making of any parenting order will be that is in the best interests of the child concerned. For that reason, when it is appropriate taking into account the age and maturity of the child, Ministers believe it is important that the court dealing with the application hears and takes into account the views of the child. They also believe it is important that the views of the parent or guardian who is the proposed subject of the order should be heard. Express provision is therefore made in this regard.

141. Given the requirement that parents must have failed to engage on a voluntary basis before a parenting order can be made, effective services must be available before any orders can be made. Existing programme provision is patchy and Ministers are committed to expanding the number and range of services available. To ensure parenting orders are used appropriately, provision is made limiting their use to local authorities where the required programmes are available. Prior to national roll-out, the Executive intends to pilot the use of parenting orders in areas where services/programmes are available.

142. Meeting the requirements of a parenting order will require considerable commitment from parents. They have the right to expect a service from those charged with delivering/administering orders. Ministers are of the view that it is appropriate to make local authorities

responsible for delivering parenting orders to those made subject to them. This would include responsibility for monitoring the parents compliance with the requirements imposed by the order in respect of the parents behaviour in relation to their child. It would also include the making of arrangements for the counselling and guidance on parenting skills that would form part of the order. The counselling and guidance may well be delivered by other agencies, such as voluntary organisations.

143. Once a parenting order has been made it is important that arrangements are in place for its review and appeal. Ministers propose that the child, the local authority who will be administering the order or the parent who is the subject of the order should be able to apply for a review of the order. An appeal by those same people or agencies against the making, refusal or varying of an order will also be competent. The appeal will be able to be made to the sheriff principal or the Court of Session.

144. Breach of a parenting order will be a criminal offence and someone convicted of that offence will be liable to a fine not exceeding level 3 (£1,000) on the standard scale. In determining what sentence should be imposed Ministers have proposed that the court shall take into account the best interests of any child of the parent concerned. Schedule 4 of the Bill provides that, in the situation where a fine for breach of a parenting order is not paid, a court must impose a supervised attendance order. Only if that supervised attendance order is not complied with will the court have all sentencing options – including imprisonment – at its disposal.

Alternative approaches

145. Ministers believe that improving the quality of parenting for children who are the subject of poor parenting is a top priority. Of course, existing procedures in relation to child protection allow a child or young person to be removed from the parental home when that is in their best interests. That decision is, quite rightly, not one that is taken lightly. Where possible a child and their family will be supported to allow them to remain together. Ministers see parenting orders as an additional tool which should help provide the support to children and their families necessary to keep them together. They will not be an alternative to removing children from the family home where that is necessary. However, in some cases a parenting order may help improve the quality of parenting in a family so as to allow the family to remain together.

146. Ministers do not believe there is any alternative to parenting orders. They are the only means whereby parents who have refused to take up voluntary support to improve the quality of their parenting can effectively be required to do so. Children's hearings have powers to require parents to attend hearings in respect of their children but that is as far as their powers go. Ministers do not believe that extending the powers of the children's hearing to make an order in respect of the parents of a child would be appropriate. It would move away from the hearing's proper focus on the child. Moreover, a hearing would not have the power to impose any sanction to ensure a parent who had already refused to engage with support would take that support up.

Consultation

147. There is general agreement across Scotland about the importance of parenting. This is obvious in the formal responses to the consultation and also came across strongly to Ministers in

their consultation engagements over the consultation period. There is less universal agreement about the need to introduce parenting orders in Scotland. However, having considered the comments received Ministers believe that parenting orders would be a useful tool in improving the position of children who suffer from deficient parenting. Ministers do not support the view expressed by some that identifying bad parents is harmful. To fail to do so would, they believe, be an abdication of responsibility in relation to the children of those parents. As envisaged in the consultation paper, and following strong support expressed by consultees, Ministers are clear that parenting orders should only be imposed where a parent has been offered support on a voluntary basis and has refused to engage with that support. The provision in this Part that requires a court to consider the behaviour of the parent in respect of their child's welfare before making a parenting order gives this effect. That requirement will also be backed up in guidance to be issued by Ministers under this part.

PART 10 – FURTHER CRIMINAL MEASURES

Policy objectives

Antisocial behaviour orders on conviction

148. In order to deal with antisocial behaviour in an effective and timely manner, courts will be given the power to make an ASBO immediately after a person has been found guilty for any criminal offence involving antisocial behaviour in addition to the sentence. The court must be satisfied that there is evidence of antisocial behaviour (on a basis consistent with the conditions required for an antisocial behaviour order) on the part of the convicted person. Unlike ordinary ASBOs, there is no requirement that a local authority or registered social landlord should apply for the imposition of an ASBO following the sentence. The evidence presented to the court during the proceedings would provide the basis for the court's decision.

Community reparation orders

149. The Executive is committed to making available to courts as wide a range of community disposals as possible to ensure that sentencers have access to appropriate sentences for all levels of crime and all types of offender. Probation orders have existed for many years whilst community service orders (CSOs) were introduced to Scotland in the late 1970s and supervised attendance orders (SAOs) for fine defaulters in the 1990s. More recently the range of community sentences has been extended to include restriction of liberty orders and drug treatment and testing orders, both of which are designed to deal with the high end of the tariff scale.

