

Diversion of Offenders and Domestic Abuse Bill 2018

This Bill deals with three distinct subjects: the diversion of offenders from the courts, fingerprints, cautions and fixed penalty notices and the final part of the Bill contains provisions addressing domestic abuse.

DIVERSION OF OFFENDERS

The diversion of offenders provisions arise out of the Criminal Justice Strategy that was received by Tynwald in December 2012. The Strategy identified that it is not necessarily appropriate or effective to put a person through the court system for a variety of reasons. For example, the offence may be relatively minor and/or a first offence. There may also be genuine remorse and indications the person would benefit from a programme of work, other supervision, an indication that the offender is prepared to make reparation for the offence or that some other remedy is possible.

An important part of the Strategy therefore is to be able to provide, where appropriate, alternative means of dealing with an incident or addressing criminal behaviour and to do so at an earlier stage. It was agreed to explore all ways and means of diverting persons from a criminal path and enabling persons, in appropriate cases, to make amends or receive help/instruction that will enable them to make better choices in future.

The Bill requires, where possible, the victim to be consulted in relation to cautions and any other out of court resolution. The Department recognises it is important to get the balance right between the investigation and determination of cases by the police and other professionals and making provision for victims. The question arises as to how much involvement in the progress of a case should be given to victims.

The first part of the Bill (up to and including clause 40) deals with interventions such as cautions, alternative remedies, anti-social behaviour, out of court disposals and immediate financial penalties for certain low level offending behaviour (see the table in clause 30).

Clauses 4 to 19 of the Bill place cautions (simple cautions) on a statutory basis, and introduce the legal basis for cautions with conditions attached (conditional cautions). Divisions 1 to 3 also empower the Department to prepare a statement of available remedies (statement) that may be applied to a particular person who has engaged in anti-social behaviour or has committed an offence. The purpose of the statement is to outline in one place the out of court remedies that are available and how they might be applied where the person has engaged in anti-social or other criminal behaviour. These remedies may describe the kind of courses or actions that an offender may be required to undertake in order to satisfy the conditions attached to a caution or set out when a penalty notice may or may not be appropriate (see clauses 30 to 40). In any event, these remedies must fulfil one or more of the following objectives: rehabilitating a person, ensuring reparation is made for the behaviour or offence in question, or punishing the person.

There are two important principles in relation to cautions. The first is the extension of the power to issue cautions so that some may be issued with conditions being attached. The idea being that, given the nature of the incident, a caution may be appropriate provided the offender undertook specified tasks (perhaps by way of reparation) or attended a course such as ones relating to drug or alcohol misuse or anger management. The second key principle is that before a person is given a caution, or a conditional caution, reasonable steps must have been taken to consult (see clause 6) the victim of the offence.

In relation to the duty to consult the victim, the draft provisions dealing with this matter reflect consideration as to how to ensure the victim has an opportunity to have their voice heard when the courts deal with a case they are involved in. The Department is aware of concerns that justice should be balanced, unbiased and proportionate and recognises the

difficulty when a victim in one case may wish tough retribution on the defendant and in another the victim does not wish to be involved. Nevertheless, the Department believes it is right at this time to seek views as to what might be the most appropriate ways to ensure victims are involved or at least informed of decisions and outcomes being made in cases affecting that person. Clause 6 has been drafted in such a fashion as to place a duty on the decision-maker to take reasonable steps to consult the victim and to keep that person informed. Clause 12(3) to (5) has a different model of involvement. The Department considers there should be a single duty to consult and is open to views as to the extent to which the investigator, or other person responsible for deciding how to deal with an offender, should involve/consult with the victim.

Clause 11 requires the Department to prepare a statement of available remedies. This is a list of reparation, community or other actions which it might be appropriate for a person to carry out where they have engaged in anti-social behaviour or committed an offence and are to be dealt with without court proceedings.

Clause 12 provides the practical legal underpinning for out of court disposals/alternative remedies.

Clause 13 empowers conditions attached to cautions to be changed.

Clauses 14 to 16 deal with consequences where conditions attached to a caution are not complied with.

Clause 17 enables the Department to issue a code of practice in relation to conditional cautions which could include guidance about the circumstances in which such a caution may be given and the procedure to be followed. In relation to the procedure to be followed, guidance could be included on what constitute reasonable steps to consult the victim and reasonable steps to inform the victim of the outcome.

Clause 18 provides that probation officers may assist those authorised to give a conditional caution as to whether or not it should be given. Probation officers may also advise as to the conditions to be attached and any supervisory requirements.

Clause 19 requires a caution in respect of a person under the age of 18 to be given in the presence of an appropriate adult.

