

ROTHERHAM BOROUGH COUNCIL – REPORT TO MEMBERS

1.	Meeting:-	Cabinet Member for Safe & Attractive Neighbourhoods
2.	Date:-	9 th January 2012
3.	Title:-	Home Office Consultation: 'Police powers to promote and maintain public order'
4.	Directorate:-	Neighbourhood & Adult Services

5. Summary

This report informs Members of the current Home Office consultation on 'Police powers to promote and maintain public order' (Appendix 'A') including proposals to extend powers of curfew and require the removal of face coverings in certain circumstances for the prevention and reduction of crime and disorder.

The consultation paper asks consultees to consider and respond to twenty two key questions. Further details on these, together with a draft response are outlined in the report.

The deadline for response to the consultation is Friday 13th January 2012.

In line with corporate reporting protocols on Government consultations this consultation requires Cabinet Member and associated Scrutiny consideration.

The draft response was presented to Overview and Scrutiny Management Board on 16th December 2011 and the additions made to the original draft response resulting from the input of the board are shown in underlined text within the draft response to the specific consultation questions.

Views expressed by the Cabinet Member for Safe & Attractive Neighbourhoods will be included in the consultation response before it is made available to the Home Office before the 13th January deadline.

6. Recommendations

- **It is recommended that, following consideration of the report and the associated government consultation, the Cabinet Member for Safe and Attractive Neighbourhoods approves the response on behalf of the Council.**

7. Proposals and Details

The Government, partly in response to the widespread disorder witnessed in August 2011, is reviewing police powers to protect the public and property. A consultation has been launched focussing on three areas of police powers:

1. the effect of the word 'insulting' in section 5 of the Public Order Act 1986
2. new powers to request removal of face coverings; and
3. new powers to impose curfews

The consultation welcomes views from anyone with an interest in public order policing in England and Wales. Public consultation will close on Friday 13 January 2012.

1. Use of the word 'insulting' in Section 5, Public Order Act 1986

The aim of this part of the consultation is to consider the value of the word 'insulting' in section 5, whether it is consistent with the right to freedom of expression and the risks of removing it from section 5. The government is considering the impact of removing the word 'insulting' from section 5 in response to civil liberty and faith group concerns that the word criminalises free speech.

Current Legal Position

Section 5 makes a summary only offence, with the maximum penalty being a fine not exceeding £1000, to:

- Use threatening, abusive or insulting words or behaviour, or disorderly behaviour, or display any writing, sign or other visible representation which is threatening, abusive or insulting, within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby.
- An offence under this section may be committed in a public or a private place, except that no offence is committed where the words or behaviour are used, or the writing, sign or other visible representation is displayed, by a person inside a dwelling and the other person is also inside that or another dwelling.

It is a defence for the accused to prove:

- that they had no reason to believe that there was any person within hearing or sight who was likely to be caused harassment, alarm or distress, or
- that they were inside a dwelling and had no reason to believe that the words or behaviour used, or the writing, sign or other visible representation displayed, would be heard or seen by a person outside that or any other dwelling, or that their conduct was reasonable.

It should be noted that by virtue of section 31(1) (c) of the Crime and Disorder Act 1998, section 5 is capable of being charged as a discrete racially or religiously aggravated offence. An offence is racially or religiously aggravated if:

- at the time of committing the offence, or immediately before or after doing so, the offender demonstrates towards the victim of the offence hostility based on the victim's membership (or presumed membership) of a racial or religious group; or
- the offence is motivated (wholly or partly) by hostility towards members of a racial or religious group based on their membership of that group.

Racially or religiously aggravated section 5 is a summary only offence, with the maximum penalty being a fine not exceeding level 4 on the standard scale (£2500).

The Debate

Human Rights organisations such as Justice and Liberty, as well as the Joint Committee on Human Rights (JCHR), have argued that section 5 of the Public Order Act gives the police wide discretion to decide what language or behaviour is threatening, abusive or insulting and that “language or behaviour which is merely insulting should never be criminalised in this way”.

Arguments for repealing the reference to ‘insulting’ words and behaviour in section 5 are based on the view that removing this strand of the offence would affect only the most low-level cases. It is unlikely to decriminalise serious, distressing and disruptive conduct which would be captured by the ‘abusive’ and ‘threatening’ limbs of section 5 or by alternative provisions such as section 2 of the Protection from Harassment 1997 or section 4A of the Public Order Act 1986 (intentional harassment, alarm or distress).

