The Committee will meet at 2.00 pm in Committee Room 2.

1. **Antisocial Behaviour (Scotland) etc Bill:** The Committee will take evidence from—

   Gerard Brown, Convener of the Criminal Law Committee, Alex Prentice, Member of the Criminal Law Committee, Michael Clancy, Director of the Law Reform Department and Anne Keenan, Deputy Director of the Law Reform Department, the Law Society of Scotland;

   Hugh Henry, Deputy Minister for Justice, Alasdair McIntosh, Head of Anti-social Behaviour Division, Michael Kellet, Anti-social Behaviour Division, Catherine Brown, Police Division and Gillian Russell, OSSE, the Scottish Executive.

Gillian Baxendine / Lynn Tullis
Clerks to the Committee
Tel 0131 348 5054
The following papers are enclosed for this meeting:

Item 1 – Antisocial Behaviour (Scotland) etc Bill

Submission from the Law Society of Scotland J2/S2/04/2/1
Scottish Executive response to question on antisocial behaviour notices J2/S2/04/2/2

Public Defence Solicitors Office Regulations

Letter from the Deputy Minister for Justice in relation to Public Defence Solicitors Office Regulations (this paper relates to SSI 2003/511 which was considered by the Committee on 25 November 2003) J2/S2/04/2/3

The following papers are enclosed for information:

- APEX information pack (Committee Members only);
- Dr Lesly McAra and Prof. David Smith – copy of presentation delivered at 1st Meeting 2004;

In addition, SACRO have provided the Committee with a range of information on tackling antisocial behaviour which is available to Committee Members on request.

Forthcoming Meetings:

Tuesday 20 January - Justice 2 Committee meeting (PM)
Tuesday 27 January - Justice 2 Committee meeting (PM)
Tuesday 3 February - Justice 2 Committee meeting (PM)
Tuesday 10 February – Justice 2 Committee meeting (PM)
JUSTICE 2 COMMITTEE

2nd Meeting 2004 (Session 2)

Tuesday 13 January 2004

Antisocial Behaviour etc (Scotland) Bill
Submission from the Law Society of Scotland
Dear Mr Hough

Anti-Social Behaviour Etc., (Scotland) Bill
Justice 2 Committee – 13 January 2004

Thank you for your letter of 14 November, inviting the Society to give evidence to the Justice 2 Committee on 13 January 2004. The following parts of the Bill relate principally to justice issues and, accordingly, the Committee has confined its comments in this response to those areas:

- Part 2 – Anti-Social Behaviour Orders
- Part 3 – Dispersal of groups
- Part 4 – Closure of premises
- Part 9 – Parenting Orders
- Part 10 – Further criminal measures
- Part 11 – Fixed penalties, and
- Part 12 – Children’s Hearings.

The Context

The Committee condemns anti-social behaviour in all its forms and wants to ensure that this Bill is effective and efficient in providing a means by which Scotland’s communities can be safer. In framing a strategy to address the causes and effects of anti-social behaviour, consideration should be given to inspiring people to better citizenship, instilling a desire at community level to take pride in the local environment, providing support for those who are victims of crime and establishing better inter-agency co-operation to deliver effective solutions to prevent re-offending.

Part 2 – Anti-Social Behaviour Orders

Section 4(2)(a) of the Bill extends the availability of an Anti-Social Behaviour Order (“ASBO”) to specified persons over the age of 12 years. The Committee has concerns about the proposed extension of ASBOs to those under 16 years of age and believes that the forum in which to address the anti-social behaviour of this group is a well-resourced children’s hearing system.

In 2000, the Scottish Executive Report of the Advisory Group on Youth Crime indicated that youth crime and repeat offending can only effectively be addressed if the
emphasis is placed on education, prevention and early intervention. Central to this process is the early identification of particular problems or vulnerability, which may ultimately lead to anti-social or offending behaviour. To ensure that effective action is taken, a multi-agency approach should be adopted between youth groups, social work and criminal justice agencies. Provision should be made to ensure that relevant information is exchanged where appropriate. The young person concerned should be at the centre of any proposed intervention, with an action plan drafted specifically to address his or her needs. Care will have to be taken in this regard to ensure compliance with the Data Protection Act 1988 and the European Convention on Human Rights, Article 8 (right to privacy). It may be that action at this stage will be enough to prevent the young person from embarking on a course of anti-social behaviour.

