FINANCE COMMITTEE

AGENDA

17th Meeting, 2003 (Session 2)

Tuesday 9 December 2003

The Committee will meet at 10.00 am in Committee Room 1 to consider the following agenda items:

1. Anti-Social Behaviour etc (Scotland) Bill: The Committee will take evidence on the Bill’s Financial Memorandum from—

   Stephen Fitzpatrick, Community Resourcing Team Leader and
   Margarita Morrison, Corporate Adviser, COSLA

   Ed Morrison, Director of Finance and Jackie Robeson, Head of
   Practice, Scottish Children’s Reporter Administration

2. Item in private: The Committee will decide whether to consider its draft report on the Financial Memorandum of the Education (Additional Support for Learning) (Scotland) Bill in private at its next meeting.


Susan Duffy
Clerk to the Committee
The papers for this meeting are:

**Agenda item 1**
Anti-Social Behaviour etc (Scotland) Bill, Policy Memorandum and Explanatory Notes

SPICe Briefing  FI/S2/03/17/1

Paper by the Clerk – Written Evidence  FI/S2/03/17/2

PRIVATE PAPER

**Agenda item 3**

PRIVATE PAPER
ANTI-SOCIAL BEHAVIOUR (SCOTLAND) BILL

JUDE PAYNE

The Antisocial Behaviour etc. (Scotland) Bill was introduced in the Scottish Parliament on 29 October 2003.

The Bill follows on from the Scottish Executive’s consultation document Putting Our Communities First: A Strategy for Tackling Anti-social Behaviour, which discussed the effect anti-social behaviour was having on communities, and set out its proposals for how it wished to tackle the issue.

This briefing provides a synopsis of the main parts of the Bill together with an analysis of the responses from various organisations to the original consultation.
# CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>KEY POINTS OF THIS BRIEFING</td>
<td>4</td>
</tr>
<tr>
<td>INTRODUCTION</td>
<td>6</td>
</tr>
<tr>
<td>OTHER SPICE BRIEFINGS ACCOMPANYING THIS SERIES</td>
<td>6</td>
</tr>
<tr>
<td>PART 1: ANTISOCIAL BEHAVIOUR STRATEGIES</td>
<td>7</td>
</tr>
<tr>
<td>CONTEXT</td>
<td>7</td>
</tr>
<tr>
<td>THE BILL’S PROPOSALS</td>
<td>7</td>
</tr>
<tr>
<td>CONSULTATION RESPONSES</td>
<td>8</td>
</tr>
<tr>
<td>ASB Strategies</td>
<td>8</td>
</tr>
<tr>
<td>Formal duty on RSLs to participate</td>
<td>8</td>
</tr>
<tr>
<td>A duty on other community planning partners to participate</td>
<td>8</td>
</tr>
<tr>
<td>Information exchange</td>
<td>9</td>
</tr>
<tr>
<td>PART 2: ANTISOCIAL BEHAVIOUR ORDERS</td>
<td>9</td>
</tr>
<tr>
<td>CONTEXT</td>
<td>9</td>
</tr>
<tr>
<td>THE BILL’S PROPOSALS</td>
<td>9</td>
</tr>
<tr>
<td>ASBOs</td>
<td>9</td>
</tr>
<tr>
<td>Relationship with the Children’s Hearing</td>
<td>10</td>
</tr>
<tr>
<td>Interim ASBOs</td>
<td>10</td>
</tr>
<tr>
<td>Breaching an order</td>
<td>11</td>
</tr>
<tr>
<td>Additional measures</td>
<td>11</td>
</tr>
<tr>
<td>CONSULTATION RESPONSES</td>
<td>12</td>
</tr>
<tr>
<td>ASBOs for under 16s</td>
<td>12</td>
</tr>
<tr>
<td>ASBOs and the Children’s Hearings System</td>
<td>13</td>
</tr>
<tr>
<td>Additional measures</td>
<td>14</td>
</tr>
<tr>
<td>PART 3: DISPER SAL OF GROUPS</td>
<td>15</td>
</tr>
<tr>
<td>CONTEXT</td>
<td>15</td>
</tr>
<tr>
<td>THE BILL’S PROPOSALS</td>
<td>15</td>
</tr>
<tr>
<td>CONSULTATION RESPONSES</td>
<td>16</td>
</tr>
<tr>
<td>PART 4: CLOSURE OF PREMISES</td>
<td>18</td>
</tr>
<tr>
<td>CONTEXT</td>
<td>18</td>
</tr>
<tr>
<td>THE BILL’S PROPOSALS</td>
<td>18</td>
</tr>
<tr>
<td>Closure notices</td>
<td>18</td>
</tr>
<tr>
<td>Closure orders</td>
<td>18</td>
</tr>
<tr>
<td>CONSULTATION RESPONSES</td>
<td>19</td>
</tr>
<tr>
<td>PART 5: NOISE NUISANCE</td>
<td>20</td>
</tr>
<tr>
<td>CONTEXT</td>
<td>20</td>
</tr>
<tr>
<td>THE BILL’S PROPOSALS</td>
<td>20</td>
</tr>
<tr>
<td>Noise control provisions</td>
<td>20</td>
</tr>
<tr>
<td>Investigating noise nuisance</td>
<td>20</td>
</tr>
<tr>
<td>Warning notices</td>
<td>21</td>
</tr>
<tr>
<td>Sanctions for offences after the service of a warning notice</td>
<td>21</td>
</tr>
<tr>
<td>CONSULTATION RESPONSES</td>
<td>21</td>
</tr>
<tr>
<td>PART 6: THE ENVIRONMENT</td>
<td>22</td>
</tr>
</tbody>
</table>
KEY POINTS OF THIS BRIEFING

- The Antisocial Behaviour (Scotland) Bill is split into 13 parts with 112 sections and 5 schedules. It follows on from the Scottish Executive’s consultation document Putting Our Communities First: A Strategy for Tackling Anti-social Behaviour.

- The Bill provides local authorities, the relevant chief constable and, when instructed by Scottish Ministers, registered social landlords with a duty to participate in the development of Anti-social Behaviour Strategies. It is envisaged Community Planning would be the overarching framework for tackling anti-social behaviour in local areas, with the local authority having responsibility to ensure that local communities are involved in formulating the strategies. The majority of respondents to the original consultation were in favour of such a proposal, though there were disagreements regarding the extent to which all or some of the community planning partners in an area should have a statutory duty to participate.

- The Bill would provide for Anti-social Behaviour Orders (ASBOs) being available to those aged to 12 to 15 as well as those aged 16 and over as at present. In addition the Bill seeks to allow courts to impose an ASBO instead of, or in addition to, any sentence where the person is convicted of an offence involving antisocial behaviour, extend the geographical scope of ASBOs, and introduce a statutory power of arrest for breach of an ASBO. These proposals received a mixed response from respondents to the original consultation.

- The Bill would provide a senior police officer, after consultation with the relevant local authority, the power to designate an area for the dispersal of groups where significant and persistent ASB has occurred in a locality, and where alarm or distress has been caused to members of the public by the presence or behaviour of groups in an area. Designation would allow police officers to direct individuals in a group who are not from the area to leave it for a period of up to 24 hours, should their presence or behaviour have resulted in, or is likely to result, in any members of the public being alarmed or distressed. A significant majority of respondents were against such a power being granted to the police. 80% of respondents believed the police already had sufficient powers to disperse groups.

- The Bill would provide the police and courts with powers to seal off both residential and non-residential premises that are the focal point for anti-social behaviour when other measures to tackle ASB have failed. A majority of respondents to the original consultation were in favour of such powers being introduced though concerns were raised regarding the closure of residential premises.

- The Bill would provide local authorities with the power to implement a noise nuisance service in their area up to 24 hours a day, 7 days a week. In addition local authority officers and the police would be given the power to issue Fixed Penalty Notices for noise nuisance offences. A majority of respondents were in favour of such powers for local authorities, though there was disagreement regarding which local authority officers should be given the powers to investigate noise nuisance and issue Fixed Penalty Notices.

- The Bill proposes to make fixed penalty powers applicable to littering offences available to the authorities in less serious fly-tipping cases. The penalty for various environmental offences would also be increased. These proposals received support from the majority of respondents to the original consultation, though some organisations wished to see more robust powers awarded to local authorities.
• The Bill proposes to give local authorities powers to issue Anti-social Behaviour Notices and introduce discretionary registration schemes to tackle anti-social behaviour in the private rented housing sector. There would also be additional sanctions made available to the courts. The majority of respondents were in favour of such proposals, though some felt that any registration scheme should be compulsory and extend to covering wider sector issues such as building standards and the tenant / landlord relationship.

• The Bill also proposes to introduce Parenting Orders, Restriction of Liberty Orders, Community Reparation Orders, ban the sale of spray paint to under 16s and provide the police with powers to issue Fixed Penalty Notices for a range of anti-social behaviours. The majority of respondents to the original consultation were in favour of such proposals, though with reservations.

• The Bill would provide the Children’s Hearing System with powers to make young people the subject of a remote monitoring arrangement. The majority of respondents were in favour of such powers being awarded to the Children’s Hearing System, though with reservations.

• The Bill also provides Principal reporters and Children’s Panels with sanctions should local authorities fail to provide necessary support for a supervision requirement or meet educational requirements of a young person who has been excluded from school. Whilst the majority of respondents to the consultation were in favour of local authorities fulfilling their duties a significant number believed this more an issue of resources rather than an unwillingness to provide services.
INTRODUCTION

The Antisocial Behaviour etc. (Scotland) Bill (the Bill) (2003) was introduced in the Scottish Parliament on 29 October 2003, under the long title of:

“An Act of the Scottish Parliament to make provision about antisocial behaviour; to make provision in connection with criminal justice; to make provision in relation to child welfare; and for connected purposes.”

The Bill is split into 13 parts with 112 sections and 5 schedules. It is accompanied by Explanatory Notes (EN) (2003), which includes the Financial Memorandum, and a Policy Memorandum (PM) (2003).

The Bill follows the Scottish Executive’s (the Executive) consultation document Putting Our Communities First: A Strategy for Tackling Anti-social Behaviour (the consultation paper) (2003), which was published on 26 June 2003 and sought responses by 11 September 2003. The Executive (2003, p 1) stated in the consultation paper that it was concerned about the effect anti-social behaviour (ASB) was having on communities, and set out its proposals for how it wished to tackle the issue. The consultation process also included Ministerial and Executive official visits to communities across Scotland and various consultative events. The consultation paper received over 300 written responses.

This briefing should be read in conjunction with the Bill (2003), the EN (2003) and the PM (2003). It provides a synopsis of the main parts of the Bill, and what each intends, together with an analysis of the responses from various organisations to the original consultation. This analysis draws on a review of the consultation responses, which was carried out on behalf of the Executive by the Department of Urban Studies at Glasgow University, A Report on the Consultation Responses to Putting Our Communities First: A Strategy for Tackling Anti-social Behaviour (Flint, J, Atkinson, R and Scott, S, 2003), together with individual responses from a range of local government, community, voluntary and professional bodies. The briefing will end with a review of the equal opportunities implications of the Bill. A full discussion of the Executive’s consideration of the financial implication of the Bill can be found in the Financial Memorandum at the end of the EN (2003).

OTHER SPICE BRIEFINGS ACCOMPANYING THIS SERIES

There are several SPICe Briefings that discuss various issues associated with the Executive’s Anti-social Behaviour strategy:

- Anti-social Behaviour: Putting Our Communities First (Payne 2003a)
- Anti-social Behaviour: Key Issues and Debates (Dewar 2003a)
- Anti-social Behaviour: England and Wales (Dewar 2003b)
- Anti-social behaviour: Community Wardens and Related Issues (Payne 2003b)

In addition, the following papers will be published in the near future:

PART 1: ANTISOCIAL BEHAVIOUR STRATEGIES

CONTEXT
In the consultation paper (2003, p 15), the Executive stated that it wished to see Community Planning as the overarching framework for tackling ASB in local areas, and this is reiterated in the PM (2003) accompanying the Bill.