Arguments opposing reform have rested on questioning a presumption that ‘insulting’ behaviours are necessarily of a lesser order than ‘abusive’ behaviours; questioning whether the removal of ‘insulting’ might impact adversely on targeting hate crime and understanding whether it would be interpreted by the courts as a lowering of the threshold for disrespectful behaviour.

Consultation questions and draft response;

Question 1: Do you think there is a clear difference between ‘insulting’ words and behaviour and ‘abusive’ words and behaviour?

Draft Response: *No. We do not consider that there is a clear, significant and definable difference. The two terms cover the same situations. A victim may consider ‘insulting’ words to be abusive. There is a clear overlap and ultimately it should be for a court to decide.*

Question 2: In your experience, are ‘insulting’ words and behaviour less serious than ‘abusive’ words and behaviour.

Draft Response: *We believe that insulting words can often be more offensive than abusive words as they often strike to the heart of beliefs, cultures and lifestyle. We do not feel that there is a significant difference between ‘insulting’ and ‘abusive’ to regard them as separate and certainly not a difference which could be defined in practice.*

Question 3: In your view, does having ‘insulting’ words and behaviour as a criminal offence restrict people from expressing themselves freely?

Draft Response: *No. People can express themselves without personally insulting other people. Removing insulting words from the offence could open the door to insults becoming acceptable and an Equality Impact Assessment would quickly determine the effect on many different individuals and groups.*

Question 4: In your view, would removal of the word ‘insulting’ from section 5 have any particular impact on specific groups?

Draft Response: *Yes. It could affect many groups, identified by their culture, ethnicity, sexual orientation or even their hobbies. Individuals and groups who are different or who have chosen to belong to a particular group should not be expected to suffer from bigoted personal comments.*

Question 5: If you do have concerns about the word ‘insulting’ remaining in section 5, can you explain if this is due to interpretation of the word or the actual legislation?

Draft Response: *We do not have any concerns about the word ‘insulting’ remaining in section 5.*

Question 6: In your opinion, is the ‘reasonableness’ defence for ‘insulting’ (which is a statutory defence in section 5) an adequate safeguard against misuse?

Draft Response: *Yes.*

Question 7: In your opinion, is guidance to police officers clear on when insulting behaviour constitutes an offence and an arrest should be made and is it sufficiently clear to ensure consistency of decisions?

Draft Response: *Police officers are trained and given appropriate guidance to be able to distinguish between an offence having taken place or not. Beyond that, we consider that it is impossible to be clear and unambiguous because guidance cannot cover all eventualities and the individual police officer – and his/her senior officer – must use their discretion in each specific circumstance.*

Question 8: Do you think that the threshold for arrest under section 5 is set at the right level?

Draft Response: *Yes.*

2. Powers to Require the Removal of Face Coverings

The aim of the consultation on face coverings is to seek views on supplementing existing provisions for demanding the removal of face coverings in section 60AA of the Criminal Justice and Public Order Act 1994 to strengthen the response both to threat and actual disorder.

Current Legal Position

Section 60/60AA of the Criminal Justice and Public Order Act 1994 enables officers at the rank of inspector or above to put a section 60 authorisation in place if he/she believes there is a threat of serious violence, that people are carrying offensive weapons or likely to commit an offence. Section 60 enables police to search people without reasonable grounds for suspicion for offensive weapons, and require the removal (or seizure) of masks, scarves etc. that the police reasonably believe are being worn to conceal identity.

Under section 60AA, the officer exercising the power must reasonably believe that someone is wearing an item wholly or mainly for the purpose of concealing identity. There is no power to stop and search for disguises. Guidance provides that where there may be religious sensitivities about ordering the removal of face or head coverings, the officer

should permit the item to be removed out of public view. Where possible, the item should be removed in the presence of an officer of the same sex as the person.

An authorisation may only be given in writing, specifying the grounds on which it was given, the locality in which the powers may be exercised and the period of time for which they are in force. This shall be no longer than appears reasonably necessary to prevent or seek to prevent the commission of offences and may not exceed 24 hours.

The government is proposing changes to legislation following a Prime Ministerial announcement to give police the discretion to remove face coverings 'under any circumstances' as long as there was reasonable suspicion of criminal activity. This would remove the limitation to specific geographic locations and time periods.

This consultation seeks views on the practicalities of strengthening existing powers: whether this means allowing police officers on the street to use their discretion to require removal of face coverings without seeking written permission from a higher rank and what exactly the threshold for the new power should be. This would prevent build-up of disorder; provide an effective deterrent to criminal activity; and accelerate the response to crime. Input is also sought on safeguards to ensure that the new powers are used appropriately.

