Response to Department of Environment Consultation on Fixed Penalty Guidance and Regulations

Summary

Whilst welcoming initiatives to improve the quality of the local environment, concerns are raised regarding the proportionate and reasonable use of fixed penalty notices in respect of environmental offences. The high levels of poverty that exist in Northern Ireland must be acknowledged along with the potential difficulties that this may present both in relation to paying the fixed penalty or default of any subsequent fine. In relation to using the fixed notice penalty against children, it is acknowledged that the draft guidance does recommend that district councils compile age-specific procedures and protocols, however it is our view that the principle of fining children should be discontinued particularly given their dependent status.
1. The Northern Ireland Human Rights Commission (the Commission) is a statutory body created by the Northern Ireland Act 1998. It has a range of functions including reviewing the adequacy and effectiveness of Northern Ireland law and practice relating to the protection of human rights, advising on legislative and other measures which ought to be taken to protect human rights, advising on whether a Bill is compatible with human rights and promoting understanding and awareness of the importance of human rights in Northern Ireland. In all of that work the Commission bases its positions on the full range of internationally accepted human rights standards, including the European Convention on Human Rights (ECHR), other treaty obligations in the Council of Europe and United Nations systems, and the non-binding ‘soft law’ standards developed by the human rights bodies.

2. We are pleased to comment on the draft guidance and regulations relating to fixed notice penalties under the Clean Neighbourhoods and Environmental Act (NI) 2011 (hereafter the Act). Whilst welcoming initiatives to improve the quality of the local environment, we wish to raise some concerns regarding the proportionate and reasonable use of fixed penalty notices in respect of environmental offences.

3. We note that the Act strengthens legislative powers available to district councils to respond to local environmental issues. Also that the Act widens the scope of persons or bodies that may issue fixed penalties and provides some local discretion regarding specified amounts and discounts.

4. The Commission would like to take this opportunity to raise a number of concerns about the draft guidance including proportionality of response; a lack of alternatives to custody for fine default and the treatment of children and vulnerable adults.

Proportionality

5. There is a wide range of environmental offences covered by the legislation including litter, graffiti and fly posting, offences under dog control orders and noise from domestic premises. Where

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1 Northern Ireland Act 1998, s.69(1).
2 Ibid, s.69(3).
3 Ibid, s.69(4).
4 Ibid, s.69(6).
the option of trial is not exercised, the issuing of a fixed penalty notice removes the separation of functions of investigation, prosecution and adjudication, and it is advised that a robust mechanism is put in place to ensure effective training and oversight of the new powers in practice. This to ensure compliance with the ECHR (Article 6).

6. Net widening through an ‘over-enthusiastic’ application of the fixed penalty notice, or in pursuit of meeting targets, may run the risk of minor offending behaviour that may previously have been disregarded or dealt with informally, escalating to the use of a penalty. Clear guidance must be put in place to ensure that responses are proportionate, reasonable and fully accountable.

Non-payment of fine

7. It is noted that fixed penalty amounts range from £50-£80 (for offences with a default of £75) and £75 to £110 (for offences with a default of £100). In considering the imposition of a fixed penalty as a reasonable and proportionate response, the high levels of poverty that exist in Northern Ireland must be acknowledged along with the potential difficulties that this may present both in relation to paying the fixed penalty or default of any subsequent fine.

8. In the event of a successful prosecution for non-payment of a fixed penalty fine, it is understood that it will become the responsibility of the court to pursue any unpaid fine. As the Commission has highlighted previously, there is still no alternative to custody for those who default on a fine. Supervised Activity Orders (SAOs) were legislated for in the Criminal Justice (Northern Ireland) Order 2008 (further amended in the Justice Act 2011), but are not yet available as a disposal. This represents, in our view, a serious gap in sentencing options for low level offences. It is particularly disappointing given that the Government has drawn attention to the positive outcomes in reducing offending that community sentences may generate.

9. We are aware of some concerns about the introduction of SAOs in that they may represent an ‘up-tariffing’ (i.e. that a community sentence might be imposed rather than a fine, with potential for escalation in case of breach). However, adequately resourced alternatives to custody that minimise the risk of breaches urgently need to be put in place. This, in our view,
would be in accordance with the Department of Justice Addendum to the Programme for Government which signals its intention to “develop more effective ways of dealing with fine default” and to ensure that appropriate options are available for sentencers dealing with less serious offending.