Under the Criminal Justice (Scotland) Act 2003, each local authority has a duty to work with the relevant chief constable and prepare a joint strategy for dealing with ASB. In the consultation paper (2003, p 16) the Executive noted that whilst there is an assumption that various agencies and local people will be involved in formulating these strategies, it was considering extending a formal duty to others, for instance Registered Social Landlords (RSLs), particularly in cases where stock transfer has taken place.

THE BILL’S PROPOSALS
Section 1 of the Bill would replace section 83 of the Criminal Justice (Scotland) Act 2003. The EN (2003, para 9) explains how local authorities and chief constables would continue to be partners in developing ASB strategies, local authorities would be solely responsible for publishing the strategy. Local authorities would also be required to consult community bodies and others deemed appropriate through the relevant community planning partnership. In addition local authorities would have a duty to consult bodies or persons adversely affected by ASB, which should include those targeted because of their race, sexual orientation, disability, gender, age or religion (PM, 2003).

In the consultation paper (2003, p 16) the Executive accepted that there was a problem in some areas of information exchange. Indeed the consultation report (2003, p 35) discusses concerns raised by various bodies regarding the Data Protection Act 1998 and the European Convention on Human Rights (EHCR) often being cited as causing confusion in what information could or could not be released. Section 1 of the Bill describes what should be contained within an ASB strategy, with a particular emphasis on information sharing. In addition, section 106 would provide local authorities, the police and responsible RSLs with the power to exchange information where necessary and relevant in tackling ASB. In the PM (2003, para 13) the Executive states that a balance needs to be struck between the privacy rights of the individual and the need to take steps to protect the community. Thus ASB strategy partners would be required to state what measures are being taken to exchange information in relation to ASB.

Section 2 would give Scottish Ministers the power to direct Registered Social Landlords (RSLs), whether on an individual, class or general basis to work with the appropriate local authority and chief constable in preparing ASB strategies (PM, 2003, para 11).

In order to monitor implementation and ensure accountability the Bill would also place a requirement on local authorities to publish reports on how they and chief constables have implemented the ASB strategy and what the results of the implementation have been. This would include an assessment of the impact of the strategy on equality groups. The police,
RSLs and the Children’s Reporter would also be required to provide information to the relevant local authority (PM, 2003, para 12). These provisions are contained within section 3 of the Bill.

CONSULTATION RESPONSES

ASB Strategies
The consultation report (2003, p 33) noted that respondents were generally in favour of developing ASB strategies through the community planning system\(^1\). However, there were concerns raised regarding how consultations with local people would take place in practice. The Poverty Alliance (2003, p 3) welcomed strengthening community involvement but wanted clarity about how this would be achieved and the resources that would be dedicated to it. In addition some children and young people’s organisations, including Children in Scotland (2003), Youthlink Scotland (2003) and the Scottish Child Law Centre (2003), wanted a specific commitment to involve young people in the process. It should be noted the PM does not specifically mention children in the list of groups to be consulted in developing ASB strategies.

Formal Duty on RSLs to participate
The consultation report (2003, p 33) found that most respondents were in favour of placing a formal duty on RSLs to be involved in the development of ASB strategies. South Ayrshire Council (2003, p 2) noted that this was essential given that more and more housing is falling under RSL management. However, others were less in favour of a formal duty. Renfrewshire Council (2003, p 4) felt that community planning partnerships were best placed to determine which organisations should take part in developing the strategies. Edinburgh Tenants Federation (2003, p 1) were concerned that emphasising landlords would only “help to magnify the slur that tenants are the principal, or only, offenders”.

Many respondents, while in favour of a formal duty, offered notes of caution. The Chartered Institute of Housing in Scotland (CIHS) (2003, p 5) argued that the huge variance in size and function of RSLs had to be taken into account, a view shared by the North Ayrshire Community Planning Partnership (2003, p 1), who noted the concern raised by RSLs in their locality that they did not have the resources necessary to participate. The Scottish Federation of Housing Associations (SFHA) (2003, p 3) observed the apparent contradiction of placing a duty on RSLs to participate in ASB strategies when they had no such duty to participate in community planning partnerships.

It would therefore appear that the Executive’s decision not to place a formal duty on RSLs to participate in the development of ASB strategies, unless directed to do so by Scottish Ministers, takes account of views of key stakeholders.

A duty on other community planning partners to participate
As noted in the consultation report, there was not a great deal of desire to see other community planning partners given a formal duty to participate in developing ASB strategies. However,


*providing research and information services to the Scottish Parliament*
Children 1st (2003, p 14) felt all community planning partners should be given such a duty. Glasgow Housing Association (2003, para 2.2) was particularly interested in local health authorities being given a duty to participate because it was of the opinion that mental health or addiction issues were very often at the root of problems that manifested themselves as ASB.

**Information exchange**

The consultation report (2003) found that most respondents agreed that effective sharing of information between agencies was essential in tackling ASB. For the most part there was a recognition that this depended on effective working relationships between agencies. However, the Association of Chief Police Officers in Scotland (ACPOS) (2003, p 2) expressed a view shared by others, that there was evidence suggesting that organisations were fearful of contravening the Data Protection Act 1998. North Ayrshire Community Planning Partnership (2003, p 2) felt that more guidance was required from the Executive on who can share information, what can be exchanged and under what circumstances this could be done.

West Lothian Council (2003, p 2) noted that greater use of electronic systems that used common geographical plotting software across all relevant agencies should be encouraged. This view was shared by other organisations.

**PART 2: ANTISOCIAL BEHAVIOUR ORDERS**

**CONTEXT**

As outlined in the PM (2003, para 16), Antisocial Behaviour Orders (ASBOs) were introduced by section 19 of the Crime and Disorder Act 1998, and amended by the Criminal Justice (Scotland) Act 2003. ASBOs are currently orders that can apply to persons aged 16 and over designed to protect the community from behaviour that causes or is likely to cause harassment, alarm or distress to others who are not members of the same household as themselves. A local authority or RSL can apply to the Sheriff Court for an ASBO, and must consult the police before doing so.

Part 2 of the Bill makes ASBOs available for those aged between 12 and 15.

**THE BILL’S PROPOSALS**

**ASBOs**

Section 4 would allow a sheriff to make an ASBO against persons aged 12 years of age or over, on application by a local authority or RSL. In making the application for all ASBOs the local authority would be required to have regard to the views of the police in applying for an ASBO. However, for those who are under 16 they would also need to consult the Principal Reporter. An RSL would also be required to consult the police in all cases, but for those involving under 16s would also consult the Principal Reporter and the relevant local authority. (EN, 2003, para 19).

In considering making an ASBO the Sheriff would have to be satisfied that the individual specified in the application had engaged in ASB and that the order was necessary for protecting others from further ASB. They would also have regard to the views expressed by the Principal Reporter of the Children’s Hearing. (EN, 2003, para 16).
ASB is defined in section 110 of the Bill, and provides that an individual engages in ASB if they act in a manner that causes or is likely to cause alarm or distress, or if they pursue a course of conduct that causes or is likely to cause alarm or distress, to at least one person who was not of the same household as themselves.

In proposing the minimum age of 12, the Executive believes it has achieved a balance between the need to prevent persistent ASB by young people with a desire to limit the scope for younger children’s engagement in the court process. In addition, it notes that, in civil law, a child aged 12 or over is deemed to have legal capacity to instruct a solicitor or to defend against proceedings. (PM, 2003, para 21).

In addition the PM (2003, para 25) states that the Executive intends that ASBOs for those aged 12 to 15 will be linked to the provisions of the Housing (Scotland) Act 2001. The effect will be that, as for those aged 16 or over at present, a social landlord will be able to convert the tenancy of the individual concerned to a short Scottish secure tenancy. This power will not, however, be available for interim ASBOs.

**Relationship with the Children’s Hearing**

The Executive accepts that there are a variety of approaches and measures available through the Children’s Hearing System, aimed at preventing and dealing with ASB by young people, including early intervention projects, which provide diversionary activities and restorative justice programmes, and support measures aimed at addressing their needs and behaviour. Whilst such measures can be imposed through a supervision order, the Executive is concerned that there are a small minority of young people who do not respond even to intensive support measures. It is for this minority of persistent anti-social offenders that it believes the additional court disposal of an ASBO should be available. (PM, 2003, para 19).

The Executive envisages that in most cases where an ASBO is granted against an individual under 16 years of age the young person will be well known to the Children’s Hearing System, and there will be a record of other unsuccessful interventions have been (PM, 2003, para 20). If a young person aged 12 to 15 had an ASBO made against them, this would lead to the individual appearing before a Children’s Panel, which would consider whether or not to impose a supervision requirement. Should the young person already be subject to a supervision requirement, it would be up to the Children’s Panel to decide whether or not to determine if additional measures are required. Any breach of these requirements would not be a criminal offence and will dealt with by the Panel (PM, 2003, para 5).

The Executive had considered in the consultation paper (2003) whether the court should also be able to impose a supervision order. However, it has decided that it is important in cases involving under 16s that their offending behaviour is not only tackled by use of a preventative order but also through the child taking positive steps to address their behaviour. The Executive acknowledges the role of the Children’s Hearing System and that it is the most appropriate forum to consider these broader needs and decide what support measures are necessary. (PM, 2003, para 22).

**Interim ASBOs**

Interim ASBOs were introduced by section 44 of the Criminal Justice (Scotland) Act 2003, which amended section 19 of the Crime and Disorder Act 1998. Interim ASBOs are intended to provide more immediate protection from ASB and can be applied for pending the application for a full ASBO. The Bill does not change the purpose of interim ASBOs, but section 7 of the Bill provides that the Sheriff would have to be satisfied that:
• the person was aged 12 years or over
• *prima facie* the person had engaged in ASB towards a relevant person
• an interim order was necessary for the purpose of protecting relevant persons from further ASB

**Breaching an Order**

Section 9 would make it a criminal offence to breach an ASBO or interim ASBO for those under 16 as well as those 16 or over, as at present. Those aged 16 or over, found guilty of breaching an ASBO, would be liable to:

• on summary conviction, a term of imprisonment not exceeding 6 months or to a fine not exceeding the statutory maximum
• on conviction on indictment, to imprisonment for a term not exceeding 5 years or to a fine or both

For those aged 12 to 15, the PM (2003, para 22) states that the Procurator Fiscal would be required to consult the Reporter and determine the most appropriate action in each case. If the case was referred to the Children’s Hearing it would take into account what more could be done, including adopting additional disposals proposed in the Bill, such as electronic monitoring (see below). The Hearing could also consider that secure accommodation is the most appropriate disposal if it believed that the young person was likely to injure or cause serious harm to themselves or others. However, as stipulated in section 9, subsection 3 of the Bill, no individual aged 12 to 15 would be liable to imprisonment for breaching an ASBO or interim ASBO.

**Additional measures**

**ASBOs on conviction**

Section 88 of the Bill would allow a court to impose an ASBO instead of, or in addition to any sentence where the person is convicted of an offence involving antisocial behaviour. The court would have to be satisfied that the making of an ASBO was necessary for the purpose of protecting other persons from further ASB by the offender and that the offender was aged 12 years or more at the time of the offence. (EN, 2003, para 188). The Executive believes this will assist in dealing with ASB in an effective and timely manner (PM, 2003, para 148).

**Geographical scope of an order**

The Bill would allow for the scope of any order applied for by a local authority to go beyond its own boundaries to cover other local authority areas or. As discussed in the PM (2003, para 28),

---

2 **Prima facie** can be defined broadly as ‘on the face of it’ and in this case means that the Sheriff will make an assessment on the face of the summary of evidence.

3 See SPICe Subject Map *The Scottish Criminal Justice System: The Criminal Courts* (Oag, D, Ross, G, and McCallum, F, 2003, p 2) for a definition of summary conviction.

