REPORT OF THE PROCEEDINGS OF THE GIBRALTAR PARLIAMENT

The Eighth Meeting of the Eleventh Parliament held in the Parliament Chamber on Monday 12th October 2009, at 2.35 p.m.

PRESENT:

Mr Speaker……(In the Chair)
(The Hon Haresh K Budhrani QC)

GOVERNMENT:

The Hon P R Caruana QC – Chief Minister
The Hon J J Holliday – Minister for Enterprise, Development, Technology and Transport and Deputy Chief Minister
The Hon Lt-Col E M Britto OBE, ED – Minister for the Environment and Tourism
The Hon F J Vinet – Minister for Housing
The Hon Mrs Y Del Agua – Minister for Health and Civil Protection
The Hon D A Feetham – Minister for Justice
The Hon L Montiel – Minister for Employment, Labour and Industrial Relations
The Hon C G Beltran – Minister for Education and Training
The Hon E J Reyes – Minister for Culture, Heritage, Sport and Leisure

OPPOSITION:

The Hon J J Bossano – Leader of the Opposition
The Hon F R Picardo
The Hon Dr J J Garcia
The Hon G H Licudi
The Hon C A Bruzon
The Hon N F Costa

ABSENT:

The Hon J J Netto – Minister for Family, Youth & Community Affairs

The Hon S E Linares

IN ATTENDANCE:

M L Farrell, Esq, RD – Clerk to the Parliament

PRAYER

Mr Speaker recited the prayer.

CONFIRMATION OF MINUTES

The Minutes of the meeting held on 10th June 2009 were taken as read, approved and signed by Mr Speaker.

DOCUMENTS LAID

HON CHIEF MINISTER:

I have the honour to lay on the Table:-

1. The Annual Report of the Gibraltar Police Authority for the year ended 31st March 2009;

2. The Income Tax (Allowances, Deductions and Exemptions) (Amendment) Rules 2009;

3. The Rates of Tax Rules 2009;

4. The Interest Swap Agreement with Barclays Bank Plc dated 31st July 2009.

Ordered to lie.

ORAL ANSWERS TO QUESTIONS

The House recessed at 5.30 p.m.

The House resumed at 5.53 p.m.

Oral Answers to Questions continued.

ADJOURNMENT

HON LT-COL E M BRITTO:

I have the honour to move that the House do now adjourn to Tuesday 13th October 2009 at 9.30 a.m.

Question put. Agreed to.

The adjournment of the House was taken at 7.43 p.m. on Monday 12th October 2009.

TUESDAY 13TH OCTOBER 2009

The House resumed at 9.35 a.m.

PRESENT:

Mr Speaker…….(In the Chair)
(The Hon Haresh K Budhrani QC)

GOVERNMENT:

The Hon P R Caruana, QC – Chief Minister
The Hon J J Holliday – Minister for Enterprise, Development, Technology and Transport and Deputy Chief Minister
The Hon Lt-Col E M Britto OBE, ED – Minister for the Environment and Tourism
The Hon F J Vinet – Minister for Housing
The Hon Mrs Y Del Agua – Minister for Health and Civil Protection
The Hon D A Feetham – Minister for Justice
The Hon L Montiel – Minister for Employment, Labour and Industrial Relations
The Hon C G Beltran – Minister for Education and Training
The Hon E J Reyes – Minister for Culture, Heritage, Sport and Leisure

OPPOSITION:

The Hon J J Bossano – Leader of the Opposition
The Hon F R Picardo
The Hon Dr J J Garcia
The Hon G H Licudi
The Hon C A Bruzon
The Hon N F Costa

ABSENT:

The Hon J J Netto – Minister for Family, Youth and Community Affairs

The Hon S E Linares

IN ATTENDANCE:

M L Farrell, Esq, RD – Clerk to the Parliament

ORAL ANSWERS TO QUESTIONS (CONTINUED)

The House recessed at 12.45 p.m.

The House resumed at 2.15 p.m.

Oral Answers to Questions continued.

The House recessed at 4.00 p.m.

The House resumed at 4.10 p.m.

Oral Answers to Questions continued.

WRITTEN ANSWERS TO QUESTIONS

HON CHIEF MINISTER:

Mr Speaker, I have the honour to Table the answers to Written Questions numbered W111/2009 to W176/2009 inclusive.

BILLS

FIRST AND SECOND READINGS

THE QUALIFICATIONS (RIGHT TO PRACTISE) ACT 2009

HON CHIEF MINISTER:

I have the honour to move that a Bill for an Act to transpose into the law of Gibraltar Directive 2005/36/EC of the European Parliament and of the Council of the 7th September 2005 on the recognition of professional qualifications as amended from time to time, and matters connected thereto, be read a first time.

Question put. Agreed to.

ADJOURNMENT

HON CHIEF MINISTER:

I have the honour to move that the House do now adjourn to Friday 23rd October 2009 at 10.00 a.m.

Question put. Agreed to.

The adjournment of the House was taken at 6.25 p.m. on Tuesday 13th October 2009.

FRIDAY 23RD OCTOBER 2009

The House resumed at 10.00 a.m.

PRESENT:

Mr Speaker……(In the Chair)
(The Hon Haresh K Budhrani QC)

GOVERNMENT:

The Hon P R Caruana QC – Chief Minister
The Hon J J Holliday – Minister for Enterprise, Development, Technology and Transport and Deputy Chief Minister
The Hon Lt-Col E M Britto OBE, ED – Minister for the Environment and Tourism
The Hon F J Vinet – Minister for Housing
The Hon J J Netto – Minister for Family, Youth and Community Affairs
The Hon Mrs Y Del Agua – Minister for Health and Civil Protection
The Hon D A Feetham – Minister for Justice
The Hon C G Beltran – Minister for Education and Training
The Hon E J Reyes – Minister for Culture, Heritage, Sport and Leisure

OPPOSITION:

The Hon J J Bossano – Leader of the Opposition
The Hon Dr J J Garcia
The Hon G H Licudi
The Hon C A Bruzon
The Hon N F Costa

ABSENT:

The Hon L Montiel – Minister for Employment, Labour and Industrial Relations

The Hon F R Picardo
The Hon S E Linares

IN ATTENDANCE:

M L Farrell, Esq, RD – Clerk to the Parliament

SUSPENSION OF STANDING ORDERS

HON CHIEF MINISTER:

I beg to move under Standing Order 7(3) to suspend Standing Order 7(1) in order to proceed with a Private Members' Motion.

Question put. Agreed to.

PRIVATE MEMBERS' MOTION

HON CHIEF MINISTER:

I have the honour to move the Motion standing in my name which reads as follows:

> "That this House do give leave for the introduction by me of a Private Members' Bill namely the Royal Bank of Scotland (Gibraltar) (Transfer of Undertaking) Bill 2009."

Mr Speaker, the Royal Bank of Scotland Group which owns both the Royal Bank of Scotland and NatWest and that operate in Gibraltar under both those brands has already stated publicly that it intends to convert the Royal Bank of Scotland franchise in

Gibraltar into a second branch of the NatWest franchise so that it exploits in Gibraltar the NatWest franchise rather than operating under two, which it believes dissipates its brand and corporate recognition in a small market like ours. It has explained that in public. There is no closure of branches. I am assured that there are absolutely no job losses arising from this rebranding and the issue is that those two operations currently, that is to say, the NatWest operation that operates in Line Wall Road and the RBS operation that operates in Corral Road are carried out in separate legal entities. Therefore, transferring the business including accounts, powers of attorney, customer mandates, assets, liabilities, mortgages, interest in mortgage security, that sort of thing, from one corporate entity to another would normally require a huge amount of legal documentation and a huge amount of paperwork, and it has become something of a tradition in Gibraltar, as hon Members who have been in this House for some years will know, that we facilitate institutions that wish to take action of this sort by allowing them to bring about the necessary legal transactions to implement those changes by an Act of Parliament which cuts right through the need to do all that documentation and all those individual legal steps with individual legal transactions. That is the nature of this Bill. Indeed, the Bill is, I believe, in identical, and if it is not identical it is very minor changes, but I believe it is in identical form to the one that was introduced back in 2001, when NatWest Offshore became RBS, when NatWest Offshore Transfer of Gibraltar Undertaking Act which was taken by this House in a Private Members' Motion moved by a Government Minister to facilitate that earlier corporate restructuring by this Bank. The RBS Group in Gibraltar remains a very important and indeed a very welcome part of our financial services system and they have remained committed and remain committed to Gibraltar. They are significant participators in funding of Gibraltar projects, whether they be private sector projects or whether they be Government projects. They are significant and good employers in Gibraltar and I believe that it is right that this House should assist them in this way by the passage of Bills of this sort. I commend therefore the Motion to the House.

Question proposed.

HON J J BOSSANO:

We supported the previous occasion, so we will be voting again in favour, obviously.

Question put. The House voted.

The motion was carried unanimously.

BILLS

FIRST AND SECOND READINGS

THE QUALIFICATIONS (RIGHT TO PRACTISE) ACT 2009

SECOND READING

HON CHIEF MINISTER:

I have the honour to move that the Bill be now read a second time. Mr Speaker, first of all can I just mention to the hon Members that I have this morning, and I think it has now been circulated to them, given them notice of a number of amendments that I will be introducing to this Bill at Committee Stage. None of them have a huge impact on the technical provisions of this Bill in terms of its impact and effect on the mutual recognition of qualifications and the right to practise which is the underlying objective of the Bill. Mr Speaker, before I comment then on the content of the Bill, one more item, a word about its background. This Bill transposes a Directive establishing rules whereby a host Member State, in our case it would be Gibraltar, must recognise the qualifications of a regulated profession from another Member State otherwise referred to as the Home Member State. This applies to all nationals wishing to pursue a regulated profession across the

EU and also includes those in the liberal professions. The legislation is intended to strike a balance between the free movement of skilled professionals on the one hand, and consumer protection on the other. As far as the provision of services is concerned, the Bill follows the principle of mutual recognition with host country control. Thus, the recognition of professional qualifications by Gibraltar will allow the beneficiary to gain access to the same profession to which he or she is qualified in her home country and to pursue their profession under the same conditions as those offered to people who are qualified and registered in Gibraltar and that is true whether it is either on self-employed or employed basis. The Bill is divided into a number of parts. Part I lays down the general provisions including the relevant definitions and scope of the Directive. Part II lays down the provisions relating to the Free Provision of Services. Part III relates to Freedom of Establishment. Part IV makes provision for Detailed Rules Pursuing the Profession. Part V deals with Administrative Cooperation and Part VI provides for a number of ancillary matters. Under Part III, a general system for the recognition of evidence of training is established. In the general system of recognition, the various national education and training systems are grouped together according to a number of levels solely for the purposes of the arrangements operation, without in any way affecting educational structures in Gibraltar. Under the general system, professional qualifications may be recognised on the basis of co-ordination of minimum training conditions or based on professional experience. At the same time, the Bill recognises that there are certain special cases which need to be taken into account. For example, as regards doctors and dentists, the principle of automatic recognition of medical or dental specialities to two or more Member States applies. Clauses 2, 4 and 5 are interpretation clauses. They essentially maintain the definitions currently contained in the General System Directives concerning the concepts of regulated professions, professional qualifications and evidence of formal training, including any evidence of formal qualifications obtained in a third country once it has been recognised by a Member State where the applicant has pursued the profession for at least three years. Clause 6 establishes the principle of mutual recognition of professional qualifications in accordance with the EC Treaty. This clause lays down that the Bill applies solely to Community nationals when the profession which the applicant wishes to pursue is regulated in Gibraltar and when the applicant has obtained his professional qualifications in another Member State. Clause 7 sets out the effects of professional recognition and introduces the obligation to allow access in Gibraltar to a regulated profession. Clause 8 lays down that the Member State may not, for reasons relating to professional qualifications, restrict the freedom to provide services when the beneficiary is legally established in another Member State. This is immediately applicable when the profession is regulated in the Member State of establishment. When the Member State of establishment does not regulate the profession, the person providing services in that other Member State must, in addition, have pursued the activity in question for two years in the former Member State. So, when it is a regulated profession, the right of establishment is automatic. When it is not a regulated profession, the right of establishment in the host country depends on having had at least two years practice in your home country. Clause 9 takes over the acquis of the sectoral Directives as regards the dispensation from any authorisation or registration with a professional or social security body. Hon Members will be aware that there are already some professions for which this recognition of qualifications doctrine exists and this is an omnibus Directive which is being adopted by the Community to bring it all together with a view of harmonising the principles that apply across all the professions to this mutual recognition of qualification and practise rights. Clause 10 lays down the obligation to inform the Gibraltar competent authority when the services are provided by movement of the provider. Pursuant to this clause and clause 11, the nationality of service providers and their lawful pursuit of the activity in Gibraltar, must be verified by the competent authority through an exchange of information with the competent authority of the Member State of establishment. Where applicable, the competent authority may also verify, through the Member State of establishment, whether the provider has exercised the profession for at least two years

in that Member State. With a view to consumer protection, clause 12 contains the obligation on the service provider to provide the recipient of the service with a certain amount of information. This provision is taken over from Directive 2000/31/EC on Electronic Commerce and hence extended, in the case of the regulated professions, to all forms of the provision of services. Clause 13 sets out the scope of clauses 13 to 18. They apply to professions not covered by the rest of Part III. Clauses 14 to 16 set out the various categories of qualifications and certificates that may be relied upon in conferring rights on migrants. Clause 17 maintains the possibility for the competent authority to make recognition of qualifications subject to the applicants completing a compensation measure which can be either an aptitude test or an adaptation period. Clause 18 provides xxxxx from compensation measures where the applicant's qualifications meet the criteria laid down by a common platform of EEA States submitted to the Commission and providing adequate guarantees as regards the applicant's level of qualifications. Clauses 19 to 22 take over the principle and subject to the amendments set out below, the provisions of Article 4 of Directive 99/42 which provides for the automatic recognition of qualification on the basis of the applicant's professional experience in the cases of the craft industrial and commercial activity set out in the restrictive list in Schedule 5. Clauses 30 to 54 take over the relevant existing provisions for coordination of the minimum training conditions, automatic recognition of evidence of formal training and, if necessary, the detailed arrangements for such recognition. Access to the professions concerned. The exercise of professional training activities in question. The procedures for including the evidence of training in the schedule and also of acquired rights. In accordance with clause 55, when deciding on a request to exercise a regulated profession in the implementation of the provisions on establishment, the competent authority may require the specific documents and certificates set out in the schedule. Clause 56, strengthens the existing rules of procedure. In particular, through the generalised application of the one-month period granted to the competent authority to decide the requests for recognition and by introducing the obligation on those authorities to acknowledge receipt of the file and where applicable to inform the applicant of any missing document. Clause 57 essentially takes over the existing rules on the use of the professional title of Gibraltar and lays down, in this respect, the rules applicable in the event of partial access to the profession. Clause 58 requires the applicant to have the language skills needed to practice the profession in Gibraltar. Assessment of the compatibility of requirements imposed with Community law by the competent authority must be based on its proportionality as regards the need of the profession, that is to say, the language skill requirement must be proportional to the need regarding the practise of that particular profession. Where the competent authority considers that the applicant does not have the necessary language skills, it is for the host Member State to ensure that the applicant can acquire the missing skills. Clauses 59 and 60 lay down the arrangements for practising the profession relating to the use of academic titles and the conclusion of an agreement with a health insurance fund which are common to the provision of services and establishment. Clause 61 extends to the whole of the Directive the obligation on the Gibraltar competent authority to cooperate closely with the competent authorities of the Member States of origin in order to ensure that the provisions of the Bill are applied adequately and to avoid the rights deriving from it being deflected from their objective and used in a fraudulent fashion. In addition, a coordinator responsible for promoting the uniform application of the Bill and collecting information useful for its implementation is appointed in and for Gibraltar. Clause 64 deals with transitional provisions. The general rule here is that no existing practitioner in Gibraltar loses his right to practice by virtue of this new law. The principle is also established that in case of a conflict between this Bill and an existing enactment, this Bill prevails. Schedule 1 comprises a list of professional associations or organisations for filling the conditions of section 3(2). Schedule 2 lists the courses having a special structure referred to in section 14 point (c) subparagraph (ii). Schedule 3 deals with recognition on the basis of coordination of the minimum training conditions. Schedule 4 sets out the documents and certificates

which may be required in accordance with section 55(1). Schedule 5 sets out the activities relating to the categories of professional experience referred to in sections 20, 21 and 22. Schedule 6 sets out the acquired rights applicable to the professions subject to recognition on the basis of coordination of the minimum training conditions and Schedule 7 lists the regulated education and training referred to in the third sub-paragraph of section 16(2).

Mr Speaker, I beg to give notice that the amendments set out in my letter be taken by me at Committee Stage and I will speak to those amendments at that time. In the meantime, I commend the Bill to the House.

Discussion invited on the general principles and merits of the Bill.

Question put. Agreed to.

The Bill was read a second time.

HON CHIEF MINISTER:

I beg to give notice that the Committee Stage and Third Reading of the Bill be taken later today, if all hon Members agree.

Question put. Agreed to.

THE INCOME TAX (AMENDMENT OF THE QUALIFYING (CATEGORY 2) INDIVIDUALS RULES 2004) ACT 2009

HON CHIEF MINISTER:

I have the honour to move that a Bill for an Act to amend rules made under the Income Tax Act, be read a first time.

Question put. Agreed to.

SECOND READING

HON CHIEF MINISTER:

I have the honour to move that the Bill be now read a second time. Mr Speaker, the Bill amends rule 9(4) of the Qualifying (Category 2) Individuals Rules 2004 with retrospective effect to the 1st July 2009 by increasing the sums which appear in paragraphs (a) to (d) of that rule in accordance with the Budget measures which I announced in the Budget earlier this year. The minimum tax payable rises from £18,000 to £20,000 and the minimum tax payable rises from £60,000 to £70,000. Any hon Member that is wondering why we are having recourse to primary legislation to amend subsidiary legislation will recall that we have done it in the past and the reason for that is that the changes have retrospective effect and taxation can only be amended retrospectively by primary legislation and not by amendments to subsidiary legislation. I commend the Bill to the House.

Discussion invited on the general principles and merits of the Bill.

Question put. Agreed to.

The Bill was read a second time.

HON CHIEF MINISTER:

I beg to give notice that the Committee Stage and Third Reading of the Bill be taken later today, if all hon Members agree.

Question put. Agreed to.

THE PUBLIC HEALTH (AMENDMENT) ACT 2009

HON CHIEF MINISTER:

I have the honour to move that a Bill for an Act to amend the Public Health Act, be read a first time.

Question put. Agreed to.

SECOND READING

HON CHIEF MINISTER:

I have the honour to move that the Bill be now read a second time. Mr Speaker, the need for this Bill is the same as the previous Bill. The need for retrospective implementation of the Act. On this occasion, relating to amendments to section 277A of the Public Health Act which gives effect to a measure that I announced in the Budget. This measure provides for an increased discount for the prompt payment of rates in respect of hereditaments used for certain qualifying activities including activity as a bar or restaurant. The discount for prompt payment of rates is increased by another 10% to 20%. This measure will be deemed to have come into operation on 1st July 2009. I commend the Bill to the House.

Discussion invited on the general principles and merits of the Bill.

Question put. Agreed to.

The Bill was read a second time.

HON CHIEF MINISTER:

I beg to give notice that the Committee Stage and Third Reading of the Bill be taken later today, if all hon Members agree.

