

CRIMINAL JUSTICE (MISCELLANEOUS PROVISIONS) BILL 2010

Comments by

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Clause 11 - Test purchases by under-age persons

*A person under that age who purchases or acquires any restricted item or attempts to purchase or acquire a restricted item does not commit an offence under a prescribed enactment **if acting in accordance with a request by an authorised officer** who is acting in the course of the officer's duty for the purpose of determining whether or not the provisions of the enactment are being complied with.*

As a parent I view this measure as completely inappropriate. In our small community where 'everybody knows everybody' using children for the purposes of entrapment is completely wrong. Furthermore, there is no requirement for the Code of Practice to require the consent of the parents before a child is used for 'test purchases'. If I, as a parent, found out that my child had been co-opted for such purposes I would be extremely unhappy. Not least because it is teaching deceitful behaviour. Anecdotally, I have heard that the children have already been used for this by the Office of Fair Trading in the Isle of Man. I would hope this proposal is rejected. At the very least it requires an amendment stipulating that the Code of Practice must specify the informed consent of the parent or guardian before a child is used for this purpose.

The Department may be 'content' in this matter but I would doubt the majority of parents would be 'content' if they were properly informed about the use of their children for 'test purchases'.

Clause 14 Travel restrictions on drug trafficking offenders

14. (1) After the cross-heading "Miscellaneous and supplementary provisions" immediately before section 28 of the Misuse of Drugs Act 1976 insert —

(4) A travel restriction order may contain a direction to the offender to deliver up, or cause to be delivered up, to the court any UK passport held by him or her; and where such a direction is given, the court must send any passport delivered up in pursuance of the direction to the Chief Secretary's Office.

(5) Where the offender's passport is held by the Chief Secretary's Office by reason of the making of any direction contained in a travel restriction order, the Chief Secretary's Office (without prejudice to any other power or duty to retain the passport) —

(a) may retain it for so long as the prohibition imposed by the order applies to the offender, and is not for the time being suspended; and

(b) must not return the passport after the prohibition has ceased to apply, or when it is suspended, except where the passport has not expired and an application for its return is made to it by the offender.

I raised a concern in my submission that the Chief Secretary's Office could not hold a power to confiscate a passport. This issue was ignored in the Department's response. British Passports in the Isle of Man are issued by the Lieutenant Governor exercising the Royal Prerogative on behalf of the Sovereign. They not belong to the Chief Secretary – even in that offices' capacity as Secretary to the Lieutenant Governor. Furthermore, there is a nonsense in confiscating a passport as an attempt to prevent someone leaving the Isle of Man as you do not need a passport to leave the Island as we are in the Common Travel Area. Additionally, you do not even need a British passport to live in the Isle of Man so they provision will be wasted on offenders who are not British!

As an issue of justice the proposal is rather bizarre. When has an offender completed their punishment? The Clause allows for an expired passport to be retained indefinitely – effectively making it very difficult if not impossible for an offender to gain a renewal.

This Clause is probably not legally possible to enact and is completely pointless.

Clause 24 - Police Superintendents' Association

(1) After section 12 of the Police Act 1993 insert —

12A. (1) There shall be an Isle of Man Police Superintendents' Association ("the Association") for the purpose of representing members of the police force of the rank of superintendent in all matters affecting their welfare and efficiency, other than questions of discipline, appointments and promotion affecting individuals.

The original justification for this was '*to ensure the terms and conditions of police officers can be kept in line with their United Kingdom counterparts*'. The Department has retained this Clause because it '*believes it is essential to provide equal treatment of all ranks*'. However, no justification or explanation is given as to why the Isle of Man Constabulary must match it's pay and conditions to policemen in the UK. Furthermore, I understand

there are in fact only two Police Superintendents so creating legislation just for those two individuals seems excessive.

Clause 29 - Drunkenness etc on premises

33. (1) Any person who is drunk on or in the vicinity of licensed premises commits an offence and is liable on summary conviction to a fine not exceeding £500.

(3) A person who appears to be guilty of an offence under subsection (2) may be arrested without warrant by any person.