150. Both CSOs and SAOs adopt a restorative justice approach whereby reparation is made to the community through the offender requiring to undertake a specified number of hours of unpaid work to the community. However CSOs are specifically defined in statute as being an alternative to custody and are thus at the high end of the tariff scale, whilst the use of SAOs has to date been confined to fine defaulters. Neither is, therefore, necessarily appropriate in dealing with those in our communities who are responsible for antisocial behaviour and who require to be dealt with through the criminal justice process.

151. Scottish Ministers believe that there is a need for a new sentence to be made available to courts, which would provide a new sentencing option designed specifically to deal with offences

where there is an antisocial behaviour element. Community reparation orders (CROs) will be confined to summary cases and will focus specifically on making reparation in response to antisocial behaviour by providing for between 10 and 100 hours of unpaid work to be carried out by the offender. This compares with the minimum in summary cases of 80 and maximum of 240 hours unpaid work requiring to be undertaken as part of a CSO. As with SAOs there will be opportunity for activities of an educational/ lifeskills nature but the unpaid work component of a CRO will dominate and will provide visible reparation to the community.

152. The focus of a CRO on reparation has led Ministers to conclude that there should be a statutory requirement on local authorities, who will be responsible for directing those made the subject of a CRO, to consult with appropriate agencies and bodies such as local victims organisations, community councils and the police. This will be subject to certain safeguards to ensure that the offenders themselves are not stigmatised in the tasks they require to undertake. The intention is that the reparation should in the majority of cases be to the benefit of the community as a whole rather than to individual victims.

Restriction of liberty orders

153. In the Partnership Agreement *A Partnership for a Better Scotland*, Ministers indicated their commitment to “allow children who might otherwise be in secure accommodation to remain in the community through the use of electronic tagging”. In order to allow the courts to impose a restriction of liberty order (RLO) on offenders under 16 years, who are dealt with by the court system rather than through the children’s hearings, the removal of the age restriction in section 245A(1) of the Criminal Procedure (Scotland) Act 1995 Act is required. The Bill does that.

154. Restriction of liberty orders were introduced in Scotland by section 5 of the Crime and Punishment (Scotland) Act 1997 and following successful pilots in three courts were made available across Scotland from 1 May 2002 as an order for offenders aged 16 years or over. RLOs require an offender to be restricted to a specified place for up to 12 hours per day or specified place for up to 24 hours per day, or both, for a maximum period of 12 months. Compliance with an RLO is monitored by remote monitoring equipment. The purpose of an RLO is to reduce the offender’s liberty, protect the public by reducing the opportunity to offend and to impose a punishment on offenders by restricting their movements. Section 50(3) of the Criminal Justice (Scotland) Act 2003 made provision for a restriction of liberty order to be used as a direct alternative to custody.

155. Presently the courts, like the children’s hearings, have the power to detain children under 16 years of age in secure accommodation. This provides the courts with the power to remove dangerous or persistent serious offenders from the community. There will, however, be instances where the circumstances of the offender or the nature of the offending behaviour can be addressed effectively in the community. As well as extending the provision of electronic monitoring to children’s hearings, we also propose to extend the options available to the courts by providing RLOs (with electronic monitoring to monitor compliance) as an alternative disposal to detention for offenders under 16 year olds in appropriate cases.

156. RLOs can be used to keep the young person off the streets at specific times and to isolate them from their peer group. It can provide a breathing space to allow programmed work to be

done with the young person to address problems related to the offending behaviour. Effective assessment procedures will be implemented to ensure that family relationships and household circumstances will be able to support the RLO arrangements. Whilst electronic monitoring does not physically prevent an offender leaving an area to which he or she is restricted, any failure to comply with the conditions of an order or tampering with equipment is quickly detected. This is then reported to the court by the company contracted to supply the service.

Sale of spray paint to children

157. Preventing vandalism and graffiti is a key part of the Executive's strategy to promote safe, secure and attractive communities and tackle antisocial behaviour. Graffiti involving use of spray paint is particularly difficult and expensive to remove. Ministers believe it is appropriate to ban the sale of spray paint to under 16s. This will help control and reduce the antisocial misuse of spray paints by children in acts of graffiti.

158. The Executive considers that 16 is the most appropriate age for the ban on the sale of spray paint. Over the age of 16, it is more likely that a person will have legitimate reasons for purchasing spray paint, whether for work purposes or if they own a car at age 17. The misuse of spray paints in acts of graffiti will still be a crime even if the ban does not apply to 16 and 17 year olds. On balance, a threshold of 16 meets the policy objective while limiting the extent to which the ban impacts on the freedom of individuals aged 16 or over.

159. Enforcement of the ban will mainly be a matter for trading standards officers and the police. A duty is being placed on the local authority to enforce the ban in its area. However, the local authority will not be authorised to institute proceedings for the offence of selling spray paint to a child. This is a matter within the discretion of Procurators Fiscal. The Bill also contains a requirement to display a notice setting out that it is illegal to sell spray paint to under-16s at every retail outlet in which spray paint is sold. Non-compliance with this requirement will be a criminal offence.