The Scottish Children’s Reporter Administration has an important role, both in considering the welfare issues for that child and in seeking to address the offending behaviour. If the intervention of the Children’s Panel is not successful in assisting the young person address the behaviour, then criminal proceedings may follow if there is subsequent offending, once the child has reached the age of 16 (subject to the few exceptions where children under that age may be prosecuted).

In seeking to extend the use of ASBOs to those under 16, the policy memorandum indicates that “there remains a small number of persistently anti-social young people for whom no existing measures are effective. In these cases, a court imposed order may be necessary to make clear that persistent disorderly behaviour will not be tolerated”\(^1\). It is difficult to ascertain what greater deterrent effect the use of an ASBO could have over the application of the criminal law. Section 110 of the Bill provides the interpretation of “anti-social behaviour” for the purposes of the Bill and indicates that anti-social behaviour is constituted by acts, or a course of conduct, that causes or is likely to cause alarm or distress. Conduct such as this would be capable of being prosecuted as a breach of the peace in the criminal courts, if there was sufficient evidence.

If the policy intention is generally to divert young persons away from the criminal justice system, and as an alternative to provide ASBOs, then it should be noted that breach of an ASBO is a criminal offence. Those under 16 who breach an ASBO could therefore be brought into the criminal justice system and find themselves with a criminal record before they reach the age of 16.

If ASBOs are to be extended to those under 16 years of age, then the Committee agrees that the sheriff should have regard to any views expressed by the Principal Reporter, prior to making the order. The Committee welcomes the inclusion of this requirement in section 4(2) of the Bill.

Although reference is made in section 7 to intimation of the application for an interim ASBO to the specified person, there is no provision for the specified person to make representations to the sheriff in advance of the making of the interim order. The Committee also notes that there is no requirement under section 7(2) for the Sheriff to consult and have regard to the views of the Principal Reporter when the specified

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\(^{1}\) Policy Memorandum paragraph 19
person is a child and an interim ASBO is sought. The Committee would suggest that section 7(2) is extended in this regard.

Section 9(7) of the Bill makes specific provision for breach of an ASBO when the specified person is a child, and restricts the penalty to a fine. Is this an appropriate sanction in circumstances when the specified person will have no or little income?

**Part 3 – Dispersal of Groups**

Part 3 of the Bill is designed to provide the police with the authority to designate an area where anti-social behaviour is a significant and persistent problem and where groups have caused alarm or distress. The police will have the power in that designated area to disperse groups whose presence or behaviour causes alarm or distress to any members of the public.

However, the Committee notes that the police already have powers both under statute and at common law to deal with the dispersal of groups in certain circumstances. Part IV of the Civic Government (Scotland) 1982 deals specifically with the powers of constables to deal with annoying, offensive, obstructive or dangerous behaviour. Section 50 of that Act makes provision for dealing with those who are drunk and incapable in a public place. Section 53 creates the offence of obstruction and provides for a situation in which individuals in a group obstruct the “lawful passage” of others and who refuse to move along when asked to do so. Section 54 deals with noise nuisance. In addition, police have powers to intervene in circumstances where the disorderly behaviour amounts to a breach of the peace and can detain or arrest those involved in criminal behaviour.

Section 18(1) of the Bill, however, extends these powers by allowing a constable to give a direction requiring a group of two or more persons to disperse or leave the relevant locality and prevent them from returning to the locality for a period not exceeding 24 hours, if that constable has reasonable grounds for believing that the *presence* of those persons is likely to, or has resulted in any members of the public being alarmed or distressed. It would appear from the drafting of this provision that if the constable has reasonable grounds for believing that the *presence* of the group alone in that area would result in alarm or distress to members of the public, then the dispersal provisions will apply. The Justice 2 Committee should be satisfied that this aspect of the Bill is compliant with Article 11 of the ECHR (freedom of assembly and association).