(4) On the conviction of a person of any offence the court by which he or she is convicted may, if it thinks fit, make either or both of the following orders —

(a) an order that the person shall not purchase liquor from the holder of any licence or otherwise for such period (not exceeding 5 years) from the date of the order as may be specified in the order;

(8) Where the court makes an order under subsection (4)(a) or (b) against any person (“A”), it may also issue a warrant —

(a) authorising any person directed to do so by the Chief Constable to take a photograph of A and to distribute copies of the photograph to the holders of licences; and

(b) authorising any constable to arrest and detain A for that purpose.

and

Clause 34 - Public drunkenness

75. (1) Any person who is drunk in a public place commits an offence and is liable on summary conviction to a fine not exceeding £500.

(3) A person who appears to be guilty of an offence under subsection (2) may be arrested without warrant by any person.

The Department did not refer to the Clauses on public drunkenness in its response. However, I consider that banning someone for 5 years is an excessive punishment for being *'drunk on or in the vicinity of licensed premises'*. Also I note that the Clause *'authorising any person directed to do so by the Chief Constable to take a photograph of A and to distribute copies of the photograph to the holders of licences'* was not included in the original consultation so we were unable to comment on it at the time. This working practice of introducing new clauses – post consultation – should be challenged. How are the public to accurately react to proposed legislation if the original consultation is incomplete? As a new measure in crime reduction I view it as a worrying trend. Publicly identifying people in this way as part of a 'name and shame' culture may well have unintended consequences in a small jurisdiction. I would be concerned if the police viewed this working practice as some kind of new way forward. It certainly seems like a disproportionate punishment to me.

Also very concerning in Clauses 29 and 34 is the new provision *'may be arrested without warrant by any person.'* which seems to be a form of citizens arrest. Encouraging the public to tackle drunk and disorderly people seems like a dangerous strategy. There must be few public houses in the Isle of Man that are more than ten minutes away from a police station. Why should it be left to the public to do the apprehending?

Clause 36 - Crime and Disorder Strategies

1E (3) Regulations under subsection (2) may in particular make provision for or in connection with —

The sharing of information

1E. (1) A responsible authority is under a duty to disclose to all other responsible authorities any information held by the authority which is of a prescribed description, at such intervals and in such form as may be prescribed.

(2) In subsection (1) “prescribed” means prescribed in regulations made by the Department of Home Affairs.

(3) The Department of Home Affairs may only prescribe descriptions of information which appears to it to be of potential relevance in relation to the reduction of crime and disorder in any local government district (including anti-social or other behaviour adversely affecting the local environment in that district).

(4) Nothing in this section requires a responsible authority to disclose any personal data (within the meaning of the Data Protection Act 2002).

Clause 1E (4) basically says that there is no 'requirement' to share personal and sensitive data. The Department noted in its response a concern that there should be *'stronger provision to ensure that data shared between crime and disorder partners did not include*

personal data'. Clause 36 is about a Crime and Disorder **Strategy**. As such the use of personal and sensitive data or case specific information should be specifically prevented. Merely saying that there is no requirement to disclose personal data is not, therefore, a strong enough provision within the meaning of the Clause.

I propose the following amendment to prevent the responsible authority from breaching the Data Protection Act. Importantly the Amendment clearly reinforces that the responsible authorities are clearly engaged in strategies and **not** individual policing matters.

From

(4) Nothing in this section requires a responsible authority to disclose any personal data (within the meaning of the Data Protection Act 2002).

to

(4) A responsible authority shall not disclose any personal data (within the meaning of the Data Protection Act 2002).

Clause 37 - Search warrants

(1) Section 11 of the Police Powers and Procedures Act

1998 (power to authorise entry and search of premises) is amended as follows.

(3) After subsection (1) insert —

(1C) The warrant may authorise entry to and search of premises on more than one occasion if, on the application, the justice of the peace is satisfied that it is necessary to authorise multiple entries in order to achieve the purpose for which he or she issues the warrant.

(1D) If it authorises multiple entries, the number of entries authorised may be unlimited, or limited to a maximum.”.