10. Within this it is important that departments adopt a ‘joined up’ approach to tackling low level offending behaviour. For example, the Department of Justice is currently consulting on fine default and the outcomes of the Prison Review Team and the Youth Justice Review are pending. Also the Executive has given a commitment to work towards the elimination of poverty as expressed in its Programme for Government 2008-11, with a key aim to work toward the elimination of child poverty.

Children

11. The Commission is concerned to note that the Department does not take a view on whether to use the fixed penalty notice against children, and that it is viewed in terms of a “political decision for a district council” to take. This, in our view is against the best interests of the child and the principle of fining children should be discontinued particularly given their dependent status.

12. It is acknowledged that the draft guidance does recommend that district councils compile age-specific procedures and protocols in conjunction with relevant agencies and that the principle of ‘last resort’ should apply to the issuing of fixed notice penalties to anyone under 18. Within this different procedures are recommended for children aged between 16-17 and those aged between 10-15 years.

13. The Commission has already expressed its view that it is not in the ‘best interests’ of a child to be issued with a fixed notice penalty. As such, the Commission welcomes consideration in the draft guidance of alternatives to fixed penalty notice enforcement that might be undertaken including school based education, issuing of warnings; and where an offence is so trivial that action would not be in the public interest. Further information is required as to how Councils intend to reflect in their procedures and protocols what alternative actions might be taken so as to ensure adherence to the ‘best interests’ principle. For example, in terms of school based education, has there been
engagement with the Department of Education and the Council for the Curriculum, Exams and Assessment (CCEA) as to how this might be taken forward?

14. In assessing options that provide alternative diversionary measures for children and young people in conflict with the law, it is recommended that full consideration be given to the particular contribution that CBRJ schemes can make in meeting rehabilitative and restorative justice objectives and diversion of children away from more formal criminal justice processes.

15. However, where a district council decides that it will take enforcement action against children serious human rights concerns are raised regarding a child’s ability to pay a fine given their dependent status. It is important that the aims of the youth justice system encompass the overarching principle of the best interests of the child. Here the Commission draws attention to relevant international standards in this regard.

16. Article 3 of the UN Convention on the Rights of the Child (UNCRC) provides that:

   in all actions concerning children whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

17. In the context of criminal justice, the Committee on the Rights of the Child in its General Comment No.10 elaborates on this principle, stating:

   Children differ from adults in their physical and psychological development, and their emotional and educational needs. Such differences constitute the basis for lesser culpability of children in conflict with the law. These and other differences are the reasons for a separate juvenile justice system and require a different treatment for children. The protection of the best interests of the child means, for instance, that the traditional objectives of criminal justice, such as repression/retribution, must give
way to rehabilitation and restorative justice objectives in
dealing with child offenders.\(^5\)

18. While commending the UK Government for efforts to harmonise
its legislation with the Convention on the Rights of the Child, the
UN Committee was clear that “the principle of the best interests
of the child is still not reflected as a primary consideration in all
legislative and policy matters affecting children, especially in the
area of juvenile justice” (emphasis added).\(^6\) The Committee
urged the UK to rectify this and to fully implement international
standards pertaining to youth justice. The Commission submits
that concerns remain as to whether this principle is appropriately
reflected in the legislative and practice framework in Northern
Ireland. This point takes on particular significance in situations
where there may be an inability on behalf of the child (or the
child’s parent/guardian) to pay the fixed notice penalty and the
child is subsequently prosecuted in the youth court.

**Age of criminal responsibility**

19. The age of criminal responsibility in Northern Ireland, legislated
for in the Criminal Justice (Northern Ireland) Order 1998, is ten.
It is important to note that this is below the minimum
recommended by the UN Committee on the Rights of the Child
which is clear that any limit below the age of 12 is not
internationally acceptable. Indeed, in relation to the UK, the UN
Committee has recommended on three separate occasions that
the minimum age of criminal responsibility be increased to
between 14 and 16 years.\(^7\) The Council of Europe’s
Commissioner for Human Rights made a similar recommendation
in his comments to Government following his visit to the UK in
2008.\(^8\) The age of criminal responsibility in the UK was assessed

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\(^6\) Committee on the Rights of the Child, Concluding Observations on the UK’s third

\(^7\) Committee on the Rights of the Child, Concluding Observations on the UK’s third
and fourth periodic report, 3 October 2008, CRC/C/GBR/CO/4; Concluding
Observations on the UK’s second periodic report, 9 October 2002, CRC/C/15/Add
188; Concluding Observations on the UK’s initial report, 15 February 1995,
CRC/C/15/Add 34.