4 See SPICe Subject Map *The Scottish Criminal Justice System: The Criminal Courts* (Oag, D, Ross, G, and McCallum, F, 2003, p 2) for a definition of conviction on indictment.
there can be difficulties at present if the ASB takes place in the Sheriffdom of one local authority while the person to whom the ASBO refers lives in another local authority area, or a neighbouring Sheriffdom or if the Sheriffdom has jurisdiction over more than one local authority area.

Statutory power of arrest for breach of an ASBO

Whilst a breach of an ASBO is currently a criminal offence, there is no statutory power for the police to arrest without warrant on suspicion of a breach. There are powers of arrest under common law but the Executive believes there is a lack of clarity in this respect. Therefore, to enable the police to act immediately section 10 of the Bill would introduce a statutory power of arrest for breaching an ASBO. (PM, 2003, para 27).

CONSULTATION RESPONSES

ASBOs for under 16s

The consultation report (2003, p 50) found that the majority of respondents were in favour of introducing ASBOs for under 16s. For example, the Scottish Youth Parliament (2003, p 2) stated that they would be a deterrent and viable alternative to detention.

However, most of the respondents who were in favour of the proposal had reservations. ACPOS (2003, p 3), whilst accepting ASBOs for under 16s could provide an additional sanction for persistent young offenders, contended that they should only be used after other options have been considered. Glasgow City Council (2003, p 12) argued that the appropriateness of the proposals had to be considered in conjunction with a number of other issues:

- the potential creation of a parallel legal system to the Children’s Hearing System
- the creation of a lack of parity for the type of intervention linked to the nature and level of behaviour i.e. ASB or offending
- a widening of the net, with young people coming into contact with the system who would not already trigger a support package; this would have considerable impact on the ability of services to provide support and supervision
- the current focus for children’s services is one of maintaining young people with their families in their home community, with support. ASBOs have the potential to separate families and exclude vulnerable young people further.

The consultation report (2003) noted that “a significant minority” of respondents were against extending ASBOs to under 16s. Youthlink Scotland (2003, p 5), Children in Scotland (2003, p 10) and the Scottish Parenting Forum (2003, p 5) noted their concern that the proposals would most likely contribute to the criminalisation of young people and further marginalise those that needed most support.

West Lothian Council (2003) was concerned that bringing children within the sheriff court appeared to be contrary to normal procedures for young people. Children in Scotland (2003, p 11) agreed with this assessment noting:

“An overarching principle of the Children (Scotland) Act 1995 is the ‘no order principle’. This is where ‘no court should make an order relating to a child and

providing research and information services to the Scottish Parliament

12
no children’s hearing should make a supervision requirement unless the court or hearing considers that to do so would be better for the child than making no order or supervision requirement at all’. No account is taken in the strategy of this overarching principle particularly where Anti-Social Behaviour Orders – and sanctions for breach of an order - are proposed.”

The Law Society of Scotland (2003, p 7) stated they were not satisfied that ASBOs should be extended to under 16s. It observed that the sanction was only intended for the small minority of persistent offenders, but questioned whether or not an ASBO would be a better deterrent than current disposals available in criminal law. It concluded that ASB as described by the Executive could already be prosecuted as a breach of the peace in the criminal courts if there was enough evidence. The Scottish Child Law Centre (2003, p 3-4) agreed with this, adding that ASBOs for under 16s would devalue and undermine the Children’s Hearings System. It argued that the behaviour of the most persistent offenders is an indication of severe problems that require urgent attention, and that if the Executive believes that the Hearings System is unable to cope and therefore must defer to the courts, there should be more explanation of why this is the case.

There was also some comment made regarding the current effectiveness of ASBOs for those over 16. Both Aberdeenshire Council (2003, p 6) and SACRO (2003, p 3) make reference to this, with the latter questioning the emphasis being placed on ASBOs given their “small volume and inconsistent use by only some councils since their introduction”. In addition, Barnardos (2003, p 15) argued that the prohibitions that would come from an ASBO could be written into the conditions of existing compulsory supervision requirements through the Children’s Hearing System.

**ASBOs and the Children’s Hearings System**

The consultation report (2003, p 50) noted that there was strong support for maintaining the primacy of the Children’s Hearing System. The Scottish Children’s Reporter Administration (SCRA) (2003, p 13) stated that:

“…any extension of ASBOs to under 16s must be based on the understanding that the Children’s Hearing System continues to offer the best means of addressing anti-social behaviour by children and young people whilst also meeting their needs for guidance, treatment or protection. As long as effective services are available to implement the decisions made by Reporters or Hearings, the Hearings system can positively engage with the vast majority of young people involved in anti-social behaviour”.

This point appears to have been accepted by the Executive given that any supervision requirement considered necessary to accompany an ASBO will be made by the Children’s Hearing. However, as noted by Glasgow City Council, above, and indeed in the consultation report (2003) there are concerns regarding the current level of resources available to the Children’s Hearing System. The BASW (2003, p 4) are concerned about the current level of social workers available to carry out the current workload, and raise the issue of whether this sanction is necessary:

“When there are enough social workers preventative work can be offered to those who could be diverted from formal systems through voluntary intervention. Now only work with an ‘order’ is currently allocated. This is not a problem of the system or current legislation but of a failure to provide staff to carry out current legislation, including the promotion of social welfare.”
This view was endorsed by the Howard League for Penal Reform in Scotland (2003, p 5), which wanted to see more effort put into improving educational, social work and psychiatric services for the minority of persistent offenders, so that they can be utilised by the Children’s Hearings System.

**Additional measures**

**Linking ASBOs for under 16s to housing and homelessness legislation**

The consultation report (2003, p 99) found that there was an equal split in favour and against this proposal. ACPOS (2003), CIHS (2003), City of Edinburgh Council (2003) and South Ayrshire Council (2003) were amongst those in favour of the link. South Ayrshire (2003, p 11) argued that this would help in making parents more responsible for the behaviour of their children.

However, there were concerns that the proposals were not in line with the ethos behind recent housing and homelessness legislation. Shelter Scotland (2003, p 6) argued that the purpose behind the original link between ASBOs and housing was to provide an opportunity to help homeless families gain a full tenancy through their engagement with housing support services. It believes now that the emphasis in the Bill is to evict people. The SFHA (2003, p 10) added that the result would be that the family would have to be rehoused under homelessness legislation without the underlying cause of the problem being addressed.

Children in Scotland (2003, p 16) were also concerned that should a young person be subject to an ASBO, it is likely that a difficult relationship will already exist with their parents and this will only be made worse should eviction take place. It, together with COSLA (2003, p 11) and SCRA (2003, p 29), were of the opinion that eviction would lead to the further exclusion of these families and in particular other children in the household who had not done anything wrong.

**ASBOs on conviction**

The consultation report (2003, p 116) stated that almost all respondents agreed courts should be able to grant an ASBO on conviction of a criminal offence where there is evidence of persistent ASB.

However, there were some groups against this proposal. The Law Society of Scotland (2003, p 18) contended that as the imposition of an ASBO is a civil procedure this should remain distinct from criminal proceedings. NCH Scotland (2003, p 11) was concerned that an ASBO could become a replacement for proper sentences and argued that more consideration should be given to extending the range of community supervision in such cases.

**Geographical scope of an order**

The consultation report (2003, p 117-118) found that over 90% of all respondents were in favour of extending ASBOs to wider geographical areas, not least because it would help to prevent individuals subject to an ASBO merely moving away from the local authority area where they would no longer be held to the conditions of the order. North Ayrshire Community Planning Partnership (2003, p 15) typified many responses, arguing that such a proposal would help to reduce bureaucracy and, during enforcement, would help to ease the interpretation of conditions.
Statutory power of arrest for breach of an ASBO

According to the consultation report (2003, p 115) the vast majority of respondents were in favour of this proposal. ACPOS (2003, p 6) believed this would strengthen the police response to ASB. However reservations were raised by a minority. The Law Society of Scotland (2003, p 18) believed that in circumstances where breaching an ASBO could result in imprisonment, there is already a common law power of arrest. NCH Scotland (2003, p 11) contended that this would not be an appropriate power given that ASBOs can be made on the basis of behaviour that is not in itself criminal. It added that in situations where an order is needed to secure another person’s safety from violent attack or intimidation, the proper course of action would be to seek an interdict or injunction.

PART 3: DISPERSAL OF GROUPS

CONTEXT

In the consultation paper (2003, p 59) the Executive stated it was aware that, in some communities, groups of young people can be intimidating, and whilst the majority are law abiding, a minority are not. There was also a concern about other groups such as football hooligans causing significant public order difficulties for the police. In an attempt to address this, the Executive proposed giving the police powers to disperse groups.

In the PM (2003, para 39-40) the Executive state that many members of the community are subjected to noise, intimidation, fear and harassment from groups of mainly young people. This, it argues, impacts upon their use of recreational and other public facilities. In addition, the Executive contends that shop owners can be affected as customers and deliveries are put off by the presence of these groups, which has cost implications for these businesses.

The Executive accepts that the police have general powers to disperse individuals, but considers that more explicit powers are required. Part 3 of the Bill would provide the police with the authority to designate an area where ASB is a particular problem and groups have caused alarm or distress. Once designated, the police would be able to disperse groups whose presence or behaviour continues to cause alarm to any members of the public in that area. (PM, 2003, para 42).

THE BILL’S PROPOSALS

As discussed in the EN (2003, para 42-43), section 16 would give a police officer of the rank of superintendent or above the power to designate an area under this part of the Bill. In taking this decision the officer would have to be satisfied that significant and persistent ASB 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 the area. In addition this section:

- sets out that an authorisation would last for a specific period and that a local authority may choose to refer to times or days within the period e.g. Friday and Saturday nights, when ASB may be a particular issue
- sets out the form in which the authorisation would appear and what it would include
- provides that the officer would consult the relevant local authority prior to giving the authorisation
- provides that the authorisation would not last longer than three months
Section 17 of the Bill states that before authorisation powers can become exercisable, police would be required to display an authorisation notice in a conspicuous place in the area concerned and in a local newspaper. This must include details of the area affected and the period it will last for.

There is also provision for the withdrawal of the authorisation when the police are satisfied that the ASB is no longer a serious problem, which would:

- require the authorising officer to consult the relevant local authority
- set out that withdrawal will not affect the exercise of any power that occurred prior to the authorisation
- allow a further authorisation to be made in the same area in the future should it be deemed necessary (EN, 2003, para 44-46).

As regards the powers available to enforce the authorisations, these are provided for in sections 18 and 19. As discussed in the EN (2003, para 47):

“...where a constable has reasonable grounds for believing that the presence or behaviour of a group of two or more people in the relevant locality has resulted in, or is likely to result, in any members of the public being alarmed or distressed, the constable may also give a direction requiring the persons in the group to disperse.”

The constable would be able to direct those individuals in the group who are not from the area to leave it for a period of up to 24 hours. This direction could be given orally to an individual or a group and could also be withdrawn by the officer that gave it. In addition contravening the direction without reasonable excuse could result in arrest without warrant and then in a fine, or imprisonment or both, following conviction. (EN, 2003, para 47,49-50).

As discussed in the PM (2003, para 51-52) the Bill would allow Scottish Ministers to issue guidance and directions in relation to how these powers are used.

CONSULTATION RESPONSES

The consultation report (2003, p 110) noted that only a small minority of respondents were in favour of extending police powers in this way. These included the Dundee Tenants and Residents Association (2003) and the South Lanarkshire Tenants Development Support Project. Others who were in favour had some reservations. The City of Edinburgh Council (2003, p 20) and Fife Community Safety Partnership (2003, p 10-11), were of the opinion that this power should be accompanied by a strategy that looked at the wider problems of dealing with dispersal problems, ensuring that young people had alternative places to go and things to do.