Alternative approaches

160. One alternative to introduction of community reparation orders would be to rely on the existing range of community disposals to deal with this group of offenders and not to introduce a new sentence. However, Ministers are not convinced that the options currently available to courts are sufficient to deal with offenders indulging in antisocial behaviour. The intention is to provide courts with an additional sentencing option, which reflects more appropriately where antisocial behaviour should sit in the tariff scale. A second alternative would be to reduce the number of hours required to be undertaken within a CSO thereby avoiding the need for introduction of CROs but this would run the risk of diluting the principle of a CSO being an alternative to custody.

161. The alternative to extending RLOs to under-16s would be to retain the present RLO arrangements restricting RLOs for offenders over the age of 16. However as electronic monitoring is to be made a disposal for the children's hearing system as an alternative to secure accommodation it would also be appropriate to extend the arrangements for the adult RLO scheme to cover those offenders under-16 in the courts.

162. The alternative to the ban on the sale of spray paint to children would be not to impose such a ban or to introduce a ban with a different age threshold. A ban will not prevent graffiti on its own, but Ministers believe it is a useful step to control the misuse of spray paints by children in acts of vandalism. Education and crime prevention initiatives will continue to have a major role in preventing graffiti. The ban will complement other approaches.

Consultation

163. Most respondents supported the principle of introducing CROs although concern was expressed by some as to the potential for overlap with CSOs and SAOs as a disposal of first instance. The majority supported the notion of there being programmes for individuals as well as groups and also felt that there should not be an upper age group of 21 as proposed in the consultation paper *Putting Our Communities First*. Respondents also proposed a wide range of organisations/agencies who should be consulted formally about the nature of reparative work to be undertaken.

164. Respondents who supported the introduction of RLOs for under 16's in the courts agreed that these should be accompanied by additional support measures; they also highlighted the need to support the families of those subject to the order. There was general agreement to the period of restriction being the same as for adults, but there was a need to ensure flexibility in application to accommodate schooling etc. Some respondents also raised concerns that RLOs might be seen as a soft option. Those respondents who did not support the introduction of electronic monitoring considered that its use instead of secure accommodation would have an effect on the vulnerable and breach of the order should not be grounds for a secure placement.

165. While some concerns were expressed about the effectiveness of a ban on the sale of spray paint to children and about the means of enforcement, there has been wide support for the introduction of such a ban. A number of respondents suggested that the ban should be extended to under-18s to ensure continuity with what is being proposed for England and Wales. Ministers have considered this issue but still believe that setting the ban at under-16s is more appropriate for Scotland.

PART 11 – FIXED PENALTIES

Policy objectives

166. Scottish Ministers want to ensure that where antisocial behaviour has taken place that swift, effective and fair justice is provided for. Ministers believe that fixed penalty notices (FPNs) for antisocial behaviour will help in this regard.

167. The power to issue FPNs for disorderly behaviour will be given to the police. Ministers believe that FPNs would only be appropriate in relation to low-level offences. Some of these offences are set out in the Bill. FPNs should help free up police time and reduce some of the burden on the courts of dealing with minor cases.

168. At present the police have a number of options open to them when they apprehend someone who has committed a low-level offence. They may just warn the alleged offender or

they may arrest the offender and take him or her to the police station. There, after establishing the offender's identity, they may release the offender with a warning, they may release the offender under a bail requirement to attend court on a specified day, or they may release the offender on the basis that a report will be sent to the local Procurator Fiscal. Thereafter, if the Procurator Fiscal decides to proceed with a prosecution, this would be initiated by serving of a summary complaint. The FPN will be one other option open to the police. If the identity of the offender can be confirmed in the street a FPN may be issued there and then. However, Ministers expect that in most situations the offender will be arrested and taken to the police station. Whichever is the case, an FPN will be another tool at the disposal of the police in these situations.

169. An FPN will work as follows. Once it is issued the recipient will have 28 days to either pay the fixed penalty or intimate their wish to challenge the notice. If the fixed penalty is paid then that is the end of the matter. If the recipient challenges the notice then the case will be reported to the Procurator Fiscal who determines whether a prosecution is appropriate. If, on the other hand, the recipient does nothing – i.e. does not take up his or her opportunity to challenge the notice and prove his or her innocence or does not pay the fixed penalty – the fixed penalty is converted to a fine registered against the recipient. The level of the fine will be 150% of the level of the fixed penalty. Once registered the fine will be enforced in the normal way.

170. Ministers are confident these arrangements are fair and equitable. They allow an alleged offender to challenge the notice, leaving the burden on the prosecution to prove any criminal charge subsequently brought against them. They allow someone who accepts their guilt and that a penalty should be paid, to pay it and have the matter finally dealt with. If that is the case then no conviction is recorded against that person. On the other hand, for those who do nothing an increased penalty – in the form of a recorded fine – will be imposed. The Bill also provides a mechanism for someone who alleges that the FPN was not issued to them – i.e. that there is a case of mistaken identity – to prove that they were not the person to whom the FPN was issued.