Question put. Agreed to.

THE SOCIAL SECURITY (AMENDMENT OF REGULATIONS) ACT 2009

HON CHIEF MINISTER:

I have the honour to move that a Bill for an Act to amend the Social Security (Open Long-Term Benefits) (Voluntary Contributors) (Amendment) Regulations 2009, be read a first time.

Question put. Agreed to.

SECOND READING

HON CHIEF MINISTER:

I have the honour to move that the Bill be now read a second time. Mr Speaker, again, this is to introduce the Budget announcement which increased the weekly rate of contributions payable by voluntary contributors to £12.38 and which came into operation on the date of publication, that is to say, the 3rd of September 2009. This Bill amends those regulations in order to provide that the increase be retrospective to the 1st July 2009 in accordance with what I said at the Budget. I commend the Bill to the House.

Discussion invited on the general principles and merits of the Bill.

Question put. Agreed to.

The Bill was read a second time.

HON CHIEF MINISTER:

I beg to give notice that the Committee Stage and Third Reading of the Bill be taken later today, if all hon Members agree.

Question put. Agreed to.

THE GIBRALTAR PORT AUTHORITY (AMENDMENT) ACT 2009

HON J J HOLLIDAY:

I have the honour to move that a Bill for an Act to amend the Port Authority Act 2005, be read a first time.

Question put. Agreed to.

SECOND READING

HON J J HOLLIDAY:

I have the honour to move that a Bill be now read a second time. Mr Speaker this Bill amends section 3 of the Gibraltar Port Authority Act 2005 to make the Financial Secretary a member of the Port Authority. It also inserts a new section 21 to enable the Minister with responsibility for public finance to make regulations for the financial control and regulation of the Authority and the conduct of its financial affairs. I commend the Bill to the House.

Discussion invited on the general principles and merits of the Bill.

HON DR J J GARCIA:

Yes Mr Speaker, simply to say that when the Bill setting up of the Port Authority was adopted by this House in December 2004, the Opposition abstained on the Bill. So, we will be abstaining on this Bill today as well.

HON CHIEF MINISTER:

Yes, Mr Speaker, I recognise that the hon Member's position may be motivated by a desire for consistency and of course I would understand it if that were the case. I do not think you need to be in favour of the Port Authority to be in favour of the Government exercising financial control of the Authority if indeed it exists. In other words, the fact that the hon Members disapprove of the Port Authority, surely does not take them to a position where they disapprove of the Financial Secretary and the Accountant General exercising financial control of public funds once they are passed on to the Treasury. I do not say this in order to persuade them to change their minds although, of course, they are perfectly free to do. I just want to make it clear that whilst we acknowledge their logical desire to be consistent with their previous voting, in fact I do not think that this is a case of consistency. Rather the Port Authority exists. This House is now voting not on whether it likes or dislikes the Port Authority which already exists but rather given that it exists, should the Government's financial controllers be able to account for the use of public funds which are paid to the Authority. That is all that this Bill is intended to do.

Question put. The House voted.

For the Ayes:
The Hon C G Beltran
The Hon Lt-Col E M Britto
The Hon P R Caruana
The Hon Mrs Y Del Agua
The Hon D A Feetham
The Hon J J Holliday
The Hon J J Netto
The Hon E J Reyes
The Hon F J Vinet

Abstained: The Hon J J Bossano
The Hon C A Bruzon
The Hon N F Costa
The Hon Dr J J Garcia
The Hon G H Licudi

The Bill was read a second time.

HON J J HOLLIDAY:

I beg to give notice that the Committee Stage and Third Reading be taken later today, if all hon Members agree.

Question put. Agreed to.

THE INTERNATIONAL CRIMINAL COURT (AMENDMENT) ACT 2009

HON D A FEETHAM:

I have the honour to move that a Bill for an Act to amend the International Criminal Court Act 2007, be read a first time.

Question put. Agreed to.

SECOND READING

I have the honour to move that a Bill for the International Criminal Court (Amendment) Act 2009 be now read a second time. Mr Speaker, this Bill contains three important amendments to the International Criminal Court Act 2007 but before I speak on the effect of the actual amendments, I would like to say a few words on why they had become necessary and why the Hon the Chief Minister has issued a Certificate under section 35(3) of the Gibraltar Constitution Order that the Bill is too urgent to permit a delay of six weeks before it can be proceeded upon. Hon Members will recall that the International Criminal Court Act transposes the Rome statute of the International Criminal Court into Gibraltar law. The Rome statute, as it is often referred to, is the Treaty that established the International Criminal Court, its functions, jurisdiction and structure. The United Kingdom has enacted the International Criminal Court Act 2001 (Overseas Territories) Order 2009 that applies to all Overseas Territories except Gibraltar. This will enable the Rome statute to be extended to the Overseas Territories listed in its Annex 2. The effect of that Order is that all statutory instruments made under the UK Act as it applies in the UK automatically apply to the Overseas Territories listed in its Annex 2. The UK Order does not apply to Gibraltar which, of course, has its own legislative framework, the International Criminal Court Act 2007. There is however, Mr Speaker, some doubt as to whether the Gibraltar Act provides sufficient vires to make subsidiary legislation that would be equivalent to three UK statutory instruments. The first of these is the International Criminal Court Act 2001 (Darfur) Order 2009 which I shall refer to as the Darfur Order which makes provision for certain individuals allegedly involved in genocide, crime against humanity and war crime in Sudan to be stripped of state or diplomatic immunity if charged or convicted by the International Criminal Court as a result of a referral to that Court by the United Nations Security Council. The Darfur Order has been an Act pursuant to section 1(1) of the UK United Nations Act 1946 which allows the UK Government to implement any resolutions of the United Nations Security Council by Order and section 23(5) of the UK International Criminal Court Act 2001 which allows the power to make subsidiary legislation under the UK United Nations Act to be used in circumstances where state immunity or diplomatic immunity is involved following a referral to the ICC via the UN Security Council. Gibraltar has no equivalent provisions. Therefore it cannot enact an equivalent of the Darfur Order.

Secondly, the International Criminal Court Act 2001 (Elements of Crimes) (No. 2) Regulations 2004, which I shall refer to as the Elements of Crime Regulations, which set up the Elements of

Crimes adopted by the parties to the Rome statute which are to be taken into account by a domestic court considering offences of genocide, crime against humanity and war crime. For example, in relation to genocide by killing in Article 6A of the Rome statute, the elements of that crime agreed by the state parties are: Firstly, that the perpetrator kill one or more persons; secondly, that such person or persons belong to a particular national, ethnic or racial or religious group; thirdly, that the perpetrator intended to destroy in whole or in part that national ethnic or racial or religious group as such; and fourthly, that the conduct took place in the context of manifest patterns of similar conduct directed against that group or was conduct that could itself affect such a destruction. Now, our current section 57 provides that in interpreting and applying the articles on genocide, crime against humanity and war crime, the Court shall have regard or take into account any relevant judgement or decision of the International Criminal Court and take into account any other relevant international jurisprudence. Of course, Mr Speaker, the jurisprudence of the ICC will apply the Elements of Crimes involved in proving genocide, crime against humanity and war crime but those elements are not a matter of jurisprudence of the International Criminal Court. They have actually been set out, by agreement, by the parties to the Rome statute. It is those elements that have been set out in the Elements of Crime Regulations which we do not have in our Act the vires to enact by way of subsidiary legislation.

Thirdly, the International Criminal Court Act 2001 (Reservations and Declarations) Order 2001 which sets out the reservations and declarations which each state party has made or may make in relation to their domestic construction of the Rome statute. Section 54 of the UK Act provides that in relation to criminal offences created under Part V of the UK Act, certain articles of the Rome statute, that is, genocide, crime against humanity and war crime, shall be construed subject to and in accordance with such reservations and declarations made in the ratification of any Treaty or Agreement relevant to the implementation of those articles. Now our section 58(2) has the same provision but whereas in the UK the certification is done by way of subsidiary legislation, under section 58(3) of our Act, the certification is done by the Attorney General and not by way of subsidiary legislation.

Mr Speaker, these issues have come to our attention because in August of this year, in fact, I received a call when I was away on holiday in the United Kingdom, the UK Government notified us that they had undertaken to lodge a Note Verbale with the UN in New York by the 1st September that the Rome statute had been extended to its Overseas Territories and asking whether we had implemented equivalent statutory instruments to those that I have just described a few moments ago. A Note Verbale in respect of the other Overseas Territories is being deposited and once the Gibraltar Act is amended and the relevant subsidiary legislation is in place, and these Mr Speaker, have already been drafted, the UK Government intends to deposit a Note Verbale at the United Nations that the Rome statute is being extended to Gibraltar. With this background in mind, hon Members would be able to appreciate the urgency necessitating the Certificate by the Chief Minister under section 35(3) of the Gibraltar Constitution Order.

Mr Speaker, the amendments to section 3 of the Act allows the Minister to give effect by Order to any decision of the Security Council of the United Nations under Article 41 of the Charter of the United Nations as it affects the International Criminal Court. This reflects the powers that exist in the UK under the International Criminal Court Act 2001 and, as I have just explained, their United Nations Act. The new section 3.5A is derived from section 11 of the UK's United Nations Act 1946. The new sections 3.5B is derived from section 23(5) of the UK's International Criminal Court Act 2001 which I said earlier expands the power to make subsidiary legislation under the UK United Nations Act in certain circumstances where state or diplomatic immunity is involved following a referral from the United Nations Security Council. The amendments to section 58 do two things. Firstly, they clarify that when interpreting the provisions of the Articles of the Rome statute referred in section 57, being the definitions of genocide, crime against humanity

and war crime, the Court shall take into account the Elements of Crimes adopted by the state parties to the Rome statute not simply the jurisprudence of the International Criminal Court. It also imposes a duty on the Minister responsible to publish those elements as regulations. Secondly, the amendment to section 58(3) changes who may certify the reservations and declarations made in the ratification of any Treaty or Agreement relevant to the interpretations of Article 6 to 8 of the Rome Treaty from the Attorney General to the Minister for Justice and whereas the Act was silent on the manner in which the Attorney General certified those reservations or declarations, the Minister must certify by regulations. Finally, the amendment to section 72 provides a general regulation making power to make provisions to give effect to any international measure in respect of Gibraltar or to fulfil any other international obligations in relation to the International Criminal Court. I commend the Bill to the House.

Discussion invited on the general principles and merits of the Bill.

Question put. Agreed to.

The Bill was read a second time.

HON D A FEETHAM:

I beg to give notice that the Committee Stage and Third Reading of the Bill be taken later today, if all hon Members agree.

Question put. Agreed to.

THE CRIMES (VULNERABLE WITNESSES) ACT 2009

HON D A FEETHAM:

I have the honour to move that a Bill for an Act to make provision for the protection of vulnerable and intimidated witnesses in court proceedings, for restricting reporting about certain offences generally, for restricting the reporting of the identify of victims of certain offences, for the making of orders to secure the anonymity of witnesses in criminal proceedings, and for connected purposes, be read a first time.

Question put. Agreed to.

SECOND READING

HON D A FEETHAM:

I have the honour to move that the Bill for the Crimes (Vulnerable Witnesses) Act 2009 be now read a second time. Mr Speaker, the main aim of the Bill is to protect vulnerable witnesses and in some cases vulnerable defendants in court proceedings in situations that might make them reluctant to testify due, for instance, to intimidation or other factors that might otherwise negatively affect the quality of their evidence. In so doing, it seeks to ensure the court has access to the evidence necessary to reach the best possible decision in a criminal case. The particular problems that the Bill seeks to deal with include over-intrusive cross examination of a witness, by or on behalf of a defendant; unsettling and intimidating encounters by victims of attacks with their alleged attackers; inappropriate exposure to the media of details of certain offences; and witnesses reluctant to give evidence because of fear of reprisals from defendants. In the most serious of crimes where the court is satisfied that there is a real risk of serious harm to a person, a witness anonymity order may be appropriate. Mr Speaker, the Government intend to build on these provisions, protecting witnesses or parties to proceedings from intimidation when it

publishes legislation to reform the jury system later this year. This Bill draws upon, inter alia, three UK enactments. The Youth Justice and Criminal Evidence Act 1999, the Sexual Offences (Amendment) Act 1992 and the Criminal Evidence (Anonymity of Witnesses) Act 2008. Part 2 of the Bill is entitled Special Measures and provides that the court may give special measures directions in relation to eligible witnesses. Such measures may be available for child witnesses, witnesses who have had mental disorders, learning difficulties, physical disabilities or disorders. They may also be made available in respect of witnesses who are fearful or distressed about giving evidence, for example, because of the behaviour of the defendant or the family of the defendant towards the witness. Under clause 4(4), a witness in a case of a sexual nature is automatically eligible for special measures, unless he or she indicates they are not needed. Clause 6 enables a special measure direction to be given on the application of a party or on the court's own initiative. Sub clauses 2 and 3 set out the matters that a court must have regard to if it determines that a witness is eligible for assistance. Clauses 8 and 9 make particular provisions for children or young persons where the offence is a sexual offence or is a serious offence against the person and the witness is under the age of 17 years. The aim of these clauses are to maximise, as far as possible, the quality of the evidence of a child witness or a young person. Clauses 10 to 17 set out the various special measure directions which can be made where appropriate. These include screening the witness from defendants; permitting a witness to give evidence by means of a live link; the power to exclude certain persons form the courtroom whilst the witness is giving evidence; the power to order the removal of wig and gowns; the power to allow video recording of an interview to be admitted as evidence xxxxx of the witness; the power to allow video recorded cross-examination or re-examination; the power to allow a witness to give evidence through a court approved intermediary; and, in cases where the witness has difficulty with communication, that a device be used as an aid to communication. Where evidence is admitted in accordance with a special measure direction, the status of that evidence is set out in clause 18. In general, that evidence is to be treated as though it has been made by the witness through direct oral testimony. The judge may however give a jury a warning as to the evidence submitted in accordance with a special direction, if he considers it to be necessary. Part 3 of the Bill makes general provisions for the protection of some witnesses. Clause 20 provides that certain defendants may be permitted by the court to give evidence by live television link if certain conditions are met and the interests of justice are so served. These are that the defendant is under the age of 18 and his ability to participate effectively in the proceedings as a witness would be compromised by his level of intellectual ability or social functioning and the use of a live link would enable him to participate more effectively in proceedings. If the defendant has reached the age of 18, the same measure could be directed if he suffers from a mental disorder or impairment and the same concerns arise. The court may also prohibit defendants in person from directly cross-examining certain witnesses. For example, a person charged with a sexual offence would be prohibited under clause 22 from directly, that is in person, cross- examining the alleged victim of the offence. Clause 23 affords protection from cross- examination of a child witness by a defendant in person in relation to certain offences. These are, in the main, sexual offences and very serious offences against the person under Part X1 of the Criminal Offences Act, for example, murder and manslaughter. In cases where the defendant is not permitted to cross-examine the witness in person, he may do so through a legal representative instructed by him or one appointed by a court under clause 26. Where a defendant is not being permitted to cross-examine the witness in person, the court must, under clause 27, consider the fairness of the process for the defendant, and, if appropriate, warn the jury as to the influences that can properly be drawn. Further, in cases involving sexual offences, a witnesses sexual history may only be raised with leave of the court, and under clause 28, after an application is heard by the judge, in private, pursuant to clause 30. Part 4 restricts the reporting that can be done in certain types of proceedings. It limits the reporting of offences and alleged offences involving children and in relation to other criminal offences. Publications that breach these

provisions are liable to prosecution for a criminal offence. Clause 31 concerns the restriction on the reporting of investigations where a person who is alleged to have committed the offence is under 18 and the court proceedings have not been instituted. These may be dispensed with if a court so orders because it is in the interests of justice to do so. Clause 32 has effect once the court proceedings have been instituted and also applies to persons under the age of 18. Clause 33 of the Bill applies to persons who are over 18, other than the accused, but who require protection from publicity. As with the earlier clauses, the information that may be restricted is that which may lead to a person being identified, such as, for instance, an address or a place of work. In such cases, the court will have to balance the competing interest prior to imposing a restriction on reporting. Clause 35 provides for the prosecution of persons who contravene restrictions which are to be ordered, whilst clause 36 sets out the nature of the defences which are available to a person charged under clause 35. Part 5 of the Bill provides that in cases involving sexual offences, no matter relating to the victim may during that persons lifetime be included in any publication if it is likely to lead members of the public to identify that person as a person against whom the offence is alleged to have been committed. Clause 39 sets out the offences in respect of which restrictions apply, namely, (a) an offence under any provision of Part XII of the Criminal Offences Act, that is the sexual offences; (b) an attempt, or conspiracy to commit or incitement of another to commit any of the offences included in (a) and (c) aiding, abetting, counselling or procuring the commission of any of those offences. Under clause 40, the rule can be displaced in the public interest but the mere fact of an acquittal of the defendant does not, of itself, displace it. Part 6 deals with witness anonymity orders, Mr Speaker. The part in response to the House of Lords' judgement in the Crown against Davis of the 18th June 2008 which held that the use of anonymous witness evidence in criminal proceedings was not permissible at common law. Clause 43 creates a statutory power for the court to make a witness anonymity order in criminal proceedings, for example, by using screens or voice distortion mechanisms in the interests of the safety of a witness or other person or for protecting serious damage to property or for the prevention of real harm to the public interest, provided (a) that it is consistent with the defendants right to a fair trial and (b) that it is in the interests of justice to do so. This means that in addition to ensuring that the defendant receives a fair trial, the court must consider that the anonymous evidence is in the wider interest of justice by reason of the fact that it appears to the court that it is important that the witness should testify and that the witness could not testify if the order were not made. The key factor to be determined is whether the proceedings as a whole, including the way in which the evidence was taken, were fair. In addition, clause 46 requires the court to consider various non-exhaustive list of factors which highlight the exceptional nature of these orders. These include the general right of a defendant in criminal proceedings to know the identity of a witness in those proceedings. The extent to which the credibility of the witness concerned would be a relevant factor when the weight of his or her evidence comes to be assessed. Whether the evidence given by the witness might be the sole or decisive evidence implicating the defendant. Whether the witness's evidence can be properly tested, whether on grounds of credibility or otherwise, without his or her identity being disclosed. Whether there is any reason to believe the witness has a tendency to be dishonest or has any motive to be dishonest in the circumstances of the case having regard in particular to any previous convictions of the witness and to any relationship between the witness and the defendant or any associates of the defendant and whether it would be reasonably practical to protect the witness's identity by means, other than making a witness anonymity order. There is also, Mr Speaker, a requirement that a warning is given to the jury in such terms as he or she considers appropriate to ensure that the defendant's right to a fair trial is not prejudiced. An application can be made in respect of both the prosecution witness or indeed a defence witness. These provisions are based on the UK Criminal Evidence (Witness Anonymity) Act 2008 which is in itself broadly based and modelled on the New Zealand Evidence Act 2006. The English Act, as I have said, was introduced as an

emergency measure in response to the decision in the Crown against Davis on the basis the United Kingdom had 580 cases where witness anonymity orders had been made under the common law rules and a failure to act quickly could have led to a significant number of very serious on-going and pending trials having to be abandoned. Because it was introduced as an emergency measure, the Justice Secretary included a Sunset Clause into the Bill whereby the Act, if passed, would lapse automatically on the 31st December 2009 unless extended by Order of the Secretary of State. Mr Speaker, at the time of the decision of the Crown against Davis, there had been no witness anonymity orders made in Gibraltar. The Gibraltar Government therefore had more time to carefully consider the position and has had the benefit of looking not only at the UK provisions but also the New Zealand Act, which I mentioned a few moments ago. We have taken the view that if the provisions are worthwhile and they comply with our constitutional obligations, we should introduce the legislation on a permanent basis. That is what we have done with this Bill. We have also kept a close eye on further legislative developments in the United Kingdom in this area. Indeed, this House will note that in January this year the UK Government re-enacted the provisions of the Criminal Evidence (Witness Anonymity) Act 2008 in the Coroners and Justice Bill 2009 without a Sunset Clause and, therefore, on a permanent basis. The Bill has its third reading in the House of Commons in March of this year and is going through, as we speak, its reporting stage in the House of Lords. Once passed, the provisions relating to witness anonymity orders will commence on the 1st July 2010, the day after the Sunset Clause in the Criminal Evidence (Witness Anonymity) Act 2008 expires. With the exception of transitional provisions, the provisions relating to anonymity of witnesses in the new Bill in the UK is identical to the Bill before the House today. It is also noteworthy, that the Joint UK Parliamentary Committee on Human Rights has said about the UK Bill that it is, and I quote, "broadly welcome from a human rights perspective", and that it agrees, and I quote "with the analysis in the Bill's Explanatory Notes that the Bill is compatible with Article 6 of the European Convention of Human Rights on the basis of the expressed provision for the right to a fair trial and the discretion left to the trial judge on this issue". The Bar Council in England and Wales also welcome the fact that applications of this nature are now underpinned by a proper statutory framework despite opposition by some criminal barristers at the time of the introduction of the original Bill. A draft of this Bill was sent to the Gibraltar Bar Council before it was published in green paper format and as part of the Government's consultation process on these matters. The Bar Council wrote to me on the 16th June 2009 stating that they had no comment on the Bill. We then proceeded to publish the Bill. The reality is that these kind of Orders will be very rare indeed and confined to exceptional cases. In Gibraltar, the old common law rules were invoked, for example, albeit not in the context of a criminal trial, during the IRA inquest and it is right and proper that in the very serious of cases, where the risks justifies it, that a judge is given the power to protect critical witnesses from harm. I commend the Bill to the House.