However, as discussed in the consultation report (2003, p 109) a considerable majority were not in favour of an extension to existing powers. Around 80% of respondents, including Aberdeenshire Council (2003), ACPOS (2003), the Scottish Police Federation (2003) and the Law Society of Scotland (2003), believed the police had sufficient powers under both existing statute and common law. The Law Society of Scotland (2003, 17) discusses this in detail, arguing that the current provisions in Part IV of the Civic Government (Scotland) Act 1982 are sufficient to deal with the behaviours described in the Bill. An associated point raised by some, including the Edinburgh Tenants Federation (2003, p 7), is that the current law is not well implemented or enforced. As the consultation report (2003, p 110) notes, many respondents felt this was an issue to do with a lack of police resources.
Another of the main reasons voiced against this part of the Bill is in relation to the proposal that police would be able to use this power against the presence of groups and their perceived behaviour rather than their actual behaviour. This has been discussed by the SFHA (2003), SACRO (2003), the Scottish Youth Parliament (2003), and Youthlink Scotland (2003), amongst others. There is a particular concern that young people will be stigmatised because of a perceived threat by older generations. SACRO (2003, p 8) observes that it is normal to see young people “hanging around” and this should not be criminalised. Youthlink Scotland (2003, p 8) argues that:

“This proposal will penalise law abiding young people with nowhere to go, while encouraging the view that it is groups of young people who are responsible for anti-social behaviour within communities.”

In addition North Lanarkshire Council (2003), Aberdeenshire Council (2003) and ACPOS (2003) believe it would be very difficult for the police to define when groups are causing an annoyance. ACPOS (2003, p 5) contends:

“Whilst the traditional stereotype of teenage youths loitering in groups around shopping centres during the evenings might be considered anti-social, particularly to elderly or vulnerable persons, the Procurator fiscal could find proving, to a criminal standard, that this causes alarm and distress difficult.”

ACPOS (2003) and Aberdeenshire Council (2003) make reference to the National Intelligence Model, and argue that this could be used effectively within the current legal framework to target areas where there is a problem with groups.

A further reason given in consultation responses against the proposal was that it breached human rights conventions. SACRO (2003, p 8) maintain that it would breach Article15 of the United Nations Convention on the Rights of the Child (UNCRC), which gives young people the right of association. Youthlink Scotland (2003, p 8) added that the power of dispersal could also breach Article 31 of the UNCRC, which provides rights to engage in leisure activities, and Article 11 of the Human Rights Act 1998, which provides for the rights regarding freedom of assembly and association. In addition the CIHS (2003, p 11) drew attention to a report by the House of Lords / House of Commons Joint Committee on Human Rights that, when considering the Anti Social Behaviour Bill for England and Wales, concluded that powers to disperse groups contravene Human Rights legislation. The Scottish Executive approach this matter in the PM (2003, para 217) and contend that the provisions in the Bill are a proportionate response to a pressing social need. It believes the provisions 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.

As stated in the consultation report (2003, p 111) there was also a view raised by 25 of the respondents, including ACPOS (2003) and the Scottish Police Federation (2003) that the proposal would result in greater conflict between young people and the police.

For some organisations the issue to be addressed was identifying ways of engaging positively with young people through youth services. The Scottish Youth Parliament (2003, p 8) wanted to see greater use of youth shelters in order to give somewhere for young people to go. They argued that most young people “simply want a safe, dry place where they can gather without causing harm or distress”. Barnardos (2003, p 23) also made reference to youth shelters, but argued that this was only one of a number of responses that could be developed on a national basis. For instance they want to see greater resources spent on parks and recreation areas, and pointed to the example of other European countries where such areas are well resourced.
PART 4: CLOSURE OF PREMISES

CONTEXT
In the consultation paper (2003, p 64-65) the Executive stated that it wished to take more action against premises that have become a focus for disorder or ASB. It proposed to introduce a new power under which properties that have become centres of drug dealing or other serious criminal activity can be closed down following ratification by the Court.

THE BILL’S PROPOSALS
This part of the Bill would provide the police and courts with powers to seal off both residential and non-residential premises swiftly when other measures to tackle ASB have failed. As discussed in the PM (2003, para 53) the police would be provided with powers to close premises where, during the preceding 3 months, a person has engaged in ASB on the premises and where it is associated with significant and persistent disorder or nuisance. Initially a closure notice will be served in order that the premises are closed to the public. Thereafter a sheriff will be required to consider the notice within two days and decide whether or not a closure order should be served, which could close the premises for a period of up to 3 months, with a possible extension to 6 months.

Closure Notices
As discussed in the PM (2003, para 54-55) sections 24 and 25 of the Bill state that a police superintendent would have to be satisfied that a number of measures have been taken before authorising a closure notice, including:

- the relevant local authority must have been consulted
- ensuring all reasonable steps were taken to inform those living in or operating from the premises of the intention to serve a closure notice immediately and to apply to the court for a closure order

On being served, the notice would contain certain information, including details of the court hearing, and would be attached to prominent places on and around the premise and served on persons living in, having responsibility for or an interest in, the premises.

Section 24 also provides that Ministers would be able to exempt certain premises from such notices by means of regulations (EN, 2003, para 57).

Closure Orders
As outlined in the PM (2003, para 56), in order to serve a closure order following a closure notice, the sheriff would have to be satisfied that:

- a person had engaged in ASB on the premises
- the use of the premises was associated with the occurrence of disorder and serious nuisance to members of the public
- the making of an order was necessary to prevent future significant and persistent disorder or significant, persistent and serious nuisance

Should an order be granted, the police or a person authorised by the police would secure the premises and be responsible for any essential maintenance and repairs during the period of the closure order. Should a person remain or enter the premises in contravention of the order
without reasonable excuse they would be guilty of an offence which could result in a fine, imprisonment or both.

CONSULTATION RESPONSES

The consultation report (2003, p 121) notes that two thirds of respondents agreed that the police should be given additional powers in this regard.

However, whilst ACPOS (2003), Aberdeenshire Council (2003) and North Ayrshire Community Planning Partnership (2003), agreed with the principle of closure powers, they contended that this should be the reserve of local authorities.

According to the consultation report (2003, p 122) there was a mixed response regarding whether powers should apply to both residential and non-residential premises. The CIHS (2003, p 12), who were generally in favour of the proposal, were concerned about how a closure notice served against a residential property would work in practice:

“The closure of an occupied property would effectively make the residents homeless with a statutory right to be housed by the local authority. There are additional implications for other residents in the property in particular if children are involved or if the property is a group home. The Institute therefore seeks further information on how closure notices would work in light of recent homelessness legislation.”

The City of Edinburgh Council (2003, p 23) and Edinburgh Tenants Federation (2003, p 8) were also concerned about creating homelessness, whilst North Ayrshire Community Planning Partnership (2003, p 122) voiced concerns about how such a power would interact with recent housing and homelessness legislation:

“The legalities of such a power cutting across Housing (Scotland) Act 2001 legislation in relation to ending a tenancy would however need to be addressed. If premises are closed down in instances where it is the principal home of a family…[they] should not require to receive assistance under homelessness legislation. However this could then give rise to issues regarding the care of the children.”

Glasgow City Council (2003, p 26) maintained that difficulties posed in certain types of residential accommodation could already be resolved within the existing powers of local authorities.

The Scottish Federation of Housing Associations (2003, p 12), in line with several other organisations, asked for reassurance that residential accommodation housing vulnerable people with support needs and dependency issues would be excluded from the broad application of the powers.

In addition to the above, there were also concerns regarding the wide ranging nature of the powers. ACPOS (2003, p 6) was concerned that such powers may “lack proportionality” in terms of the Human Rights Act 1998. Together with COSLA (2003, p 13) and Aberdeenshire Council (2003, p 23), it argued that consideration should be given to allowing a closure notice to be invoked only when an ASBO has been granted and subsequently breached. The Executive has responded to the Human Rights Act issues in the PM (2003, para 218) and contend that, as
the measures in the Bill are concerned with a control of rights and not a deprivation of property, it is satisfied there is no incompatibility with the Human Rights Act.

Some organisations, including ACPOS (2003, p 6) and SACRO (2003, p 9), were also concerned that the power to close premises only treated the symptom rather than the cause and that the problem may only be dispersed elsewhere.

**PART 5: NOISE NUISANCE**

**CONTEXT**
In the consultation paper (2003) the Executive stated that while the current system, involving local authority Environmental Health Officers (EHOs), community mediation services and the police in dealing with persistent noise nuisance problems did work. It was concerned that too long a period of time has to elapse before an abatement notice can be served. It sought views on whether or not local authorities should be able to extend noise nuisance EHO services.

**THE BILL’S PROPOSALS**

*Noise control provisions*
Section 37 of the Bill concerns the application of noise nuisance provisions to local authority areas. The Executive has elected to include in the Bill the power for local authorities to implement a noise nuisance service in their area up to 24 hours a day, 7 days a week. As stated in the PM, “local authorities would have discretion to adopt such a service and…the power to set the times and days on which such a service would operate” (2003, para 62). The Bill also stipulates that local authorities would have to give 3 months notice before applying the provisions to an area. In addition, the details of the provisions would be presented to Scottish Ministers 2 months before the commencement and should be published in a local newspaper. The resolution made under this part of the Bill could be revoked by the local authority, again after a 3 month notice period.

*Investigating noise nuisance*
According to the PM (2003, para 63) accompanying the Bill it is intended that either a nominated local authority officer or the police would be empowered to investigate noise complaints. The Executive envisages a local authority officer to be either an Environmental Health Officer (EHO) or community warden.

Local authority officers would be able to investigate noise emanating from a dwelling. The EN (2003, para 87) states that it would be up to the officer, when making an assessment, to decide whether any noise, if measured from a relevant place outside the dwelling would or might exceed the maximum level noise permitted (the permitted level).

Section 43 of the Bill proposes that the permitted level, which is the maximum level of noise that can be emitted from a dwelling, would be set by Scottish Ministers. The section also provides that different permitted levels could be determined for different circumstances and for different
periods of the day, week, year and areas within a local authority. (EN, 2003, para 106, 107). In addition, section 44 states that the permitted level would be measured by a device approved by Ministers.

**Warning notices**

Section 40 of the Bill deals specifically with warning notices. These could be served by a local authority officer where they are satisfied that excessive noise was being emitted from a dwelling. The notice would not commence for at least 10 minutes after it has been served, and would end either at the end of the local authority noise control period or the point at which the permitted level ceases to be applicable (EN, 2003, para 90-91).

**Sanctions for offences after the service of a warning notice**

Section 41 of the Bill provides that an offence would be committed if noise exceeds the permitted level during the period specified in a warning notice. Section 42 allows for the relevant local authority officer or police officer to serve a Fixed Penalty Notice (FPN) on a person who they have reason to believe has committed an offence. The FPN would require payment of a maximum fine of £100 within 28 days of it being served. A person found guilty of an offence but who has not paid an FPN within 28 days would be liable on summary conviction to a penalty not exceeding level 3 on the standard scale, which is currently £1,000. (PM, 2003, para 67-68).

In addition, section 47 of the Bill would allow local authority officers to obtain a warrant, enter premises and remove any equipment used in the emission of noise above the permitted level. This would bring local authority officers into line with the police. (PM, 2003, para 69).

**CONSULTATION RESPONSES**

From the consultation report (2003) it is clear that many respondents would be supportive of extending noise services, the issuing of FPNs and the discretion being given to local authorities to determine the level of service that should be provided within their areas.

However, some organisations, including the National Society for Clean Air and Environmental Protection in Scotland (NSCA Scotland) (2003) and the Society of Chief Officers of Environmental Health in Scotland (SCOEHS) (2003), believe that adequate powers already exist. NSCA Scotland (2003, p 1) and the Royal Environmental Health Institute of Scotland (REHIS, p 2) argue that before new legislation is introduced, there should be a review of how current legislation could be applied more effectively, particularly as regards EHOs utilising the Environmental Protection Act 1990 and the police using provisions in the Civic Government (Scotland) Act 1982 to seize equipment. They add that the main inhibitors to this happening are resources and a lack of joint working between agencies.