Responding to public concerns about multiple arrest warrants the Department stated that it *'believes the proposal in respect of multiple search warrants is reasonable and proportionate in a modern democratic society.'* If it is not possible to specify in the warrant all the premises which might be searched and to provide for the number of properties in

the warrant to be unlimited then a default situation is provided for where a constable may search a house when that property has not been entered on the warrant. How, for example, is a person able to know that their house is being legally searched if it is not specifically named on the search warrant? This would allow a constable, effectively, to search an entire street or estate and include properties that may not have anything to do with the investigation in hand. Government should never pass a law that allows a constable to search property without a warrant. If this power is created where is the safeguard to prevent it being abused?

I suggest the following amendment:

From:

(1D) If it authorises multiple entries, the number of entries authorised may be unlimited, or limited to a maximum.”.

to

(1D) If it authorises multiple entries, the number of entries authorised must be limited, *and the properties to be searched must be stated on the warrant,*

Clause 38 – Warrants: persons who may accompany constables.

After section 11 of the Police Powers and Procedures Act 1998 insert —

11A. (1) This section applies where, under any enactment, a Deemster or a justice of the peace has the power to issue a warrant or order authorising a constable to enter and search any land and inspect, examine, operate, test, retain, seize or take possession of any thing found there.

(2) Such a warrant may name any suitable person who may accompany and assist the constable in the execution of the warrant.

(3) Where a suitable person is accompanying and assisting a constable under subsection (2), the warrant shall be authority for the person to do such things under the warrant as the constable is authorised to do.

(4) This section is in addition to but does not limit enactments that make express provision —

(a) for a warrant to name other persons who may accompany a constable when executing a warrant; or

(b) for a constable to be accompanied by other

persons when executing a warrant.

(5) In this section, “suitable person” means a person possessing such scientific, technical or other expertise as the constable believes will advance the investigation.”.

Clause 11A.(2) provides that a Deemster may name on a warrant *'any suitable person who may accompany and assist the constable in the execution of a warrant'* and in Clause 11A.(3) for that person to *'do such things under the warrant as the constable is authorised to do'* and in Clause 11A.(5) for that person to have *'expertise as the constable believes will advance the investigation'*. These powers are wide open to abuse. In plain terms what is being allowed for is for a constable to nominate any untrained lay person to carry out tasks that person has no legal or professional expertise in. The public need to be protected from loopholes like this which could allow miscarriages of justice to take place. Obviously there is a case for calling in professional expertise in certain cases. However, this needs to be strictly limited to accountable and professional people.

To protect the public I suggest the following amendment:

From:

11A(5) In this section, “suitable person” means a person possessing such scientific, technical or other expertise as the constable believes will advance the investigation.”.

to

11A(5) In this section, “suitable person” means a professionally qualified person possessing such scientific or technical expertise as the constable believes will advance the investigation.”

Clause 42 - ADDITIONAL POWERS OF SEIZURE

26A. (1) Where —

(a) a person who is lawfully on any premises finds anything on those premises that the person has reasonable grounds for believing may be or may contain something for which that person is authorised to search on those premises;

(b) a power of seizure to which this section

applies or the power conferred by subsection (2) would entitle that person, if that person found it, to seize whatever it is that the person has grounds for believing that thing to be or to contain; and

Nowhere in this clause is there reference to a code of conduct or process for safeguarding the integrity of seized articles. In the Barry George/Jill Dando case a jacket was held for a year in a room where firearms were examined and then a minute particle of bullet primer was found in the jacket and used to wrongly convict Barry George. Without actual legislation to safeguard the integrity of seized items the public are unprotected from the possibility of physical evidence being unintentionally or intentionally contaminated.

I am concerned that this clause is wide open to abuse because no provision is made for a safe process to govern the seizure of what could highly significant and physically sensitive evidence. Even, say picking up a photograph with bare hands could lead to that vital sample being contaminated.

The Clause should be withdrawn and, if considered truly necessary, re written with a full set of forensic safeguards.