Discussion invited on the general principles and merits of the Bill.

HON G H LICUDI:

Mr Speaker, we will be supporting this Bill. We consider that these are appropriate measures to be introduced. The Bill will increase and improve the powers of the court in giving orders, in giving directions for the protection of vulnerable witnesses. As the hon Member has said, it will be the rare occasion when these powers may have to be used but one never knows when that rare occasion may arise. It may arise in a case next week or next month, so it is appropriate to have this as part of our legislation. As the hon Member has mentioned, the Bill deals with vulnerable witnesses and, to a certain extent, with vulnerable defendants as well. Although I recognise that this Bill deals primarily with the issue of people as witnesses, whether as defendants or just as witnesses, I also note that the hon Member has indicated that the Government intend to build upon this legislation. We are a little bit in the dark as to what is

proposed and I look forward to seeing what those measures may be and reviewing those measures and being able to comment and be able to debate those particular measures. The only issue in relation to this Bill which I would raise at this stage is, quite simply does the Bill go far enough in dealing with all issues which affect children that go through he criminal justice system. I premise that by saying, I note, as I said, that further measures will be introduced and perhaps what I do say may or may not be in the Government's thinking already. There are of course two sides to the coin in dealing with children as part of the criminal justice system. One is children as defendants, and the other is children purely as witnesses. The legislation that is currently before the House, as the Explanatory Memorandum and the hon Member has said, is taken in part from the UK Youth Justice and Criminal Evidence Act of 1989. There are provisions in that Act which do not appear in this Bill and I simply raise it just to welcome the hon Member's thoughts as to whether this is part of the Government's thinking or part of the Government's plans going forward. The English Act, and I am not suggesting for one minute that we should slavishly follow whatever English legislation, says we have to adapt and consider the appropriateness for Gibraltar, and I do not know whether this has been considered but Part I of that Act deals with referrals to youth offender panels when dealing with children as defendants in cases. I will not go into details of all the provisions of that Act in connection with youth offender panels because that might be outside the ambit of the Second Reading of this particular Bill which deals primarily with witnesses. But broadly speaking, it provides for powers to the court to refer young offenders to this panel where meetings are held with the offender, with the participation of victims to the crime and what is sought ultimately is to put in place a contract with the offender whereby certain measures are required to be taken, for example, maybe work in the community and it is all part of the rehabilitation process rather than simply finding measures to punish the offender. It is part of the process to rehabilitate young offenders. I raise this, particularly, because not very long ago we had occasion in Gibraltar, generally, to debate and to consider the position of two young persons who were involved, as defendants, in an assault and there was an issue as to whether sentencing options in Gibraltar were appropriate in order to rehabilitate and provide properly for those defendants. So there seems to be a lacuna in the legislation in dealing with young offenders in that particular way. The legislation which is in part adopted for the purposes of this Bill does provide a mechanism and I would welcome the hon Member's thoughts as to whether that forms part of the Government's strategy and plans for young offenders generally.

HON D A FEETHAM:

Mr Speaker, the provisions specifically that the hon Member has just referred to are not provisions that were or are appropriate to be included in a Bill of this nature which refers specifically to protecting witnesses and vulnerable defendants in very specific set of circumstances. The Government are, as I have mentioned in the past, undertaking, and in fact the Bill itself has already been drafted and it has been circulated with the Bar Council. The Criminal Evidence and Procedure Bill which also draws upon other provisions from the Youth and Justice Criminal Evidence Act 1999. I cannot, from memory, confirm to the hon Member in the context of this debate today whether, in fact, it deals with the question of youth offender panels but it does overhaul the legislation on how one treats youth offenders in Gibraltar. I know it does not go as far as the United Kingdom because there are other implications and we can debate that in the context of that Bill as and when that comes to the House but I cannot, at the present moment, tell the hon Member whether this particular issue is in the Criminal Evidence and Procedure Bill. What I can tell him is that the bulk of the provisions from this particular Bill, the Youth and Justice Criminal Evidence Act that we have left out from here, are included in that particular Bill. I cannot really take it much further than that.

Question put. Agreed to.

The Bill was read a second time.

HON D A FEETHAM:

I beg to give notice that the Committee Stage and Third Reading be taken today, if all hon Members agree.

Question put. Agreed to.

THE CRIMES (INDECENT PHOTOGRAPHS WITH CHILDREN) ACT 2009

THE HON D A FEETHAM:

I have the honour to move that a Bill for an Act to prohibit the taking possession and distribution of indecent images or pseudo-images of children, the abuse of children by causing, controlling or arranging for their participation in pornography, and for related purposes, be read a first time.

Question put. Agreed to.

SECOND READING

HON D A FEETHAM:

I have the honour to move that a Bill for the Crimes (Indecent Photographs with Children) Act 2009 be now read a second time. Mr Speaker, this Bill is an important piece of legislation to help law enforcement agencies to prevent the exploitation of children and for the protection of children generally. This Bill builds upon other measures we have already introduced into this House this year such as the Children Act but in a criminal rather than civil legislative framework. We shall continue to build on our work later this year and early next year with other measures such as the Crimes Bill which will deal specifically with sexual offenders, prostitution and the grooming of children, amongst other things. At that stage, the legislative framework in this Bill will be subsumed by the Crimes Bill that will consolidate much of our criminal offences. Mr Speaker, this Bill draws upon not only UK legislation but also on the Council of Europe Convention on the Protection of Children against Exploitation and Sexual Abuse (the Convention on the Protection of Children), Council Framework Decision 2004/68/JHA on Combating Sexual Exploitation of Children and Child Pornography, and the Council of Europe Convention on Cybercrime. The full implementation of all these measures will be finalised with the Crimes Bill. Mr Speaker, we are also keeping a close eye on the draft Council Framework Decision on Combating Sexual Abuse and Exploitation of Children and Child Pornography circulated amongst Member States on the 25th March 2009. The UK Government itself has expressed some doubt about its provisions and it is unlikely to be adopted sometime soon but we are keeping a brief in relation to its progress. This Bill can be broadly divided into four main areas. Firstly, possession of indecent images of children. Secondly, distribution of such images or possession with aggravating features. Thirdly, the use and exploitation of children through pornography and fourthly, forfeiture of images. The penalties for each of these offences progressively increase from five to fourteen years. We are not only talking about actual images of children but realistic images purportedly depicting a child. For example, artificially created or generated computer images of a child. Possession. Clause 2 creates the offence of possessing an indecent image of a child. A child in this case will be a person under the age of 18 years. The clause purposely uses the term photograph and pseudo-photograph in connection with an image since the technologies that exist allow for the traditional photographic paper image to be created and held in a variety of ways and mediums and for the image to be artificially created or generated. The procuration and attempted procuration of such images is also prohibited by this clause which is within the purview of the Convention on the Protection of Children and also the Cybercrime Plan Convention but not the UK legislation. This clause will close a lacuna in our current statutory framework where possession without distribution of obscene images is not an offence. On conviction, a maximum custodial sentence of five years is available in the Supreme Court. That is, in fact, the

punishment in the United Kingdom. Sub clause 2 provides certain defences to this offence. In this regard, particular attention is given to circumstances where in today's electronic society it is possible for a person to be sent such images in an unsolicited manner and electronically possess such items without being conscious of their presence. Of course, the defences will not bite unless the person establishes, for example, that he had not seen the image and did not know or suspect these to have been indecent. Distribution or possession with aggravating features. Clause 3 concerns the more serious conduct whereby a person is concerned with the production and dissemination of indecent photographs. The distribution of indecent images has been a longstanding offence in Gibraltar. This section widens the scope of our existing provisions and more than doubles the penalty available to the court. Thus the section punishes production, taking or allowing images to be taken, offering such images, distribution of such images. Possession with intent to distribute or share such images to others or to procure or attempt to procure for those purposes. The publishing of adverts likely to be understood as conveying that the advertiser distributes or shows such images. Copying or moving any indecent photographs from one storage medium to another. Mr Speaker, in this regard, the Government take the view that transferring images from one storage device to another creates the propensity for distribution and is an aggravating feature which is punishable under section 3 and not section 2 on simple possession. These offences are all punishable with a maximum sentence of ten years in prison and are double that available in the case of simple possession. Mr Speaker, there are various defences to these offences in Gibraltar and also in the United Kingdom. We have, for instance, ensured that law enforcement agencies and crime prevention agencies do not commit a crime under clauses 2 or 3 where they are acting in the prevention, detection or investigation of crimes. As in the United Kingdom, the taking of photographs of a person over 16 who is in a marriage or enduring family relationship is not an offence if no third party is involved, there is consent and there is no distribution. The UK is currently extending this defence to pseudo-photographs as well as photographs through the Coroner and Justice Bill 2009 and that is the effect of the amendment that I am also going to be moving at Committee Stage. That amendment will also cure an inconsistency in section 4 of the Bill on this issue. Namely, that some of the subsections apply to photographs and pseudo-photographs but some only apply to photographs. Clause 6 together with the Schedule provide the basis for the search and seizure of indecent material to which the Bill applies including the forfeiture of any seized material. These forfeiture provisions are based on the UK Police and Justice Act 2006 which amend the Protection of Children Act 1978 in April of last year. The abuse of children generally. Clauses 8 to 10 are concerned with the abuse of children through pornography. This term is defined in clause 11 to mean the making, production, recording or storing of an indecent image. It will be a question of fact for the court to determine what constitutes an indecent image. The issue is one of impression conveyed by the image. Clause 8 is concerned with the person who intentionally involves a child in pornography in any part of the world, not just Gibraltar. The offence is aimed at persons who recruit children to pornography. The offence is made out if a person who is subjected to pornography is under the age of 18 years of age. Where the child is 18 but not under the age of 16, the defendant must reasonably believe that the child is in fact 18 or over. In the UK, the position is that if a person has reasonable belief that a child is over 18 but in fact the child is at least 13 years old, there is a valid defence. The Government do not believe that 13 is the appropriate age for Gibraltar. Clause 9 builds on the proceeding clause and creates the offence of intentionally controlling the activities of another person who is involved in pornography. An example of the behaviour that might be caught by this offence, is where a person requires or directs the child to pose for a photographer and the child complies with the request or direction. As with the proceeding clause, the reasonable belief defence applies. Clause 10 creates the offence of arranging or facilitating the involvement of a child in pornography. Thus the person who delivers the child to a place, that may be anywhere in the world, where the child is used to make pornography, commits an offence. As with the proceeding clauses, a reasonable belief

defence is available where the child is under 18 but not under 16 years old. In the UK, as I say, that is 13 years old. All three offences carry severe penalties and on conviction or indictment that all three carry a maximum sentence of imprisonment of 14 years. Mr Speaker, these provisions do not affect the law on pornography and distribution of indecent material generally which continue to be offences under existing provisions in other statutes. The provisions in this Bill are an overlay and constitute tougher provisions as they relate specifically to children. Mr Speaker, these are important sections in the fight against organised crime and organised paedophile rings that may attempt to establish a connection with Gibraltar. I commend the Bill to the House.

Discussion invited on the general principles and merits of the Bill.

HON G H LICUDI:

Mr Speaker, we will be supporting this legislation today. The only comments I would have on the Bill as presented by the hon Member concerns two issues, and I should say, that at Committee Stage there may be one or two minor drafting matters that I will raise, and I will give notice of that in Committee rather than in the Second Reading. But the two issues, again on which I would welcome the hon Member's thoughts, concern firstly, a defence of reasonable belief that a child is over 18 which applies to some offences but not others, and secondly, in connection with the difference in sentencing options, maximum sentences, ten years on the one hand for some offences and 14 years for others. Clauses 2 and 3 create the offences of possession in the case of clause 2 and taking and publishing indecent photographs, there are a number of offences in clause 3, including producing or making a photograph or a pseudo-photograph. As I see it, in these clauses, for these particular offences in which clause 4 is also relevant, there is no defence of the person who is charged having a reasonable belief that the child is over 18. Whereas if we go to clauses 8, 9 and 10, which deal with causing or inciting, controlling a child, arranging or facilitating, these are the sections which generally have been described as exploitation offences, those do contain a defence of reasonable belief that the child is 18 or over. I am just wondering whether there is any particular reason why there is a difference for the treatment of the two offences, whereas in one case someone can be acquitted for having a reasonable belief, and in the other case the person may not. There may be a good explanation for that. The other issue which is related in part to this is the maximum sentences. Ten years on the one hand under clause 3, taking or publishing and 14 years under clauses 8, 9 and 10. The issue arises primarily because of the use of the words in clause 3, "producing or making". So a person who produces or makes an indecent image of a child commits an offence under clause 3. The definition of being involved in pornography at clause 11 includes making, producing, recording or storing and in fact clause 3 also has provision for an offence in respect of storing an image. The issue which may arise is where someone simply makes an image or incites someone to make an image. If you make an image, you are liable at clause 3 to a maximum of ten years. If you incite or assist someone, call someone to make that image, because of the definition in clause 11, you are liable under clause 8. Yet for inciting, you have 14 years and for making, you have ten years. In inciting is generally something which is considered being an accessory, aiding, abetting, procuring or inciting, whereas the main and, generally, the sentence for an accessory to a crime, is considered to be the same on a par because he is as guilty as the main offender. But there is also a practical issue which may arise from this. If, for example, there are two persons who are charged with an offence, one is charged for making an image, an indecent image, and that person is a principal offender charged under section 3 and you have someone who has aided or incited that person and charged jointly, or in the same case, as the main offender. Now, that second person can be charged either, simply, as an accessory, as an aider or abettor, in which case he is charged under clause 3 with a sentencing option being a maximum of ten years or he can be charged for the second

offence of inciting under clause 8 which carries a maximum sentence of 14 years. The issue really is in terms of the terminology where you have some language, producing, making and storing which catches both offences. So you can have a situation where those two people are charged and yet one is charged as an accessory but liable to receive a higher prison sentence. If someone is charged as an accessory under clause 8 in the same case as someone is charged under clause 3, potentially, and that is why I said the issues were linked, one has the defence of reasonable belief but the other one does not, and does that give rise to any practical issue or inconsistency in dealing with the case. These are just concerns about practical possibilities that may arise in the future, particularly, as regards charging options where someone simply makes or incites the making or the storage of an image. Does one charge under clause 3 or does one charge under clause 8. Those are the two issues, apart from, as I have said, a couple of minor matters for Committee.

HON D A FEETHAM:

The hon Gentleman is right to raise the issue because it was a matter that, in fact, concerned me when I was looking at this. In fact, the hon Gentleman has also not mentioned, I thought that he was going to do so, the fact that under sections 2 and 3, in particular, there is the marriage defence, but under sections 8 to 10 there is no marriage defence. Now, that is exactly the position as in the United Kingdom. In the United Kingdom what we have is section 3 where you have punishable by ten years, permitting to be taken, the making et cetera of indecent photographs and then you have these other offences that are punishable by 14 years with a reasonable belief defence. Now, the reason for the distinction appears to be, from explanations in the text books et cetera that, in fact, sections 8 to 10 attempt to deal with something more than just the basic taking in section 3. We are dealing with people who are recruiting children into pornography where it is almost organised. We are into the realms of organised crime. So, rather than, in fact, create an entirely different regime here in Gibraltar in respect of this aspect of it, we decided, in fact, to follow the United Kingdom regime which was section 3. You have a marriage defence. You are dealing with something that is lesser than your sections 8 to 10 which intends to deal with the recruitment, the arranging for children to……. What it attempts to deal with is organised paedophile rings and organised crime. That is the explanation that is afforded in some of the text books for the difference in the treatment in the two. We have decided to really follow the UK regime in relation to this aspect of it because we felt that when the courts were considering the relevant sections, that was the appropriate way to proceed.

HON G H LICUDI:

Mr Speaker, will the hon Member give way before he sits down? I understand fully that argument and the logic of that argument and that is why I said at the beginning, to echo his words, that the offences under clauses 8, 9 and 10 are really exploitation, therefore can be considered more serious. But that does not actually deal with the point I raised that you can have equivalent offences which fall under clause 3 and also under clause 8 and you can have two people charged and you have discrepancies in terms of sentencing option. As I mentioned in an earlier contribution, we can be guided by the UK, we do not have to follow slavishly and I know that the hon Member does look at things from the Gibraltar point of view rather than just following what happens in the UK but is there not a case for looking at that practical issue and maybe adapting the legislation for Gibraltar?

HON D A FEETHAM:

No, because I prefer to leave it to the common sense of prosecutors, Mr Speaker. That is the reality of it. Prosecutors looking at a situation such as this, have to make a judgement call. They make it all the time. In the United Kingdom and

everywhere else where they have to make that judgement call as to whether to just simply charge under section 3 or charge under sections 8 to 10. To charge under sections 8 to 10 there has to be an extra element. That is what the authorities actually indicate. That is the judgement call that needs to be undertaken by the prosecutors and it is not for me to undertake it. It is for them to do so.

Question put. Agreed to.

The Bill was read a second time.

HON D A FEETHAM:

I beg to give notice that the Committee Stage and Third Reading of the Bill be taken today, if all hon Members agree.

Question put. Agreed to.

