



CRIMINAL JUSTICE, POLICE POWERS AND OTHER AMENDMENTS BILL 2013

EXPLANATORY NOTES

These notes are circulated for the information of Members with the approval of the Member in charge of the Bill, the Hon. Juan Watterson BA (Hons), ACA, MHK

INTRODUCTION

- 1.** These explanatory notes relate to the Criminal Justice, Police Powers and Other Amendments Bill 2013. They have been prepared by the Department of Home Affairs in order to assist readers of the Bill. They do not form part of the Bill and have not been endorsed by the House of Keys.
- 2.** The notes need to be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill.

SUMMARY AND BACKGROUND

- 3.** Should the Bill be passed by the branches, and receive Royal Assent, it is proposed its provisions would be brought in individually, or together, by Appointed Day Order. It is intended the Bill's provisions would either substitute existing provisions or insert new provisions into the Bail Act 1952, the Police Act 1993, the Police Powers and Procedures Act 1998 and the Children and Young Persons Act 2001. It also makes incidental changes to 4 other Acts. A number of the provisions in this Bill were in the Criminal Justice (Miscellaneous Provisions) Bill 2010. The difference between the previous Bill and this Bill is that this Bill is only intended to be a vehicle by which existing legislation controlling police powers, or affecting the operational capability of the police, is clarified or revised and updated where necessary. This is in accordance with the wishes of the Committee of the House of Keys on that Bill.
- 4.** The issue of breach of bail has been introduced into the Bill because failure to comply with bail conditions has repercussions for the credibility of justice as well as resource implications for the police, who have to deal with the consequences of breaches of bail and arrest the person. It also has implications for victims and witnesses and militates against the interests of justice where, for example, breaches of bail involve interfering with witnesses or evidence or committing further offences whilst on bail. The Bill empowers the court to order the forfeiture of some or all of the security taken, should any condition of bail be breached, as opposed to just failure to surrender to custody, as at present.
- 5.** Some minor amendments have been inserted into the Bill to address human rights issues relating to juveniles and their treatment in police custody and those provisions that refer to "appropriate consent". In these matters a juvenile is to be taken as a person under the age of 18.
- 6.** The Island's international reputation is very important in terms of its positive identity. Some changes are needed to respond to a changing legal environment, the challenges of crime across borders, and compliance with International Monetary Fund Recommendations. The international community expects jurisdictions to co-operate in

fighting serious organised, and finance related, crime wherever it occurs and to be capable of offering mutual legal assistance in these matters. This is why provisions relating to search warrants and additional powers of seizure have been re-introduced through this Bill. It is recognised it is important the new search warrant powers are accompanied by judicial checks and balances.

7. The provisions within the Police Act 1993 enabling the Department to make regulations concerning the administration, discipline, pay and conditions of service of the Constabulary require updating following legal advice. Updating the legislation will mean it is possible, amongst other things, to make modern regulations governing the conduct, and securing the efficiency, of officers within the Constabulary.
8. The Bill was subject to consultation over a period of 10 weeks during June and July 2012. As part of the consultation process the independent Police Consultative Forum (PCF) arranged public meetings in the 4 Neighbourhood Policing Areas where officers of the Department delivered a presentation on the principal points of the Bill and responded to questions from those who attended. The Department considered the responses to the consultation submitted by email or letter, through the public meetings and the report prepared by the PCF. All responses were taken into consideration when the Bill was being redrafted following the consultation period.

9. EUROPEAN CONVENTION ON HUMAN RIGHTS

Section 16 of the Human Rights Act 2001 requires the Member moving the Bill to make a statement about the compatibility of the provisions of the Bill with the Convention rights (as defined by section 1 of that Act). In the opinion of the Member moving the Bill, the provisions of the Criminal Justice, Police Powers and Other Amendments Bill 2013 are compatible with the Convention rights.

10. FINANCIAL EFFECTS OF THE BILL

In the view of the mover of the Bill, it is not expected to result in significant financial implications. Furthermore, the mover does not expect there to be any personnel implications.

NOTES ON CLAUSES

PART 1

OPENING PROVISIONS

11. **Clause 1** provides that the short title of the Act will be the Criminal Justice, Police Powers and Other Amendments Act 2013.
12. **Clause 2** provides that the Act will come into operation by Appointed Day Order. The provisions of the Act may be brought in all together or at different times and subject to such transitional arrangements as are appropriate.
13. **Clause 3.** As this Act does not contain substantive provisions but amends other legislation, clause 3 provides that this Act will expire on the day after the last provision (or all provisions, if they are brought in at the same time) comes into operation.

Subsection (2) means that once the amendments or repeals in this Act are in operation in the Acts amended, the expiry of this Act does not do anything else to the Act, or Acts.