Whilst a majority of respondents were in favour of enabling local authorities to provide 24 hour services should they wish, there were reservations about these proposals. Dundee City Council (2003, p 8) was concerned about the cost implications for local authorities, together with the health and safety implications for local authority employees in relation to training, the provision of personal protective equipment, suitable back-up arrangements, compliance with the Working Time Directive, the consideration of shift working and the need for improved communication arrangements. SCOEHS (2003, p 2) was concerned that small local authorities may not have the resources to implement such powers, whilst REHIS (2003, p 3) believed it was for this
reason the police are better placed to undertake night time services, given they currently operate a 24 hour service.

The consultation report (2003, p 89) found that respondents generally welcomed the proposal for local authority officers and the police to be able to issue FPNs for noise nuisance offences. However, whilst a majority of respondents agreed that Environmental Health Officers should be given this power, it was not felt appropriate for Community Wardens to undertake this role. Glasgow City Council (2003, p 21) argued that because of the need for consistent evidence gathering, and the complexity of the technical aspects associated with investigation and resolution, it would be more appropriate for only EHOs supported by technical staff to undertake this role. The REHIS (2003, p 2) voiced a concern shared by many that granting such powers to community wardens would conflict with their role and ethos, arguing that a more appropriate role for them in tackling noise nuisance would be as community mediators.

In addition some organisations also discussed lifestyle issues and building standards as problems that led to noise complaints and that the proposals may not be the best way of dealing with them. The Law Society of Scotland (2003, p 15) felt that greater use should be made of mediation as a cost effective and positive way of tackling neighbourhood disputes. Glasgow City Council (2003, p 21) suggested that if the noise nuisance is due to a structural defect rather than unreasonable behaviour it could be difficult to conduct a proper assessment in order to issue a FPN.

PART 6: THE ENVIRONMENT

CONTEXT

In the consultation paper (2003) the Executive stated that it wished views on how existing powers regarding litter and fly-tipping could be made more effective.

The PM (2003, para 74-76) describes the Executive’s review of the litter and fly-tipping provisions of the Environmental Protection Act 1990. It found that, whilst there was a considerable degree of overlap between the two offences, there were problems with the current provisions. For instance the offence of littering applies only to restricted, mainly public, land, which means that rubbish dumped on private land can only be dealt with under fly-tipping legislation.

THE BILL’S PROPOSALS

Fixed penalty notices

Sections 49 and 50 of the Bill relate to the issuing of FPNs for littering and fly-tipping. The Executive is proposing in the Bill to make the fixed penalty powers applicable to littering offences available to the authorities in less serious fly-tipping cases. This would allow for minor cases of littering on private land to be dealt with as is currently the case on public land. The more serious fly-tipping cases would continue to be dealt with by the courts. (PM, 2003, para 77).
As stated in the PM (2003, para 78-79) the intention of the Bill is that powers to issue FPNs would be awarded to authorised local authority officers, the police and authorised officers of the Scottish Environmental Protection Agency (SEPA). SEPA has been considered for these powers because of the role the organisation currently plays in countering fly-tipping, and because it reports most fly-tipping cases to the Procurator Fiscal. Similarly the powers to issue FPNs for littering offences, currently held by local authority officers, would be extended to the police. However, the Executive does not consider these should be extended to SEPA because it does not currently have any functions in respect to litter.

The Executive are proposing to give the police FPN powers for littering because:

- it would make it easier to deal with littering offences taking place outside local authority office hours
- local authority officers may not demand names and addresses from individuals caught littering, whereas the police can (PM, 2003, para 81).

As at present the payment of the FPN will be an alternative to prosecution. Where a FPN remains unpaid a report will be submitted to the Procurator Fiscal. The Executive does not envisage that SEPA or the police would be involved in the administration of enforcement procedures or the collection of fines, which would be carried out by local authorities. (PM, 2003, para 80).

**Duties to keep land and highways clear of litter**

As discussed in the PM (2003, para 82), the Environmental Protection Act 1990 lays statutory duty on local authorities and other, mainly public, bodies to clean litter. This is governed by a Code of Practice, which is, however, a general document with a wide application and does not, in all cases define responsibilities for specific situations.

Section 52 of the Bill would give Scottish Ministers discretionary powers to request bodies to clear up specific areas to specific standards, where the Code of Practice is currently silent. (PM, 2003, para 83).

**Penalties for certain environmental offences**

In schedule 2 of the Bill, the Executive has identified a number of current environmental offences that it believes can be committed in circumstances where there is an antisocial element. These are further explained in the EN (2003, para 133) and relate to sewerage and pollution.

The maximum fine on summary conviction for these offences is currently £20,000. The Bill would increase this to £40,000.

**CONSULTATION RESPONSES**

The consultation report (2003) indicates that many of the respondents to the original consultation paper (2003) would be supportive of the Bill’s proposals for littering and minor fly-tipping offences. For instance the consultation report (2003, p 78-83) stated that over 90% of all respondents were in favour of providing the police with FPN powers for littering, and it is also clear many would also be in favour of allowing FPNs to be issued for minor fly-tipping offences.
However, whilst there was general agreement regarding much of what the Executive originally proposed, there were some, including CIHS (2003, p 9) that believed local authorities had sufficient powers but that more resources were required to maximise their effect. Also, some were unsure about the benefit of using FPNs for these offences. The Dundee Tenants and Residents Association (2003, p 4) was concerned that it would be easy for people to give false details and ignore the fine. The Edinburgh Tenants Federation (2003, p 5) felt that the use of FPNs was punitive, unfair and impractical and would hit the poorest hardest, whilst barely affecting the well off. It argued that community service would be a fairer way of dealing with the problem.

In addition, given the issues that were discussed in the original consultation document (2003), it is clear from the responses that some may not feel the Executive has gone far enough in relation to some aspects. For instance REHIS (2003, p 4) and the City of Edinburgh Council (2003, p 14), as well as a significant number of other respondents, wanted more direct powers for local authorities to be able to clear private land, land belonging to other public statutory bodies and Crown land and then charge the owners for the work undertaken. In addition, the Executive had also discussed granting local authorities more powers regarding the removal of abandoned vehicles, but this has not been taken forward in the Bill.

PART 7 & 8: HOUSING

CONTEXT

In the consultation paper (2003, p 51) the Executive noted it was particularly concerned that some landlords in the private rented sector fail to take action against anti-social tenants, and that it can be difficult for local residents to identify and contact the landlord when they have a complaint.

In the PM (2003, para 102) the Executive accepts that there has been no specific research regarding the extent to which management failures by private landlords contributes to ASB, but it believes there is sufficient anecdotal evidence to indicate that if unchecked it can contribute to “a spiral of social decline”. The Executive acknowledges that the majority of private landlords are responsible owners, but is concerned about those who aren’t. It notes that the intention of the Bill in this regard is to focus on property where there is evidence of ASB or where the property is in an area where ASB is prevalent, as this can be an indication that there may be a management failure on the part of the relevant landlords. (PM, 2003, para 100).

The Executive also accepts that there are wider issues regarding the voluntary accreditation of private landlords, physical standards of the private rented sector and the private landlord / tenant relationship. However it notes its intention to address these in a future Housing Bill, and in this Bill concentrate on regulating those aspects of management that relate to ASB. (PM, 2003, para 99).

The Executive has concluded that local authorities are best placed to decide when action under this part of the Bill is appropriate, and intends that these additional powers would complement the other powers at their disposal in tackling ASB. (PM, 2003, para 101).

THE BILL’S PROPOSALS

Antisocial Behaviour Notices
This aspect of the Bill is provided for in Part 7, sections 53 to 64. It would allow a local authority to serve an ASB notice on a landlord where a tenant, occupant or visitor had been involved in ASB at or in the locality of the house. The notice would specify the action the landlord must take and the period of time within which it must be taken, though there is no detail as to what could be required of the landlord. The local authority would not be required to prove the culpability of tenants, occupiers or visitors for the notice to be served and for the landlord to take appropriate measures to reduce ASB.

Should a landlord unreasonably fail to comply with a notice the Bill proposes that they would be guilty of an offence and liable, on summary conviction, to a fine not exceeding level 5 on the standard scale, which is currently £5,000. (EN, 2003, para 148). In addition, the local authority would be able to apply to the sheriff for either or both of the following, the objective of which are to encourage the landlord to take the specified actions as quickly as possible and if necessary to allow local authorities the power to take those actions in the landlord’s place.

1. **Cessation of the occupier’s liability to pay rent**
   
The Executive believes that, as the main reason for letting property is to get the income from it, sanctions that flow from income or increased costs would be an incentive to take the actions required. This sanction would mean landlords being unable to pursue the tenant for rent arrears as long as the sanction is in force. In situations where the tenant receives Housing Benefit entitlement would cease because the tenant no longer had rental liability. (PM, 2003, para 110).

2. **Transfer of management control of the property to the local authority**
   
   As stated in the PM (2003, para 112-113), this sanction would allow the local authority to apply to take control of a property where the landlord had not or could not manage ASB effectively. The management control order, which could be granted for a maximum of 12 months, would give the local authority rights and obligations under existing tenancies or occupancy arrangements. Thus the landlord would require the permission of the local authority for any new lease or occupancy agreements, as the Executive believe’s it would be irrational for a tenant to leave a property subject to a control order and for them to be replaced with someone who had a record of ASB. Although not a financial penalty the order would allow the local authority to request reasonable costs for carrying out its functions. The Executive envisages that the landlord would apply to the Sheriff for the order to be revoked once the necessary actions in the original notice had been taken.

**Registration areas**

Part 8 of the Bill proposes that a local authority would be able to designate one or more registration areas where there is a persistent problem with ASB associated with the private rented sector. In making a designation, the local authority would be required to consult affected landlords and agents of whom they are aware, together with any other persons it believed appropriate. It would also be required to consider any consultation responses before making a decision. (EN, 2003, para 150).

The Executive envisage that the notice should specify the period it will have effect, and that this should be no more than 5 years. The notice of designation would come into force after three months of being made and the local authority would also be required to keep the need for registration under review. The Executive intends that when the local authority concludes that the designation is no longer required then it should be revoked. (EN, 2003, para 152).

The Bill would allow local authorities to determine a charge for registration, though Scottish Ministers would reserve the right to introduce regulations should they believe them to be
required. For licensed Houses in Multiple Occupation, owners would be required to register but not be liable to pay a fee given they are already liable for a fee under the HMO licensing scheme. (EN, 2003, para 155).

Local authorities would have the discretion to determine the duties that registered landlords would have in relation to preventing or reducing ASB, and landlords would be required to comply with these (EN, 2003, para 157). They would also be required to set up and maintain a public register (EN, 2003, para 156).

The Bill would also make it a criminal offence to knowingly let an unregistered property that is in a designated area unless the owner had taken reasonable steps to withdraw the premises from letting. The Bill also proposes that it would be a criminal offence to fail to comply with a registration condition or direction. The penalty for these offences would be a fine not exceeding level 5 on the standard scale. Local authorities would also have the option not to accept the registration application of a landlord. For all properties that are not registered, for whatever reason, but should be, or where a landlord fails to comply with conditions or specific directions, then the sanction that rent is not payable, as discussed above, would apply. (PM, 2003, 122-123).

CONSULTATION RESPONSES

As stated in the consultation report (2003, p 94) over 90% of respondents agreed that local authorities should have powers in this area. For instance, Aberdeenshire Council (2003, p 17), West Lothian Council (2003, 11) and ACPOS (2003, p 5) all stated that for the Bill to be effective it was vital that private landlords play their role in tackling ASB, and therefore agreed that local authorities be allowed to regulate the sector and be able to apply for court sanctions.