Clause 44 - Powers of arrest

44. (1) For sections 27 and 28 of the Police Powers and Procedures Act 1998 (arrest without warrant) substitute —

27. (1) A constable may arrest without a warrant —

- (a) anyone who is about to commit an offence;
- (b) anyone who is in the act of committing an offence;
- (c) anyone whom the constable has reasonable grounds for suspecting to be about to commit an offence;
- (d) anyone whom the constable has reasonable grounds for suspecting to be committing an offence.

28. (1) A person other than a constable may arrest without a warrant —

- (a) anyone who is in the act of committing an offence triable on information;

What we have here is a proposal that someone who has not actually committed an offence can be arrested because it is perceived they might commit an offence and for the

justification for that arrest to be the mere fact that the constable wants to know the person's identity. This is a very wide and disproportionate power and for which no justification has been provided. Nor, I suspect, would it be possible to do so. The clause removes the distinction between arrestable and non-arrestable offences. It does this by allowing the police to make a judgment that someone might be about to commit an offence but without codifying in any way what pre crime behaviour is likely to be. In effect, with just a little manipulation or provocation, the police will be able to arrest anyone for anything at any time.

The Joint Committee On Human Rights Fourth Report, commenting on the Serious Organised Crime and Police Bill which introduced this provision to England, stated:

1.74 This would have two immediate effects. First, it would create a power to arrest without a warrant in respect of offences (including trivial offences) for which no such power currently exists. Secondly, in respect of offences for which an arrest may currently be made only by a constable in uniform it would remove the requirement for the arresting officer to be in uniform, making it more difficult for the person being arrested to know whether the purported arrest is lawful or is an unjustified battery which the person is entitled to use reasonable force to resist: see for example the proposed power to arrest a person for committing the proposed new offence of harassing a person in his or her home under clause 117 of the Bill.[50]

1.75 Secondly, the proposal to abolish the category of arrestable offences has a very significant knock-on effect on the availability of other powers currently limited to arrestable offences. It also leads inevitably to the abolition of the concept of the 'serious arrestable offence'. As noted in paragraph 1.66 above, this concept currently provides the basis for other powers which have a major impact on human rights. The Bill would make those powers available in respect of all indictable offences, i.e. those offences which are triable only and those which are triable either on indictment or summarily ('triable either-way offences').[51] While many indictable offences are serious and carry maximum sentences on conviction of imprisonment for five years or more, many others do not carry such maximum sentences, and so are currently not even arrestable offences, much less serious arrestable offences. As a result, the proposals in the Bill result in a considerable extension of the consequential powers mentioned above, and others, to offences to which they have not previously been applied.[52] The Government has not yet offered to Parliament an explanation of or justification for this move, which significantly shifts the balance between rights and police powers and reduces the protection for the rights, in the debates on the Bill.

The case-law of the European Court of Human Rights and national courts makes it clear that an interference is 'necessary in a democratic society' only if there is a pressing social need for action to advance the legitimate aim, and the measures proposed are a proportionate response to the need bearing in mind the extent and severity of the potential impact on those whose rights are interfered with and the need to ensure that, within reasonable limits, the interference with rights is as small as is compatible with achieving the legitimate aim.

However, arresting a person has serious consequences, and not only in relation to immediate deprivation of liberty. It enables the police to activate further powers, for which the arrest is a trigger.

I do not believe that the Department has explained what the '*pressing social need*' is for this new power. Nor is the Department in any way concerned about the need to limit the '*extent and severity of the potential impact on those whose rights are interfered with*'. The power is designed to trigger other powers such as fingerprinting and requirement for identification.

Clause 52 - Child arrested for serious offence

55. (1) This Part does not apply to a child who is arrested without a warrant otherwise than for —

- (a) homicide; or
- (b) an offence specified in an order under subsection (2).

(2) The Department may by order specify offences for the purposes of subsection (1)(b).

The Departments states in its response that:

'However, the Department is to provide powers to extend, by order, the offences for which a child can be detained so that the provision is future proofed for any offences that it believes necessary to have. The order would be subject to Tynwald approval.'