THE LIMITATION (AMENDMENT) ACT 2009

HON D A FEETHAM:

I have the honour to move that a Bill for an Act to amend the Limitation Act, be read a first time.

Question put. Agreed to.

SECOND READING

HON D A FEETHAM:

I have the honour to move that the Bill for the Limitation (Amendment) Act 2009, be read a second time. Mr Speaker, this short Bill amends the Limitation Act, that is, the amount of time someone has to sue someone else before they are barred from doing so in the Limitation Act, in relation to actions for damages, for negligence not involving personal injury or death. As it currently stands, section 4 of the Limitation Act provides for a limitation period of six years for any action founded on tort other than in respect of personal injury and this period begins to run on the date on which the cause of action accrues subject to various exceptions contained in Part II of the Act. There are a number of decisions including the House of Lords decisions in Pirelli General Cable Works against Oscar Faber and Partners and Nykredit Mortgage Bank plc against Edward Erdman Group Ltd which have held that a cause of action accrues when the potential claimant suffers damage. In the context of negligent advice for instance, Mr Speaker, that was held to mean the date in which the person relies on any negligent advice to enter into the financial product and not the often later date when a downturn in the market causes or may cause him to lose his money. In other words, the negligence takes place in the mis-selling of the product which may have been unsuitable for that person, not the later date at which a downturn in the market unravels the negligent advice. In these types of cases, as in cases involving latent damage in buildings, these amendments will obviously be significant. Indeed, the amendments are based on the Latent Damage Act 1986 of England and Wales which followed the recommendations of the 24th Report of the Lord Chancellor's Law Reform Committee. The Report found that the law setting a time limit of six years from the date of accrual of the course of action in negligence actions, not involving personal injuries or death, was unsatisfactory because sometimes the defendant's negligence or its effects may lie hidden for years. Claimants can become statute barred before they know or could even be in a position to know that they had suffered damage. The Report concluded that a claimant who has no means of knowing that he has suffered damage, should not as a general rule be barred from taking proceedings by a limitation period which can expire before he discovers or could discover his loss. Mr Speaker, this Bill inserts a new Section 10A which extends the normal limitation period so as to give a plaintiff in latent damage negligence cases, not involving personal injury or death, an additional three years from the date on which he

knows or ought reasonably to have known that he has suffered significant damage. However, there is also a need to create certainty so that a person knows the length of time during which he remains liable for past action or omissions. Further, it is right that defendants should be protected from stale claims for which they no longer have the evidence to contest. Section 10B therefore introduces a long stop which would operate to bar legal action in cases of latent damage after 15 years. Clauses 2(4) and 2(5) of the Bill introduces certain amendments consequential upon the insertion of the new 10A and 10B. The new section 28A makes special provisions for cases where the plaintiff is under a disability at the time when the special time limit begins to run. The amendments to section 32 also prevent the new time limits provided by sections 10A and 10B applying cases which involve deliberate concealment by the defendant. That is also the position in the UK. This means that deliberate concealment will operate to disapply the long stop and the initial limitation period so that if there is deliberate concealment in a latent damage case, the limitation period of six years, generally applicable to torts, will apply but commencing on the date when the claimant discovered or could with reasonable diligence have discovered the concealment. The House will note that I am moving an amendment to clause 10A and 10B to substitute the words, "in respect of personal injury or death" for "one to which section 5 of this Act applies", to make it absolutely clear that only cases in respect of personal injury or death are excluded from sections 10A and 10B. The House will also be interested to learn that we are undertaking a much wider review of the Limitation Act together with some members of the Bar which include personal injury and other causes of action. This is a far more complex exercise, not least because the English Limitation Act in areas such as personal injury has been subject to criticisms by academics and professionals and we need to make a choice as to whether we develop some other model. Finally, the amendments introduced by this Bill will have effect in relation to causes of action accruing before as well as after the amending Act comes into force but shall not affect any actions which have already been statute barred or any actions commenced before the Act comes into operation. Those were the same transitional provisions that the UK introduced at the time of the introduction of the Latent Damage Act. I commend the Bill to the House.

Discussion invited on the general principles and merits of the Bill.

HON G H LICUDI:

Mr Speaker, we will be supporting this legislation once again.

Question put. Agreed to.

The Bill was read a second time.

HON D A FEETHAM:

I beg to give notice that the Committee Stage and Third Reading of the Bill be taken later today, if all hon Members agree.

Question put. Agreed to.

HON G H LICUDI:

Mr Speaker, maybe I missed something that I did not hear. On the Agenda which was published yesterday, there is at (9) the Bill in connection with computer systems. Can we just be told what has happened to that?

HON CHIEF MINISTER:

Yes, Mr Speaker, that was the subject matter of my little informal exchange with the Clerk. We are not proceeding with that Bill. That Bill contains important omissions which need to be corrected before it can be taken in this House.

COMMITTEE STAGE

HON CHIEF MINISTER:

I have the honour to move that the House should resolve itself into Committee to consider the following Bills clause by clause:

1. The Qualifications (Right to Practise) Bill 2009;

2. The Income Tax (Amendment of the Qualifying (Category 2) Individuals Rules 2004) Bill 2009;

3. The Public Health (Amendment) Bill 2009;

4. The Social Security (Amendment of Regulations) Bill 2009;

5. The Gibraltar Port Authority (Amendment) Bill 2009;

6. The International Criminal Court (Amendment) Bill 2009;

7. The Crimes (Vulnerable Witnesses) Bill 2009;

8. The Crimes (Indecent Photographs with Children) Bill 2009;

9. The Limitation (Amendment) Bill 2009.

THE QUALIFICATIONS (RIGHT TO PRACTISE) BILL 2009

Clause 1 – was agreed to and stood part of the Bill.

Clause 2

HON CHIEF MINISTER:

Yes, Mr Chairman, in clause 2, in the definition of EEA State, I propose to insert the words "if it were" immediately before the words "a separate EEA State" in the last line. So that it should read "Gibraltar shall be treated as if it were a separate EEA State" rather than as it reads at present that "Gibraltar shall be treated as a separate EEA State". The point of the amendment is that of course Gibraltar is not a separate EEA State but for the purposes of the Bill, when there are different rights and different obligations imposed and recognition powers imposed in respect of EEA States, that for those purposes Gibraltar is deemed to be an EEA State.

Clause 2, as amended, was agreed to and stood part of the Bill.

Clauses 3 to 9 – were agreed to and stood part of the Bill.

Clause 10

HON CHIEF MINISTER:

Yes, Mr Chairman, in clause 10 I have given notice of a small amendment which is really to add into the sentence, into the section, an element of the ingredient of it which is required by the Directive but it was omitted from the section. So that this whole section only applies in the case of regulated professions having public health and safety implications. That is an essential part of the article in the Directive from which this section is drawn but had been omitted by oversight from the language of the section so that the section was in fact much wider than the Directive. So that amendment is to prefix the existing language with the words "In the case of regulated professions having health and safety implications" and therefore narrows the scope of the section to that which is what the Directive permits.

Clause 10, as amended, was agreed to and stood part of the Bill.

Clauses 11 to 53 – were agreed to and stood part of the Bill.

Clause 54

HON CHIEF MINISTER:

Yes, Mr Chairman, in clause 54 I have proposed an amendment to sub clause (2) by the addition of a letter "(c)" to make provision for the date as it applies to Bulgaria and Romania by adding "(c) 1 January 2007 for Bulgaria and Romania" and therefore the consequential re-lettering of the existing letter "(c)" which related to a different date for other EEA States. That then becomes letter "(d)".

Clause 54, as amended, was agreed to and stood part of the Bill.

Clause 55 – was agreed to and stood part of the Bill.

Clause 56

HON CHIEF MINISTER:

Yes, Mr Chairman, in clause 56 I proposed an amendment which is to delete the restrictive words "on a point of law" from the right of appeal so that it would now read that "The decision or failure to reach a decision within the deadline, shall be subject to appeal to a judge of the Supreme Court" and not limited to a point of law as the section presently says. So the amendment there is to strike, to delete the words "on a point of law".

Clause 56, as amended, was agreed to and stood part of the Bill.

Clause 57 – was agreed to and stood part of the Bill.

Clause 58

HON CHIEF MINISTER:

In clause 58, Mr Chairman, again the language as drafted is too permissive of restriction. More permissive of restriction than is allowed by the Directive and it requires to be limited by the words that I alluded to in my speech on the Second Reading by adding the words "necessary for practising the profession in Gibraltar". So it is not a question of having need to have knowledge of the English language, as the Bill now reads. It has got to be "knowledge of the English language necessary for practising the profession in Gibraltar" and those latter words are the ones that the amendment seeks to add, which is what the Directive requires.

Clause 58, as amended, was agreed to and stood part of the Bill.

Clauses 59 and 60 – were agreed to and stood part of the Bill.

Title to Part V

HON CHIEF MINISTER:

Yes, Mr Chairman, here there is just some reorganisation and representational amendments. The provisions relating to the competent authorities and the previous provisions which are also to be deleted relating to the contact point are being recast and I will speak separately to the different amendments for the two sections which are sections 61 and old section 62. At the moment the Clerk has just called the amendment to the heading to Part V, which used to read "ADMINISTRATIVE COOPERATION AND RESPONSIBILITY FOR IMPLEMENTATION" and we are striking from that the words "AND RESPONSIBILITY FOR IMPLEMENTATION" because indeed the provisions of the competent authorities, the powers of implementation of the competent authority are cast throughout the Act and not just in this part. So there are other

parts of the Act that give power to the competent authority. So this is just, I am only speaking now to the reason for the removal of the heading of the words "AND RESPONSIBILITY FOR IMPLEMENTATION".

The Title to Part V, as amended, was agreed to and stood part of the Bill.

Clause 61

HON CHIEF MINISTER:

Yes, Mr Chairman. Here is an amendment to the Bill in so far as deals with this question of the competent authority. At present it reads: "61(1) The competent authorities in Gibraltar shall work in close collaboration with the competent authorities of other EEA States and shall provide mutual assistance." That section is being simplified and indeed made wider by being made to read: "61(1) The competent authorities in Gibraltar shall collaborate with and provide assistance to the competent authorities of other EEA States", and deleting the words "and shall provide mutual assistance". So the concept of collaboration and providing assistance is retained, but the concept of "work in close collaboration", simply becomes "collaborate" and the concept of "provide mutual assistance", simply becomes the concept of "provide assistance" on the basis that every other country that has legislated this, has the equivalent provision for providing assistance to us. So we cannot legislate for mutual assistance provided. We legislate for providing assistance and the others, who have to do the same, legislate for providing assistance to us. The other amendment, a little but further down in subsection (3) is simply to state… At present it says, "The Minister shall designate the authority". It does not say in what method. Now it says "by Legal Notice". In other words, that we cannot just designate it in some private document that we put in a file and that was just, I think, an omission from the original drafting. In subsection (4), there is a……. This coordination of the authorities. The hon Members may have noticed that the Bill provides for different authorities, different competent authorities in Gibraltar perhaps been designated for different professions and there is a need to provide a coordinator of the activities. If there are multiple competent authorities in Gibraltar, there is a need to designate under the Directive a coordinator of the various competent authorities in Gibraltar to make sure that the various competent authorities in Gibraltar are, amongst other things, uniformly applying the Bill in Gibraltar. So, the amendment is that: "The Minister shall designate a coordinator for the activities" which was there already "within Gibraltar of authorities" delete the word "the" of authorities, however many there may be, "referred to in this section and shall ensure that the other EEA States and the European Commission are informed thereof", adding there……. The phrase therefore changes from "and shall inform the other EEA States and the European Commission thereof". That becomes "shall ensure that the other EEA States and the European Commission are informed thereof". The reason for this, Mr Speaker, is one that I wish to explain to the House and it is one that may become more polemic as the European Union post… it now looks as if it may go through, post Lisbon Treaty, where we shall be more automatically subject to Justice and Home Affairs measures in respect of which the UK previously had a general exclusion and had an opt-in clause. All that is changing under this but……. So we will find ourselves much more frequently and automatically subject to JHA measures. JHA measures have traditionally had things called "contact points". "Contact points" have to be distinguished from competent authorities. In other words, the competent authority is the authority within Gibraltar that has responsibility for exercising the powers in relation to a particular area. In the area of Justice and Home Affairs, the practice has established over the years of their being an addition to competent authority, something called "contact points" which is basically a formal or informal gathering of Member State contact points where they meet to see how are things working. Is it working well? Nothing to do with the administration or the exercising of powers, just really a contact forum to keep things under review. In the past, because Gibraltar's participation in these things has been optional, because it was optional for the UK, so the UK used to

give us the option, "look we are planning to participate in this, do you want to?" We were free to take the view whether we were happy to participate notwithstanding that there was not a separate contact point for Gibraltar. In other words, France……. The Member States had contact points but because Gibraltar is not a Member State they almost never made provision for multiple contact points in Member States. So where you have measures, like this one for example, where the Directive specifically provides for one contact point per Member State, there is no possibility for Gibraltar to have its own contact point. In those circumstances, any Gibraltar related contacting, which is not to be confused with "competent authorities" contacting each other through, for example, in our case the post-box. This is something else. This is not that. This is Member States reviewing and talking to each other about how cooperation is going. There is no possibility of Gibraltar participating in its own right in that forum because the Directive says that the Member States shall each appoint only one contact point. Now this is an issue. This is an issue because we believe that the United Kingdom should do its utmost when the texts of European measures are being negotiated which is not a forum at which we are present. They should do their utmost to ensure, as is the case with competent authorities where it usually says, that "Member States are free to appoint competent authorities", more than one, which lets us in. That they should adopt the same attitude in respect of contact points. There is no reason why Gibraltar should not have its own contact point for other Member States to ask questions of, in this less non-competent authority area. It has not been the case until now. So this will become a bigger issue or at least a more frequent……. It is up to people to form their own view about whether they think it is a big issue or not, but it certainly will become a more frequent question because post Lisbon, Gibraltar's automatic obligation to participate in many of these JHA things will become an automatic obligation compared to in the past, where in most cases, it has become an optional choice. This explains why the provisions in relation to contact points in section 62, which is, and if the Clerk, the House bears with me, I will speak to now because they are connected in this way. Why the contact point in section 62 has been recast. By eliminating the reference to contact point, it is simply a breach of the Directive as it is recast for Gibraltar to have a separate contact point because the Directive specifically says that Member States shall only have one each. But rather than do away with the substance of the function of the contact point in Gibraltar, we have added it to the functions of the competent authority, so that is why section 61 and section 62, following this amendment, merge into one section. So that, for example, whereas it was the contact point, under section 62, that had the obligation in Gibraltar to provide citizens with information, as is necessary concerning recognition or to assist citizens in realising their rights, the fact that Gibraltar cannot have its own contact point in the Directive, does not mean that these are not functions that somebody needs to carry out in Gibraltar. So they have been added to the responsibilities and functions of the competent authority which is the formula that we have found. For making sure that there is somebody with the obligation to do these things in Gibraltar and for Gibraltar whilst at the same time not infringing the terms, or not purporting to infringe the terms of the Directive which does not allow for the UK Member State to have multiple contact points. I apologise to the House for that somewhat lengthy explanation but I think it was important. First of all, this is a more significant amendment to put it into its full and wider context and also to signal to the House that this is an issue where unless the UK takes care to ensure that language is negotiated for EU Directives and Regulations in the future that allows for multiple contact points, we will have this problem every time that there is a measure that simply says that "every Member State shall have only one contact point".

HON J J BOSSANO:

Mr Chairman, can I ask the hon Member, from the explanation that he has given, does it not follow that, in fact, we were not making this provision in our own law, under the EU requirement the UK contact point would have then to take the responsibility

for doing in Gibraltar what we are providing here. Is that not the case?

HON CHIEF MINISTER:

Correct, which is why I have only gone so far as to make this legislation compatible with the Directive rather than exclude all the language about contact point functions because it is not acceptable to Gibraltar for the UK contact point to have domestic competences in Gibraltar, and this is the way that the line is drawn. So that, for example, where it says in the Directive that the contact point shall communicate this or that to other contact points. For example, in our law this is now written following the amendments as, "The Gibraltar competent authority shall ensure that" without specifying how that will happen. So we will ensure that leaving it for a future debate, an arrangement with the UK as to the scope that exists for Gibraltar to do the communicating directly. Obviously, when it is competent authority we can communicate directly because of the post-box arrangements. But when the communicating is to be done with or through contact points, because for the Directive purposes the UK can only have one contact point, there is an issue there which we are going to have to work an arrangement with the UK for how that happens in our case and the language now is neutral in that respect. It speaks of the Gibraltar domestic authority ensuring that necessary information is transmitted leaving it open to doing therefore directly or, if it should be so required when we have sat down with the UK to discuss these things, perhaps through the UK contact point but acting on our behalf and not quoi the UK domestic situation.

Clause 61, as amended, was agreed to and stood part of the Bill and clause 62, as drafted originally, was deleted.

Clauses 63 to 69

HON CHIEF MINISTER:

Mr Chairman, these are simply renumbered consequentially on the deletion of 62. So, consequent on the deletion of 62 all subsequent sections are reduced in numbering by one.

Clauses 62 to 68, as renumbered, were agreed to and stood part of the Bill.

Schedules 1 to 7 – were agreed to and stood part of the Bill.

The Long Title – was agreed to and stood part of the Bill.

Arrangement of clauses

HON CHIEF MINISTER:

Yes, Mr Chairman, consequent to the amendment to the heading, to the title to Part V, the equivalent amendment should be made in the arrangement of clauses in the index part of the Bill. Simply to delete "ANY RESPONSIBILITY FOR IMPLEMENTATION" from the heading and also to the reference in subsection 62 and to renumber the subsequent sections.

The arrangement of clauses, as amended, was agreed to and stood part of the Bill.

THE INCOME TAX (AMENDMENT OF THE QUALIFYING (CATEGORY 2) INDIVIDUALS RULES 2004) BILL 2009

Clauses 1 and 2 – were agreed to and stood part of the Bill.

The Long Title – was agreed to and stood part of the Bill.

THE PUBLIC HEALTH (AMENDMENT) ACT 2009

Clauses 1 and 2 – were agreed to and stood part of the Bill.

The Long Title – was agreed to and stood part of the Bill.

THE SOCIAL SECURITY (AMENDMENT OF REGULATIONS) BILL 2009

Clauses 1 and 2 – were agreed to and stood part of the Bill.

The Long Title – was agreed to and stood part of the Bill.

THE GIBRALTAR PORT AUTHORITY (AMENDMENT) BILL 2009

Clause 1 and 2 – stood part of the Bill.

The Long Title – stood part of the Bill.

THE INTERNATIONAL CRIMINAL COURT (AMENDMENT) BILL 2009

Clause 1 to 4 – were agreed to and stood part of the Bill.

The Long Title – was agreed to and stood part of the Bill.

THE CRIMES (VULNERABLE WITNESSES) BILL 2009

Clauses 1 to 53 – were agreed to and stood part of the Bill.

The Long Title – was agreed to and stood part of the Bill.

THE CRIMES (INDECENT PHOTOGRAPHS WITH CHILDREN) BILL 2009

Clause 1 – was agreed to and stood part of the Bill.