\(^8\) Memorandum by Thomas Hammarberg, Commissioner for Human Rights of the
Council of Europe, following his visits to the United Kingdom (5-8 February and 31
March – 2 April 2008) (available: https://wcd.coe.int/wcd/ViewDoc.jsp?id=
1356037&Site=COE&P97_12967).
as “manifestly too low” by the European Committee of Social Rights in its Conclusions XVII-2 (United Kingdom) Articles 7, 8, 11, 14, 17 and 18 of the Charter (2005).9

20. The Commission has raised the issue of the low age of criminal responsibility both nationally and internationally, including in its advice to the Secretary of State for Northern Ireland on a Bill of Rights for Northern Ireland issued in December 2008. The Commission continues to recommend the raising of the age of criminal responsibility in Northern Ireland as a matter of urgency.

Anti-Social Behaviour Orders

21. The reference to Anti-social Behaviour Orders (ASBOs) is noted as an alternative action to be considered by district councils as a response to more serious offences, “such as graffiti, or persistent offending”. The Commission is opposed to ASBOs, particularly as proceedings blur the division between civil and criminal law. Breach of the civil order is a criminal offence punishable by imprisonment. Not only do ASBOs apply equally to children from the age of 10 years, but they have been sought disproportionately against children.

22. The Commission reiterates its concerns that ASBOs indicate a fundamental failure to observe its obligations regarding the best interests of the child under Article 3, and to uphold the requirements of Article 40 of the UNCRC in relation to treatment of a child involved in the administration of juvenile justice.

23. The Commission draws attention to the Concluding Observations of the Committee on the Rights of the Child, which reporting in October 2008, recommended that “the State party reconsider the ASBOs …… insofar as they may violate the rights of children to freedom of movement and peaceful assembly” … .

Vulnerable persons

24. We note the reference (at C6, page 36) to circumstances where it would not be appropriate to issue a fixed penalty notice. One example given is when an “alleged offender” seems confused

“through some form of mental impairment”. The draft guidance advises that in such instances the enforcement officer is advised “to seek support from the relevant agency” and that the issuing of a fixed penalty notice should be viewed as a secondary issue.

25. Further clarification is required regarding what actions may be taken in seeking support from the “relevant agency”. As it stands the guidance potentially raises some concerns regarding the principles of ‘autonomy’ and ‘consent’. The guidance should ensure compliance with Article 25 (Health) of the United Nations Convention on the Rights of Persons with Disabilities (CRPD). The meaning of Article 25 (Health) of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) is clarified by reference to Article 3, General Principles, which reads:

“The principles of the present Convention shall be: (a) Respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons”.

26. It is understood that the DHSSPS is taking work forward to ensure that new mental health and capacity legislation will be introduced in the Assembly by December 2011. As such, it is advised that any consequent action taken by an enforcement officer towards a person who may have a mental health condition, has the principle of autonomy as its guiding rule.

27. ECHR (Article 6) rights are also engaged in respect of a positive obligation to take account of age, level of maturity and intellectual and emotional capacities in the administration of justice.

**Appeals process**

28. It is noted that the guidance states that there is “no obligation” for a district council to offer an appeals process but that it considers it to be “good practice” to offer one. In order to ensure access to civil and administrative justice (ECHR, Article 6) the Commission strongly endorses the view that clear and

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10 Women’s Offending Behaviour in Northern Ireland: A Strategy to Manage Offenders and those Vulnerable to Offending Behaviour 2010-2013, DoJ/NIPS/PBNI, October 2010
transparent appeal processes are put in place in each district councils, so as to allow individuals access to a process whereby grounds for contesting a fixed penalty notice can be fully considered. This is of particular importance given that there is a degree of local discretion over whether to issue a fixed penalty notice and over fixed penalty amounts and discounts. There is also potential for fine default to lead to a criminal prosecution. An appeals process would assist in ensuring that responses are proportionate, reasonable and fully accountable.

**Contractors**

29. The 2011 Act provides for contractors working on behalf of a district council to issue fixed notice penalty notices in respect of some environmental offences including litter, graffiti and fly-posting. As a public authority is obliged to ensure that the Human Rights Act (HRA) is upheld, so it must uphold a contractor to these standards. Indeed, as the contractors are performing a public function, it may be argued that contractors themselves are defined as functional public authorities for the purposes of the HRA and are therefore covered. As such, it is recommended that contractual obligations clearly reflect human rights duties.

30. We trust that these comments will help inform the Department’s formulation of Guidance in relation to fixed notice penalties.

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