Where is the '*pressing social need*' for '*future proofing*' offences this? The Department wants Tynwald to approve a blank cheque whereby it can arbitrarily stipulate offences whereby children shall be arrestable without a warrant. This is a highly excessive power and it would significantly change the relationship between the police and the local community.

The Howard League for Penal Reforms website states that '*England and Wales jails more children than any other country in Western Europe. Despite our obsession with locking up children, they have the highest rates of reoffending than any other age group, with a staggering 76 per cent of under 18s reconvicted within one year of release from prison.*'

With the recent debate about the Children Bill in mind giving the Department a blanket provision to extend the range of offences for which a child can be arrested without a warrant flies in the face of other Isle of Man policies to improve children's lives. The age of criminal responsibility is ten in the Isle of Man. This policy seems intend on increasing the early criminalisation of children and young people. What we need is to find ways of keeping children and young people out of the criminal justice system – not creating new ways for trapping them in it .

Clause 53 - Police powers relating to drugs

58A. (1) If an officer of at least the rank of inspector has

reasonable grounds for believing that a person who has been arrested for an offence and is in police detention —

(a) may have —

- (i) swallowed a Class A drug; or
- (ii) concealed a Class A drug in his or her anus or vagina; and

(b) was in possession of it with the appropriate criminal intent before his or her arrest,

the officer may authorise that an x-ray is taken of the person or an ultrasound scan is carried out on the person (or both).

The Department's response to concerns about this was:

'The provision allows X-rays and ultrasounds to be taken of a person suspected of having concealed drugs to discover if drugs have been concealed and to protect their health. The person has to agree to the scan being carried out. The Department has had regard for the views of the DHSS and is to have further discussions with the relevant Department to resolve those issues. The intent is to retain the clause in the Bill.'

Whatever discussions the Department may have had with the DHSS it nonetheless remains the case that there is no provision for a Doctor to refuse to authorise an x-ray because it might be harmful to the person. I am very cautious about relying on the consent of the arrested person. That individual may not be able to tell for themselves whether the x-ray might be harmful. A Doctors clearance is needed.

I would suggest an amendment:

From

(2) An x-ray must not be taken of a person and an ultrasound scan must not be carried out on him or her unless the appropriate consent has been given in writing.

to

(2) An x-ray must not be taken of a person and an ultrasound scan must not be carried out on him or her unless the appropriate consent has been given in writing and *in the case of an x-ray a Doctors has confirmed it is safe to do so.*

Clause 55 – Fingerprints

55. (1) Section 64 of the Police Powers and Procedures Act

1998 (fingerprinting) is amended as follows.

(2) After subsection (2) insert —

“(2A) The fingerprints of a person who is not detained at a police station may only be taken with the appropriate consent.”.

(3) For subsection (6) substitute —

“(6) The fingerprints of a person detained at a police station may be taken without the appropriate consent if the person has been —

(a) convicted of a recordable offence; or

(b) given a caution in respect of a recordable offence which, at the time of caution, he or she has admitted.”.

The Department's response states that *'This provision will avoid persons having to attend a Police Station to have finger prints taken if they agree, otherwise the usual procedure will have to be followed. The Department believes this provision is reasonable and proportionate and proposes to retain the clause in the Bill as drafted.'*

Stating that a belief that fingerprinting someone who has '*admitted*' to a caution is '*reasonable and proportionate*' is not a justification for a policy. The Department is merely expressing a point of view that mobile fingerprint checks under caution are acceptable. In reality the Police probably want this Clause because it makes their job easier. However, whilst it may be '*reasonable and proportionate*' for the police the Department is not asking itself whether it is '*reasonable and proportionate*' from the public perspective for fingerprints to be taken pre charge.

There are important civil liberties implications here because no meaningful limit has been set on the policy. In Clause 52 the Department is seeking to be able to create new arrestable for children offences by order. We are therefore looking at a policy development whereby children can be asked to accept a caution in the street and can have their fingerprints taken on a mobile reader. No indication has been given as to how this fingerprint data will be processed. I.e. How long it will be retained and which other British polices forces it will be shared with.