Clause 2

HON G H LICUDI:

Mr Chairman, there are references in clause 2 as in other clauses to pseudo-photograph and I see that notice has been given of amendments because the hon Member in his contribution, in the Second Reading, said that there were some inconsistencies because there were some references to photographs which did not say "or pseudo-photograph". What I was going to suggest is whether it is not better, if all references to photographs are going to follow with the words "or pseudo-photograph", whether is it not better in the definition of photograph to include a reference to pseudo-photograph and that would be later on at clause 7(4) which says, "references to a photograph include" and there could be a little (c) there which says "a pseudo-photograph" which would mean that we could take away all the references to pseudo-photograph everywhere else, unless of course there is any provision that I have missed and I have not looked in detail at the proposed amendments and whether that covers everything. Whether there is any situation at all where you can have an offence in respect of a photograph but not a pseudo-photograph.

HON D A FEETHAM:

No, for this reason there are two different concepts and, in fact, pseudo-photograph is defined in section 7 subsection (7) as an image, whether made by computer-graphics or otherwise howsoever, which appears to be a photograph and the difference between a photograph and a pseudo-photograph is obviously a photograph is a photograph and then there are……. The definition of photograph is, in fact, expanded to

include film et cetera, but a pseudo-photograph is designed……. For instance, an example of a pseudo-photograph would be, you take a picture of somebody, of a child, and you transpose the head, just the head of the child, a picture and you transpose that head over, say for instance, an indecent image of someone. That is a pseudo-photograph. It is intended to deal with, though they are related, two separate concepts. Throughout the Act we are referring separately to photograph and to pseudo-photograph although of course the offences are made in relation to both. The mistake is in relation to section 4 which I will speak to in a moment when we come to considering the defence of marriage because in relation to section 4 the defence in some of the subsections apply to photograph and in some of them it applies to photographs and pseudo-photographs. But apart from that, it is consistent throughout, the references both to photograph and to pseudo-photographs. In fact again, and I am the first to say, as I did in the debate a few weeks ago with exchanges with the hon Member Mr Picardo who is not here today, that we should not slavishly follow the UK in respect of everything. But in this particular instance we have decided to follow the UK. That is exactly how they have dealt with it as well.

HON G H LICUDI:

Mr Chairman, I understand the argument. I was not suggesting for one moment that the definition of photograph which is clause 7(3) should include a pseudo-photograph so that……. No. What I said was, in clause 7(4) references in the legislation to photograph should include pseudo-photograph but as two different concepts. So one thing is the definition of photographs which is covered by sub clause (3) of 7, another thing is the definition of pseudo-photograph which is covered by (7) of clause 7 and there are two different concepts. But for the purpose of legislation, this is just a drafting issue rather than a technical issue, whether it is necessary at every single stage to say photographs or pseudo-photographs when it could be simply included, for the purposes of this legislation, under sub clause (4). If it does not work, it does not work. It is only a suggestion as to whether drafting it makes more sense or not.

HON D A FEETHAM:

I am very grateful to the hon Member for making this constructive suggestion but, with respect to him, they are both separate concepts, the concepts of photograph and pseudo-photograph, although they are linked, and therefore they ought to be separately dealt with in the Act.

Clause 2, as drafted, was agreed to and stood part of the Bill.

Clause 3

HON G H LICUDI:

Mr Chairman, there is possible drafting typographical issue here. Clause 3 (1) starts “subject to section 4, it is an offence for a person” and then “to produce, to distribute, to have, to publish” and then (e) “copies or moves”. So if you just look at (e) in the context of the beginning “it is an offence for a person” I suppose it must be “to copy or to move”. Should it not be “to copy or to move” rather than “it is an offence for a person, copies or moves”?

MR CHAIRMAN:

Yes. The infinitive is missing.

HON G H LICUDI:

So I would simply suggest replacing "copies or moves" with the words "to copy or to move".

Clause 3, as amended, was agreed to and stood part of the Bill.

Clause 4

HON D A FEETHAM:

Yes, Mr Chairman, I am moving amendments in relation to clause 4. There are two reasons for moving these amendments. The principle reason is in fact that the intention of this particular clause is to cover both photographs or pseudo-photographs. Now, hon Members will recall that in my speech I said that in the United Kingdom the defence of marriage as presently drafted, the legislation as is presently enacted, only extends to photographs and not pseudo-photographs. That really does not make sense because of course, in reality there is very little……. there is no reason why we should be granting the defence of marriage to a photograph and not in fact to a pseudo-photograph when in many respects it can be the lesser of the two. Now, in the United Kingdom, they are extending that at the moment to include both photographs and pseudo-photographs. This defence in section 4 by the Coroners and Justice Bill 2009 as I said is going through the House of Lords as we speak. In fact, that was the intention all along because if one looks at subsection (2) of section 4, the defence as it applies to section 3(1)(a), (b), (c) or (e) applies to both photographs and pseudo-photographs. But then pseudo-photographs is left out of section 4(1) and it is also left out in subsections (3), (4) and (6). An additional point is of course that if one looks at subsection (4)..……. Subsection (4) is limited to applicability to section 3. It should also be extended to section 2, otherwise the defence of marriage in this particular section, taken as a whole, is out of kilter as regards possession and possession with intent to distribute and the aggravating features. So Mr Chairman, in relation to section 4(1), after the word "photograph" in the third line, insert "or pseudo-photograph". In subsection (3), first line, after the word "photograph", insert "or pseudo-photograph". In subsection (4), where it says "in the case of an offence under section" after the word "section" insert "2(1) or". So it should read "2(1) or 3(1)(a)" and then it carries on and where it says "photograph" insert the words after photograph "or pseudo-photograph being in the defendant's possession". That is the point. So it extends to possession as well as the section 3 offences. The more aggravated offences. Then in subsection 6(a) after the word "photograph" insert "or pseudo-photograph", in (b) after the word "photograph" insert "or pseudo-photograph" and (ii) after the word "photograph" insert "or pseudo-photograph".

HON G H LICUDI:

Mr Chairman, we have no difficulty with that proposed amendment. We will support that. In relation to general comment on the defence of marriage, it was a point that the hon Member made in his last intervention, in the Second Reading, as to why I had not mentioned the defence of marriage which applies to these sections but not the other sections. It seems to us that there is a very logical reason and a good reason why that should be the case. It is one thing for one to have possession of an indecent image of ones own spouse and it is quite another where the spouse is a child to use that child for exploitation purposes notwithstanding that that person is a spouse. It cannot be right that one exploits whether it is a wife or a husband, a 17 year old, just because of marriage and the defence of marriage should not properly apply to the question of exploitation. So we agree that the defence of marriage is in the right place in the legislation. We will not be proposing any amendments to that.

Clause 4, as amended, was agreed to and stood part of the Bill.

Clauses 5 to 11 – were agreed to and stood part of the Bill.

The Schedule

HON D A FEETHAM:

Yes, Mr Chairman, there is a typographical error in the heading for clause 8 of the Schedule and that is the word "forfeited". The letters "ted" at the end have slipped out of the formatting, in fact. It is caused by the formatting of the Bill. So I would move an amendment to add the letters "ted" so that it reads "forfeited". I have no other amendments to the Schedule.

The Schedule, as amended, in respect of the heading to paragraph 8, stood part of the Bill.

The Long Title – was agreed to and stood part of the Bill.

THE LIMITATION (AMENDMENT) BILL 2009

Clause 1 – was agreed to and stood part of the Bill.

Clause 2

HON D A FEETHAM:

Yes, Mr Chairman, in clause 2(3), in section 10A(1), replace the words "one to which section 5 of this Act applies" with the words "in respect of personal injury or death". Now, there is in fact another amendment in 10B(1) which is identical to this one. Now, the reason for this is because, although strictly speaking section 5, does deal with personal injury, we felt that, in fact, the safer course of action is, rather than to refer to section 5 to make it explicit that this particular section does not apply in respect of personal injury or death. Just in case somebody came up with a point in court that it should be read in a more narrow way because it only referred to section 5 of the Act. It is to really make it clear beyond per adventure that all that is excluded is personal injury or death. Sub clause 5, the number 32 has been omitted before the number 1 in brackets. So it should read, "by renumbering sections 32 as section 32 (1)".

Clause 2, as amended in respect of all three matters spoken to by the Hon Minister, was agreed to and stood part of the Bill.

Clause 3 – was agreed to and stood part of the Bill.

The Long Title – was agreed to and stood part of the Bill.

THIRD READING

HON CHIEF MINISTER:

I have the honour to report that:

1. The Qualifications (Right to Practise) Bill 2009;
2. The Income Tax (Amendment of the Qualifying (Category 2) Individuals Rules 2004) Bill 2009;
3. The Public Health (Amendment) Bill 2009;
4. The Social Security (Amendment of Regulations) Bill 2009;
5. The Gibraltar Port Authority (Amendment) Bill 2009;
6. The International Criminal Court (Amendment) Bill 2009;
7. The Crimes (Vulnerable Witnesses) Bill 2009;
8. The Crimes (Indecent Photographs with Children) Bill 2009;
9. The Limitation (Amendment) Bill 2009,

have been considered in Committee and agreed to, some with and others without amendments, and I now move that they be read a third time and passed.

Question put.

The Qualifications (Right to Practise) Bill 2009;

The Income tax (Amendment of the Qualifying (Category 2) Individuals Rules 2004) Bill 2009;

The Public Health (Amendment) Bill 2009;

The Social Security (Amendment of Regulations) Bill 2009;

The International Court (Amendment) Bill 2009;

The Crimes (Vulnerable Witnesses) Bill 2009;

The Crimes (Independent Photographs with Children) Bill 2009;

The Limitation (Amendment) Bill 2009,

were agreed to and read a third time and passed.

The Gibraltar Port Authority (Amendment) Bill 2009.

The House voted.

For the Ayes:
The Hon C G Beltran
The Hon Lt-Col E M Britto
The Hon P R Caruana
The Hon Mrs Y Del Agua
The Hon D A Feetham
The Hon J J Holliday
The Hon J J Netto
The Hon E J Reyes
The Hon F J Vinet

Abstained:
The Hon J J Bossano
The Hon C A Bruzon
The Hon N F Costa
The Hon Dr J J Garcia
The Hon G H Licudi

The Bill was read a third time and passed.

ADJOURNMENT

HON CHIEF MINISTER:

I have the honour to move that this House do now adjourn to Thursday 26th November 2009 at 10.00 a.m.

Question put. Agreed to.

The adjournment of the House was taken at 12.33 p.m. on Friday 23rd October 2009.

THURSDAY 26TH NOVEMBER 2009

The House resumed at 10.00 a.m.

PRESENT:

Mr Speaker……(In the Chair)
(The Hon Haresh K Budhrani QC)

GOVERNMENT:

The Hon P R Caruana QC – Chief Minister
The Hon J J Holliday – Minister for Enterprise, Development, Technology and Transport and Deputy Chief Minister
The Hon Lt-Col E M Britto OBE, ED – Minister for the Environment and Tourism
The Hon F J Vinet – Minister for Housing
The Hon J J Netto – Minister for Family, Youth & Community Affairs
The Hon Mrs Y Del Agua – Minister for Health and Civil Protection
The Hon D A Feetham – Minister for Justice
The Hon L Montiel – Minister for Employment, Labour and Industrial Relations
The Hon C G Beltran – Minister for Education and Training
The Hon E J Reyes – Minister for Culture, Heritage, Sport and Leisure

OPPOSITION:

The Hon J J Bossano – Leader of the Opposition
The Hon F R Picardo
The Hon Dr J J Garcia
The Hon G H Licudi
The Hon C A Bruzon

ABSENT:

The Hon N F Costa
The Hon S E Linares

IN ATTENDANCE:

M L Farrell, Esq, RD – Clerk to the Parliament

SUSPENSION OF STANDING ORDERS

HON CHIEF MINISTER:

I beg to move under Standing Order 7(3) to suspend Standing Order 7(1) in order to proceed with a Private Members' Bill.

Question put. Agreed to.

PRIVATE MEMBERS' BILL

FIRST AND SECOND READINGS

THE ROYAL BANK OF SCOTLAND (GIBRALTAR) (TRANSFER OF UNDERTAKING) ACT 2009

HON P R CARUANA:

I have the honour to move that a Bill for an Act to make provision for and in connection with the transfer of the Undertaking of The Royal Bank of Scotland (Gibraltar) Ltd to The Royal Bank of Scotland International Limited, be read a first time.

Question put. Agreed to.

SECOND READING

HON P R CARUANA:

I have the honour to move that the Bill be now read a second time. Mr Speaker, the House is already aware of some of the background to this Bill following my comments at the time of the motion to seek leave to bring the Bill. The hon Members of the House will recall that at the moment the Royal Bank of Scotland (Gibraltar) Limited, which is a Gibraltar registered company, carries on business from premises in Corral Road under the name RBS International. As opposed to Royal Bank of Scotland International Limited, which is registered in Jersey as a company and carries on business in Line Wall Road under the name NatWest. The intention of the Bank, which this Bill is designed to allow them to do without the considerable legal and administrative effort that would be required to do it by non-legislative means, is that a result of the provisions of this Bill, the Royal Bank of Scotland International branch in Gibraltar, that is to say, the structure that is presently operating in Line Wall Road will also be carrying on business under the same name, that is to say NatWest, both from Line Wall Road, as it is at present, and also from Corral Road. In other words, whereas at the moment NatWest, through Royal Bank of Scotland International Limited, is presently carrying on business in Line Wall Road and Royal Bank of Scotland (Gibraltar) Limited through RBS is presently carrying on business in Corral Road, in future, both premises will operate as branches of NatWest under RBSI, the Jersey Company. In other words, both will replicate what has recently been the position in the case of the Line Wall Road operation. Mr Speaker, section 1 of the Bill contains various definitions. I would particularly draw the House's attention to the definition of the changeover date. This is the date on which the current undertaking of Royal Bank of Scotland (Gibraltar) Limited, Royal Bank of Scotland, Corral Road, will under the Bill vest in Royal Bank of Scotland International Limited. The date will be appointed by notice in the Gazette and the present intention is that this will be a date very shortly after the passing of the Bill and its obtention of Royal Assent. Section 2 is the fundamental provision of the Bill. It provides for the vesting of the undertaking of Royal Bank of Scotland (Gibraltar) Limited in Royal Bank of Scotland International Limited with effect that is obviously from the changeover date. Effectively on that date, Royal Bank of Scotland International Limited succeeds to the undertaking of Royal Bank of Scotland (Gibraltar) Limited as if Royal Bank of Scotland (Gibraltar) Limited and Royal Bank of Scotland International Limited were the same person in law. The remainder of the provisions of the Bill, other than section 10, develop, supplement and refine this fundamental provision. Section 3 deals specifically with various types of property. The term "property" is widely defined in section 1 in which immediately before the changeover date, Royal Bank of Scotland (Gibraltar) Limited may have an interest. Subsection 1 of section 3 deals with the generality of property which at that time forms part of the undertaking of Royal Bank of Scotland (Gibraltar) Limited. The remaining provisions of this section deal with property held jointly, third party rights, property subject to a trust or similar obligations and property held as custodian. The overall effect of these provisions is to put Royal Bank of Scotland International Limited in the shoes of Royal Bank of Scotland (Gibraltar) Limited whilst ensuring that the rights of third parties are safeguarded. Section 4 excludes five descriptions of property from the vesting provisions of the Bill. In other words, five descriptions of property which are not transferred in this way. The details are set out in the Explanatory Memorandum of the Bill but two of these, the Corral Road premises and any rights or liabilities in which only RBS(G) and RBSI, that is "Gibraltar" and "International" have an interest, remain for "Gibraltar" and "International" to deal with themselves. In other words, where there is property in which only the two companies have an interest and they can do the documentation privately between them, then the legislation does not substitute that bilateral transaction between them which remains necessary for them to pass property. The exclusion of banking and similar licences and authorisations, which also are

not transferred, follows from the fact that as a matter of law, licences are not transferable. That is to say, licences issued under the Financial Services Licensing and Regulatory legislation. The specific exclusion of contracts and other property of which the proper law is not that of Gibraltar, simply reflects the basic proposition derived from international law that this Parliament cannot effectively legislate so as to modify matters which are governed by the law of another state. Finally, as a piece, as a fifth type of property that is not transacted by this Bill, the share capital and reserves of Royal Bank of Scotland (Gibraltar) Limited remain as the essence of the corporate entity which is Royal Bank of Scotland (Gibraltar) Limited. The remaining provisions of the Bill, other than section 10, are technical provisions which are well precedented in this type of legislation when this House has assisted banking reorganisations in the past. Perhaps the most significant is section 6 which provides that on the changeover date existing accounts, that is to say, customer bank accounts with the Royal Bank of Scotland (Gibraltar) Limited, become accounts of that customer with the Royal Bank of Scotland International Limited but subject to the same terms and conditions as applied before the changeover date to that account. Section 10, which also is contained in similar pieces of legislation, ensures that any Government expenditure in connection with the introduction and enactment of the Bill is to be paid by Royal Bank of Scotland International limited. Mr Speaker, Royal Bank of Scotland International Limited is a welcome part of Gibraltar's economic community. It provides many well paid, quality and stable jobs. It is supportive in the context of the local lending market and environment. The Royal Bank of Scotland has always been supportive of Gibraltar, its aspirations and its socio-economic growth and development needs and the Government believes that it is right that this House should therefore assist them in their corporate reorganisation and therefore I commend the Bill to the House.

Discussion invited on the general principles and merits of the Bill.

HON J J BOSSANO:

Not so much on the Bill itself because, Mr Speaker, we know that this has been done before when banks have needed a less expensive route and I think it is a good thing that we should have the possibility of doing these things because it makes Gibraltar an attractive place to do business from. My question would be to ask whether, am I right in thinking that with the present structure they have two banking licences , one for the Corral Road operation and one for the one round the corner and that following that, one of the banking licences will be given up. That is, the one in the name of the Royal Bank of Scotland and they will be using……. They will have one licence and two branches presumably. Is that the correct interpretation?

HON P R CARUANA:

It would be a correct interpretation if the basic factual premise of the analysis were correct. In other words, if it is true that Royal Bank of Scotland International Limited will be able to operate both its branches with one banking licence. In other words, at the moment they had two banking licences because they are two separate legal entities, each operating separately and differently. So the effect of this Bill and when the bank uses the provisions of this Bill to consolidate and to establish in effect two branches of NatWest instead of one branch of NatWest, will be that both branches, in Corral Road and in Line Wall Road, will be operating under the present single Royal Bank of Scotland International licence, which is not necessarily to say, that they intend to surrender the licence. They have not yet decided whether they will continue to use Royal Bank of Scotland (Gibraltar) Limited and its licence for some other niche banking activity, separate and different to the branch network, which they are now wanting to brand for purposes, I think, also of market presence. NatWest is their main retail brand. They have not yet made a decision about whether they will surrender the licence or not surrender it and use it for some other purpose. That is one

of the things that they will let us know when they have made a decision.

Question put. Agreed to.

The Bill was read a second time.

HON P R CARUANA:

I beg to give notice that the Committee Stage and Third Reading of the Bill be taken later today, if all hon Members agree.

Question put. Agreed to.

COMMITTEE STAGE

HON CHIEF MINISTER:

I have the honour to move that the House should resolve itself into Committee to consider the Royal Bank of Scotland (Gibraltar) (Transfer of Undertaking) Bill 2009, clause by clause:

THE ROYAL BANK OF SCOTLAND (GIBRALTAR) (TRANSFER OF UNDERTAKING) BILL 2009

Clause 1 to 10 – were agreed to and stood part of the Bill.