**Part 4 – Closure of Premises**

Part 4 of the Bill will allow the closure of premises where in the preceding three months, a person has engaged in anti-social behaviour on the premises and where the use of the premises is associated with persistent disorder and serious nuisance to members of the public. There does not appear to be any restriction on the type of premises to which Part 4 of the Bill will apply and “licensed premises” would, therefore, appear to come within the ambit of these provisions. The Committee questions how these provisions interface with the current review of licensing law being carried out by Sheriff Principal Nicholson. In the interests of clarity and consistency, there would be merit in dealing with closure of licensed premises in the context of licensing law.

E-mail: libbyboid@lawscot.org.uk
Part 9 – Parenting Orders

Part 9 of the Bill introduces parenting orders which are designed to introduce compulsory measures to improve the parenting skills of those identified as having poor parenting skills. A parenting order will require the parent to comply with the requirements set out in it and will normally require the parent to attend counselling or guidance for a maximum of 3 months in the course of the order. Breach of a parenting order can be a criminal offence resulting in the imposition of a fine.

The Committee is not convinced that parenting orders will achieve their objective if backed by criminal sanction. The Scottish Children’s Reporter Administration is designed to look both at the welfare of the child as well as his or her offending behaviour and, as such, is privy to information about the family as a whole. In addressing these issues, the Panel can make recommendations where appropriate for supervision and design disposals, which will assist the family as a whole. The Committee would endorse this approach, rather than shifting the emphasis towards punishment of the parent. The Policy Memorandum makes it clear that parenting orders require a parent to exercise control over the child’s behaviour and to ensure that the child, for example, avoids contact with disruptive children. Whilst the parent may do their best to ensure compliance, there could be situations in which the parent is unable to control the actions of a child or is simply unaware that the child is in fact engaging in the prohibited behaviour. Breach of a parenting order is, nevertheless, a criminal offence.

The Committee is concerned that in practice, these proposals will extend the doctrine of vicarious liability in the criminal law. The concept that one person, other than when acting in concert with another person or other persons, will be criminally responsible for the actions of another, although not novel in Scots law, has traditionally been restricted to specific offences, such as those involving the supply, or the sale of goods under the Licensing Act. Parenting orders would extend responsibility for the acts or omissions of the child to the parent, even in circumstances where there was nothing further that a reasonable parent could have done to prevent the child acting in that way.

The Committee also believes that greater consideration requires to be given to the operation of these orders from an equality perspective. The unmarried father of a child who has not acquired his parental rights in terms of section 4 of the Children (Scotland) Act 1995 would be able to avoid responsibility for these orders, whereas the mother of the child would not. In what way, therefore, do these provisions ensure equality of treatment for both parents of the child?

Part 10 – Further Criminal Measures.

Community Reparation Orders – Section 89

Section 89 introduces a new sentencing option in the form of a Community Reparation Order (“CRO”) to deal with offences where there is an anti-social behaviour element. The Committee agrees with the ethos behind CROs and believes that the courts should have a disposal available to them which would focus on making reparation in response to anti-social behaviour. The Committee would, however, question whether it is

2 Policy Memorandum paragraph 134.
necessary to create a new disposal in the form of a CRO and whether the Supervised Attendance Order (SAO) could be adapted to serve the same purpose. The principle agents within the criminal justice system are familiar with the concept and operation of SAOs and the existing framework could be adapted. Indeed, the Committee understands that two pilots are already under development to explore the extension of the use of SAOs as a disposal at first instance, in circumstances where the court considers that the offender is unlikely to be able to pay a fine.

Sufficient resources should be allocated to the agencies involved in implementing these orders if they are to be effective. In this regard, it would also be helpful if provision were made for local authorities to consult with appropriate agencies and bodies, such as local victim organisations and the police, in determining the appropriate form of reparation for individual offenders. The Committee would also recommend that efforts are made to ensure that the period between alleged commission of the crime and disposal of the case is kept to a minimum, mirroring the approach taken in the Hamilton Youth Court Project.

The Committee notes that in terms of the new section 245K(2)(b) that such orders will only be applicable when the offender is aged between 12 and 22 years of age. The Committee would question the limitation of this provision in this way and would suggest that a wide range of disposals should be available to ensure that the most appropriate disposal is tailored to the offender in question. Whilst young people may benefit from such orders, it would appear arbitrary to set an upper age limit at which this disposal would then be unavailable.