However some respondents were not convinced by such proposals as laid out in the Bill. The SFHA (2003, p 9) contend that such measures are impractical arguing that they would not address ASB difficulties in the private sector, as there is not enough emphasis on prevention and management. It was also concerned that RSLs and local authorities were being asked to “carry the brunt” of addressing ASB when it applied to all tenures. Indeed NCH Scotland (2003, p 10), though supportive of the measures, wanted to know how ASB would be tackled in the owner occupier sector. The National Federation of Residential Landlords (NFRL) (2003, p 1-2) stated that private landlords were already under pressure as they were having to take on the tenants that RSLs did not want. It argued that private landlords have to take on anti-social tenants and “fix a problem which has not been solved by a RSL”. It was concerned that this will eventually lead to all private rented sector landlords being branded as rogue landlords. The NFRL maintained that private landlords should not be made legally responsible for the conduct of tenants beyond their obligations under civil law and that it was not appropriate for them to police tenants.

Glasgow City Council (2003, p 22-23) were not in favour of registration or other court sanctions being used. As regards registration, it argued this would have a negative effect overall for two main reasons:

- the experience of the HMO registration was that the process was expensive and that there would be a substantial charge to the landlord; there was a concern regarding charging landlords whose lettings were not causing a problem
- a substantial number of properties could be abandoned leading to a range of adverse effects on the local community including vandalism and fire raising
In terms of transferring management control the Council believed it would be an expensive course of action for local authorities. It also raised the issue of local authorities, like themselves, who had or may in the future transfer their housing stock to an RSL. Such authorities would have to find an agent to carry out this work for them. In addition it argued it would be essential to be able to defray the costs against the rental income from the property and that abandonment by the landlord would be likely to leave the local authority with further costs. The Council also believed the prohibition of letting and cutting of housing benefit would be undesirable as it would create a void in circumstances where sale into owner occupation was unlikely, and give the local authority responsibility for rehousing the tenant. It argued that the local community would have to bear the cost of this with no rental income to offset it.

Others who were in favour of regulating private landlords also had reservations. The City of Edinburgh Council (2003, p 19) felt it would be more appropriate to await the response from the Executive to the final report of the Housing Improvement Task Force, which had made recommendations on the regulation of private landlords, before developing a scheme. The CIHS (2003, p 10) noted the HITF had recognised the difficulties in getting details of private landlords and argued that, to be effective, any scheme had to be compulsory across the country. It also believed that it would be detrimental to the private rented sector if regulation was based on ASB alone, contending that any scheme should be considered on “a strategic basis to tackle all the concerns of the sector”. Together with Shelter (2003, p 7) the CIHS argue for a mandatory certification scheme.

PART 9: PARENTING ORDERS

CONTEXT

In the consultation paper (2003, p 35), the Executive noted its concern that a small minority of parents are not fulfilling their parental responsibilities, and are thus putting their children at risk. It pointed to a study that showed that 42% of children who had low or medium levels of parental supervision had offended, compared with 20% who had experienced high levels of parenting. It also reviewed the evidence from England and Wales where Parenting Orders (POs) have been available since 2000, and in particular to a study showing that only 10% of POs are breached, and that the majority of parents, young people and agency staff said the process had a positive effect.

THE BILL’S PROPOSALS

Sections 76 to 87 of the Bill deals with POs. The Bill proposes that either the Principal Reporter to the Children’s Panel or the local authority for the area in which the child of the parent normally resides would be able to apply to the sheriff court to impose a PO.

The local authority would be able to apply for a PO on one of two grounds:

- the child had engaged in ASB and that the order is desirable in the interests of preventing further ASB
- the child had engaged in criminal conduct and that the order is desirable in the interests of preventing such criminal conduct by the child (EN, 2003, para 167).

The Principal Reporter would be able to apply for an order based on these grounds, but also on one further ground that states that the order is desirable in the interests of improving the welfare of the child (EN, 2003, para 168).
A PO would direct the parent as to how they should behave in respect of the child, and could last up to 12 months. An order would also include a requirement to attend counselling or guidance as directed by a local authority supervising officer for a maximum of 3 months, unless the parent has previously been the subject of a parenting order, in which case this would not be mandatory (EN, 2003, para 163).

In considering whether or not to make a PO, the sheriff would be required to take the following issues into account:

- any views expressed by the child
- information gained about the circumstances of the family
- any information about the behaviour of the parent that the court considers to be relevant

The Executive envisages that this would allow the court to ascertain whether a parent had been offered and engaged with voluntary support in relation to their parenting skills before an order is made. The Bill provides that the welfare of the child would be the primary consideration of the court in determining whether or not to grant an order. (EN, 2003, para 172-173).

In addition, the Executive has decided that it would be useful for the courts to be able to consider whether a PO would be appropriate in any proceeding where a child is involved. Therefore, courts would be able to instruct the Reporter to consider whether an application for an order would be appropriate. In addition where a civil court has made an ASBO in respect of a child it would also be able to make a PO where it believes it will be necessary to prevent further ASB by a child. (PM, 2003, para 139).

Given the demand on support services that will arise through this part of the Bill, the Executive accepts that services must be available before any orders are made. Whilst the Executive states it is committed to ensuring there are services available, the Bill proposes that Sheriffs would only be able to make such orders when Scottish Ministers have notified the relevant court that a local authority had the necessary arrangements in place. These services do not necessarily require to be delivered by local authorities but they would have the responsibility to ensure the services are available, and for monitoring the parent’s compliance with the order. (PM, 2003, 141-142).

Breaching a PO would be a criminal offence, with a conviction leading to a fine not exceeding level 3 on the standard scale, which at present is £1,000. Should the fine not be paid courts would be allowed to place a supervised attendance order on the parent, and should this not be complied with, the court would have all sentencing options, including imprisonment at its disposal. (PM, 2003, para 144).

The Executive states it plans to pilot PO in local authority areas where sufficient services currently exist prior to a national roll-out (PM, 2003, para 141).

**CONSULTATION RESPONSES**

The consultation report (2003, p 63) noted that the majority of respondents gave qualified support to the introduction of POs. ACPOS (2003, p 4), whilst agreeing with the principle felt that some aspects may be contentious:

“Whilst the grounds are sound, many children to whom these Orders will apply exist on a day-to-day basis, far removed from the childhood experiences of many adults in Scotland today, and therefore the view amongst some enclaves providing research and information services to the Scottish Parliament
of society may fail to perceive the marginal existence experienced by some families. It remains to be seen, given the factors prevailing upon disadvantaged groups, what weight will they will place on complying with such a Parenting Order.”

For some, including Aberdeenshire Council (2003, p 11), Barnardos (2003, p 19) and Highland Council (2003, p 6), there was a significant problem with resources within the existing system and they argued that this required to be addressed before implementing new structures. The SCRA (2003, p 22) stated that there was a gap in the provision of supportive services to parents and that whilst progress had been made, there was a need to address the issue in the context of wider workforce and service planning strategies. This issue has been highlighted by the recent Audit Scotland report Dealing with Offending by Young People: A Follow-up Report (2003, p 3), which found:

- 15% of children on statutory supervision were facing significant gaps in the service that should be provided
- nearly a quarter of local authorities were having significant problems in providing the required level of supervision
- around half of children under supervision do not see their social worker often

BASW (2003, p 6) stated that the proposal “simply introduces another order that will probably be unallocated in the current staffing crisis”.

COSLA (2003, p 8) identified a number of practical problems with POs:

- in many cases parental control has already broken down and it is difficult to see how a PO would bring that back under control
- there is a question mark over whether POs would add value to the work that social workers do with families within the terms of a supervision requirement on a voluntary basis
- it would be important to distinguish between wilful neglect or abuse and issues of parenting capacity when issuing a PO
- imposing sanctions when a PO is breached could have serious implications for the welfare and / or behaviour of the young person involved

The consultation report (2003, p 65) found that the majority of respondents agreed with the proposal to allow both local authorities and Reporters to be able to apply for a PO. However, there were also a majority, including Barnardos (2003, p 19), that believed POs introduced through the courts should only take place when the same assistance could not be achieved through the Children’s Hearing System. For some this means that only the Reporter should have power to apply for a PO, but only after a Children’s Hearing has been called and the local authority and other relevant stakeholders consulted.

There was a minority of organisations who were entirely against POs. Both the Law Society of Scotland (2003, p 11) and NCH Scotland (2003, p 8-9) felt that it was difficult to see what POs would achieve over powers that already existed. Given the Children’s Hearing System is designed to look at the welfare of the child as well as their behaviour, assess information about the whole family and can utilise supervision disposals that assist the family as a whole, they are unconvinced by the need for the proposals. It should be noted that SCRA (2003, p 23), agreed with this sentiment and therefore suggested that POs be piloted in the first instance so that an evaluation could be made of the extent to which they add to existing powers.
The Law Society of Scotland (2003, p 12) also found several other difficulties with the proposals:

- they would seek to extend the doctrine of vicarious liability, extending responsibility for the acts or omissions of the child to the parent, even in circumstances when there was nothing further that a reasonable parent could have done
- there are equalities issues and possible sex discrimination legislation breaches, in that the unmarried father of a child who has not declared his parental rights in terms of the Children (Scotland) Act 1995 would be able to avoid responsibility for these orders whereas the mother would not
- the use of the orders could contribute to a possible breakdown in the parent / child relationship and interfere with the right to family life under Article 8 of the European Convention on Human Rights

The North Ayrshire Community Planning Partnership (2003, p 9) also points to the experience from England and Wales where POs have been available since 2000. It argues that evidence shows that parents who have made use of the support measures under PO would have been used by them on a voluntary basis anyway. In addition it contends that the sanctions accompanying POs may increase social exclusion and “negate the benefits of robust intervention, diversion and restorative programmes”. The Scottish Parenting Forum (2003, p 4) also raised some of the issues discussed above, but in addition were concerned that POs will be seen as stigmatising parents as bad parents, and may also lead to a deteriorating relationship between the parents involved and the support professionals.

PART 10: FURTHER CRIMINAL MEASURES

COMMUNITY REPARATION ORDERS

In the consultation paper (2003, p 18) the Executive stated that it wished to build on the principles of Community Service Orders (CSOs) and create Community Reparation Orders (CROs). Although it believed the system of CSOs had been successful they were at the high end of the tariff scale and are an alternative to custody. Thus they are not an appropriate response to many forms of anti-social behaviour. The CSO would be an additional disposal available when dealing with more serious cases of ASB.

CROs are dealt with in section 89 of the Bill, which would amend the Criminal Procedure (Scotland) Act 1995, inserting new sections, 245Kto 245Q, into that Act. It proposes that CROs would be confined to summary cases, where the offender is aged between 12 and 21 focusing specifically on making reparation in response to ASB. The Bill provides for between 10 and 100 hours of unpaid work to be carried out by the offender, under the supervision of an officer appointed by the local authority. There would also be an opportunity for educational / lifestyles activities, though the unpaid work element will dominate. The nature of the unpaid work would be safeguarded to ensure offenders are not stigmatised themselves and that the work carried out is for the benefit of the community as a whole rather than individual victims. Local authorities would have a statutory duty to direct those made subject to an order, and to consult with appropriate agencies including local victims’ organisations, community councils and the police. (EN, 2003, para 190 and PM, 2003, para151-152). As with Parenting Orders, above, section 245K, subsection 2(d) states that to make the order the court would have to be notified

---

5 The concept that one person will be criminally responsible for the actions of another, which has traditionally been restricted to specific offences such as those involving the supply, or the sale of goods under the Licensing Acts.
by Scottish Ministers that the local authority has made arrangements that would enable the order to be complied with.

Where it appears that a CRO has not been complied with, the court would be able to cite the offender to appear before it or issue a warrant for their arrest. Sanctions would include being able to extend the normal period of 12 months for completion of the order, vary the number of hours specified or to revoke the order and use other disposals available to the court EN, 2003, para 191).

RESTRICTION OF LIBERTY ORDERS

In the consultation paper (2003, p 29) the Executive stated its intention to extend Restriction of Liberty Orders to the under 16s. In addition it indicated that it wanted to extend electronic monitoring to the under 16s, following the example of England and Wales where they are available for 10-15 year olds. The Bill proposes that electronic monitoring would be available through the Children's Hearing System (see Part 12 below) and through the courts under a RLO, which will be discussed in this section of the briefing. This is proposed in section 90 of the Bill.