The Long Title – was agreed to and stood part of the Bill.

THIRD READING

HON CHIEF MINISTER:

I have the honour to report that the Royal Bank of Scotland (Gibraltar) (Transfer of Undertaking) Bill 2009 has been considered in Committee and agreed to, without amendments, and I now move that it be read a third time and passed.

Question put. Agreed to.

The Bill was read a third time and passed.

SUSPENSION OF STANDING ORDERS

HON J J NETTO:

I beg to move under Standing Order 7(3) to suspend Standing Order 7(1) in order to proceed with a Government Motion.

Question put. Agreed to.

GOVERNMENT MOTION

HON J J NETTO:

I have the honour to move the Motion standing in my name which reads as follows:

> "That the Gibraltar Parliament approves by resolution the making of the Social Security (Open Long-Term Benefits Scheme) (Amendment of Benefits) Order 2009."

Mr Speaker, the Order simply increases the amount of pension benefits payable under the Social Security (Open Long-Term Benefits Scheme) Act 1997 with effect from the 1st April 2009, as per the last budget announcement. In accordance with the provisions of the Act, amendments can only be made by Regulation with the prior approval of Parliament indicated. I commend the Motion to the House.

Question proposed.

HON J J BOSSANO:

Mr Speaker, the benefits have been paid of course, presumably from the 1st April already and it is not that we are now approving a payment which is backdated to the 1st April and has to be made. What I would like an explanation of is, if the law has got the old rates in it until today, how is it that the money can be paid from the fund in terms of amounts higher than what the existing law says until we approve this? I understand that sometimes things get overlooked but I mean this seems to be the normal way it is done all the time nowadays.

HON CHIEF MINISTER:

Yes, Mr Speaker, it is not the result of being overlooked, it is a result of the xxxxx impossibility of complying with the chronology of the law as it presently stands and I will answer him how it is done mechanically in that context. One of the Bills that we are discussing today is designed to permanently remedy this feature. In other words, the law as it presently stands, as he correctly says, says in effect, that these things are operative, effective, once they are approved by the House. Of course, I stand up in the budget session, which is at variable times of the year, and I announce or at some point of the year, in not necessarily in the budget, there is an announcement about what the pension rise is going to be. The effective date of that commencement cannot coincide with a motion having already been brought and passed so that there is already the approval of the House before the commencement date starts. So, the way that the problem has been overcome now for several years, because this is not the first time that we do this, is that regulations are passed on the basis of which the Financial Secretary makes payment, in a sense, as an advance from the fund. We then have to bring a Bill, which we did last year and it is on the Order paper for later today, giving retrospective effect by primary legislation to the increase. So later today, hopefully, if the House agrees, we shall be passing a Bill that says that notwithstanding that under the regulations, the increase is only effective from the day that the House approves it, the House retrospectively by primary legislation, back dates it earlier. Now, I entirely agree with what I think is the underlying point that the hon Member was making, that it hardly seems the best way to organise business, if there was some other way of doing it and indeed the Bill this year does that. In other words, in addition to authorising this year's increase retrospectively, this year's Bill on a once and for all basis, which will make such Bills unnecessary in the future, changes the reporting mechanism to this House. At the moment, the reporting mechanism to the House is that the regulation increasing the rate is not effective until it is approved by this House. Well, the hon Member knows that there are several control mechanisms by Parliament available to us using Parliamentary precedent in the UK. One is, which is the one that we have opted for and is reflected in the Bill that the House will debate later. One of them is that the regulation is effective from the moment it is promulgated subject to it being debated in the House and subject to its annulment retrospectively if the House disapproves of it. This is a mechanism that exists and is very widely used. It is one of the two or three mechanisms for Parliamentary approval of subsidiary legislation and it will allow us to not have to amend retrospectively the primary legislation every year. By primary legislation to give it retrospective effect to the commencement date, the House will still be able to debate it. If the House disapproves it, the regulation would be annulled. The Government would then have a problem of what it does with the payments that have been made but I think that as a procedural matter, as a procedural method it is better than the way we do it at the moment.

Question put. The House voted.

The motion was carried unanimously.

SUSPENSION OF STANDING ORDERS

HON C G BELTRAN:

I beg to move under Standing Order 7(3) to suspend Standing Order 7(1) in order to proceed with the laying of Regulations on the Table.

Question put. Agreed to.

DOCUMENTS LAID

HON C G BELTRAN:

I have the honour to lay on the Table the Children With Special Needs (Assessment Panel) (Amendment) Regulations 2009.

Ordered to lie.

BILLS

FIRST AND SECOND READINGS

PORT OPERATIONS (REGISTRATION AND LICENSING) (AMENDMENT) ACT 2009

HON J J HOLLIDAY:

I have the honour to move that a Bill for an Act to amend the Port Operations (Registration and Licensing) Act 2005, be read a first time.

Question put. Agreed to.

SECOND READING:

HON J J HOLLIDAY:

I have the honour to move that the Bill be now read a second time. This short Bill, Mr Speaker, removes the right of appeal against the registration of an entity under the Act from another entity who objects to that registration. It also makes a small amendment to the Forms Regulations to reflect the change. Under section 3 of the Act, the Port Authority may register an entity to carry out port operations if, essentially, it is fit and proper to conduct that business. Another entity - usually a competitor - may object to the registration and the Authority will consider the objection. If the registration is then granted despite the objection, the objector may then appeal and this Bill removes that possibility. The Bill does not remove the right of objection or proper consideration of the objection, but does remove the right of appeal from the objector because that right can be used as a delaying tactic which is not justifiable. Of course, judicial review of the decision remains open. I commend the Bill to the House.

Discussion invited on the general principles and merits of the Bill.

HON DR J J GARCIA:

Sorry Mr Speaker. Can I just clarify, in relation to what the Minister has just said, what the Bill does is obvious, it is quite clear, it is a very short Bill and the hon Member has explained it again in this House. He has given us the reason for removing this right. That is to say, the right of objectors to appeal to the Port Tribunal, the fact that the right might be, if I heard him correctly, abused or used as a delaying tactic. Is that something which has been happening continuously in the last four years since 2005 and that is why Government has taken these steps?

HON J J HOLLIDAY:

No Mr Speaker. It has not been usual but there have been cases when that has been the case and it has been clear to the Port Authority that it has been done purely for that purpose.

Question put.

HON J J BOSSANO:

We are voting against Mr Speaker. I do not think that explanations have been given. If the Government provided a right to people that if they were not satisfied with the original decision in terms of feeling perhaps that their objections had not been gone into sufficiently and they thought it was worth giving them the right to object to that licence, it is obviously a good thing from the point of view of giving people the right to protect their business interests and now we are taking it away because one or two times or somebody or maybe. I think we need more solid evidence than what was there before, which seems a good thing, needs removing.

HON CHIEF MINISTER:

I do not know if Mr Speaker has already brought his hammer down on the debate or not.

MR SPEAKER:

I was half way through the word "carried".

HON CHIEF MINISTER:

With Mr Speaker's leave, I think it goes a bit further than that. It goes a little bit further than that. The fact of the matter is that the right to conduct business and remember that this is used also against local people that want to establish business. The right to object to a licence application by somebody else. In other words, my right to object to you as a citizen having the right to compete with me is for reasons set out in the Act. In other words, to protect the public interest, xxxxx satisfied, rather like in the Trade Licensing Act. This is not intended as a mechanism to protect monopolistic situations or to prevent competition or to keep potential competitors out of your market place. It is right that the applicant for the licence whose right to do business is being denied to him if it is refused, that he should have the right to appeal through the law courts against the refusal of the grant of the licence to him, the applicant, but, and that of course is preserved by the Bill. But the rights of the objector are different to the rights of the applicant. The objector is doing the business. He is already in the business and to most objectors the right of objection is not pursuant to some…, the protection of some public interest, but a protection of his own commercial interest because the less competition there is the better. This is not to say that the objection cannot be made. It can be made, that has not been changed. It does not mean that the licensing body, whoever it is in this case, does not have to take the objections into account in the same way as it did before. It does not even mean that if the objector thinks that his objection has been ignored in a way which is procedurally objectionable, in other words, which renders the process unfair, he can still judiciarily review the decision of the Licensing Authority. What he cannot do is appeal the outcome simply because he does not like it. In other words, nobody wants to see a competitor licensed. Therefore necessarily everybody would challenge it and that is how the sense of using it to delay the entry of competition comes into effect but even the competitor, the objector let us call him that, still has the right under this legislation to object and to ensure that the decision is made properly, lawfully and correctly, including the consideration given to his objection. But he cannot appeal simply on the basis of the outcome. In other words, that if he does not like the decision because it results in somebody else competing against him in the market place. It is simply a

question of the legislation reflecting the different nature of rights. Government believes that it is right that the applicant for a licence who is being denied a right to do business should have the right of appeal against the decision through the courts. But the objector's rights, really, should be limited to having his views on the matter recorded, properly taken into account and lawfully, correctly considered by the decision-making body which he should be able to challenge for those reasons, if they are not properly taken into account, but not simply because he does not like the idea of somebody competing with him in his business, which nobody ever likes.

Question put. Agreed to.

This Bill was read a second time.

HON J J HOLLIDAY:

I beg to give notice that the Committee Stage and Third Reading of the Bill be taken later today, if hon Members agree.

Question put. Agreed to.

THE SOCIAL SECURITY (INSURANCE) (AMENDMENT) ACT 2009

HON J J NETTO:

I have the honour to move that a Bill for an Act to amend the Social Security (Insurance) Act to provide for the laying in Parliament of orders made pursuant to section 52; and to provide for the retrospective effect of legislation that revised social insurance contributions rates, be read a first time.

Question put. Agreed to.

SECOND READING

HON J J NETTO:

I have the honour to move that the Bill be now read a second time. Mr Speaker, section 52(3) of the Social Security (Insurance) Act currently states: "(3) No order increasing the weekly rate of contribution shall be made under this section unless it has been approved by resolution of the Parliament". This means that an order made pursuant to that subsection cannot come into operation until approved by the Parliament. Clause 2(1) of the Bill seeks to amend the Act so that future orders come into operation when published in the Gazette. Any such order will still have to be laid before the Parliament and is liable to annulment. Provision is made for that eventuality in the new subsection (4). In addition to the foregoing, clause 3 of the Bill gives retrospective effect to the Social Security (Insurance) Act (Amendment of Contributions) Order 2009 so that these shall be deemed to apply as from 1 July 2009. This is in keeping with the Budget 2009 announcements made to that effect. I commend the Bill to the House.

Discussion invited on the general principles and merits of the Bill.

HON J J BOSSANO:

When we had the motion to increase the benefits just now, we were told that this Bill was in fact altering the mechanism for increasing benefits. In fact the Bill refers to the provisions of section 52(3) which we are told deals with increasing contributions as opposed to benefits. I do not know……. I am having somebody look at the section to see if it covers both. But here we are talking about the other side of the coin which is when the contributions go up and here it seems to me that the wrongness of the mechanism is even worse than in the previous one because that affects something else. That is that it affects the legislation that there is which protects people from having

contributions to anything taken from their pay packet without a law authorising it or the individual giving his approval. The hon Member knows, as I do, when we organise payroll deduction for Unions, that the employer is not permitted to take the money from the employee's pay without his approval and that is because the law makes it very clear that you must either give permission to the employer to remove things from your pay or there must be a legal mechanism that allows it. So, it seems to me that it must follow that all the employers in Gibraltar since the 1st July have been illegally withholding from peoples' pay higher amounts in respect of social insurance contributions than the law provided. Therefore they have been deducting money that they were not permitted to deduct and paying into the fund money which the fund was not entitled to receive. Now, even in the case of the other one, I can understand that if you are going to raise the benefits or indeed raise the amounts, you may not be able to print this ahead of the statement because then effectively the statement would be announcing something that everybody already knows. But surely, when we have the statement made in the House, there is nothing to stop this being printed a week later and not that the decision should come to the Parliament of something that was supposed to be happening in April and here we are nearly on the 1st December, retrospectively authorising it. Certainly, whatever the level of workload they have got in the Department, I cannot imagine that they are so bogged down with work that it takes them seven months to produce something that is a one page thing and which frankly, apart from editing the figures, is the same whenever the rates of benefit go up. But in any event, it seems to me that in the case of the increase in contributions, in addition to the need that was explained earlier to ensure that if we have got this happening after the event then it can still happen after the event without the need for changes in primary legislation because instead of us having to approve the thing retrospectively after the passing of this Bill, what we will have to do is to decide whether we annul it or not. Certainly annulling an increase in social insurance benefits would not create the same problem because we would be given more money back as it would be getting them to pay back higher pensions. But I think, in addition to the mechanism for social insurance, there is another dimension to it which is in fact the protection that employees have, that they cannot have money removed from their pay packet. I do not know under what particular provisions it is, but it may be that it is something to do with the xxxxx Act which is very clear that people have to be paid and that you cannot deduct money for lodgings or money for anything else. So, that is the only concern we have about this Bill. The rationale of the mechanism that was explained earlier in relation to the motion we can see the logic of and we are supportive of, but this part of it is not something that we are too happy about.

HON CHIEF MINISTER:

Yes Mr Speaker, everything that the hon Member has just said is entirely justified as a response to a misstatement on my part when I spoke earlier, which I misspoke in confusing the motion as relating to the contributions. I am grateful to him for spotting it and for giving me the opportunity of disentangling the consequences of my misspeaking. The Bill which we are now debating deals with contributions only, not with benefits. The motion……. and I will explain that in a moment, the motion deals with benefits and attached to the motion is the order increasing the benefits, which has already been promulgated and pursuant to which payments have already been made. That order says that it comes into effect on the 1st April and the House is now approving that order through the motion, including, the 1st April commencement date. So the motion, contrary to what I said when I spoke to it, only speaks and relates to the payment of benefits to benefit receivers which this House is today, by this motion, authorising, not just the rates of benefit but its retrospection to the 1st April. The Bill does everything that I said it would do but in respect of contributions, not in respect of benefits. In other words, we announced an increase in social insurance contributions which normally kick in on the 1st July, either a few days before or a few days after the Budget, depending on exactly when we do the Budget session. Regulations are passed and now the House is saying, by this

piece of primary legislation, when the Minister, or whoever it was that signed the regulation, increasing backdated to the 1st July by regulations, this House is now by primary legislation endorsing that 1st July commencement date. It is not usually by very many days that the retrospective element takes place. That is the process which we think is unnecessarily clumsy and unnecessary and hence the system of changing it to one of subsequent annulment by the House which, as he correctly says, the hon Member correctly says, means that in the event of annulment by the House, it is the Government that has got to return to the employers and the employees, if there was an increase in employees' contribution rate as well as employer contribution rate, the excess contributions that we have been collecting since the 1st July, but which Parliament has disapproved of and has annulled. So, I do apologise to him and to the House. What he has said was entirely justified but all as a correct comment to an incorrect comment and an incorrect analysis on my part.

Question put. Agreed to.

The Bill was read a second time.

HON J J NETTO:

I beg to give notice that the Committee Stage and Third Reading of the Bill be taken today, if hon Members agree.

Question put. Agreed to.

THE CRIMES (COMPUTER HACKING) ACT 2009

HON D A FEETHAM:

I have the honour to move that a Bill for an Act to provide for the protection of computer systems and computer data from unauthorised access, use or modification; and for related purposes, be read a first time.

Question put. Agreed to.

SECOND READING

HON D A FEETHAM:

I have the honour to move that the Bill for a Crimes (Computer Hacking) Act 2009 be read a second time. Mr Speaker, this Bill seeks to criminalise the various forms of abuse and misuse of computers and computer systems. Amongst the matters which the Bill will criminalise are the unauthorised access to another person's computer data, computer hacking, and unauthorised interception. It also gives the police limited powers to require preservation of data and interception although interception can only be undertaken on the basis of an appropriate Court Order, as I shall be explaining later. In bringing this Bill to Parliament, some of the issues raised in the Council Framework Decision 2005/222/JHA of 24 February 2005 on attacks against information systems and the 2001 Council of Europe Convention on Cybercrime are transposed and implemented. Clause 1 of the Bill relates to the ordinary domestic matters relating to citation and commencement. In this case, I shall be moving an amendment at Committee Stage to enable the staggered commencement of the various provisions. The reason for this is that the Government does not want to make some of the provisions effective until the codes of practice have been drafted under clause 30. The question of the codes of practice relates to a further amendment that I shall speak to at the appropriate juncture. Clause 2 of the Bill provides for the interpretation of the terms used throughout the Bill. At Committee Stage, I shall be moving amendments in relation to clause 2 so as to insert a definition of "internet" which for the purposes of this Act will include intranet networks. Without this, the Bill may not have caught the intranet system because the relevant communications were sent via the intranet as opposed to the

internet. Clause 3 creates the offence of unauthorised access to computer material. The offence is only made out if the person seeking access to another computer intends to secure such access and he does not have permission. Clause 4 builds on clause 3. This clause applies where the reason for committing the offence of unauthorised access under clause 3 is to enable that person to commit a further offence. Accordingly, whilst the maximum penalty on conviction on indictment under clause 3 is two years imprisonment, under clause 4 the maximum is a term of imprisonment of five years because of the aggravating feature. Clause 5 makes it an offence for a person to do an act, whether temporary or permanent, which he knows or is reckless as to whether it will cause an impairment of the operation of a computer or any programme or data held in a computer or an impairment of the reliability or the authenticity of any such data. The interception of any non-public transmission from a computer without the appropriate authority is prohibited by clause 6, where the person knows he is not authorised to intercept that transmission. Clause 7 makes it an offence for any person to produce, sell or procure for use any device, programme or data which is designed or adapted with the intention that it should be used to commit an offence under clauses 3, 5 or 6. The disclosure of any password, access code or other means of access to a computer is prohibited under clause 8 if the disclosure is made for wrongful gain or an unlawful purpose and where access is not authorised and is likely to cause loss to any person. Clause 9 punishes as an offence any aiding and abetting of the commission of any offence under the Act. Clauses 10 to 14 provide for various scenarios under which there would be jurisdiction for offences to be tried in Gibraltar's courts. Clauses 10 and 11 taken together require that either the person committing the offence or, as the case may be, the computer is based in Gibraltar. Clause 12 relates to conspiracies and attempts, and sets out the elements required for the legislation to bite where there are international factors. Clause 13 provides the basis for considering the relevance of external law with respect to a prosecution brought in Gibraltar. Clause 14 refers to the national status of the accused and provides that the law applies irrespective of whether the accused is, with the amendments I shall be moving later, a British person. Clause 15 empowers a magistrate to issue a search warrant to a police officer, who, upon executing it, may seize any computer or computer programme or data if he believes it is evidence that an offence under the Act has been committed or is about to be committed. Clause 16 concerns the investigation of offences in circumstances where a particular computer has been used or evidence is held in that computer. In such cases the police may apply to a magistrate for an order authorising entry into premises, and thereafter undertaking the activities set out in subsection (2) including accessing the computer and searching data stored within it. At Committee Stage, I shall be moving the deletion of the words "under this Act" so as to allow for warrants to be issued in connection with computers used in connection with any offence, for example, child pornography. Clause 17 makes provision for a record to be made following a search pursuant to a warrant issued under clause 5. Mr Speaker, I have given notice of amendments to clauses 18 to 22 and will speak on the effect of these clauses as amended. Clause 18 relates only to the preservation of a programme or data which is stored in a computer and which is at risk of being lost. This clause will enable the Commissioner of Police to act expeditiously to require the preservation of the relevant material for up to 30 days. Should this prove to be insufficient, the Attorney-General may then apply to the Magistrates' Court for an order extending the time during which the programme or data must be preserved. The total period during which a person may be under an obligation to preserve material is 90 days. It should be noted that the notice relates only to the preservation of relevant information and is not accompanied by a duty to disclose the information to the Commissioner of Police. Disclosure of preserved information requires a court order under the other provisions in the Bill. Clause 19 refers to traffic data; in layman's terms this may be described as information relating to the route a certain communication has taken. It is distinct from content data, which is the term used to describe the detail contained in the actual communication itself. This clause allows a court to make an order requiring the collection and recording of traffic data, where