The main purpose of this provision is to ensure that when the Act has fulfilled its function, it ceases to exist and is removed from the statute book.

PART 2
AMENDMENTS TO THE BAIL ACT 1952

Bail conditions and breach

- 14. Clause 4** introduces sections 5 to 11, which amend the Bail Act 1952. The changes to this Act are designed to address the fact that approximately 1 in 12 arrests by the police have been for breach of bail. The Department considered carefully whether or not there are or may be human rights implications in making the changes proposed in the following provisions. The provisions outlined below merely extend the matters for which a person may forfeit any security (bail money) provided from the current sole purpose of ensuring a person surrenders to custody at the time, date and place set to ensure a person adheres to any other condition of bail. The provisions also set out a process by which, having confirmed the person breached his or her bail, forfeiture of some or all the bail money is effected. The Department was satisfied the provisions complied with human rights considerations and will help reduce the number of breaches of bail conditions, and hence arrests.
- 15. Clauses 5 & 6** amend sections 2 and 3 of the Bail Act 1952 by removing the words after "bail by recognizance" in the 3 instances these words occur. This is because currently such bail only relates to securing surrender to custody. **Clause 7** deals with the grant of bail and what are termed recognizance conditions.
- 16. Clause 7** substitutes existing section 3A with new provisions setting out what are called "recognizance conditions". These are conditions a court may impose on a person before or after release on bail to ensure the person surrenders to custody at the time, date and place required, does not commit an offence whilst on bail, interfere with witnesses or obstruct the course of justice. Further conditions may be imposed to ensure the person makes themselves available when required or does not leave the Island. A recognizance condition may be varied by the court.
- 17. Clause 8** repeals section 4, which provided for bail to continue throughout the criminal proceedings, unless varied, as this is now included within recognizance conditions 3A(1)(b)(v) and (3).
- 18. Clause 9** omits the words "with or without a surety or sureties" in section 8 because this is dealt with by **substituted section 3A**.
- 19. Clause 10** repeals section 12, which deals with bail on arrest as this is now incorporated in **new section 50D** of the Police Powers and Procedures Act 1998 (see clause 33).
- 20. Clause 11** substitutes section 15 with **new sections 15, 15A, 15B, 15C** and **15D**.

The purpose of the substitution is to do two things. Firstly, the presumption in the Act is altered so that if a person breaches any condition of his or her bail the court must consider the forfeiture of money, where a security is taken. Secondly, it sets out in statute the procedure to be adopted by the police and the court upon a person's arrest for breach of bail. In fulfilling these purposes the provisions speak in more up to date and immediate language.

Substituted section 15 authorizes a constable to arrest a person on four grounds relating to bail as set out in subsection (1). This is similar to current section 15 but uses plainer language. This provision re-locates section 5 of the Criminal Law Act 1981 into the Bail Act.

Subsections (2) to (4) and (6) to (8) deal with the how and the when in terms of bringing such a person before a court. A person ought to be brought before a court within 24 hours of arrest. If the person has been arrested just before they are due in court anyway then they must be brought before that court. In all other cases the

requirement is to bring them before a court. Subsection (5) states that the Deemsters may set out in writing the dates and times when a court may sit to deal with bail breaches. This is to give them the flexibility to regulate sittings for this purpose to meet need on the one hand and deploy court and court user (i.e. police, prosecution and defence) resources as is seen fit. Subsection (8) applies if the Deemsters have not specified court sitting days in writing and says that if the period of 24 hours would mean a court had to sit on a Sunday, Christmas Day, Good Friday or Tynwald Day then the court must sit the day after one of those days. This provision is in line with section 49 of the Police Powers and Procedures Act 1998, which requires a person to be brought before a court very quickly once they have been charged. Subsections (9) to (12) deal with procedural matters around arrests under the section and how it interacts with other legislation.

New section 15A deals with the procedure once a person is brought before a court. The court must order forfeiture of money (subsection (2)) unless it finds reasons not to do so. Where it does find reasons not to do so (subsection (3)), it must give those reasons. Subsection (2)(b) also sets out what else the court may do. Amongst other things, the court may vary or withdraw bail.

New section 15B states that if forfeiture is ordered then the court must order the forfeiture of an amount equal to or less than the "recognizance sum" (i.e. the money put forward in support of bail). Subsection (2) states that in determining how much money should be forfeited the court may take into account any reasonable excuse for breaching a bail condition. Subsection (3) provides that if the person has a reasonable excuse for breaking bail, the forfeited amount may be zero. Subsection (4) applies where the money was not taken by the court when bail was granted and is clear that the forfeited money will be collected as if it were a fine imposed by a criminal court. Subsection (5) means that a person remains liable for the full sum of money in the event they are readmitted to bail but breach bail again. Subsection (6) defines terms.