The purpose of a Restriction of Liberty Order (RLO) is to:

- reduce the offender’s liberty
- protect the public by reducing the opportunity to offend
- impose a punishment on offenders by restricting their movements (PM, 2003, para 154).

The Bill would amend the Criminal Procedure (Scotland) Act 1995 allowing courts to impose a RLO for offenders under 16. The RLO would require the offender to be restricted to a specific place for up to 12 hours a day or restricted to a specified place for up to 24 hours a day, or both, for a maximum period of 12 months. Compliance with an RLO would be monitored by remote electronic equipment, or electronic tagging. The Executive contends that the proposal would provide the courts with an alternative to detention for young offenders where the circumstances of the offender or the nature of the offending behaviour could be addressed effectively by the community. (PM, 2003, para 154-155).

The Executive envisages that effective assessment procedures would be implemented to ensure that family relationships and household circumstances will be able to support the RLO. (PM, 2003, para 156).

SALE OF SPRAY PAINT TO CHILDREN

The consultation paper (2003, p 70) stated the Executive's belief that graffiti undermines communities and the environment. The PM (2003, para 157) notes how graffiti can also be difficult and expensive to remove. The Bill (sections 91-94) therefore proposes to make it an offence to sell spray paint spray paint to under 16s, contending that this would help control and reduce antisocial misuse of spray paints by children in acts of graffiti.

The maximum penalty for a person found guilty of this offence would be a fine not exceeding level 3 on the standard scale, which is currently £1,000. Retailers would also be required to display a notice stating that it is illegal to sell spray paint to anyone under the age of 16. Failure to do so would be a criminal offence with the maximum penalty being a fine not exceeding level 2 on the standard scale, which is currently £500. (EN, 2003, para 198-199).
The Executive envisages that enforcement would be carried out by trading standards officers and the police. Local authorities would have a duty to enforce the ban and the requirement to display a warning notice in their areas. Authorised local authority officers would also have statutory powers of entry, inspection and seizure for the purpose of enforcing the ban. (EN, 2003, para 200-201).

CONSULTATION RESPONSES

Community Reparation Orders

From the consultation report (2003) it would appear that many of the respondents to the original consultation would largely be in favour of this proposal. However, this is largely in response to a majority being in favour of community reparation. The Law Society of Scotland (2003, p3), whilst in favour of the ethos behind the proposal, questioned whether it was necessary to create a new disposal in the form of the CRO and instead adapt the Supervised Attendance Order for the same purpose.

Children in Scotland (2003, p 7-8) had four main concerns about the use of CROs, which summarise the concerns of some organisations:

- the Children’s Hearings System already has the power to use reparation as a disposal. Introducing another form of reparation will lead to unnecessary duplication and increase the pressure on the court system.
- in the past young people have been given Community Service Orders but once they have completed the work there is no follow up due to a lack of joint working between the relevant agencies. The result is that although the restorative element of the work is completed there is no longer term work carried out to help the individual change their behaviour. If restorative measures are to work there must be greater integration of services in order that young people do not fall through the net and return to offending behaviour.
- in any system of reparation the young person must feel as though they want to ‘buy in’ to it and that it is worth the investment of their time (otherwise there will be a greater danger of breach and increased risk of criminalisation) and that they are not simply being used as unpaid labour.
- imposing an upper age limit so that CROs are targeted at young people raises concerns that they are being singled out and that certain types of behaviour are unique to them. It is important that resources are targeted at restorative programmes aimed at the young person.

In addition the CIHS raised the issue of what type of visible reparation would be chosen, as there would be health and safety implications if, for example, individuals were to remove graffiti and had to use specialist equipment. It therefore concluded that the practical use of visible reparation could be limited.

SACRO (2003, p 2) reflected on the experience of the use of CROs in England and argued that they had not achieved much success due to the apparent resentment from individuals to being ordered to make amends. They believed that such schemes work far better when they are voluntary. BASW (2003, p 4) was concerned that using more and more orders could result in

---

6 Supervised Attendance Orders were introduced into the Scottish Criminal Justice system in 1990, and are aimed at providing the court with a viable, direct alternative to custody for those in fine default, because they are financially unable (rather than unwilling) to pay a fine(s). The order replaces the existing fine(s). The offender is then required to undertake a range of designated activities within the community for a specified number of hours, depending on when the offence was committed.
more people being drawn into formal structures and ending up with criminal records. It argued that strengthening communities requires sustained development so that people grow up to respect their community, thereby feeling that they belong to and are valued by the community.

**Restriction of Liberty Orders**

There are two separate issues that respondents were asked to consider, the first was restriction of Liberty Orders and the second was electronic monitoring.

**Restriction of Liberty Orders**

The consultation report (2003, p 59) stated that a majority of respondents were in favour of utilising RLOs in a small number of cases, for instance supporting a transition from secure accommodation into the community.

There were reservations, however, and many of these can be summed up in the response from Aberdeenshire Council (2003, p 9-10), which noted:

- the experience with adults suggests that there will be a need for additional support services, and in relation to under 16s this would be required from social work, education and possibly the police
- under16s should be dealt with by the Children’s Hearings System
- the legal order would provide no benefits to young people who are in need of support programmes and supervision to affect a change and not simply "house arrest"
- restrictions should be shorter than for adults as under 16s may not have the capacity to sustain the periods being proposed in the Bill; in addition if a person requires the proposed levels of restriction it is questionable whether an RLO is the best disposal
- RLOs for under 16s may be unenforceable depending on the work commitments of parents and whether or not a support network of extended family and friends is available
- It is essential that young people have the access to appropriate support programmes, assistance and supervision that they require

The Scottish Child Law Centre (2003, p 4) were of the opinion that RLOs for under 16s could breach Article 5 of the **ECHR** and Article 40.4 of **UNCRC**, which require disposals for young people who offend to take account of their well-being and their circumstances. In the PM (2003, para 220) the Executive states it is confident that restriction of liberty orders for under-16s would not be incompatible with any of these convention rights.

**Electronic Monitoring**

The consultation report (2003, p 56-57) found that whilst the majority of respondents were in favour of extending electronic monitoring to the under 16s, a significant minority were not.

Children in Scotland (2003, p 12) outlined the following concerns with this proposal, which mirrored many of the arguments of those who were opposed:

- the possibility of an increase in the number of secure places needed as breach of a tag could be a new route to secure accommodation. A child or young person could find that the gap between a minor offence and being tagged is very narrow, and not fully grasp, or care, about the consequences of breaching the tag
- tagging a child or young person will mean a key role for parents. This may have the effect of placing increasing strain on a family that is already under pressure. There is evidence that
many local authorities do not have the necessary support services that would be required
and as such the likelihood of a child as young as 12 breaching a tag is significant

- children’s offending can often be linked to difficult circumstances at home possibly even
  involving abuse. Implicitly giving parents a key role in enforcing compliance with the tagging
  order may be tying the child to an abusive relationship which may underlie the offending
  behaviour

In addition, the Scottish Child Law Centre (2003, p 4) believed that electronic tagging would breach EHCR Articles 5 (see above) and 8 (the right to privacy and a family life).

For other organisations, including ACPOS (2003, p 3) and Youthlink Scotland (2003, p 6), there was the likelihood that young people may see an electronic tag as a ‘badge of honour’, and this may negate the purpose of issuing it.

Some organisations, including the Law Society of Scotland (2003, p 10) and Youthlink Scotland (2003, p 6-7), discussed research that had been carried out in England and Wales to evaluate the scheme there and in Scotland regarding pilot schemes. In particular, reference was made to the report for the Scottish Executive (2000) Evaluation of Electronically Monitored Restriction of Liberty Orders and a report by the Home Office Research, Development and Statistical Directorate (2000) Making the Tag Fit: A Further Analysis - The First Two Years of the Trials of Curfew Orders. Both showed that young offenders who were electronically monitored were more likely to breach a restriction based order, for many of the reasons highlighted above. There was also a concern about the cost effectiveness of such approaches.

It is against this background that Glasgow City Council (2003, p 14) believe that a full evaluation of the England and Wales schemes should be awaited before taking a final decision on this.

**Sale of spray paint to children**

The consultation report (2003, p 101) stated that there was a clear majority of respondents in favour of banning the sale of spray paint to under 16s. However there were a number of reservations discussed, including:

- the ban may have a limited impact and could be difficult to monitor and enforce (Barnardos, 2003, p 22)
- when glue was was restricted to over 16s, many shops took them off shelves and replaced them with cards that were taken and exchanged for goods at the checkout; there are questions regarding the feasibility of doing likewise with spray paint (SACRO, 2003, p 7)
- there will still be a range of other materials available for those who wish to pursue the activity (City of Edinburgh Council, 2003, p 16)
- questioning the research base that showing that under 16s are buying spray paint and using it for graffiti (SACRO, 2003, p 7)
- the proposal won’t stop those over 16 buying spray paint on behalf of under 16s (Dundee Tenants and Residents Association, 2003, p 4)
- penalising young people that are using spray paint legitimately e.g. for art projects at school (Children 1st, 2003, p 17)
- there should be greater emphasis on restorative justice projects and educational opportunities for tackling graffiti and similar offences (Law Society of Scotland, 2003, p 14)

**PART 11: FIXED PENALTIES**
THE BILL’S PROPOSALS

The Executive is keen to ensure that where ASB has taken place, “swift, effective and fair justice is provided for”, and believe that FPNs will help in this regard (PM, 2003, para 166).

The Bill (sections 95-102) makes provision for FPNs in this regard and proposes them for a number of low level statutory and common law offences that are detailed in section 95 of the Bill. These include offences of being drunk and disorderly, vandalism and breach of the peace.

The powers to issue FPNs for these offences would be given to the police, as an alternative to prosecution. The Executive believes this would free up police time and reduce the burden on the courts of dealing with minor cases.

On being issued with a FPN the recipient would have 28 days to either pay or intimate their wish to challenge the notice. Scottish Ministers would be able to set the amount payable by order, though the Bill proposes that the amount should not exceed level 2 on the standard scale, which is currently £500. If the FPN is paid then the matter would be closed. If, however, the FPN is challenged the case would be reported to the Procurator Fiscal who would determine if a prosecution is appropriate. If the recipient did nothing then the FPN would be converted to a fine registered against them, which would be 150% of the level of the fixed penalty. (EN, 2003, para 205; PM, 2003, para 169).

The Executive states in the PM (2003, para 171) that matters of prosecuting criminal offences are in the exclusive jurisdiction of the Lord Advocate and they will have the power to direct the police about the circumstances in which a FPN should be used or not used.

It is also the intention of the Executive to pilot FPNs for ASB, and this will be planned in conjunction with the Lord Advocate, the Crown Office, the Procurator Fiscal Service, the police and the courts (PM, 2003, para 172).

CONSULTATION RESPONSES

The consultation report (2003, p 104) found that over 80% of responses supported the introduction of FPNs for low level ASB offences. There was a view that FPNs had worked well for other offences and would help to reduce bureaucracy and increase the effectiveness of enforcement procedures in relation to ASB, whilst reducing the time of legal processes and lessening the pressure on the courts.

Some organisations did have reservations, however. The North Ayrshire Community Planning Partnership (2003, p 14), whilst welcoming the measure, had three main concerns, shared by other organisations:

• the impact on police resources, and in particular the knock on effect that may reduce their ability to prevent, investigate and detect more serious types of crime
• how fines could be applied consistently. Unlike road traffic offences there would be an element of subjectivity in deciding whether or not behaviour is a nuisance or not
• such fines could be disproportionately targeted at groups on very low incomes, leading to custodial sentences for non-payment of fines

There were also concerns from other respondents, including Aberdeenshire Council (2003, p 18), that current FPN schemes face problems of non-payment. In addition, according to the consultation report (2003, p 107) three quarters of respondents were opposed to imposing FPNs on under 16s. Glasgow City Council (2003, p 24) expressed a commonly held view that
under 16s would have no ability to pay fines and this would become the responsibility of the parents. In addition non payment of fines would merely lead to further contact with the criminal justice system, defeating the principle behind issuing the FPNs.