I would not be happy with mobile fingerprinting under caution. A caution is not a criminal conviction. The bar for harvesting fingerprints and other biometric data should be set at arrest and charge for a record able offence.

Clause 60 - Codes of practice

(1) For section 75 of the Police Powers and Procedures Act 1998 (codes of practice) substitute —

75. The Department shall by order provide for codes of practice in connection with —

(a) the exercise by police officers of statutory powers —

(i) to search a person without first arresting him or her;

(ii) to search a vehicle or vessel without making an arrest; or

(iii) to arrest a person;

(b) the detention, treatment, questioning and identification of persons by police officers;

(c) searches of premises by police officers;

(d) the seizure and treatment of property found by police officers on persons, premises, vehicles or vessels; and

(e) the exercise by police officers of any other statutory or common law powers.”.

Clause 60 states that '*The Department shall by order provide for codes of practice in connection with—*’ (i) to search a person without first arresting him or her;’. Giving police officers authority to search people who have not been arrested is a very wide power. This blanket approval for direct interference against a private individual is a highly intrusive proposal. How is it expected the public will react to the police having such a power and where are the safeguards to prevent that power being abused?

The Clause is completely unacceptable.

Clause 64 - Persons acting in an anti-social manner

64. After section 3 of Public Order Act 1998 insert —

3A. (1) If a constable in uniform has reason to believe that a person has been acting, or is acting, in an antisocial manner (within the meaning of section 28 of the Criminal Justice Act 2001 (anti-social behaviour orders)), the constable may require that person to give his or her name and address to the constable.

(2) Any person who —

(a) fails to give his or her name and address when required to do so under subsection (1); or

(b) gives a false or inaccurate name or address in

response to a requirement under that subsection, commits an offence and is liable, on summary conviction, to a fine not exceeding £1,000.”.

Clause 64 states that *'If a constable in uniform has reason to believe that a person has been acting, or is acting, in an anti-social manner . . . the constable may require that person to give his or her name and address to the constable'* and the penalty for non compliance is *'a fine not exceeding £1,000.'* The purpose of this clause would seem to be to create a very loose requirement for a compulsory identity check on the basis of *'reason to believe'*. What does this mean? Since when has *reason to believe'* been evidence of actual wrong doing? Such a flimsy threshold for criminality is open to abuse. *'Reason to believe'* could be as weak as hearsay and could lead to vexatious prosecutions. Again, the Department justifies this *'reasonable and proportionate'* but does not consider whether it is so for the public.

The bar for this type of intervention is again set to low. No evidence or explanation has been given as to how this type of intervention will improve behaviour in the community.

Clause 65 – Removal of Persons

3B. (1) This section applies where a relevant officer

has reasonable grounds for believing —

- (a) that any members of the public have been intimidated, harassed, alarmed or distressed as a result of the presence or behaviour of groups of 10 or more persons in public places in any locality (the “relevant locality”); and
- (b) that anti-social behaviour is a significant and persistent problem in the relevant locality.

(4) Subject to subsection (5), the constable may

give one or more of the following directions —

(c) a direction prohibiting any of those persons

whose place of residence is not within the relevant locality from returning to the relevant locality or any part of the relevant locality for such period (not exceeding 24 hours) from the giving of the direction as the constable may specify.

(6) If, between the hours of 9pm and 6am, a

constable in uniform finds a person in any public place

in the relevant locality who the constable has reasonable grounds for believing —

(a) is under the age of 16; and

(b) is not under the effective control of a parent or a responsible person aged 18 or over,

the constable **may remove the person to the person's place of residence** unless the constable has reasonable grounds for believing that the person would, if removed to that place, be likely to suffer significant harm.

The Department states that *'is satisfied there are, from time to time, groups of persons who are causing members of the public alarm, distress or making them feel intimidated or harassed and who gather in large groups'*. So where is the actual evidence that this is a problem and is the Department reacting to a significant number of public complaints over groups of young people? This Clause is similar to Section 14 of the Crime and Disorder Act 1998 and to Section 30 of the Anti-social Behaviour Act 2003. However Liberty challenged this 2003 Act and their website states:

'The police already have many powers to deal with the kinds of low-level youth offending that curfews are intended to prevent.'