New section 15C defines three relevant terms.

PART 3

AMENDMENT OF THE CRIMINAL LAW ACT 1981

- 21. Clause 12** repeals section 5 of the Criminal Law Act 1981 because it appears in isolation in that Act. The provision, as updated, is re-enacted in substituted section 15 of the Bail Act 1952 (see clause 11).

PART 4

AMENDMENT OF THE SUMMARY JURISDICTION ACT 1989

- 22. Clause 13** amends section 83(1) (warrant endorsed for bail) so the warrant may be endorsed with a direction that the person on arrest must be released on bail by recognizance, with or without sureties, and subject to a condition (a recognizance condition) imposed in line with section 3A of the Bail Act 1952 (see clause 7 regarding "recognizance condition").

PART 5

AMENDMENT OF THE CRIMINAL JUSTICE ACT 1991

- 23. Clause 14** amends section 22 of the Criminal Justice Act 1991 so that section 22 incorporates the changes to the types of search warrant introduced by clauses 21, 23 and 24.

PART 6

AMENDMENT OF THE CRIMINAL JURISDICTION ACT 1993

24. **Clause 15** substitutes section 32(1) (bail pending determination of appeal) so that the language is similar to that in **substituted section 3A** of the Bail Act 1952.

PART 7

AMENDMENT OF THE POLICE ACT 1993

25. **Clause 16** introduces the amendments to the Police Act 1993 (the 1993 Act) set out in clauses 17 to 19.
26. **Clause 17** substitutes sections 8 and 8A of the 1993 Act and inserts **new sections 8B to 8G**. The purpose of this clause is to ensure the Department has the full powers necessary to make regulations that effectively govern the administration, equipping, conduct and discipline of the Isle of Man Constabulary.

Given that the administration of the police force is done through regulations, whereas elsewhere such matters would be dealt with by agreement or formal contract, it has become evident existing legislative provision does not permit the degree of flexibility necessary to fulfil the purpose outlined.

Substituted sections 8 and 8A reinstate and modernise the powers to make regulations relating to the government, discipline, administration and conditions of service of the police force and for special constables.

New section 8B empowers the Department to make regulations in respect of police cadets.

New section 8C empowers the Department to make regulations in respect of standards of, or for, police equipment.

New section 8D empowers the Department to make regulations requiring the police force to adopt particular procedures or practices or such of a particular description.

New section 8E empowers the Department to establish a body for the purposes of negotiating or consulting (or both) in respect of the conditions of service of police officers. For many years there have been regular meetings between the Department, the Chief Constable, the Superintendent and officers represented by the Isle of Man Police Federation called Tri-Partite meetings. Recently it was decided to change the title to the Joint Consultative Committee. It is considered appropriate to place these meetings on a statutory basis to enable, should circumstances favouring the current reciprocity in policing terms and conditions between the Island and the UK change, the establishment of an Isle of Man Police Joint Negotiating Committee. This provision is not about making any change in current reciprocal arrangements now but being equipped to do so, should all parties feel it is necessary.

New section 8F empowers the Department, in exercising its regulation making powers under new or substituted sections 8 to 8E, to confer discretionary powers or to delegate functions sufficient to enable the effective government, administration conduct and efficiency of the Constabulary.

New section 8G is about three things. Firstly, stating that Regulations made under sections 8 and 8A before they were substituted through this Bill will remain in operation and continue to have effect as if they had been made under the substituted, or inserted, provisions.

Secondly, declaring that any actions or decisions taken or made under the Regulations currently in operation, particularly those purportedly exercising discretion conferred by any of the regulations, were valid and will continue to be valid. This provision is necessary because the Department has been made aware of advice that the Department's powers to delegate in regulations functions to the Chief Constable and through him to subordinate officers may not be as extensive as is necessary. The relevant Regulations are specified in **Schedule 1** (which inserts **new Schedule 1A** into the 1993 Act).

Third and finally, subsection (2) of this new section confirms, for the avoidance of all doubt, that any other regulations (not specified in **new Schedule 1A**) made under the 1993 Act before the commencement of this new section are revoked. In looking at the records of regulations made under the 1993 Act it was considered appropriate to use this opportunity to clarify and confirm those regulations that are revoked and no longer apply.

- 27. Clauses 18 and 19** repeal section 11 and insert a **new Schedule 1A** into the 1993 Act. Section 11 is repealed because regulations for police cadets may now be made under substituted new section 8B. Inserted new **Schedule 1A** sets out those regulations currently in operation that are to be taken as if they were regulations made under substituted sections 8 to 8E.