171. Matters of prosecution of criminal offences are in the exclusive jurisdiction of the Lord Advocate in Scotland. The Lord Advocate has the power to direct the police about in what circumstances a FPN should be used or not used in respect of the offences where FPNs are applicable. Whether a FPN has previously been issued to an individual will obviously be an important factor in determining whether it is appropriate to issue one again. For that reason, although an FPN will not be a criminal conviction, the fact that one has been issued and paid will be recorded.

172. Ministers plan to pilot FPNs for antisocial behaviour in Scotland. The Lord Advocate and the Crown Office and Procurator Fiscal Service, the police and the courts will be closely involved in planning for this pilot. An evaluation of that pilot will be carried out. Ministers are confident that, if properly designed, savings in police and court time will be made.

Alternative approaches

173. Ministers believe that FPNs will be a useful mechanism for delivering summary justice in respect of minor offences. The Executive is also taking action to improve the summary criminal court justice system. Ministers are of the view that FPNs will complement these efforts. An

FPN will be another option open to the police when dealing with minor offenders. It is itself an alternative approach that Ministers believe will prove useful in freeing up police time and reducing the burden on Scotland's courts.

Consultation

174. The vast majority of those who responded on this issue supported the introduction of FPNs for low level antisocial behaviour offences. They agreed with Ministers that if the system was designed properly FPNs should allow for a reduction in bureaucracy and speedier justice. A number of consultees argue that FPNs for low level offences should be piloted in Scotland before being rolled out nation-wide. They pointed to the pilots currently running in England and Wales but made the point that the Scottish criminal justice system was different and that a separate pilot would be necessary here. Ministers agree and the intention is to commence these provisions in a manner that enables these provisions to be piloted.

175. The consultation paper also sought views on the wisdom of extending FPNs for disorderly behaviour to under-16s. On this issue, the vast majority of consultees were opposed to the proposal. This Part does not provide for the application of FPNs to under-16s.

PART 12 – CHILDREN'S HEARINGS

Policy objectives

Supervision requirements: conditions restricting movements

176. Remote monitoring arrangements are currently available in the criminal justice system, through the use of restriction of liberty orders (RLOs) which apply to young people aged 16 and over. Remote monitoring of young people aged 10+ is also a disposal available to courts in England and Wales.

177. As set out above, Scottish Ministers propose that RLOs should also be available for those aged under 16 in the criminal justice system. In addition, it is intended to introduce remote monitoring for young people who are dealt with by the children's hearing. They will mainly be aged under 16, but could also include those aged 16 and 17 who are subject to a supervision requirement.

178. The vast majority of children and young people who will be the subject of a remote monitoring arrangement (RMA) will be the small number of serious and/or persistent offenders for whom a wide range of interventions have been tried but failed.

179. Scottish Ministers also believe there are a small number of young people who may not offend but whose behaviour is putting themselves at risk. Many of these young people may currently be placed in secure or residential care. The hearing may consider that an RMA would be more appropriate, taking into account the best interests of the child.

180. Ministers believe that for this very small number of young people, an RMA could be more effective than secure or residential accommodation, provided it is just one part of an intensive programme of supervision and support, including educational provision. An RMA

could not therefore, be imposed without an action plan that covers the range of elements in such a programme and how it will be delivered. As set out in the Financial Memorandum to this Bill, the Executive will be making available significant resources to help provide the intensive supervision and support that will be required.

181. It is intended that RMAs could be used as an alternative to placing a young person in secure accommodation. A child is placed in “secure accommodation” by a supervision requirement under section 70(9) of the Children (Scotland) Act 1995. The hearing would have to be satisfied that the child met the criteria for secure accommodation set out in section 70(10), it may then impose an RMA in a supervision requirement. Hearings are required to review a “secure” decision after three months. Ministers intend to set the same review period for an RMA.

182. It is also proposed that RMAs could be used in support of serious intervention with a young person for welfare or offending reasons. This option would enable young people who are coming out of secure accommodation to “phase” their re-entry to the community. It could also be considered as a response to the breach of an antisocial behaviour order and if a young person is continually absconding from home or their place of residence and placing their welfare at risk.

183. If an RMA is breached, the young person will be referred back to a Children’s Hearing for disposal. It is possible that secure accommodation will be the sanction.

184. The hearings already have wide powers to impose a supervision requirement (section 70(1) of the 1995 Act) and to attach any condition it considers to be in the best interests of the child (section 70(3)). Ministers believe that an additional express provision under section 70(3) to impose an RMA will demonstrate that this is a serious intervention but that it can only be imposed through a supervision requirement, which will also address the young person’s range of other needs. Further discussion will be required but it is considered that the review period for an RMA will be three months, which is the same as the requirement to review a secure order and placements for looked after children.

185. Ministers have also been mindful of ECHR requirements under Article 5 and the rights of young people to educational provision, where there has been a restriction of liberty, and to ensure that any action taken by the hearing is made in the welfare interests of the child. Imposing an RMA will be a restriction of liberty rather than deprivation. Nevertheless, Ministers’ proposals to impose an RMA through a supervision requirement that sets out the range of provisions that must be in place for a young person will ensure ECHR requirements have been met.