QUESTION 3

Conditional cautions

The Criminal Justice Strategy has four priorities:

- Prevention
- Appropriate Response
- Rehabilitation
- New ways of working

The provisions outlined in clauses 9 and 10 enable an offender not only to be cautioned but to be cautioned on condition the offender meets certain requirements (conditions) or undertakes certain programmes or tasks. The idea being not simply to acknowledge an offence has been committed but to ensure the offender is helped to avoid committing further offences and is enabled to be rehabilitated back into the community. This represents a new way of working.

- i. Do you have any comments or suggestions about the proposal to enable some offenders to be cautioned providing they meet certain conditions or undertake certain tasks?
- ii. If you have any specific concerns about this proposal, please outline them in detail here.

QUESTION 4

Statement of available remedies

Clause 11 requires the Department to prepare a statement of available remedies that may be used where the person responsible for dealing with an offender (a constable or other authorised person – see clause 5) does not think it appropriate to prosecute the offender, issue a fixed penalty notice or issue a conditional caution to the offender.

The purpose of this provision, and clause 12, is to expand (and provide the legal basis for) the range of alternative disposals or remedies available to address offending behaviour. This fits in with the principle that it is not always appropriate to send offenders to court.

Do you have any comments on this proposal?

QUESTION 5

Role of victims

Before administering a caution or detailing some other alternative out of court disposal clauses 6 and 12 require the person dealing with the offender to take reasonable steps to consult the victim.

Do you think the way the clauses are framed strikes the right balance in terms of empowering a person authorised to administer a caution or other remedy to deal with an offender in an appropriate manner whilst also requiring reasonable steps to be taken to consult the victim?

FINGERPRINTS, CAUTIONS AND FIXED PENALTY NOTICES

Clauses 20 to 26 are about enabling fingerprints to be taken where a person has been cautioned for a recordable offence. This fills a gap in the law as the acceptance of a caution is an admission of guilt and such persons should be treated accordingly in terms of fingerprinting. Clause 27 deals with an anomaly in Manx legislation that meant if a person accepted a caution then the caution could never become spent and would always have to be declared. If this clause and the accompanying Schedule are enacted then a simple caution would become spent immediately and a conditional caution would become spent 3 months¹ after it had been administered.

Clauses 30 to 40 provide for the issue of immediate financial penalty notices for a number of relatively low level offences set out in a table. It is recognised that there are certain offences and circumstances where a criminal sanction may be considered harsh, and can have long lasting consequences on people job prospects which can be considered disproportionate to the original offence.

- The Department would have the power to add or remove offences from the table by order, subject to approval by Tynwald.
- Subsection (5) [definition of "penalty notice"] of clause 31 states that if a person pays the financial penalty then the person is not liable to be convicted for the offence. This is important in terms of giving people as much opportunity as possible to avoid receiving a criminal conviction.
- Clause 33 means that if a person decides they do not wish to pay the financial penalty but instead wish to be tried in a court they may "request to be tried" and should do so within 21 days of the notice being issued (clause 34).
- Clause 35 empowers the Department to issue a code of practice about the issuing of penalty notices. Such a code would guide police and others authorised to issue penalty notices as to the exercise of their discretion, how a notice is to be given and with a view to encouraging good practice.

QUESTION 6

The table within clause 29 provides a list of offences regarded as low level offences, which the Department considers would be appropriate for the issue of a fixed penalty notice. The benefit of such a notice is that if the penalty is paid it means the offender does not acquire a criminal conviction, but is nevertheless punished appropriately for the offence.

- i. Do you agree with the list of offences set out in the table?
- ii. If you do agree with the list of offences, are there any other offences you think ought to be added to the table as suitable to be dealt with by means of a fixed penalty notice (or removed as not being suitable)?
- iii. If you do not agree with offences being dealt with by means of a fixed penalty notice, please say why and what alternative means of dealing with such offences you think should be used.

¹Subject to the provisions of the Rehabilitation of Offenders Act 2001 and the Rehabilitation of Offenders Act 2001 (Exceptions) Order 2001 and related matters.

[Intentionally blank]

DOMESTIC ABUSE

Within the terms of the Criminal Justice Strategy the Department is committed to providing legislation that enables an appropriate response to be made to crime through new ways of working. One of the key aspects of crime where it has become clear new powers are required is where crime is committed in the home or if not in the home nevertheless amongst or against persons within intimate or wider family relationships. Physical, psychological, emotional, financial, or any other abuse whether against or between adults or children within the home or wider domestic setting can be devastating on the victim and have wider consequences not least where children are involved. The Department is therefore bringing forward provisions within this Bill to address the issue of coercive or controlling behaviour. It is also aware the police are called to domestic incidents where it would be especially helpful if they had the necessary legal powers to take immediate steps to address the particular situation encountered. Accordingly the Bill contains provisions to enable them to issue domestic violence protection notices.