PART 8

AMENDMENTS TO THE POLICE POWERS AND PROCEDURES ACT 1998

- 28. Clause 20** introduces clauses 21 to 49, which make various amendments to the Police Powers and Procedures Act 1998 (the 1998 Act).

Search warrants

- 29. Clauses 21 to 25** relate to search warrants. The provisions reflect changing practice in society in terms of criminal behaviour and address situations whereby a person suspected of an offence or offences may have been concerned or involved in the preparation or commission of the alleged offence or offences in more than one location. Sometimes the locations are known and can be specified in the application for a warrant. However, there are occasions when the extent of a person's criminal involvement only becomes evident upon the conduct of a search of a particular property. Where the evidence links that person to other properties it is necessary, at times, to swiftly conduct a search of other properties in order to prevent evidence being removed or destroyed. The search of property in one location may then lead back to a property previously searched which is where the need for multiple entry warrants can arise.

These provisions, and those in **clauses 26 and 27**, are also required in order to assist with the Island's international obligations in terms of working with other jurisdictions in the fight against crime across borders. It is considered that without these powers there is a risk the Island, in fulfilling its international (and neighbourly) obligations, will be less well equipped in legal terms than is necessary to maintain its reputation as an open and transparent jurisdiction, able and willing to undertake mutual legal assistance. These warrants will continue to be subject to judicial oversight.

- 30. Clause 21** amends section 11 of the 1998 Act to further provide for search warrants to enable a constable to enter more than one premises relating to a particular person and/or to enter the same premises on more than one occasion. A justice of the peace must be satisfied there are reasonable grounds for believing it is necessary to search other premises occupied or controlled by a particular person which are not specified in the application for a warrant. He or she must also be satisfied it is not reasonably

practical to specify in the application all the premises which might need to be searched. The justice of the peace must also be satisfied it is necessary to issue a multiple entry warrant in order to achieve the purpose/s for which the warrant is to be issued. If a warrant is issued for multiple entries, the number of entries may be limited, unlimited or subject to a maximum number.

It is worth noting that by virtue of section 3 of the Justices Act 1983, persons holding the offices of Deemster and High Bailiff are ex-officio justices (of the peace). Section 3 of the Interpretation Act 1976 clarifies that "High Bailiff" includes the Deputy High Bailiff. In other words, even where the law specifies a justice of the peace, the person scrutinising the warrant may be a more senior judicial person.

- 31. Clause 22** inserts **new section 11A** which makes further provision in relation to persons who may accompany constables. This is to provide further legal protection for those a constable sometimes feels it necessary to ask to accompany him or her on a search. The kind of person, referred to as "suitable person", who may accompany a constable is a person with scientific or other technical expertise (such as accountants) which the constable believes will assist. This provision will ensure that persons who accompany police officers in the execution of warrants can play an effective role in searching for, and seizure of, evidence. The person accountable for the conduct of a search is the constable to whom the warrant was issued and the senior officers under whose authority the constable serves.
- 32. Clause 23** amends section 18 (search warrants – safeguards) to take account of the amendments to section 11. This clause expands the details required to be specified on an application for a warrant to provide for applications for multiple entry to the same premises, warrants to permit entry to all premises occupied or controlled by a particular person, or more than one specified premises.
- 33. Clause 24** amends section 19 (execution of warrants) by altering subsection (3) (validity of warrant) from one month to three months and inserting after subsection (3) two new subsections. New subsection (3A) provides that in the case of an all premises warrant issued by a justice of the peace, no premises which have not been specified in it may be entered and searched unless an officer of at least the rank of inspector has authorised entry to them in writing. New subsection (3B) similarly prohibits entry and search of premises for a second or subsequent time under a warrant which authorises multiple entry unless an officer of at least the rank of inspector authorises such entry in writing. After paragraph (b), in subsection (9), further provision is made requiring the constable executing a warrant to endorse the warrant separately in respect of each set of premises entered and searched as to whether the articles or persons sought were found; and whether any articles were seized, other than articles which were sought.
- 34. Clause 25** amends Schedule 1 (Special Procedure) to take account of the amendments to section 11 providing for entry on more than one occasion to the same set of premises or entry to specified premises or to any premises occupied or controlled by a particular person.

Additional powers of seizure

- 35. Clause 26** inserts new Part IIA which provides for additional powers of seizure. The powers in new Part IIA are necessary where something the police are entitled to seize is inextricably bound up with other material. The power to seize material also extends to material that it is believed may lawfully be seized but where it is not reasonable or practicable to make that judgement on the premises being searched. The background to the provisions within this clause are that whilst the Island has its own judicial system, the decisions of the higher courts in the United Kingdom, in similar relevant areas of law, are deemed to be ones it is sensible to have regard for. Note has been

taken of the decision of the Divisional Court (in the United Kingdom) in *R v Chesterfield Justices and the Chief Constable of Derbyshire ex parte Bramley*, which was given on 5th November 1999, which brought into focus the difficulties faced by the police and other law enforcement agencies, in that jurisdiction, where material they are entitled to seize is contained within a larger collection of material some of which they might not be entitled to seize.