Supervision requirements: duties of local authorities

186. The Bill introduces a provision clarifying the statutory duties of local authorities in relation to supervision requirements imposed by children’s hearings. An obligation is imposed on the local authority to perform its statutory duties where these are imposed on it in terms of a supervision requirement, and provision is made empowering the hearing to direct the Reporter to raise proceedings in the sheriff court against a local authority, compelling it to perform its statutory obligations where the hearing considers that the authority is failing in its responsibilities in respect of a specific supervision requirement.

187. Where a hearing considers that compulsory measures of supervision are needed in respect of a child referred to it, the hearing will determine what the child's needs are and what action should be taken by the child in order to address those needs. The supervision requirement may contain one or more conditions as appropriate. These may range from seeing a social worker as required, to attendance on a particular community based programme; or attending school, to placement in secure accommodation. While the obligations are placed on the child, the local authority already has a duty to give effect to supervision requirements (section 71 of the Children (Scotland) Act 1995). A child under a supervision requirement is a "looked after child" for the purposes of section 17 of the Children (Scotland) Act 1995 which places statutory obligations on local authorities. Local authorities are expected to make such arrangements as are necessary to enable the child on a supervision requirement to meet the obligations on the child. In practice, this will involve organising the allocation to a social worker and supervision by a social worker or other service provider.

188. The Audit Scotland report on youth justice (*Dealing with offending by young people*, December 2002) identified shortcomings in the supervision of children (paragraphs 147 to 149) and highlighted that hundreds of children subject to a supervision requirement did not receive a suitable service. Over twice as many children are under supervision in relation to welfare grounds than on offence grounds. There are potentially a large number of children not being provided with a service to enable the supervision requirement to be put into effect.

189. The new provision specifies the procedure to be followed by the Reporter in giving notice of intended application to the court. The Reporter must send such a notice to the local authority and copy it to the child, and also to 'relevant persons' (as referred to in the 1995 Act) and to any person appointed under section 41 of the 1995 Act. The provision also specifies time limits within which action requires to be taken. The local authority has 21 days from the date of receipt of the notice to comply with its duty under the 1995 Act, and a hearing which directs the Reporter to give notice of an intended application will meet as soon as possible after 28 days of the notice being given, to review the case. If, after that period, the local authority is considered still to be in breach of its duties, the hearing may authorise the Reporter to make an application to the court.

190. The effectiveness of the current legislation is dependent upon local authorities complying with their statutory obligations, but where these have not been met there is no mechanism at present which allows early action to be taken to remedy that failure. The new provision will enable a hearing, where necessary, to direct a Reporter to give notice of intention to raise an action in the sheriff court in relation to a specific failure to give effect to a supervision requirement. Failure to comply with the sheriff's order would be dealt with as contempt of court. To ensure that the new provision operates successfully, it will be important for supervision requirements to set out in detail what the child is expected to undertake and what the local authority is expected to deliver. Panel members will receive further training on what is required to ensure that the local authorities' duties are clear.

Failure to provide education for excluded pupils

191. Local authorities have specific duties in respect of children who have been excluded from school (section 14 of the Education (Scotland) Act 1980 as amended). These include requirements to provide education. The Bill introduces a provision for the Reporter or the

hearing, as appropriate, to refer the local authority to Scottish Ministers in order to facilitate an investigation under section 70 of the 1980 Act into whether there has been a breach of duty under that Act, upon discovering that an excluded child has not received education as required. That section sets out certain enforcement measures Scottish Ministers may take where there has been a failure to discharge any statutory duty relating to education.

192. Although local authorities have a statutory duty to provide education, children's hearings on occasion discover that children who have been excluded have not then received education. Reasons for this vary. For example, some local authorities may have offered services which have not been taken up; the child may have been excluded from several schools or may have been moved around between foster and family carers.

193. On occasion, however, local authorities may have been slow in undertaking their statutory responsibilities and this may only come to light at a hearing. The powers of Reporters and hearings relate to their functions under the Children (Scotland) Act 1995 to ensure the protection of children. This new provision enables Reporters and hearings, in attending to their responsibilities, to make a referral to Scottish Ministers where it appears to them that there has been a failure on the part of a local authority to fulfil its statutory obligations. This will ensure that children who might not otherwise have received an education service are brought to the attention of Scottish Ministers. They may then require action to be taken if they decide that there has been a failure on the part of the local authority.

194. It is intended that guidance will be issued to Reporters and hearings to indicate the reasonable steps that local authorities would be expected to have taken where a child is excluded. The absence of such information from the reports received by Reporters and hearings in respect of the child will enable a decision to be made on whether to refer the case to Scottish Ministers for a fuller investigation to be undertaken.