Clauses 41 to 47 enable the police to deal with some domestic situations to which they may be called by issuing a Domestic Violence Prevention Notice (a DVPN) to the person ("P") the officer/s have reasonable grounds for believing has been violent towards, or threatened violence towards, an associated person. The provisions relating to DVPNs/Domestic Violence Protection Orders (DVPOs) are civil rather than criminal and enable the police to act quickly if the particular situation merits it, whilst matters giving rise to the police action are assessed or investigated.

- The issue of a DVPN must be considered necessary to protect the associated person from P and must contain such measures as are considered necessary to achieve that objective, which may include evicting P from the premises.
- Subsection (9) of clause 41 outlines who the associated person may be. It is made clear that the provisions do not apply where the parties simply live in the same household by virtue of one being an employee of the other, a lodger, a tenant or a boarder.
- Within 48 hours of the DVPN being issued the police must apply to a court for a DVPO. A DVPO, if issued, must be in operation for not less than 14 days and not more than 28 days.
- The court need only be satisfied on the balance of probabilities that P has been violent towards, or threatened violence towards, an associated person and that making the DVPO is necessary to protect an associated person.

Clauses 48 and 49 are concerned with addressing controlling or coercive behaviour in intimate or family relationships. The drafting may need to be amended so the definitions² are matched. There are four elements to the offence –

- i. The offender engages in behaviour that is controlling or coercive on more than one occasion (the Bill uses the word "repeatedly" and the Department would welcome views on whether that word lacks specificity – e.g. how many occasions amount to "repeatedly"?);
- ii. The offender and the other person are personally connected (in relation to DVPNs and DVPOs, "associated");
- iii. The offender's behaviour has a serious effect on the other person; and

²e.g. in relation to DVPN/DVPOs references are to "P" and "associated person", whereas in respect of controlling and coercive behaviour the provisions refer to "A and B" and "personally connected".

- iv. The offender ought to know the behaviour will have a serious effect. The words “ought to know” are explained as that which a reasonable person in possession of the same information would know.

For behaviour to have a serious effect it is sufficient for the behaviour to cause the person to fear, on at least two occasions, that violence will be used against him or her by the offender; or it causes the person serious alarm or distress which has a substantial adverse effect on the person’s usual day to day activities.

Clause 49 enables the Department to issue guidance about the investigation of offences of controlling or coercive behaviour. In publishing the Bill and associated papers for consultation the Department is interested in views as to whether or not the guidance issued by the Department should also be taken into account by a court when trying a case or sentencing a person in the event of a conviction. The guidance could contain detail about the different ways in which, and the circumstances in which, behaviour may be defined as controlling or coercive and the aggravating or mitigating circumstances that may apply in any case. In preparing such guidance the Department would intend to consult widely before issuing such guidance.

QUESTION 7

The Bill contains the offence of “controlling” and “coercive” behaviour

The current offence follows the UK legislation. Do you think the current offence set out in clause 48 is –

- i. clear? Yes/No
- ii. if no, in what way would you make the offence clearer?

QUESTION 8

It is conceivable that understandings of what constitutes controlling or coercive behaviour will evolve over time. It could be useful if the Department had the power to provide definitive guidance to those responsible for investigating or trying allegations of such behaviour.

Would you support the principle of the Department having power to issue guidance about controlling or coercive behaviour that may be used to assist the police in investigating, the prosecutor in prosecuting and the courts in trying or, in the event of conviction, sentencing a person?

QUESTION 9

The Department recognises there are concerns that the courts should have appropriate sentencing powers in cases of domestic abuse. It also considers that this is a distinct area of behaviour where it is important to offer guidance (that can therefore be updated) not only to those who investigate and prosecute offenders but also to those charged with passing sentence.

- i. Do you think there should be the power to issue guidance that will assist the court, when passing sentence, in a case where domestic abuse is involved?
- ii. As an alternative to issuing specific guidance to the court to assist in the task of sentencing, would you prefer the law to state that if a case before it involved domestic abuse then the court must regard that as an aggravating factor? If you prefer this alternative approach, please tell us why.

QUESTION 10

In clause 48 and subsection (1) the maximum sentence for an offence of coercive or controlling behaviour is 5 years custody

The Department would be interested in your views as to whether you think the maximum sentence should be increased and if so, what level you think the maximum should be set at (7 years, 10 years or 14 years?).

QUESTION 11

Should these matters relating to Domestic Abuse be dealt with in a separate and specific Bill? If you think they should, it would be helpful if you would explain why.

QUESTION 12

Domestic abuse is an area of the law where the Department is very keen to ensure there are powers to deal with these crimes in a manner that protects people and is effective for victims. Do you have any suggestions of areas or ways in which you would like to see the law strengthened?