The difficulty facing the police is that there are circumstances where it is not practicable to establish on the premises subject to the search which material can be seized and which cannot. This may be because of the bulk of the material. It may be because relevant material is contained within the same document or set of documents as material which is protected from seizure. The most difficult circumstances relate to material held on computer media. It may be impossible to establish which material is relevant and seizable without processing the data forensically. That may involve removing the computer and/or imaging the entire contents of its hard disks and/or removing other storage media.

Outline of proposals

The new sections do two separate things. First they deal with the problem identified by the United Kingdom Bramley case. They give the police powers to remove material from premises so that they can examine it elsewhere, where it is not possible to examine it properly on the premises, due to constraints of time or technology. Second, they recognise the fact that with the advent of modern technology and the expansion in the use of computers, it is often important for investigators to be able to seize and forensically examine an entire disk or hard drive, in order to determine when individual documents have been created, amended and/or deleted. This inevitably means retaining all the material on the hard drive, including possibly legally privileged material. The new sections give the police and others the power to retain this inextricably linked material. The new sections also provide a mechanism whereby an application can be made to a Judge (see paragraph 58) for the return of material seized. In certain circumstances there will be an obligation on the police to secure the material in question pending the determination of such an application.

The Department takes the view the Bramley principle applies equally to all powers of seizure given to the police and therefore the new powers are free standing powers which can only be exercised where a person could have exercised an existing power of seizure. **New Schedule 1A** to the 1998 Act lists these existing powers. The underlying policy is that whilst the police and others can use the new powers to remove material to examine it elsewhere, they are only able to retain material which they have power to seize under their existing powers. The only exception to that is the new power to retain inextricably linked material.

New section 26A provides the police with further powers to seize anything they find whilst lawfully on premises which they have reasonable grounds for believing may contain something the constable is authorised to search for on those premises.

New section 26B provides additional powers of seizure from the person and makes similar provision in relation to a search of any person. It is necessary because, for example, individuals might have on them handheld computers or computer disks which might contain items of electronic data which the police would wish to seize. Alternatively, they could be carrying a suitcase containing a bulk of correspondence which could not be examined in the street.

New section 26C requires the person exercising a power to seize additional material under **new section 26A** to provide the occupier of the premises with a written notice specifying what has been seized and the grounds on which it has been seized, as well as information about the scope to apply to a Judge for the return of seized material and about applying to attend any examination of the material seized. In like manner a written notice must be provided to a person who has been searched under **new section 26B**.

New section 26D provides for the examination and return of seized property under section 26A or 26B. It deals with the examination and sets out what material does not need to be returned. The aim is to enable the police to retain whatever they could have seized had the examination taken place on the premises. Subsections (3) and (5) permit the retention of inextricably linked material. This is material which it is not reasonably practicable to be separated from material that can be seized without prejudicing the use of that seizable material. For example, it means the police may retain a whole computer hard drive which contains a certain document constituting evidence of an offence if the rest of the hard drive is needed to prove when that document was created, amended or deleted. Subsection (4) refers to giving the occupier or some other person with an interest in the property an opportunity to be present, or represented, at the examination. The person who seized the property must examine it as soon as practicable. If any of the property seized is not necessary for the purposes of the investigation, and can be separated from the other property, it should be returned to the person with an interest in it.

New section 26E imposes an obligation to return items subject to legal privilege.

New section 26F imposes an obligation to return excluded (such as journalistic material and personal records which are held in confidence) and special procedure material.

New section 26G concerns property seized by constables and authorises the retention of that property subject to certain restrictions. These are that the property was seized by a constable carrying out a lawful search whilst on premises in connection with the commission of an offence. The constable must have reasonable grounds for believing the seized property is evidence in relation to any offence and that its retention is necessary to prevent it being lost, altered, concealed or destroyed.

New section 26H sets out when property obtained under seizure powers of certain enactments may be retained and provides that the enactments ("relevant provisions") must be specified in an order made by the Department.

New section 26I sets out to whom property should be returned. This is normally the person from whom it was seized unless the police consider someone else has a better claim to it. If property is found on premises, subsection (4) provides that the person from whom the property is seized is a reference to the occupier. Subsection (5) defines the occupier of premises.