**Section 90 – Restriction of Liberty Orders**

Section 90 of the Bill removes the age restriction in section 245A(1) of the Criminal Procedure (Scotland) Act 1995 to allow the courts to impose a Restriction of Liberty Order (RLO) on offenders under the age of 16 who are dealt with by the court system rather than through the Children’s Hearing System. In August 1998, RLOs with electronic monitoring were introduced as a new community sentence and made available on an experimental basis to the sheriff courts in Aberdeen, Hamilton and Peterhead. The imposition of the orders provided an alternative to custody, or to other community sentences. An evaluation was conducted from the start of the period until early in 2000 and results of research published by the Scottish Executive. The report produced indicated that younger offenders were less likely to complete their orders and that factors such as family tensions, unsettled accommodation and chaotic and erratic lifestyles indicate unsuitability for such a disposal.

The results of research on the pilot of electronic monitoring for those aged 10 to 15 in England and Wales is also interesting. There was a low rate of use of the curfew order for this group of offenders, particularly because only a small number were thought to be suitable. Many young offenders did not have a stable home life, which is a prerequisite for a curfew order. The report also highlights concerns about the potential effect of tagging on young offenders. One concern was that the tag would be seen as a stigma. Although it is desirable for people to accept responsibility for their actions, another concern was that if a person is labelled “offender” and accepts the label, they will then live up to it. Interviews with young offenders and their families provided evidence of both reactions.
The financial memorandum indicates\(^3\) that of the 80 children who were dealt with by the adult courts in 2001, 16 were detained in secure accommodation. Against this background, consideration should be given to whether the extension of RLOs to those under 16, is an appropriate and effective policy initiative.

**Part 11 – Fixed Penalties**

Part 11 of the Bill extends the availability for the use of fixed penalties to specified offences. The Committee notes that the use of fixed penalty fines is one of the issues under consideration by Sheriff Principal McInnes’s Committee on the Review of Summary Justice. It may, therefore, be more appropriate for the use of fixed penalties to be considered in the light of recommendations which will be proposed by the McInnes Committee and in the context of community policing, rather than consider it in isolation in the context of the Bill.

However, the Committee can see the merit in the extension of fixed penalty notices for some of the more straightforward and discrete offences listed in the Bill, but is concerned that these notices could be used in cases where there is a reasonable chance that the victim of the crime could be compensated for pecuniary loss which has resulted from the crime, particularly in cases of vandalism under section 52(1) of the Criminal Law (Consolidation) (Scotland) Act 1995 and the common law offence of malicious mischief. The Committee would also question where it is appropriate to extend the use of these notices to cases involving drunkenness and breaches of the peace. The common law offence of breach of the peace can encompass a wide range of conduct and in light of the decision in Smith-v-Donnelly 2001 SCCR 800, can require legal judgment to determine whether specific conduct will fall within its ambit. The Committee is therefore concerned about the blanket extension of fixed penalties for all breaches of the peace.

Section 98(5) and (6) provides that if the fixed penalty notice is not paid within the specified period of time and the recipient of the fixed penalty notice has not made a request to be tried, then that person will be liable to pay a sum equal to 1½ times the amount of the fixed penalty notice and that amount will be treated as a registered fine. Given the consequences of failure to pay the fixed penalty notice, the Committee would recommend that section 97(3) is extended to include a reference to the fact that the recipient of the fixed penalty notice can consult a solicitor prior to determining the appropriate course of action and information should also be provided in the notice about the possible availability of legal aid.

**Part 12 – Children’s Hearings**

Part 12 of the Bill introduces the availability of the monitoring for young people who are dealt with by the Children’s Hearing System. The Committee is not in favour of the extension of the use of electronic monitoring as a disposal for the Children’s Hearing System.

Electronic monitoring could be perceived as an alternative to secure accommodation. However, secure accommodation places some focus on the education of the child and

\(^3\) At paragraph 359.
seeks to ensure that welfare issues are addressed, whereas electronic monitoring will deal solely with containment.