Alternative approaches

195. Ministers believe that an RMA should only be applied when a range of other options have been tried with the young person but they have failed. Ministers believe that the credibility of the hearings system has been undermined by the absence of resourced interventions for tackling young people with a history of serious and persistent offending and in a tiny minority of welfare cases, when other community-based options have failed. Recent increases in funding of local youth justice teams and specific programmes, as well as the pilot of fast track hearings in certain locations are expected to improve the impact of the hearings system. Resources have also been allocated to increase the secure estate. Decisions of hearings are very flexible in that a hearing may impose any condition in a supervision requirement which it considers necessary to address the welfare interests of the child. Interventions such as RMAs, together with ASBOs and the power to require an application for parenting orders, will provide additional specific measures for the most troublesome. Hearings at present seek to engage parents in improving the welfare of their child and in controlling the child's behaviour but do not have direct control over parents. The provision of support services and the option of parenting orders through the courts will help reinforce the work of hearings. Wider changes to the hearings system such as direct control over parents would require a re-examination of the Children (Scotland) Act 1995 and is an issue better suited to the proposed review of the children's hearings system.

196. Local authorities already have a duty to give effect to supervision requirements. However, where difficulties emerge in implementing hearings decision, there is no specific option for hearings to take action. Children's panel chairs will discuss with local authority staff and may review decisions, but this process does not always guarantee action. Existing powers to take action against local authorities, for example under the Court of Session Act 1988, are more suited to addressing a generic failure by a local authority and require a more lengthy process through the courts. The new provision will require action in specific cases within a fixed time frame. The new powers to specify the duties on local authorities and to require action or, in the case of children not receiving education, to permit investigation will complement the existing provisions.

Consultation

197. The consultation process produced a range of comments on electronic monitoring in the hearings system. A significant number were opposed, others very much in support. Overall the majority of views were that, on balance and in certain circumstances, there was a role for electronic monitoring. To be effective, many felt that it should be part of a package of support measures and should not be made in isolation as a punitive measure. There was considerable support for electronic monitoring to be further evaluated before introduction or to be piloted, given concerns over its effectiveness for the younger age group. Concerns were expressed over children's rights issues, especially under international law, the issue of stigmatisation, the possibly of a tag being seen as a badge of honour and the need to ensure that the environment where a child was to be required to stay should be safe. Some doubted whether, if the secure accommodation criteria were met, tagging could provide an alternative as the need to avoid the risk of the child harming themselves or others might not be met by electronic monitoring. There was no clear preference between the two options in the paper. There was strong support for any review period to be no longer than three months.

198. On powers to require local authorities to comply with supervision requirements, the majority supported the desirability of requiring local authorities to comply with supervision orders. Many children's hearings organisations felt that this was overdue, and was both detrimental to individual children and to the hearings system. However, it was strongly argued by COSLA, individual local authorities and many other respondents, including children's hearing organisations, that the situation was primarily caused by a lack of resources rather than a wilful refusal to comply on the part of local authorities. In particular, the lack of available social workers was viewed as the most serious issue impacting upon the compliance of supervision requirements. If the current national measures to address this problem were successful, the need for the powers would diminish. It was argued by local authorities and others that local authorities' accountability had to be linked to adequate resources.

199. There was support amongst the majority of respondents for a Reporter, at a hearing's direction, to request a sheriff to make an order to enforce implementation of a supervision requirement but that the underlying shortage of resources had to be tackled. Several respondents were concerned that the ability of local authorities to prioritise cases, particularly related to child protection and looked after children, would be compromised, and that other cases would necessarily lose resources. Guidance would be important. Concerns were also raised that more children may become subject to supervision requirements to secure resources. Several responses from children's hearing groups were also concerned that recourse to the sheriff undermined the

primacy of the original disposal made by the hearing. Clarification on the disposal powers of the court was sought, and some suggested that local authorities should have a right of appeal against a disposal from a children's hearing if they felt it to be unreasonable. Other procedural changes were suggested to clarify actions taken by the hearings system and for ensuring accountability.

200. A majority of responses supported a role for hearings and Reporters in alerting Ministers to failure by a council to ensure a child before them receives appropriate education. There was general agreement that such an action should only occur if all other options, including local authorities' appeal procedures for parents, had been exhausted. Guidance would be helpful. Some respondents suggested interim procedures involving the local authority should be pursued before referral to Scottish Ministers. One children's panel suggested that hearings be provided with detailed education plans, similar to action plans in fast-track hearings.

PART 13 – MISCELLANEOUS AND GENERAL

Policy objectives

Disclosure and sharing of information

201. Effective management of antisocial behaviour requires effective sharing of information amongst authorities. Ministers are determined that unnecessary obstacles to the sharing of that information are eliminated. This part provides that local authorities, the police and responsible social landlords will have the power to exchange information where it is necessary and relevant in tackling antisocial behaviour.

Equal opportunities

202. Scottish Ministers are committed to equal opportunities. This part makes it clear that those discharging functions under the Bill must do so in a manner that supports equal opportunities.

Alternative approaches

203. The alternative in relation to these measures would be to omit any specific statutory power to exchange information or requirement to promote equal opportunities. Ministers' view is that these matters are best explicitly provided for.

Consultation

204. A wide range of individuals and organisations stressed the importance of effective and efficient information exchange in tackling antisocial behaviour. They explained that individual authorities were often reluctant, for reasons that were unclear, to exchange information with each other that would allow them collectively to combat antisocial behaviour more effectively. Ministers share that view and these provisions are the result.

205. Those representing equality groups who responded to the consultation stressed the need to be very clear that the Bill could not lead to discrimination against them. They suggested that the Bill include an explicit provision to make this clear.

EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.

Equal opportunities

206. The measures in the Bill are intended to provide additional protection to individuals and groups whose quality of life is undermined by antisocial behaviour by others. Individuals who experience prejudice on the grounds of race, religion, gender, age, disability or sexual orientation may also be more likely to be victims of antisocial behaviour. The Executive expects the Bill to promote equal opportunities by promoting a strategic approach to tackling antisocial behaviour in communities and enhancing the range and effectiveness of disposals giving communities greater confidence that antisocial behaviour will be dealt with.

207. The Executive recognises that there can be unintended consequences in introducing new powers and requirements and it is important to assess the likely impact on equality issues. As part of the consultation on *Putting Our Communities First: a Strategy for Tackling Anti-Social Behaviour*, meetings were held with the Commission for Racial Equality, the Equality Co-ordinating Group (which includes the statutory Commissions as well as the Equality Network, Age Concern Scotland and the Scottish Interfaith Council) and YouthLink Scotland. This was in addition to the wide range of meetings with community representatives throughout Scotland over the summer.

208. Of course, it should be emphasised that those public bodies responsible for implementation of the Bill will be expected to do so in ways which comply with the duties placed upon them by the Race Relations (Amendment) Act 2000 and the related Race Relations Act 1976 (Statutory Duties) (Scotland) Order 2002. In other words, bodies such as local authorities and the police will need to ensure that in carrying out their statutory responsibilities in tackling antisocial behaviour they do so in ways that eliminate unlawful racial discrimination, promote equality of opportunity, and promote good race relations. Public bodies responsible for implementation of the Bill will be expected also to do so in ways that comply with the duties imposed by other equality legislation, for example, the Disability Discrimination Act 1995 and the Sex Discrimination Act 1975.

209. An overarching equality provision has been added to the Bill to ensure that checks and balances are in place when measures in the Bill are implemented. This provides that any person discharging functions under that Bill should discharge those functions in a manner which encourages equal opportunities and in particular the observance of the equal opportunities requirement. "Equal opportunities" and "equal opportunities requirements" have been given the same meaning as in section L2 of Part II of Schedule 5 to the Scotland Act 1988.

210. It is important to be clear, as far as possible, on the links between the Executive's proposals on antisocial behaviour and existing legislative provision to protect individuals who are victims of harassment or incidents perceived to be motivated by prejudice. In terms of existing law, statutory protection is provided on grounds of race and, following the introduction of the Criminal Justice (Scotland) Act 2003, religion. The Executive has also established a working group on hate crime to consider the approach taken to incidents which may be motivated by prejudice on the grounds of other equality issues such as age, sexual orientation and disability.

211. In relation to specific provisions in the Bill it should be borne in mind that antisocial behaviour orders have been available in respect of adults since 1999. All that the Bill does is extend ASBOs to 12 to 15 year olds. The definition of antisocial behaviour in the Bill is based on the original definition set out in the Crime and Disorder Act 1998, as it refers to behaviour that causes or is likely to cause alarm or distress. ASBOs are intended to tackle both behaviour which is likely to escalate to a criminal level, and patterns of behaviour which cumulatively cause considerable alarm or distress but which do not consist of single acts which are sufficiently serious or clear cut to be prosecuted individually as criminal offences. While the provisions in the Bill also relate to low-level criminal offences, and these fall within the scope of legislation on antisocial behaviour the intention is to deal more effectively with the type of behaviour which may not be serious enough to lead to criminal proceedings. Racial harassment is more serious than antisocial behaviour, which may not be criminal in its own right. Where racial harassment has taken place it will continue to be prosecuted in the criminal courts. On the other hand, where proof to the criminal standard is not available or where the focus is on preventing future behaviour – particularly amongst under-16s - it may be that an application for an ASBO may be appropriate to deal with incidents causing alarm or distress to members of our ethnic minority communities. This would also apply to all other equality groups. This is an example of how the new powers established in the Bill to tackle antisocial behaviour should help combat discriminatory behaviour towards all equality groups.

212. Those working with children with disabilities and with special needs have expressed concern about such children being made subject to ASBOs because of behaviour linked to their particular circumstances. Again, Ministers understand that concern. However, they are confident that the requirements set out in the Bill to ensure that the circumstances of a young person as a whole are taken into account when deciding the best means of tackling difficult behaviour by that young person should ensure that ASBOs are not applied for or granted where that would be inappropriate. Ministers agree that for such young people the children's hearing system would be, in almost all cases, the appropriate forum to discuss the best interests of the young person.

213. The additional power to disperse groups of people has also attracted interest from representatives of equality groups. There is a concern that the power to disperse groups may disproportionately affect ethnic minorities as there is a higher proportion of young people in ethnic minority communities and the complaints may be made on grounds of prejudice rather than evidence of antisocial behaviour. Ministers take this concern seriously but are confident that sufficient safeguards are in place to ensure that the power will not be used in a discriminatory manner. Firstly, the police and other authorities will, when exercising this power, be required to comply with their statutory obligations under the Race Relations (Amendment) Act 2000 as set out above. Secondly, the Bill contains explicit powers for Ministers to issue guidance and directions on the use of this power. That will make clear that the police should exercise the power in a manner that does not discriminate against any equality group.