doing so may reasonably be required for the purpose of a criminal investigation. At Committee Stage, I shall be amending this clause so that the Attorney-General will replace the Commissioner of Police as the party who may apply for an order to the Magistrates' Court. Clause 20 is entitled "Order for disclosure of stored traffic" and it provides the means whereby a court may order that information held in a computer be preserved and disclosed to a police officer investigating a crime or in connection with criminal proceedings. The information that may be disclosed pursuant to an order under this clause is information in relation to a specified communication which is sufficient to enable the identification of the internet service providers and the path through which the communication was transmitted. In essence, the route taken by a particular communication and which ISP handled that communication. At Committee Stage, I shall be moving an amendment to this clause so that the Attorney-General will replace the Commissioner of Police as the party who may apply for an order. Clause 21 will enable a magistrate to order the production of data and other information where this is required for a criminal investigation or in criminal proceedings. This clause includes provision for the production of computer programmes and even printouts, where so ordered. With respect to service providers, these may be ordered to produce subscriber information, which includes a subscriber's name and address, amongst other matters. Again, at Committee Stage I shall be moving an amendment to this clause so that the Attorney-General replaces the Commissioner of Police as the party who may apply for an order. Clause 22 relates to content data, that is the content of a message or communication. This clause enables a magistrate to order the collection and recording of contents of electronic communication where this is reasonably required for the purposes of a criminal investigation or in connection with criminal proceedings. Again, at Committee Stage I shall be moving an amendment so that the Attorney-General replaces the Commissioner of Police as the person who can make or apply for an order. The purpose of clause 23 is to provide protection for persons making disclosures under and in conformity with the Act. Subsection (2), however, creates an offence for a service provider to disclose the fact that the powers under clauses 19 to 22 have been used, or to disclose any data that has been collected and recorded. Clause 24 gives law enforcement officers the powers of interception, search and seizure notwithstanding the requirement for consent under clause 3(1). Clause 25 sets out the range of penalties available to the courts in connection with the various offences provided for. Clause 26 makes it an offence for a corporate body to benefit from the commission of an offence under clauses 3 to 6, whether or not the person was acting as an agent of the body. It also provides that officers of the company may incur personal liability in addition to that incurred by the corporate body. Clause 27 empowers a court to order forfeiture of a computer and other articles used in connection with an offence. Clause 28 enables a court to make an order for payment of compensation by the offender to any person for damage caused to that person's computer or any programme or data held in his computer. The compensation is treated as a civil debt for recovery purposes. Clauses 29 creates an offence of unauthorised disclosure of information obtained during the course of an investigation or of information received from the competent authorities of a Party to the Convention for the purposes of, or to assist in the investigation of offences. Mr Speaker, at Committee Stage I shall be moving an amendment whereby I shall be inserting a new clause 30. Clause 30 relates to issues of codes of practice by the Minister with responsibility for justice. The codes may be issued for the purposes of regulating the exercise and performance of powers and duties contained in this Bill. In particular, in issuing a code of practice, the Minister must have regard to the fundamental rights and freedoms which are enshrined in our Constitution. Particular regard must be had for the right to privacy in such matters as well as the need for proportionality in the investigation and prevention of crime. This consideration applies equally to orders that may be made under sub clause (3), through which the period of retention of material or data obtained can be regulated. A code of practice issued under clause 30 must be laid before Parliament. Where a code is amended, or where it is replaced by another, the amended code or where the code is to be

replaced, the replacing code is also laid before this Parliament. I commend the Bill to the House.

Discussion invited on the general principles and merits of the Bill.

Question put. Agreed to.

The Bill was read a second time.

HON D A FEETHAM:

I beg to give notice that Committee Stage and Third Reading of the Bill be taken today, if hon Members agree.

Question put. Agreed to.

THE MATRIMONIAL CAUSES (AMENDMENT) ACT 2009

HON D A FEETHAM:

I have the honour to move that a Bill for an Act to amend the Matrimonial Causes Act for the purpose of updating the legislative provisions in line with the relevant United Kingdom legislation; and for connected purposes, be read a first time.

Question put. Agreed to.

SECOND READING

HON D A FEETHAM:

I have the honour to move that a Bill for the Matrimonial Causes (Amendment) Act 2009 be read a second time. The Bill enacts some fundamental amendments to the Matrimonial Causes Act for the purposes of:- (a) reducing the waiting period for divorce underpinning a finding of irretrievable breakdown of a marriage in respect of desertion and separation and in addition reducing the period during which a divorce petition can be presented after marriage; (b) effecting a radical overhaul of the financial relief provisions for parties to marriage and children of the family after divorce; (c) introducing pre-nuptial and post-nuptial financial agreements; and (d) making provisions for pension sharing orders as between spouses. In addition, by way of amendment to the Bill at Committee Stage, the Government intends to take this opportunity to enshrine Articles 3 and 5 of Council Regulation No 2201/2003 concerning recognition and enforcement of judgements in matrimonial matters and parental responsibility together with amendments to the provisions on domicile. I start by outlining the new waiting periods for divorce. The present law on divorce is that a petition may only be presented on the grounds that the marriage has broken down irretrievably and the court cannot hold the marriage to have broken down irretrievably unless the petitioner satisfies the court of one or more of the points set out in section 16(2)(a) to (e). Paragraphs (c) to (e) of that section provide periods during which spouses have to be separated or a spouse has to be deserted to justify a finding of irretrievable breakdown of a marriage. By way of amendment to this Bill, we will also be reducing the period justifying divorce on a finding of unreasonable conduct based on unsoundness of mind from five years to three in section 16(3)(c) (i) and (ii). With regards to the current waiting period of three years in the case of desertion, that period is reduced to two years. In the case of the waiting period for those who are separated and both parties consent to divorce, the period is reduced from three years to two years. In the case of parties who are separated but one of them does not consent to the divorce, the period is reduced from five years to three years. As a counterbalance, Mr Speaker, it is proposed to introduce a new section 17A, where the respondent may oppose the decree of divorce on the grounds that the dissolution of the marriage will result in grave financial or other hardship and it would in all circumstances be wrong to dissolve the marriage after three years of separation. The current restriction under section 18(1) on petition for divorce within five years of marriage

is also to be reduced to three years. In England, the period of marriage that has elapsed before someone can petition for divorce is one year and in Spain a divorce by consent is possible after only three months of marriage. In our view, these short time periods are not enough for a marriage to get over its problems and we believe that we have struck the right balance at three years. On the other hand, where a marriage has clearly failed, it is not right that one of the parties should be able to prevent the other from getting on with the rest of his or her life by effectively vetoing a divorce for the next five years and that is why we are reducing it to three. Mr Speaker, before one gets to that stage where a petition is presented, there is an existing statutory duty on legal advisors to advise their clients to consider reconciliation and refer them to conciliators. These provisions will be strengthened next year as part of the duties imposed on lawyers who undertake legal assistance work and by encouraging practitioners to undertake specific conciliation courses. These provisions are there to be observed and that will be reflected in the way that the Government will in future fund family cases. The Bill also amends section 25 of the Matrimonial Causes Act which provides for the grounds on which a decree of nullity may be made. The current provisions are unclear and confusing. The proposed changes by the new sections 25, 25A, 25B, 25C and 25D will clearly specify the grounds on which a marriage is either void or voidable and the powers of the court to grant relief thereon together with the effects of the decree of nullity in such cases. We have also inserted a new section 26A which deals with the postponement of a decree absolute based on two or three years separation, unless the court is satisfied that the petitioner should not be required to make financial provision for the respondent, or the financial provision made by the petitioner for the respondent is reasonable and fair or the best that can be made in the circumstances. A court may consider holding up the decree absolute, as an option, if the petitioner is deliberately evading his financial responsibilities. For instance, to a child of the family. Pre and post nuptial agreements. Clause 15 of the Bill inserts a new Part in the Matrimonial Causes Act. The new Part VI A formally recognizes pre and post nuptial agreements and their enforceability if certain conditions are met. They are a novel concept in this jurisdiction and they represent a departure form the legal position in England and Wales. They are however recognised in other jurisdictions such as Canada and Australia. In fact the provisions in this Bill are modelled on Australian legislation. Honourable Members who practice law will know that at present parties can enter into separation or maintenance agreements under the Maintenance Act. In such cases, two particular rules apply; certain provisions are void by statute. For example, a restriction on the right to apply to the court for an order containing financial arrangements is void and if the parties agree the financial payments to be made by one party to the other, the parties can still apply to the court to re-open the bargain between them. The result is that in some cases the financially weaker party, usually the wife, will have the best of both worlds, because she can hold the other party to his covenants, for example, in respect of property arrangements, but also take proceedings to open the bargain and obtain better maintenance payments. In our view, this is not only unfair but discourages agreements between the parties. Anecdotal evidence suggests that potential disputes over property and finances are putting people off, particularly young people, from getting married. We hope these measures will protect the institution of marriage by offering a consensual way in which to deal with these concerns. Again, consonant with our stated aim of placing the well being of children as a paramount consideration, these agreements will not be enforceable if they relate to financial arrangements or provision for children without the supervision of the court. In other words, under these provisions couples can agree the division of all their assets and make whatever financial arrangements they feel work for them but they cannot oust the overriding jurisdiction of the court in relation to whether adequate provision is made for their children. That does not mean that maintenance agreements in respect of children are not possible. They are, but they still continue to be dealt with under existing provisions in Part V of the Maintenance Act in relation to which the jurisdiction of the court cannot be ousted. Mr Speaker, there are two types of financial agreements envisaged by Part VI A of this Bill. Firstly, the Bill

provides for written financial agreements between the people who are contemplating entering into a marriage with each other, that is, what is commonly referred to as pre-nuptial agreements or during marriage between them, that is, post-nuptial agreements with respect to any of the following matters:- (a) how, in the event of the breakdown of the marriage, all or any of the property or financial resources of either or both of the spouse parties at the time when the agreement is made, or at a later time and before divorce, is to be dealt with; and (b) the maintenance of either of the spouse parties, but not the children, during the marriage, after divorce or both during the marriage and after divorce. Secondly, it also provides for financial agreements after the decree of divorce is made, that is, post-divorce agreements and that relates to any of the following matters:- (a) how all or any of the property or financial resources that either or both of the spouse parties had or acquired during the former marriage is to be dealt with; and (b) the maintenance of either of the spouse parties but not the children. For financial agreements to be binding, it has to be signed by both parties. It has to be certified by a lawyer that the parties have received independent legal advice. The parties themselves have to acknowledge in the agreement that independent legal advice was provided and the agreement has not been terminated or set aside under new clauses 31K or clause 31G. The grounds for setting aside include non-disclosure of material facts at the time the agreement was entered into. Agreements to defeat creditors, or because there is a change of circumstances relating to a child cared for by one of the parties which will result in hardship to that child if the court does not set aside the agreement. In order for financial agreements to bite, a declaration of separation must also be signed by the parties in the manner prescribed by the new provisions contained in this Part. A declaration of separation is a written declaration pursuant to the new section 31E that complies with sub-sections (5) and (6). That is that the declaration is:- (a) signed by at least one of the spouse parties; and (b) it must state that the spouses have separated and are living apart at the time of the declaration and in the opinion of the spouse making the declaration there is no reasonable likelihood of cohabitation being resumed. Financial Relief. Clause 16 of the Bill inserts extensive new provisions in Part VII of the Act totally reforming the provisions relating to ancillary relief orders made for parties to the marriage and children of the family. It replaces the existing provisions of sections 32 to 43 in respect of alimony, maintenance and property that have been considered inadequate and incapable of meeting the demands of modern times. Under the proposed new provisions, the court shall have statutory power to make an order against either spouse with respect to any one or more of the following matters:-(a) unsecured periodical payments to the spouse or children; (b) secured periodical payments to the other spouse or children; (c) lump sum periodical payments to the other spouse or children; (d) transfer of property to the other spouse or for the benefit of any child of the family; (e) settlement of property to the other spouse or for the benefit of any child of the family; and (f) variation of any marriage settlement. Orders coming within paragraph (a) to (c) are collectively known as financial provisions orders and those coming within (d) to (f) as property adjustments orders which are contained in sections 32, 34 and 35. Where the court makes a secured periodical payments order, a lump sum order or a property transfer order, it can further order a sale of property belonging to either or both spouses and that provision is contained in section 36. An order for financial provision or property adjustment may be made on or after the grant of decree of divorce, nullity or separation, but shall not take effect unless the decree has been made absolute. These changes, Mr Speaker, will give the new family judge more extensive powers in divorce cases to do what is just between the spouses, or former spouses, and to ensure children are properly maintained. These Parts of the Bill are very closely modelled on the English provisions, which was the desire of most of the family practitioners we consulted so that they would be able to benefit from English and Welsh jurisprudence in the area. Pension Sharing Orders. Clause 17 of the Bill inserts the new Part VII A that provides the making of pension sharing orders by the court on a decree of nullity or divorce which is an order which provides that one party’s shareable rights under a pension arrangement be subject to pension sharing for the benefit of the other party specifying the percentage value to be

transferred. Indeed under this Part, the court on divorce proceedings is placed under a duty to have regard to the spouses' pension entitlements, being:- (i) any benefits under the pension arrangement which a party to the marriage has or is likely to have; and (ii) any benefits under a pension arrangement, which, by reason of the dissolution or annulment of the marriage, a party will lose the chance of acquiring. For this purpose, a pension arrangement is defined in section 46H as:- (a) an occupational pension scheme; (b) a personal pension scheme; (c) a retirement annuity contract; and (d) an annuity or insurance policy purchased, or transferred, for the purpose of giving effect to rights under an occupational pension scheme or a personal pension scheme. Effectively a pension-sharing order re-adjusts the spouses' pension entitlements and enables each party to make future pension arrangements independently of each other. It may be possible, depending on circumstances, for the spouse in whose favour the order is made to either become a member of the other spouse's pension scheme, in his or her own right, or transfer the value of the ordered share into his or her own pension arrangement. The advantage of this approach is that, by allocating the pension rights at the time of the divorce, the intended recipient knows that she or he can take the benefit of those rights regardless of whether the other spouse dies before retirement. The mechanics of how this will work in practice, vis-à-vis a pension provider, will be the subject of detailed regulations which will be called the Matrimonial Causes Act (Pension or Divorce Regulations) either 2009 or 2010 depending when we finalise them. Mr Speaker, I will also be proposing a number of amendments to this Bill at Committee Stage. The first amendment is the replacement of new section 4 for sections 4 and 5 of the Matrimonial Causes Act. The new section 4 seeks to implement Articles 3 and 5 of Council Regulation EC No 2201 of 27 November 2003 concerning jurisdiction and recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility, repealing EC Regulation No 1347/2000. As part of the reform process, we have been constantly reviewing various provisions for compatibility with various regulations. It appears that the provisions of sections 4 and 5 of the Matrimonial Causes Act are not fully consistent with Articles 3 and 5 of the new Regulation. That Regulation contains rules on jurisdiction and recognition in civil matters relating to divorce, legal separation and marriage annulment. The jurisdiction rule in Article 3 sets out the grounds of jurisdiction to determine in which Member State the courts have jurisdiction. There is no general jurisdiction rule in matrimonial matters. Instead, Article 3 enumerates several grounds of jurisdiction ranging from habitual residence to common nationality. These are alternative grounds implying, Mr Speaker, that there is no hierarchy between them. Once a court has been seized of the matter pursuant to Article 3 of the Regulation and declared itself competent, courts of other Member States are no longer competent but must dismiss any subsequent application. The aim of the rule is to ensure legal certainty, avoid parallel actions and the possibility of irreconcilable judgements. The second amendment is the insertion of three new sections, namely sections 5, 5A and 5B of the Matrimonial Causes Act. These three sections will be dealing with the provisions of domicile. Mr Speaker, there is no simple definition of the legal term "domicile". It is a concept that is quite distinct from residence or ordinary residence, for example. At common law, a person's domicile at any given time will have been acquired in one of three ways. He will either have a domicile of origin, a domicile of dependency, or a domicile of choice. At birth, every individual acquires a "domicile of origin". This is usually the domicile of the father at the time of the birth. It is therefore not necessarily the individual's country of birth. A domicile of origin is of fundamental significance and is retained until such time as there is clear evidence that another domicile has been acquired. Children under the age of 16 automatically have the domicile of their father or in certain circumstances their mother, as a "domicile of dependence". Under the common law rules, a woman automatically acquired the domicile of her husband on marriage, regardless of her domicile of origin or any domicile of choice which she might otherwise have acquired. This was the case even if she were a minor; her dependence on her husband prevailed over her dependence on her father. Thus the domicile of a married woman was the same and changed with the domicile of her

husband. This obviously creates difficulties if spouses are separated. That common law rule applied even if spouses had been living apart and in different countries for many years, which reflected social conditions and attitudes of a past age. The rule was abolished in Canada, Australia, New Zealand and in the United Kingdom in 1973. Section 5 abolishes it in Gibraltar. In addition, the proposed section 5A and B of my amendments to the Bill, repatriates the provisions of sections 5 and 6 of the Minors Act, which is being repealed by the Children Act 2009, once that is Gazetted, about the age at which independent domicile can be acquired by a young person and the dependent domicile of children not living with their father. I commend the Bill to the House.

Discussion invited on the general principles and merits of the Bill.

Question put. Agreed to.

The Bill was read a second time.

HON D A FEETHAM:

I beg to give notice that the Committee Stage and Third Reading of the Bill be taken today, if all hon Members agree.

Question put. Agreed to.

THE PENSIONS (AMENDMENT) ACT 2009

HON D A FEETHAM:

I have the honour to move that a Bill for an Act to amend the Pensions Act, be read a first time.

Question put. Agreed to.

SECOND READING

HON D A FEETHAM:

I have the honour to move that the Bill for a Pension (Amendment) Act 2009 be read a second time. Mr Speaker, this Bill amends the Pension Act in sections 2 and 13 in order to make provisions consistent with today's amendments to the Matrimonial Causes Act. Clause 2(a) of the Bill inserts in section 2(1) the definitions of "Agency" and "child of the family" which is also consistent with the Children Act and also "pension sharing order" and "spouse". Clause 2(b) of the Bill replaces section 13 with new provisions. Under the existing provisions of section 13 of the Pensions Act, civil service pension could not be subject to pension sharing orders. In view of the amendments to the Matrimonial Causes Act, section 13 of the Pensions Act is to be amended so that civil service pensions can be subject to financial orders or pension sharing orders made by the court under the Matrimonial Causes Act. I commend the Bill to the House.

Discussion invited on the general principles and merits of the Bill.

Question put. Agreed to.

The Bill was read a second time.