Consultation questions and draft response

Question 1: In what circumstances would it be appropriate to require removal of face coverings without prior authorisation by a senior officer?

Draft Response: *We believe that the recent incidents of disorder experienced in some parts of the country raises serious questions about the current powers available to the police in respect of the removal of face coverings. It was clear that a large number of those taking part in the disturbances had taken steps to conceal their identity by covering their faces. Although the current powers are appropriate under normal circumstances, we believe that in light of recent events the police should be given greater discretion, without the current written authority, to search for and request the removal of face coverings where they consider there is an immediate risk of serious public disorder and in order to prevent/reduce the impact of that disorder. We think that it would be beneficial if it was made clear what the criteria was for making the request, although we do accept that such guidance would not necessarily meet all cases.*

Question 2: What should be the trigger under the new power if authorisation by a senior officer is not being sought?

Draft Response: *It is our view that professional judgement of the police should be a significant factor in this. Use of the power should be considered at an early stage where there is evidence to indicate through the formation and importantly, the behaviour, of groups/gangs the potential for serious public disorder. We would see the proportionate use of the power as a preventative measure, which if taken early, could reduce the opportunity for organised groups to form for the purpose of causing serious public disorder. Although the current powers refer to 'written' authorisation being obtained, we feel that based on evidence, verbal senior officer authority could be quickly obtained in most circumstances. We also think that where there is a clear and immediate risk of crime and/or serious public disorder, the decision to require removal of a face covering should be available to the police officer dealing with the situation, without the need to refer to a senior officer. In any case, a record should be made and retained of the detail and the reason for the request.*

Question 3: Do you think that wider powers to demand removal of face coverings may interfere with individual freedoms?

Draft Response: *As with any power its use must be proportionate to the situation at the time. With most enforcement powers there is the potential of interfering with individual freedom. This proposed extended power is no different and should be used proportionately. The reason for requiring the removal of face coverings should be clear at the time of making the request and should be able to stand up to any subsequent challenge. The issue of religion and the removal of face coverings is an area where the police can come into conflict with communities but we believe that there is already in place sufficient guidance to enable the police to address this in a way that minimises any offence or embarrassment.*

Question 4: Do you think that guidance, training and monitoring could help to ensure consistency of officers' decisions? Please give examples.

Draft Response: *The police do have guidance already in respect of the power to require the removal of face coverings and the affect that it can have on some religious groups. The potential for the abuse of such a power generally does exist and we would not want to see its abuse or disproportionate use in the same way as previous 'stop and search' powers. Examples of when the power can be used should be made clear to police officers through training and development and it is also important that the use of such a power is monitored in order to minimise the risk of disproportionate use.*

Question 5: Do you think that penalties for a refusal to comply with a demand to remove a face covering should be made more stringent? (Currently offenders are liable to imprisonment for a term not exceeding one month or to a fine not exceeding £1000 or both).

Draft Response: *We feel that the current level of penalties are appropriate.*

Question 6: In your view, should officers be required to explain the reason for the demand to remove face coverings?

Draft Response: *Yes. See response to Question 3.*

Question 7: Do you think that officers should be required to conduct the identification in reasonable privacy, if requested, even though it might cause a delay in the response?

Draft Response: *As a general rule yes, but only where this is possible and practical.*

3. Power to Impose Curfews

The aim of this part of the consultation is to seek views on whether the police should have additional powers to impose curfews to prevent disorder or criminality, and on the oversight arrangements and safeguards that would be required to ensure the use of any new powers was necessary and proportionate.

Current Legal Position

Sections 30-32 of the Anti-social behaviour Act 2003 enable the police, with the consent of the relevant local authority to designate an area as a 'Dispersal Zone', thus directing an individual or group to leave a zone and not return within 24 hours if an officer has reasonable grounds to believe that their behaviour is likely to result in a member of the public being harassed, intimidated, alarmed or distressed.

Section 27 of the Violent Crime Reduction Act 2006 also provides a power to direct an individual aged 10 or over to leave an area and not return for up to 48 hours if an officer believes their presence is likely to contribute to alcohol related crime and disorder. This includes the power to take a person under the age of 16 to their home address, or to a recognised place of safety.

Following disturbances in August, the Prime Minister announced that the Government would look at 'the use of existing dispersal powers and whether any wider power of curfew is necessary'.

Current police curfew powers are limited to the power to impose a curfew on an individual as a condition of police bail.

Conditional Cautioning

A conditional caution is an out-of-court disposal for low-level offences, which is available for adults and currently being piloted in five areas for young people. The conditions that can currently be attached must be rehabilitative or reparative (although a punitive, financial penalty condition is available in five pilot areas). These conditions could include restrictions, such as a curfew, if that were deemed appropriate to help rehabilitate an offender or make good the harm they had caused.