I hope these comments are of some assistance to the Committee and further detailed comments in relation to drafting of the Bill will be made in advance of Stage 2.

Yours sincerely

Mrs Anne Keenan,
Depute Director.

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JUSTICE 2 COMMITTEE

2nd Meeting 2004 (Session 2)

Tuesday 13 January 2004

Antisocial Behaviour etc (Scotland) Bill
Scottish Executive response to question on antisocial behaviour notices

In response to a question by Nicola Sturgeon to Scottish Executive officials on 25 November 2003, the Executive undertook to write to the Committee to explain the rationale behind section 56 (failure to comply with an antisocial behaviour notice). In particular, Nicola Sturgeon expressed concern that a tenant who is behaving antisocially may be rewarded by not having to pay rent. Attached is the Executives response to this query.
Dear Mr Hough,

Meeting of Justice 2 Committee 25 November 2003 – Antisocial Behaviour etc. (Scotland) Bill

Michael Kellet of the Antisocial Behaviour Unit has passed me your letter of 3 December which seeks a response to Nicola Sturgeon’s question about the penalty proposed in section 56 in Part 7 of the Bill. She asked whether the potential removal of the landlord’s right to charge rent would create the danger that a tenant who is behaving antisocially will be rewarded by not having to pay rent.

The intention is to provide a substantial incentive for a failing landlord to improve his or her management of antisocial behaviour. A landlord who is prepared to take the risk of being prosecuted for the criminal offence in the Bill and of being fined, may not be deterred on that account from bad practices. However, such a landlord is likely to respond if rent income stops and he or she is able to make it resume by taking the actions required by the local authority and then applying to the sheriff for the penalty to be revoked. This incentive to act should be effective whether the tenant normally makes the payment or whether the rent is normally paid as Housing Benefit direct to the landlord.

In drafting this section of the Bill we considered whether the penalty might, as Ms Sturgeon suggests, have a perverse effect. We felt that if the penalty were automatic there might be a danger of this happening in some cases. We therefore propose to give local authorities discretion in the use of this sanction. They will need to make a judgement on the use of their powers to deal on the one hand with antisocial behaviour by an individual and on the other with management failures by that individual’s landlord. It might be in some circumstances that ceasing rent liability could exacerbate the situation. In others it should help to change the landlord’s behaviour in a way which not only helps to deal with the particular situation but also prevents similar situations developing in the future.
The local authority will need to make a judgement based on the circumstances of the case. This and other measures in the Bill seek to provide local authorities with a wide range of tools so that they can select the most appropriate ones for the circumstances. It is our intention that the guidance issued to local authorities on the use of this sanction will advise them to consider and balance the impact of the rental sanction on the behaviour of antisocial tenants and on the behaviour of failing landlords, before they decide whether to proceed.

Yours sincerely,

Roger Harris
Senior Policy Adviser
Scottish Legal Aid Board (Employment of Solicitors to Provide Criminal Legal Assistance) Amendments Regulations 2003 (SSI 2003/511)
Letter from the Deputy Minister for Justice

Further to the debate on the above regulations which took place on 25 November 2003, attached is a letter from the Deputy Minister for Justice which relates to the possible set-up costs of the new PDSO Offices in Glasgow and Inverness.
DEBATE ON THE PDSO REGULATIONS

You may recall that Members of your Committee questioned me during the Debate last week about the possible set-up costs of the new PDSO Offices in Glasgow and Inverness. At that time I did not have the figures to hand and thought that it might be helpful to write to you with the figures.

The Board estimates that the set-up costs will be about £40,000 for each location. This includes equipment, furniture, possible refurbishment of any new Offices, surveyor costs and staff recruitment but, naturally, excludes the normal running costs such as salaries and the costs involved in running cases. All the costs attributable to the Offices will figure in the future evaluation.

I understand that the Board will shortly be advertising for solicitors to work in Glasgow and Inverness probably with a salary range of £23,000 to £40,000, depending on experience. It is expected that two solicitors in each location will be recruited, depending on anticipated workload at the beginning.

I do not know how much it would cost to set up a private solicitor’s office but I imagine similar costs would be incurred.

HUGH HENRY