'This law sweeps up the innocent with the guilty, treating all young people as potential criminals, despite the fact that young people commit fewer crimes than adults.'

'Children have the right to freedom of movement and assembly just as adults do. Young people may have legitimate reasons to be out at night without adults, such as an after school job, club or activity.'

'Curfews don't encourage young people to act responsibly but presumes that they will not.'

'In 2005 Liberty lawyers acted for 'W', a 15-year-old boy from Richmond who successfully challenged the legality of curfews for under-16s. The following year the Court of Appeal dealt a severe blow to curfew powers when it ruled that the police only have the power to use force to remove children who are involved in, or at risk from, actual or imminently anticipated bad behaviour.'

Clause 65 is based on a police officer having:

'reasonable grounds for believing —

(a) that any members of the public have been intimidated, harassed, alarmed or distressed as a result of the presence or behaviour of groups of 10 or more persons'

This clearly does not take into account the Court of Appeals ruling which sets a much higher threshold for intervention and which protects innocent members of the public being caught up in unlawful dispersal by the police. As such, I would argue that this Clause is unlikely to achieve Royal Assent.

Clause 66 - On the spot penalties for disorderly behaviour

Offences to which this Part applies

27A. (1) For the purposes of this Part, “penalty offence” means an offence committed under any of the provisions mentioned in the first column of the following table and described, in general terms, in the second column —

(2) The Department of Home Affairs may by order

amend an entry in the table or add or remove an entry.

(3) An order under subsection (2) may make such amendment of any provision of this Part as the Department of Home Affairs considers appropriate in consequence of any change in the table made by the order.

Section 3 of the Public Behaviour likely to cause

Order Act 1998 (c.11) harassment, alarm or distress

Penalty notices and penalties

27B. (1) A constable who has reason to believe that a person aged 16 or over has committed a penalty offence may give him or her a penalty notice in respect of the offence.

(6) The Department of Home Affairs may by order —

(a) amend subsection (1) by substituting for the age for the time being specified in that subsection a different age which is not lower than 10; and

(b) if that different age is lower than 16, make provision as follows —

- (i) where a person whose age is lower than 16 is given a penalty notice, for a parent or guardian of that person to be notified of the giving of the notice; and
- (ii) for that parent or guardian to be liable to pay the penalty under the notice.

I note that the Department has reacted to concerns about fixed penalty notices yet has opted to '*retain the provision (minus theft and criminal damage).*' I can find no reference in Clause that removes theft and criminal damage from the provisions of fixed penalty notices.

Liberty's briefing on fixed penalty notices states:

"We are concerned that these provisions are a further manifestation of the trend to mix criminal and civil law procedures. This dilutes the principles and protections of criminal law in particular the presumption of innocence and the burden of proof. Although these procedures will not attract a criminal conviction, they relate to behaviour that is by definition criminal and can lead to a criminal conviction if a penalty is not accepted.

We are particularly concerned that a penalty can be issued if an officer has reason to believe a penalty offence has been committed (Cl. 2 (1)). This is a lesser standard than the criminal burden of proof.

The effect of accepting a fixed penalty notice will be to accept that behaviour to a criminal standard has occurred, therefore we consider that officers imposing the penalty notices should be required to be satisfied to this standard before being able to impose them. At present the bill allows a police officer "who has reason to believe" that someone was involved in an offence, to present a fixed penalty notice. Liberty believes that this is wrong and that the police officer should be able to establish beyond all reasonable doubt that the person has committed the offence.

If a person provided with the notice goes to court to protest his or her innocence rather than pay the fine, the burden of proof the police will be expected to establish is beyond reasonable doubt . The practical implications of this are that there will undoubtedly be a large number of people challenging these notices, causing not only the administrative burden of issuing fixed penalty notices, but also upon the courts.