New section 26J gives anyone with a relevant interest in the seized property the right to apply to a Judge for its return. The grounds on which an application for the return of the property can be made are set out and, on such an application, the court can order the return of material or, amongst other things, order that it be examined, for example, by an independent third party. Provision is made to enable the police or other body in possession of the property to make an application to keep any material which they would otherwise be obliged to return if it would immediately become appropriate to issue a warrant enabling them to seize that material or to demand its production in the circumstances set out in subsection (7)(b). This means, for example, that the police will not have to return material which might be of value to

them and then have to immediately obtain a warrant to seize it back. Subsection (8) means that the court can also authorise the retention of not just what the police or others could seize under a warrant but also any material which is inextricably linked to it.

New section 26K: In certain circumstances an application under new section 26J will mean the police have to secure the material seized pending the hearing of that application. This new section sets out the circumstances in which a duty to secure material seized arises. Whilst it can only arise following the seizure of material under **new sections 26A** or **26B**, there is no duty to secure simply where it is alleged that the police have possession of irrelevant material. The whole point of the new powers is that the police can seize a bulk of material in order to separate out the relevant from the irrelevant. The circumstances where the duty to secure arises are where an application under **new section 26J** is made and at least one of the conditions set out in subsections (2) and (3) is satisfied. In particular the duty to secure will arise whenever it is claimed that the material seized includes legally privileged material which should be returned. This means that the person from whom the material is seized can, by making such an application, prevent the police or others looking at any material seized under **new sections 26A** or **26B** pending the hearing before the Judge. This gives further protection to legally privileged material. Similar protection is given to special procedure material and excluded material where the legislation containing the underlying power of seizure itself protects those categories of material.

New section 26L sets out the duty to secure which arises by virtue of **new section 26K**. The duty ensures that the person who has possession of the seized property does not, for example, examine or copy it other than with consent of the applicant or in accordance with the directions of the court.

New section 26M provides that inextricably linked property should not be examined, copied or used for any purpose other than for facilitating use in any investigation or proceedings of property to which it is inextricably linked.

New section 26N provides that almost all of Part IIA will apply to copies as it does to originals.

New section 26O gives a general interpretation of Part IIA.

New section 26P provides that **new Schedule 1B** (see clause 27 below) has effect and empowers the Department to amend Part 1 of that Schedule.

- 36. Clause 27** inserts **new Schedules 1A and 1B**. Part 1 of Schedule 1A outlines powers in legislation to which **new section 26A** and certain other provisions of Part IIA apply (additional powers of seizure from premises) apply. Part 2 outlines the powers and legislation to which **new section 26B** and certain other provisions of Part IIA apply (additional powers of seizure from the person) apply. Part 3 relates to the powers to which **new section 26F** and certain other provisions of Part IIA apply (obligation to return excluded and special procedure material) apply. **New Schedule 1B** applies some enactments and makes some minor and consequential amendments.

Powers of arrest

- 37. Clause 28** substitutes sections 27 and 28 of the 1998 Act and inserts a **new section 28A**. **Substituted section 27** provides that the exercise of arrest powers by constables will be subject to a test of necessity. An arrest will only be justified if the constable believes it is necessary for any of the reasons set out in subsection (5).

The power of arrest predates the introduction of the 1998 Act. The changes reflect the fact there is no criminal offence for which, somehow, a person may think they cannot be arrested. They clarify the power of arrest and ensure it is clear to police officers that other options must be considered before making an arrest. An officer

must be able to show the arrest was both necessary and justifiable. The existing police Code of Conduct governing the exercise of the power of arrest will be revised to reflect the requirement to show it was necessary for the officer to make the arrest.

Substituted section 28 relates to the exercise of the citizen's power of arrest. Subsection 28(3)(b) restricts the power to those occasions where it is not reasonably practicable for a constable to make the arrest. The right or power of the citizen to make an arrest, if necessary, is part of the fabric of civil society. It is a partnership between the citizen and the Constabulary. There are safeguards so it is clear the primary responsibility in all cases is for a constable to take responsibility for making arrests.

New section 28A empowers the Department to repeal or amend any enactment which refers to "arrestable offence". This can only be used where an enactment has not already been amended by virtue of **Part 1 of Schedule 3** to the Bill to which these Notes refer (introduced by subsection (3) of **clause 28**).

Bail elsewhere than at police station

38. Clause 29 amends section 33 of the 1998 Act. It restates the general provision in section 33 that a person arrested should be taken to a police station but makes that subject to certain conditions. Substituted subsection (5) and inserted subsection (5A) state that a person must be released without bail if there are no grounds for keeping a person under arrest or releasing that person on bail. However, substituted subsections (7) and (8) enable a delay in the charging or bailing of a person in order to carry out such investigations as are necessary immediately. Where there is a delay the reasons for it must be recorded when the person first arrives at a police station or is released on bail.