Attaching a curfew to a conditional caution could nip low-level or emerging criminality in the bud by restricting an offender's movements at times when they were most likely to commit further offences. This could be particularly helpful as a way of getting a young person's behaviour back on track – for instance where groups of peers are a factor in the offending.

Consultation questions and draft response

Question 1: What are your views on the proposal to give the police a limited, general power to impose curfews?

Draft Response: Based on the information provided in the consultation document we could not support the principle of the police having a limited general power to impose a curfew. There is a need for further clarity as the proposal is vague in respect of the proposal for judicial oversight: (Page 14 – "We would envisage prior judicial approval being required, with arrangements permitting subsequent validation in circumstances where that was not possible") and more thought needs to be given and communicated as to what this would actually mean before a fully informed response could be made. We consider that current powers available to the police are sufficient if the need is identified early and prompt action taken. Such a power should be proportionate and only be used in exceptional circumstances and in order to prevent serious public disorder and criminal damage to buildings and property. This is a significant factor as any such power could fall within the boundaries of Article 8 (Right to respect for private and family life) and Article 10

(Right to freedom of expression) of the Human Rights Act 1998. Any use of such a power should be intelligence led and that intelligence should be subject of detailed audit.

Question 2: Do you think there should be limits on the geographical scope and duration of such a curfew power? If so, what do you think would be appropriate limits?

Draft Response: We strongly feel that the power should only be used in specific locations where evidence of potential serious public disorder has been identified through the intelligence process and only for such a time as the threat exists and not beyond. Any general curfew once in place should be subject of regular review by senior police officers.

Question 3: What do you think would be an appropriate sanction for breach of an instruction to leave a curfew zone?

Draft Response: The power to arrest any individual refusing to comply with an instruction to leave a curfew zone after being directed to do so should be the ultimate sanction.

Question 4: What are your views of the proposal to make a curfew one of the recognised rehabilitative options for a conditional caution?

Draft Response: We believe that this form of 'out of court' conditional cautioning could have significant benefits especially for young people who are just starting to show signs of becoming involved in low level criminality, particularly in respect of gang membership. We do however have reservations about the ability of the police to enforce such curfews. Every effort should be made to steer our young people away from criminal activity at an early stage and this form of conditional cautioning would be seen as 'nipping' their low level or emerging criminality 'in the bud' by restricting their movements at times when they are most likely to commit offences. The use of such a power should always be proportionate to the problem and be subject of regular review by a senior police officer.

Question 5: In what circumstances might a curfew be an appropriate response to low-level offending?

Draft Response: Where it has been identified that an offender is on the 'cusp' of more serious criminality and to minimise the influence of 'peer group pressure' and the attraction of gang membership.

Question 6: Are there other powers you think would help the police take a more preventative approach to local crime, particularly youth crime? If so, what are they?

Draft Response: Every opportunity should be taken to address youth offending through early and preventative intervention. The earlier these issues are addressed the better and we feel that the proportionate use of out of court conditional cautioning for low level young offenders should be taken at every opportunity and should be used in conjunction with existing restorative justice models.

Question 7: What role should parents play in preventing local youth crime? How could they be encouraged to do so?

Parents and families are the main influence on a child's development and there is compelling evidence on the importance of effective parenting for outcomes for children, and young people.

Providing intensive parenting and family support for families with multiple problems often succeeds when everything else has failed, whilst delivering impressive savings in local service costs.

Draft Response: *Local authorities and the wider Community Safety Partnerships should give consideration to the introduction of Family Recovery Programmes that are in place already and working successfully in some areas.*

8. Finance

None identified.

9. Risks and Uncertainties

This consultation document relates to the amendment of police powers. Any changes to those powers resulting from the consultation would apply nationally.

It is possible that the proposals will have an impact on equality issues in relation to age, disability, gender, race or sexual orientation. The Government is inviting views on any equality-related issues that may be associated with legislative change and comments on mitigating actions.

10. Policy and Performance Agenda Implications

There is clear linkage between the proposals in this consultation document and the objectives within the RMBC Corporate Plan – Helping to create safe and healthy communities, People feel safe where they live, Anti-social behaviour and crime is reduced, and that People from different backgrounds get on well together.

11. Background Papers and Consultation

- Consultation on police powers to promote and maintain public order (Home Office)
- Public Order Act 1986
- Crime & Disorder Act 1998
- Anti-Social Behaviour Act 2003
- Protection from Harassment 1997

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