The Law Society of Scotland (2003, p 17) were of the view that the proposals to extend FPNs to ASB should await the outcome of the Summary Justice Review Committee, being chaired by Sheriff Principal John McInnes (the McInnes Committee).

PART 12: CHILDREN’S HEARINGS

SUPERVISION REQUIREMENTS: CONDITIONS RESTRICTING MOVEMENTS

The Bill (section 103) proposes to give Children’s Panels the power to make young people the subject of a remote monitoring arrangement (RMA). The Executive consider that this would be appropriate for a small number of serious or persistent offenders for whom a wide range of interventions have failed. It also envisages that RMA could be useful for those who do not offend but whose behaviour puts them at risk. (PM, 2003, para 178-179).

The Executive intends that RMAs could be used as an alternative to secure or residential accommodation provided that it is just one part of an intensive programme of supervision and support, including educational provision. An RMA could also be used in support of serious intervention with a young person for welfare or offending reasons e.g. to enable young people to have a phased re-entry into the community after being in secure accommodation. It could also be considered following the breach of an ASBO. (PM, 2003, para 180-182).

If an RMA is breached then the young person would be referred back to the Children’s Panel for a disposal, which may involve secure accommodation.

The Executive notes in the PM (2003, para 185) that it has been mindful of its responsibilities under Article 5 of the ECHR, which guards the rights of young people to educational provision where there has been a restriction of liberty and to ensure any action taken by the hearing is done in the best interests of the child. Although the Executive considers the RMA to be a deprivation, rather than restriction, of liberty, because the RMA would be imposed through a supervision requirement, this should ensure ECHR requirements in this regard have been met.

SUPERVISION REQUIREMENTS: DUTIES OF LOCAL AUTHORITIES

The Bill (section 104) introduces a provision clarifying the statutory duties of local authorities in relation to supervision requirements imposed by Children’s Panels. The Executive noted concerns that, although local authorities have various statutory duties as regards supervision requirements, there is no way of taking early action where a failure to comply with a duty occurs (PM, 2003, para 190).

In cases where a local authority fails to comply with its duties, the Bill would allow the reporter to give notice of intent to make an application to the sheriff court to compel it to undertake those duties. The local authority would have 21 days from the date of receipt to comply, with the Hearing reconvening 28 days after serving the notice to ascertain whether or not the local authority had now complied. If the local authority had not then the hearing could instruct the reporter to make an application to the court. Failure to comply with a sheriff court order would result in the local authority being in contempt of court (PM, 2003, para 189-190).
FAILURE TO PROVIDE EDUCATION FOR EXCLUDED PUPILS

The PM (2003, para 191) states that local authorities currently have a duty to provide education to excluded pupils under section 14 of the Education (Scotland) Act 1980.

The Executive believe that, in some instances, Children’s Panels are finding that local authorities have been slow to undertake these responsibilities. The Bill (section 105) would allow Reporters and Hearings to make a referral to Scottish Ministers where it appears that there has been a failure on the part of a local authority to fulfil its statutory duty. The Executive believe this would ensure that children who might not otherwise have received an education service are brought to the attention of Ministers.

CONSULTATION RESPONSES

Supervision requirements: conditions restricting movements

Many of the debates surrounding this issue are discussed in Restriction of Liberty Orders above, and as stated many organisations were of the opinion that Children’s Panels should be the key mechanism for the use of Restriction of Liberty Orders and electronic monitoring. However, in this section it would be appropriate to discuss the views of the SCRA (2003, p 17-19), which, after reviewing available evidence made the following conclusions regarding the use of electronic monitoring:

- the current criteria governing the use of secure accommodation was appropriate and sufficiently wide-ranging enough to negate the use of electronic monitoring
- if the Executive consider it necessary to give Hearings a power to require electronic monitoring as a condition of supervision requirement, this should be done in the context that the Hearing should first obtain:
  - confirmation that the monitoring will form an integral part of an overall package of measures of supervision
  - a risk assessment covering the risk factors such as the safety of the home environment for the young person and the availability of support services
  - confirmation that the young person understands the proposed monitoring arrangements and the implications of their breach, and has the capacity to adhere to them
- a need to promote the further development of services that are now working on an extended-hours basis with high-risk young people at the places and times when they are most at risk, such as on the street on Friday or Saturday evenings

Duties of local authorities

The consultation report (2003, pp 76) found that there was universal support for local authorities to carry out their duties regarding supervision requirements and education provision. As discussed above the recent Audit Scotland report Dealing with Offending by Young People: A Follow-up Report, raised some important issues regarding service provision at present. However, many local authorities and others believe that the problem is associated with the resources that are currently available. COSLA (2003, p 9) contends:

“The ability to fulfil supervision requirements by Local Authorities is not one of wilful refusal to comply with statutory…[provisions]…but an issue of resources.”

The lack of qualified social workers was raised by many organisations as a particular problem in this regard. COSLA (2003, p 9-10), whilst agreeing to the powers proposed, felt that before such sanctions could be used against local authorities there had to be a recognition that many
councils were unable to resource all supervision requirements. NCH Scotland (2003, p 9) argued that in many cases local authorities were spending over the suggested amount of Grant Aided Expenditure on child and family services and suggested that the Executive meet the additional costs required by local authorities. Aberdeenshire Council (2003, p 13) believed that attention had to be given to the priority of services and how a supervision requirement was to be balanced against other issues such as child protection. The Scottish Child Law Centre (2003, p 5-6) argued that although local authorities should be accountable there was a potential for services to be resource driven, and for the proposals to increase the number of supervision requirements rather than lead to the prioritisation of preventative work with families.

The SCRA (2003, p 26-27) was of the opinion that there was no simple solution to the problems regarding supervision requirements, and that what was required was a comprehensive and committed approach from all relevant agencies. They outlined a strategy for doing this, the key elements of which are:

- a clear statement of the overall outcomes the Hearings System is to deliver should be agreed along with core objectives and standards
- the meaning of “supervision” and of the duty to give effect to both compulsory supervision requirements and voluntary arrangements instituted by the Reporter should be spelled out in law, backed up by guidance
- legislation that spells out more clearly a process by which authorities account to the Hearing for any failure in supervision requirement service delivery
- local authorities performance in meeting their obligations under supervision requirements should be one of the local government key indicators
- authorities should receive demand led funding for these services
- the forthcoming Hearings System review should seek to strengthen the position and authority of the hearings themselves

As regards the education provision requirement in particular, it was generally agreed that this would be appropriate. Children in Scotland (2003, p 15) argued that there needed to be an effective mechanism in place for ensuring Ministers are fully aware of the problems that can arise, and therefore accepted that it would be prudent for reporters and Hearings to have a role in this. However there were a minority of organisations who were against this proposal, and felt it could jeopardise the relationship between local authorities and Children’s Panels. Aberdeenshire Council (2003, p 13) was of the opinion that this could seriously disrupt attempts to take forward collaborative approaches that were essential in responding effectively to the issue of ASB.

**EFFECTS ON EQUAL OPPORTUNITIES**

The Executive (PM, 2003, para 206) contends that the measures in the Bill are intended to provide additional protection to individuals and groups whose quality of life is undermined by ASB. It argues that those groups who are likely to experience prejudice because of their race, religion, age, gender, disability or sexual orientation are more likely to be victims of ASB. The Executive states that it 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."

The Executive (PM, 2003, para 211-214) notes the various concerns that have been raised in regards to equal opportunities and the Bill, in particular:

- that children with disabilities and special needs may be subject to ASBOs because of their behaviour linked to their particular circumstances
- the power to disperse groups may disproportionately affect ethnic minority groups as there are a higher proportion of young people in ethnic minority communities and grounds may be made on prejudice rather than evidence of ASB
- introduction of POs may stigmatise particular cultures or minority communities

The Executive is confident that current race legislation and the systems that would be put in place through the Bill will safeguard against such discrimination taking place. Bodies that will be required to undertake new duties and responsibilities under the Bill, such as the police and local authorities, will need to ensure that they fulfil their responsibilities in ways that eliminate unlawful race discrimination, promote good race relations and promote equality of opportunity (PM, 2003, para 208).

The definition of ASB used in the Bill (see page 8 above) has raised concerns with some groups. The National Autistic Society Scotland / The Scottish Society for Autism (2003, p 2) argue that the definition is extremely general. They are concerned that people with autistic spectrum disorders, who can sometimes display challenging, obsessive and ritualistic behaviours, could have their actions wrongly interpreted as being anti-social and / or criminal. The Executive (PM, 2003, para 39) is aware of this issue though discusses it in relation to children. It uses the example of an ASBO, and contends that the circumstances of the young person as a whole would be taken into account before an application is made, therefore protecting people who may have special needs.

Another area of concern was raised by the Commission for Racial Equality (2003, p 5), which argued that the current proposals for tackling ASB go far beyond that currently taking place for tackling racial harassment. It was concerned about the impact of such a policy on race relations as it could appear that the state was prepared to deploy greater force and resources in tackling nuisance than racially motivated harassment. The Executive (PM, 2003, para 211) notes that the Bill, whilst dealing with serious forms of ASB, is also trying to deal effectively with ASBs that are not criminal in their own right. It believes that racial harassment is a more serious crime that should continue to be prosecuted in the criminal courts. However, it also argues the Bill could assist in tackling racial harassment, for instance where proof to the criminal standard is not available, or where the focus is on prevention. An application for an ASBO could be appropriate to deal with incidents causing alarm or distress to members of ethnic minority communities and other equality groups.

**SOURCES**


http://www.scottish.parliament.uk/bills/pdfs/b12s2.pdf


providing research and information services to the Scottish Parliament

40


*Education (Scotland) Act 1980*. ch 44. London: HMSO.

*Environmental Protection Act 1990*. ch 43. London: HMSO.


Finance Committee
Anti-Social Behaviour etc. (Scotland) Bill - Financial Memorandum
Written Submissions

1. In order to assist the Committee in its consideration of the Financial Memorandum of the Anti-Social Behaviour etc. (Scotland) Bill, a written submission has been received from the following organisations:

   Scottish Children’s Reporter Administration (SCRA)

2. The Committee is invited to consider these submissions.

Emma Berry
December 2003
SUBMISSION FROM THE SCOTTISH CHILDREN’S REPORTER ADMINISTRATION (SCRA)

The Scottish Children’s Reporter Administration (SCRA) welcomes the opportunity to give evidence to the Finance Committee as part of its consideration of the Anti-Social Behaviour Etc (Scotland) Bill. We will give more detailed evidence in due course to the Communities Committee which is the lead Committee on this Bill.

We will also engage with the Scottish Executive in its forthcoming review of the Children’s Hearing System, taking account of the proposals in the ASB Bill and the wider issues affecting the Children’s Hearing System. We believe a major objective of this review should be to strengthen the position and authority of the Hearings themselves – service difficulties are the key challenge facing the Hearings System and require a committed and sustained approach.

The key points in our response to the Scottish Executive’s consultation “Putting Our Communities First: a strategy for tackling anti-social behaviour” were:

- The Children’s Hearings System remains the best means of addressing the anti-social behaviour of children and young people because it is integrated, wide-ranging, flexible and community based.
- The Children’s Hearings System, as a community based system, already has the remit and many of the powers to address anti-social behaviour by children and young people, and poor parenting.
- Virtually all new measures that the Scottish Executive is seeking to address anti-social behaviour by children and young people can be achieved through the Children’s Hearings System - as long as service delivery is improved so that existing powers can be used more creatively and fully.

We would make the following initial comments to the Finance Committee relating to the financial aspects of the Bill.

- We accept that the levels of uptake set out in the Financial Memorandum are inevitably guesstimates at this stage.
- We are looking at available evidence to support SCRA's assessment of likely uptake and would propose to update Committee members on this in a further short written statement on the 9th.
- We are currently making an assessment of the workload impact of the new measures on reporters and support staff and again will update Members on the 9th.