39. Clause 30 inserts new **sections 33A to 33D** into the 1998 Act.

New section 33A enables a police officer to grant bail at the scene of arrest. The only requirement or condition is that the person must attend a police station (at a later date or time).

New section 33B requires the police to give such a person a notice in writing specifying the offence and grounds for which they have been arrested and the date, time and police station they are required to attend.

New section 33C is supplemental and deals with procedural matters around bail under **new section 33A**.

New section 33D deals with those instances where a person is bailed from a place to attend a police station at a time and date stated, yet fails to do so. They may be arrested and then taken to a police station.

Arrested juvenile

40. Clause 31 amends the definition of "arrested juvenile" in section 40(13) of the 1998 Act. Currently the definition specifies that an "arrested juvenile" is a person arrested who appears to be under the age of 17. The definition is changed here to "under the age of 18". This is to take account of a human rights judgement in respect of similar legislation in the United Kingdom. This means, in the case of any arrested person who is (or appears to be) under the age of 18, the custody officer will have to ensure an appropriate adult is present.

Remand of suspected drug offenders to detention

- 41. Clause 32** inserts a **new section 49A** in the 1998 Act entitled "Remand of suspected drug offenders to detention". The new section will enable a person charged with an offence of possession of a controlled drug, or a drug trafficking offence, to be brought before a court of summary jurisdiction and the court may, if it considers it appropriate to do so, remand the person to the custody of a constable for a period not exceeding 192 hours.

This provision will enable any further evidence the police have reason to believe is on or in the prisoner to pass through the body. For the purposes of this provision a police station will be designated as an institution under the Custody Act 1995 and the prisoner will be treated as a remand prisoner.

Police bail

- 42. Clause 33** substitutes section 50 and inserts new sections 50A to 50E into the 1998 Act, which empowers the police to impose conditions on bail after arrest to ensure the person surrenders to custody at the time, date and place required, does not commit an offence whilst on bail, interfere with witnesses or obstruct the course of justice. Further conditions may be imposed to ensure the person makes themselves available when required or does not leave the Island. The imposition of conditions of bail is subject to authorisation by an officer of at least the rank of sergeant. A person who is subject to such bail conditions may appeal to a senior officer or, if still not satisfied, to a court of summary jurisdiction who may, amongst other things, vary the conditions, or withdraw bail.

If a person has been charged with an offence, section 49 of the 1998 Act requires that person to be brought before a court on that or the next day (or next available day if over a weekend or certain other public holidays). It follows that if the person is unhappy with his or her bail conditions he or she will be able to get them considered by a court very quickly. What the provision does is to enable some of the persons arrested and charged to be released earlier, rather than having to be held in police custody until the next court sitting.

- 43. Clause 34** amends section 52 of the 1998 Act and makes other amendments consequential on that amendment. The effect is to refer consequences of arrest for breach of bail given by police to the procedure set out under section 15 to 15D of the Bail Act 1952.

Child arrested for serious offence

- 44. Clause 35** concerns a child arrested for a serious offence. It substitutes new provision for section 55 of the 1998 Act. (The concept of an arrestable offence is removed in clause 28).

Currently, except for homicide, a child suspected of a serious offence cannot be required to assist the police with their enquiries. It is regrettable, but there are occasions when persons aged 10 or over but under 14 are suspected of involvement in some really quite serious offences (other than homicide), such as arson. The substitution does not expressly specify all the offences for which a child may subsequently be required by the police to assist them. Instead it replicates language found in section 76(14) of the Children and Young Person's Act 2001.

Intimate searches

- 45. Clause 36** defines “juvenile”, for the purposes of obtaining appropriate consent for an intimate search in connection with drugs, as a person under the age of 18. The rank of officer who may authorise an intimate search is inspector or above. This is to take account of a human rights judgement in respect of similar legislation in the United Kingdom.

Police powers relating to drugs

- 46. Clause 37** inserts a **new section 58A** into the 1998 Act and deals with those situations where a person is arrested either on suspicion of a drug related offence or on an unrelated matter but where, upon arrest, it is suspected the person under arrest has drugs concealed somewhere on their person.

This enables a police officer of at least the rank of inspector to authorise an x-ray or ultrasound scan (or both) of a person suspected of swallowing or concealing a Class A drug which he or she had in his or her possession with intent to supply or export unlawfully, where the person has been arrested for an offence and is in police detention. An x-ray may not be taken or an ultrasound scan undertaken without the suspect's consent in writing. The person must be informed the x-ray or ultrasound has been authorised and the grounds on which it has been authorised. Subsection (4) provides that the x-ray or ultrasound scan may only be taken at a hospital, registered medical practitioner's surgery or other place used for medical purposes and only by a registered medical practitioner or nurse. Subsections (5) and (6) require the custody record for the person to be updated to include the information as soon as practicable after the x-ray has been taken or ultrasound carried out. The Chief Constable's Annual Report must contain information about the use of this provision over the relevant period. Subsection (9) permits appropriate inferences to be drawn by a court or jury where a person refuses without good cause to consent to an x-ray or ultrasound scan.