Liberty is also concerned that this provision will discriminate against more vulnerable sections of society, in particular those on low income who are less likely to be able to pay fixed penalties. The types of behaviour these notices are likely to attach to, e.g. drunkenness, are also likely to be committed to a large extent by vulnerable members of society who are unlikely to be able to pay fixed penalties. As a result of the non-payment of a series of such fines, these people may end up in prison for non payment of debt . We consider this provision has the potential to further marginalise those members of society already suffering from social exclusion.

In conclusion therefore, we think that these proposals are likely to be unworkable, will marginalise vulnerable sections of society, and are undesirable in civil liberties terms because of the dilution of legal protections.'

The requirement to prove 'beyond reasonable doubt' that an offence has occurred is surely one that we should all fight vigorously to retain. I am otherwise opposed to fixed penalty notices because I believe no one should receive a punishment other than before a court of law.

This Clause further states that:

27G (3) Payment of the penalty may be made by properly addressing, pre-paying and posting a letter containing the amount of the penalty (in cash or otherwise).

The Post Office recommend that cash is NOT sent in the post. This point was made to the Department in a another submission. Attention to detail is vital when legislation is drafted. It concerns me that a factual error like this has now been overlooked twice

Clause 67 - Anti-social behaviour orders

67. (1) Section 28 of the Criminal Justice Act 2001 (anti-social behaviour orders) is amended as follows.

(2) In subsection (1)(a) the words “not of the same household as himself” are repealed.

(3) After subsection (4) insert —

“(4A) An anti-social behaviour order may also impose conditions with which the defendant must comply.”.

(4) After subsection (6) insert —

“(6A) The conditions which may be imposed under an anti-social behaviour order are those which facilitate the rehabilitation of the defendant.”.

(5) In subsection (10) after “subsection (3A)” insert “or fails without reasonable excuse to comply with any conditions imposed under an anti-social behaviour order”.

This Clause creates a power to impose an ASBO on a person in the 'household' and further proposes that *“(4A) An anti-social behaviour sentence may also impose conditions with which the defendant must comply.”*. By default persons living in the same household may mean married couples. Attempting to control behaviour of people in their own home is absurd and thoroughly draconian. If a criminal offence is being committed then I would expect that existing legislation would provide effective sanctions. Where is the evidence that attempting to control one half of a marriage by legal means is either effective of Human Rights compliant?. What is going to happen in a marriage if, say, an attempt is made to moderate an ill behaved spouse with an ASBO? If problems in a marriage have gone that far then other remedies would be more appropriate like marriage guidance or divorce. As in the other proposals in the consultation no case for proven need is made. This clause presents as someone's ill thought out whim.

Clause 76 - Return of missing children

76. After section 49 of the Children and Young Persons Act 2001 insert —

49A. (1) Where a constable has reason to believe that a child has run away or is staying away from the person responsible for the welfare of the child, the constable may arrest the child without warrant and return the child to the person so responsible.

(2) If the constable is unable for any reason to return the child to the person responsible for the welfare

of the child, the constable must take the child into police protection.

(3) For the purposes of this section, the persons responsible for the welfare of a child are —

- (a) the child's parent or guardian;
- (b) any other person who has care of the child or has otherwise for the time being assumed responsibility for the child's welfare;
- (c) where the child is being looked after the Department, the Department."

A child who has 'run away or is staying away from the person responsible for the welfare of the child' has clearly not committed an offence. Therefore, It is difficult to see how, under those circumstances, a constable can arrest that child. Furthermore, any sensible child should refuse to get in the car with a stranger. If the child refuses to get into the car then is it proposed that the constable will be able to use force and if so how much force? Is it proposed that this power would be used by a single constable? Would a male constable be able to arrest a young female or vice versa? How is the constable supposed to differentiate between a child who is merely staying out late on his or her own and the child who has genuinely run away from home? Why is it proposed that the child is arrested before the parents or legal guardians are informed? Should a person other than a constable be able to assist a child in distress or is this now only the preserve of the police? This whole issue needs to be re thought and the clause should be withdrawn.