214. The introduction of parenting orders will also need to be sensitive to the different cultures of minority communities. Again, a power of guidance by Ministers has been included in the Bill. This will make clear that although the interests of the children of the family should be the foremost concern, the new powers should operate in a culturally sensitive manner.

Human rights

215. Section 29 of the Scotland Act 1998 sets out the limits on the legislative competence of the Scottish Parliament. One of those limits is the need not to contravene any of the rights granted by the European Convention on Human Rights (ECHR) which are listed in Schedule 1 to the Human Rights Act 1998 (known as “the Convention rights”). Ministers’ view is that none of the provisions in the Bill is incompatible with any of the Convention rights.

216. Part 2 of the Bill extends antisocial behaviour orders (ASBOs) to 12 to 15 year olds. For the purposes of ECHR the courts have decided that ASBOs are civil in nature. On that basis Article 6 of ECHR is engaged since it concerns the determination of “civil rights and obligations”. Ministers do not believe there is anything in Part 2 of the Bill that is incompatible with Article 6.

217. Part 3 of the Bill provides new powers to disperse groups of people in areas designated to be suffering because of antisocial behaviour by groups. This part makes similar, although not identical, provision to Part 4 of the Anti-social Behaviour Bill currently before Westminster. In relation to the provisions in the Westminster Bill the House of Lords and House of Commons Joint Committee on Human Rights raised concerns in relation to Articles 5, 8, 10 and 11 of ECHR. They concluded that the provisions were compliant with Article 5 but stressed that to avoid incompatibility with Articles 8, 10 and 11 it would need to be demonstrated that the measures were a proportionate response to a pressing social need. Ministers are clear that the provisions in this Bill are a proportionate response to a pressing social need. Groups of people engaging in antisocial behaviour in communities are a real and acute problem in communities across Scotland. Moreover, the provisions in Part 3 in relation to consultation, designation of an area before the power applies and a time limit on that designation evidence the proportionality of the approach proposed.

218. Part 4 of the Bill provides for the closure of premises which have been the centre of serious nuisance or disorder. As such the proposals engage Article 1 of Protocol 1 and Article 8 of ECHR. The measures in the Bill are concerned with a control of rights and not a deprivation of property and Ministers are satisfied that there is no incompatibility with Article 1 of Protocol 1. Similarly, they are confident that the safeguards provided in this part avoid incompatibility with Article 8.

219. Part 9 of the Bill provides for the introduction of parenting orders in Scotland. Issues in relation to Article 8 – right to a family life – are the most relevant here. Ministers are confident that the provisions of Part 9 meet the test that the interference in family life pursued a legitimate aim in accordance with law and that was necessary and proportionate. Parenting orders may be granted to address crime and antisocial behaviour by children or to protect the welfare of the child.

220. Part 10 of the Bill extends restriction of liberty orders to under-16s as a disposal of the criminal courts. As such Articles 3, 5 and 8 of ECHR are engaged. However, Ministers are confident that restriction of liberty orders for under-16s would not be incompatible with any of these convention rights.

Island communities

221. Antisocial behaviour does impact on island communities. Those communities, just as much as any others, deserve to be protected from behaviour that threatens the quality of life of those who live in them. Of course, how antisocial behaviour manifests itself and how it should best be tackled may be different in island communities because of their isolation from the mainland. The Bill recognises that situation. It is premised on the basis that the most appropriate level at which decisions on how to tackle antisocial behaviour is the local level. Integrated antisocial behaviour strategies require to be drawn up at that level. Moreover, the additional tools to tackle antisocial behaviour set out in the rest of the Bill will be employed in the context of that strategy. Ministers are confident that island communities will benefit from the provisions of the Bill.

Local government

222. Local authorities are the key player in taking forward the Executive's plans to tackle antisocial behaviour more effectively. Ministers are committed to working with local government in implementation of the Bill and their wider strategy on antisocial behaviour. The particular impacts of individual proposals on local authorities are explained above in relation to each Part of the Bill.

Sustainable development

223. The Scottish Executive is committed to sustainable development. Ministers published *Meeting the Needs: Priorities, Actions and Targets for Sustainable Development in Scotland* in April 2002. *Meeting the Needs* made clear that environmental and social justice are central to Ministers' views of sustainable development. This Bill includes proposals that take forward both environmental and social justice. The improved powers it includes for tackling litter, graffiti, noise nuisance and fly-tipping support Ministers' commitment to environmental justice. Ministers are determined to improve the lot of communities who suffer from environmental degradation in all its forms. Ministers are also confident that increasing the protection of the vulnerable in our communities – those that suffer, often in silence, from antisocial behaviour - will contribute to environmental and social justice and thereby sustainable development. The Bill will improve social cohesion leading to safer, stronger, more confident and more sustainable communities.

This document relates to the Antisocial Behaviour etc. (Scotland) Bill (SP Bill 12) as introduced in the Scottish Parliament on 29 October 2003

ANTISOCIAL BEHAVIOUR ETC. (SCOTLAND) BILL

POLICY MEMORANDUM

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