Audio and visual recording of interviews

- 47. Clause 38** substitutes existing provision, which currently provides for the tape-recording of interviews. **Substituted section 63** provides for the audio recording of interviews (i.e. the recording of interviews may be done using modern technology). The substituted provision also restricts the visual recording of interviews to those permitted by order. Whether an interview is audio or visually recorded, or both, the Department must make a code (or codes) of practice about the conduct of such interviews.

Fingerprints

- 48. Clause 39** amends section 64 to enable the taking of a person's fingerprint whilst detained at a police station where the person has been convicted of a recordable offence, or has admitted their guilt and accepted a caution.

Samples taken elsewhere than at a police station

- 49. Clause 40** amends section 65 and provides that an intimate sample may be taken from a person who is not in police detention, at a place other than a police station, if an officer of at least the rank of inspector authorises it and the person consents.
- 50. Clause 41** amends section 66 and makes similar provision in relation to non-intimate samples.

Fingerprints and samples: supplementary provisions

- 51. Clause 42.** Substituted subsection (1) of section 67 provides for the taking of fingerprints, impressions of footwear or samples from a person suspected of having committed a recordable offence. It also provides for those samples to be checked against other such records held by law enforcement agencies specified in new subsection (1A).

Photographing of suspects

- 52. Clause 43** amends section 68A to enable the photographing of suspects at a place other than a police station.

Consent to searches etc

- 53. Clause 44** amends the references to age in the definition of "appropriate consent" in section 69(1) so that it refers to persons under the age of 18 instead of 17. This change is required in the light of a recent human rights ruling in the United Kingdom in relation to the treatment of juveniles in police custody.

Codes of practice

- 54. Clause 45** substitutes section 75 and is proposed to ensure the Department's powers to make codes of practice are commensurate with the full range of police activity. This provision is designed to ensure in future, if there is an area of police activity not currently covered by a code, that there is no legal barrier to issuing such a code.
- 55. Clause 46** makes consequential amendments to section 76 (codes of practice – supplementary).

Meaning of "serious offence"

- 56. Clause 47** is consequential on the changes made to the power of arrest set out through clause 28. With the removal of the concept of the "arrestable offence" it follows that there can be no "serious arrestable offence" either. The definition now centres around "serious offence". Practically speaking it means the difference in treatment formerly applied as between those detained for an "arrestable offence" and those detained for a "serious arrestable offence" are retained as between those arrested for an offence and those arrested for a serious offence.

General interpretation

- 57. Clause 48** adds interpretive provisions for "all premises warrant", "registered medical practitioner", "registered nurse", "serious offence" and "specific premises warrant" and repeals definitions relating to persons under the age of 18 and of "arrestable offence". These changes are consequential on the amendments made by the other clauses.

Miscellaneous

- 58. Clause 49** substitutes the word "Judge" for "Deemster". Judge is short for "judge of the High Court" by virtue of section 3 of the Interpretation Act 1976. Section 3 of the High Court Act 1991 provides that "Judge of the High Court" includes Deemster and other judicial persons. The effect of the change is to enable the First Deemster to assign functions to his colleagues as he sees fit or as befits the nature of the matter to be dealt with.

PART 9

CHILDREN AND YOUNG PERSONS ACT 2001

59. Clause 50 inserts **section 49A** into the Children and Young Persons Act 2001 to enable a constable to return a child reported missing to the adult responsible for that child's welfare. The person responsible for a child's welfare may be a parent or guardian, any other person who has care of the child or who has assumed responsibility for the child's welfare, or the Department of Social Care (DSC) where the child is being looked after by that Department. Under this Act a child is defined as a person under the age of 18 years of age.

In the event the police locate a child reported to them as missing but have concerns for that child's welfare, they retain the power under section 45 to take the child into police protection. The exercise of this power to return a child reported missing will be subject to a code of practice prepared by the Department of Home Affairs after consultation with interested parties (such as the DSC).

60. Schedule 1 lists the regulations currently in operation that are to continue to have effect, after the amendments in Part 7 are brought into operation, as if they had been made under the **substituted sections 8 to 8E** of the Police Act 1993.

61. Schedule 2 inserts **new Schedules 1A and 1B** into the Police Powers and Procedures Act 1998. These new Schedules relate to the additional powers of seizure inserted by clauses 26 and 27.

62. Schedule 3 lists the amendments to enactments caused by the removal of the concept of the "arrestable offence" (and the "serious arrestable offence") through **clause 28**.