HON D A FEETHAM:

I beg to give notice that the Committee Stage and Third Reading of the Bill be taken today, if all hon Members agree.

Question put. Agreed to.

THE EUROPEAN ARREST WARRANT (AMENDMENT) ACT 2009

HON D A FEETHAM:

I have the honour to move that a Bill for an Act to amend the European Arrest Warrant Act 2004, be read a first time.

Question put. Agreed to.

SECOND READING

HON D A FEETHAM:

I have the honour to move that a Bill for the European Arrest Warrant (Amendment) Act 2009 be read a second time. Mr Speaker, this Bill amends the European Arrest Warrant Act 2004. The European Arrest Warrant Act came into force in 2004 in order to give effect to the provisions of Council Framework Decision on the European arrest warrant and the surrender procedures between Member States of the European Union. The Framework Decision is based on the concept of mutual recognition and respect for the judicial processes of Member States of the EU. Honourable Members may recall that a European arrest warrant is a court decision in one Member State, addressed to a court in another Member State, for the purposes of conducting a criminal prosecution or the execution of a custodial sentence in the issuing Member State. It applies to all offences having a penalty of at least 12 months imprisonment in law of the issuing Member State or, where a sentence has been handed down, a sentence of imprisonment of at least four months has been imposed. However, the judicial authorities in Gibraltar have experienced difficulties in executing warrants due to the wording used in parts of our legislation when transposing the Framework Decision. The main difficulties have been in respect of the safeguards sought in the form of undertakings and statements which local authorities require from the judicial authorities abroad, which in our view, are technically unnecessary under the Framework Decision. This Bill is intended to close these technical loopholes and also, in effect, bring the Act closer to the Framework Decision and its underlying principle of mutual recognition. It also introduces the concept of a provisional arrest in relation to the European arrest warrant. In introducing these amendments, we do bear in mind that the Framework Decision allows citizens to be uprooted to a foreign jurisdiction without the ability of the Gibraltar Courts to test the case against them. Such a situation should be curtailed to the greatest possible extent in favour of the citizen but within the terms of the Framework Decision and certainly within the transposition of the Framework Decision in a way that works. The first amendment, amendment 2 (2) in the Bill, is to section 7 subsection (3). This is the subsection which has been causing difficulties in surrendering individuals under the Act, in particular to the United Kingdom but also to some Roman law jurisdictions. It is the critical amendment, in my view, introduced by the Bill. The current subsection reads: (3) Where a European arrest warrant is issued in the issuing State in respect of a person who has not been convicted of the offence specified therein, the European arrest warrant shall be accompanied by: (a) an undertaking in writing of the issuing judicial authority that the surrender of that person is sought for the purpose, only, of his being charged with, and tried for, the offence concerned; and (b) a statement in writing of the issuing judicial authority that– (i) proceedings against the person have commenced and a decision to try him for the offence concerned has been made; or (ii) a decision to commence proceedings against the person and try him for the offence concerned has been made by a person who, in the issuing State or part thereof, performs functions the same as or similar to those performed in Gibraltar by the Attorney General. The main problem has been the requirement for “undertakings in writing” and “statements in writing” to be specifically from the “issuing judicial authority”. I am advised by the Attorney General’s Chambers that a number of Magistrates’ Courts in the United Kingdom, who are the issuing judicial authority in that jurisdiction, have been of the opinion that they are unable to give such an undertaking and statement. This is due to their belief that the giving of such undertakings and

statement is outside their remit. Under the UK legislation, persons surrendered as a result of a European arrest warrant do benefit from similar undertakings or statements as required by the Framework Decision and they have been received here in Gibraltar from the UK Home Office. However, these undertakings were found not to be sufficient in a recent case involving "class A" drugs because they did not emanate from the issuing judicial authority, that is, the UK Magistrates' Court. As a result, the amendment proposed to the Act is that a statement can now be received from any authority competent to issue such a statement in the issuing State. This is intended to ensure that statements can be received by the Gibraltar Courts from whomever in the requesting State has the power or locus to make them. The second issue that has arisen is the fact that the current provision requires both:- (a) an undertaking that the surrender is sought for the purposes, only, of his being charged with and tried for the offence, and in addition, (b) a statement in writing from that judicial authority that:- (i) proceedings have been commenced and a decision to try him for the offence concerned has been made or (ii) a decision to commence proceedings against the person and try for the offence concerned has been made by the equivalent to the Attorney General. That kind of double statement or undertaking is not required by the Framework Decision and has again given rise to some confusion when seeking to comply with European arrest warrants. It is therefore proposed to have one statement instead of an undertaking and a statement. Finally, the current provisions have also made it very difficult to execute European arrest warrants from some Roman law jurisdictions because of the of the words "decision to try" and "charge" and when exactly those decisions are made by examining magistrates in some Roman law jurisdiction. I am advised by the Attorney General that the meaning of the word "charge" or the concept itself in this jurisdiction is very different to that in some Roman law jurisdictions and this has created confusion when it comes to executing warrants. Article 1 of the Framework Decision itself states that a European arrest warrant is "a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution". The first paragraph of the standard or model EAW annexed to the Framework Decision uses the words, again I quote, "I request that the person mentioned below be arrested and surrendered for the purposes of conducting a criminal prosecution." The UK legislation, section 2(3) of the UK Extradition Act also refers to a prosecution. It is therefore proposed to amend section 7(3) as follows:- "Where a European arrest warrant is issued in the issuing state in respect of a person who has not been convicted of the offence specified therein, the European arrest warrant shall include or be accompanied by, a statement in writing from the judicial authority or any judicial authority competent to issue such a statement in the issuing State that the arrest and surrender of the person concerned is sought only for the purposes of conducting a criminal prosecution against him in respect of the offence specified therein or any offence disclosed by the same facts as the offence specified therein". We believe this closely reflects the Framework Decision. The amendment in clause 2(3) of the Bill is to section 8 subsection (11) of the Act. This change reflects the fact that the amendments in clause 2(2) means that there would no longer be a 7(3)(b), that is, the second limb of the current provision. The amendment in clause 2(4) inserts a new section 9A into the Act. This makes provision for provisional arrests in respect of European arrest warrants. Such provision is not required under the Framework Decision. However, following consultation with the RGP and Attorney General, it is our view that such provision is necessary in order to ensure that local authorities are able to act speedily if they are aware of the presence in Gibraltar of a person who is sought by another jurisdiction and in relation to whom a warrant may be issued. This is broadly in line with provisions in the equivalent UK legislation and provisions in the Gibraltar Fugitive Offenders Act 2002 which also allows for provisional arrests. Under the proposed section 9A, a police officer may arrest a person without a warrant if he has reasonable grounds for believing that a European arrest warrant has been or will be issued in respect of the person without having to have possession of the said warrant or without the warrant having arrived in Gibraltar. Once arrested, the authorities have 48

hours to obtain the warrant. If the warrant is not obtained in that time, the person may apply to the Magistrates' Court to be discharged and the Court must order a discharge of the warrant. Where a person has been discharged he may not be arrested provisionally again in relation to the same warrant but he may be arrested under section 9 once the warrant is transmitted to Gibraltar. Amendment 2(5) amends section 10 of the Act. Section 2(5)(a) makes provision for persons arrested under provisional arrest warrants when persons are taken before the court. Section 2(5)(b) deletes the words "being a date that falls not later than 21 days after the date of the person's arrest". There is no requirement in the Framework Decision for this particular time limit and as such it is our view that having it removes flexibility from the court's handling of such cases. The amendment in clause 2(6) has been requested by authorities in order to allow for greater flexibility in dealing with a person who has consented to be surrendered. It will mean that the person need not wait ten days before he is so surrendered. The amendment in clause 2(7)(a) clarifies the wording of section 12(2)(a) allowing for copies to be accepted of certain documents. The amendment in clause 2(7)(b) corrects an error in the original Act. Clause 2(8) contains a number of amendments to section 15 of the Act. The amendment at paragraph (a) extends the regime to offences which may not be disclosed in the warrant but which are included in the facts specified therein. This would cover offences which are available as alternatives. The amendment at paragraph (b)(i) contains a similar amendment to that mentioned earlier in respect of clause 2(2) allowing for statements to be received from competent authorities and not just the issuing judicial authorities. The amendment in (b)(ii) reflects the amendment in paragraph (a). The amendment in paragraph (c) inserts a new subsection 1A into section 15. This is intended to bring local legislation closer to the Framework Decision by reflecting that each jurisdiction which implements the decision is obliged to have legislation in place which reflects these minimum standards and safeguards. However, rather than simply remove these tests from local legislation, this amendment and similar ones in clauses 2(9) and 2(10), create a presumption that safeguards are in place which can be rebutted on a balance of probabilities should the requested person be aware of deficiencies in the requesting states legislation. The amendments in paragraphs (d), (e) and (f) reflect the above. The amendments to paragraphs (a) and (c) of clause 2(9) change the authority to which certain undertakings need to be given to by the issuing State from the Magistrates' Court to the Central Authority. This is in order to streamline matters so as not to create confusion in requesting States as to where different documents need to be sent. There is therefore one point of contact. The amendments in clause 2(10), which do not reflect the above amendments, are intended to tidy up section 17 of the Act by clarifying the situations where a person may be surrendered in relation to the possibility that the person will subsequently be extradited elsewhere. I am informed that there was confusion as to the use in this Act of the terms "surrendered" and "extradited" and the terms "country" and "State". This should no longer be an issue. The amendment in clause 2(11) inserts new sections setting out rules with respect to persons surrendered to Gibraltar. The new section 25A deals with specialty and the new section 25B deals with subsequent surrender or extradition. These closely follow the Framework Decision. The effects of these new sections is that persons surrendered to Gibraltar will have the same safeguards we expect will be given to persons surrendered from Gibraltar. The amendments in clause 2(12) removes subsections (6) and (7) of section 43. These subsections are seen as being too inflexible due to difficulties that may arise in the allocation of court time. Again, this is not a matter covered by the Framework Decision. The amendment in clause 2(13) clarifies the language in section 44. I commend this Bill to the House.

Discussion invited on the general principles and merits of the Bill.

HON G H LICUDI:

Mr Speaker, there is just one matter on which I would ask the hon Member opposite, the Minister for Justice, to provide some clarification. The hon Member has described possibly the most fundamental aspect of this Bill, clause 2(2), which introduces certain changes as regards the problem with regard to receiving undertakings or statements from the issuing judicial authorities and the problem in particular with Magistrates' Courts in the UK and he has now proposed that these statements or undertakings be given by any judicial authority. The only matter on which I would ask the hon Member to clarify is how it works in other countries? In other words, is this revised version of the application of the Framework Decision how other countries, not just the UK, but other countries in Europe to which the European Arrest Warrant Framework Decision applies, actually apply it in practice. Are we reciprocating arrangements which are already in place with other countries? I say that quite simply for the reason that, as the hon Member knows, on any matter concerning surrender and extradition arrangements, generally, these are based on principles of reciprocity and you do with regard to other countries what other countries are prepared to do with regard to you? So does this ensure that we have reciprocal arrangements or do we have arrangements which go beyond what other countries are required to do in respect of us?

HON F R PICARDO:

Mr Speaker, just two points. When the hon Gentleman was reading out to us the proposed new subsection (3), in the middle of that he said "from the judicial authority or any judicial authority competent to issue such a statement". The word "judicial" does not appear in the text that we have got here. Is that an amendment that is going to be moved or was it that the hon Gentleman…….

HON D A FEETHAM:

No. If I said that……. That is my answer to your question.

HON F R PICARDO:

Fair enough, and the second point, Mr Speaker, if I read the position correctly, in the United Kingdom the relevant wording towards the end of that clause is that the extradition or the surrender of the person concerned is sought for the purpose of being prosecuted. The wording we are going to put in is "for the purpose of conducting a criminal prosecution". Now, as Mr Speaker will be aware, slight differences in wording can have dramatic consequences in the interpretation that a court will put on these issues. Can the hon Gentleman first of all tell us what he believes the difference between the UK wording is and the wording that he is proposing and why we have not decided to follow what I believe to be the wording in the UK; and second, whether he can confirm to this House, as I am sure is the case, that there is absolutely no intention whatsoever of allowing extraditions other than for prosecutions and that there is no suggestion in the amendments being made that people will be subject to extradition for questioning or for the conduct of investigations and that those matters will continue to be dealt with in the appropriate way by way of mutual legal assistance requests Commissions Rogatoire et cetera, which would otherwise be rendered completely nugatory in respect to other members of the EU.

HON D A FEETHAM:

I take the hon Gentleman's point first. In fact, if I said judicial authority or any judicial authority competent to issue such a statement, I was wrong. It is "any competent authority". The second part is "any authority competent to issue such a statement". So, it has nothing to do with……. It is the authorities that are competent to issue such a statement. That,

in fact, is the structure of the regime in the United Kingdom and it is my understanding that it is the structure of the regime in other jurisdictions as well. As to the point that the hon Member made, the last point first, there is no question of this Act allowing somebody to be extradited just simply to act as a witness in a criminal prosecution. There has to be a prosecution in relation to that particular person. That is what the wording quite clearly states. In fact, I believe that the wording that we have used, although different in terms of its effect, is identical to the United Kingdom. If I read section 2(3) of the UK Extradition Act, what it says is: "(a) a person in respect of whom the Part I warrant is issued is accused in the Category 1 territory of the commission of an offence specified in the warrant; and (b) the Part I warrant is issued with a view to his arrest and extradition to the Category 1 territory for the purposes of being prosecuted for the offence." It is the effect, in my view, of our amendments in practice and the way that the UK has drafted their own extradition proceedings are in practice xxxxx.

HON F R PICARDO:

I am grateful to the hon Gentleman giving way and for that information in respect of the second point. The first thing that he said was that there was no intention that this should be used to extradite people who would be witnesses in the prosecution and that is not the point that I was making and I am sorry if I did not make it clearly. The point that I was trying to make is that this Act should not, or the amendments to this Act, should not serve to enable people to be extradited for questioning in their own potential prosecution but that a decision to prosecute should already have been made by the authorities seeking the extradition and that is the position in the United Kingdom as I understand it. I just want to make it clear or understand clearly if that is what the hon Gentleman is telling us the position will be here.

HON D A FEETHAM:

That gloss that the hon Member seeks to make, does not appear anywhere in the United Kingdom legislation. It does not. The question of whether somebody, at what stage, say for instance in a foreign jurisdiction, in a Roman law jurisdiction where the kind of problems that the hon Gentleman is alluding to, because he is alluding to problems with examining magistrates questioning people et cetera. The point at which somebody is prosecuted is a matter for French law. I am not going to … or a matter for Spanish law or a matter for Italian law. It is impossible in the context of this to actually define, which is what the hon Gentleman really wants, when somebody is being prosecuted. It is absolutely impossible. It is quite clear from section 7(3) that what this says is "that the arrest and surrender of the person concerned is sought only for the purpose of conducting a criminal prosecution against him". It is for the purpose of that. In respect of the offence specified therein or similar facts, the question of when there is a prosecution, that is a question for the law of the country that is making the request. Therefore, this is why I am hesitant to provide the hon Gentleman with an all encompassing answer to the question that he has asked me.

Question put. Agreed to.

The Bill was read a second time.

HON D A FEETHAM:

I beg to give notice that the Committee Stage and Third Reading of the Bill be taken today, if hon Members agree.

Question put. Agreed to.

COMMITTEE STAGE

HON CHIEF MINISTER:

I have the honour to move that the House should resolve itself into Committee to consider the following Bills clause by clause:

1. The Port Operations (Registration and Licensing) (Amendment) Bill 2009;

2. The Social Security (Insurance) (Amendment) Bill 2009;

3. The Crimes (Computer Hacking) Bill 2009;

4. The Matrimonial Causes (Amendment) Bill 2009;

5. The Pensions (Amendment) Bill 2009;

6. The European Arrest Warrant (Amendment) Bill 2009.

THE PORT OPERATIONS (REGISTRATION AND LICENSING) (AMENDMENT) BILL 2009

Clauses 1 to 3 – were agreed to and stood part of the Bill.

The Long Title – was agreed to and stood part of the Bill.

THE SOCIAL SECURITY (INSURANCE) (AMENDMENT) BILL 2009

Clauses 1 to 3 – were agreed to and stood part of the Bill.

The Long Title – was agreed to and stood part of the Bill.

THE CRIMES (COMPUTER HACKING) BILL 2009

Clause 1

HON D A FEETHAM:

I have already spoken on the merits of the amendments. There is an amendment to section 1 by adding subsection (1) after 1, and then adding a subsection 2 which reads: "(2) This Act comes into operation on the day appointed by the Minister with responsibility for justice by notice in the Gazette and different days may be appointed for different purposes."

It is the intention, I reiterate, not to make these provisions effective until the codes of conduct have been finalised under section 30. This is the first time, in fact, that any kind of intercept provisions have been brought before this House.

Clause 1, as amended, was agreed to and stood part of the Bill.

Clause 2

HON D A FEETHAM:

Mr Chairman, insert the definition of internet. Does Mr Chairman require me to repeat it?

MR CHAIRMAN:

Yes, as set out in the notice of amendments.

""internet" includes a privately maintained computer network that can only be accessed by authorised persons (commonly referred to as an 'intranet');"

Clause 2, as amended, was agreed to and stood part of the Bill.

Clauses 3 to 13 – were agreed to and stood part of the Bill.

Clause 14

HON D A FEETHAM:

Mr Chairman, I have an amendment to clause 14. Substitute "British person" for "Gibraltarian" and delete subsection (3).

Clause 14, as amended, was agreed to and stood part of the Bill.

Clause 15 – was agreed to and stood part of the Bill.

Clause 16

HON D A FEETHAM:

Mr Chairman, yes in the heading, delete "under this Act" and also in subsection 1(a), delete the words "under this Act".

Clause 16, as amended, was agreed to and stood part of the Bill.

Clause 17 – was agreed to and stood part of the Bill.

Clause 18

HON D A FEETHAM:

Mr Chairman, I have amendments to subsection 1, also subsection 2 and the consequential renumbering.

In clause 18 (1), delete the words "as long as is reasonably necessary for the investigation of an offence" and replace with the words "the period stated in the notice, which must not exceed 30 days".

After Clause 18 (1), insert the following new sub clause:
"(2) Before the period stated in the notice issued under subsection (1) has expired, a magistrate may, on the application of the Attorney-General, order that the period stated in the notice be extended for a maximum of up to 90 days from the date of first issue."

Sub clauses "(2)" and "(3)" are re-numbered "(3)" and "(4)" respectively.

In re-numbered sub clause "(3)", delete the words "whether one or more" and replace with the words "how many".

Clause 18, as amended, was agreed to and stood part of the Bill.

Clause 19

HON D A FEETHAM:

Mr Chairman, I have amendments to subsection 1 which I have given notice.

In clause 19 (1) delete the words:

"If the Commissioner of Police is satisfied that traffic data associated with a specified communication or general traffic data is reasonably required for the purposes of a criminal investigation, he may, by written notice given to a person in charge or in control of such data or an internet service provider, require that person or service provider to – "

and replace with the words:

"If traffic data associated with a specified communication or general traffic data is reasonably required for the purposes of a criminal investigation, a magistrate may, on the application of the Attorney-General, order a person in charge or in control of such data or to an internet service provider to – "

Clause 19, as amended, was agreed to and stood part of the Bill.

Clause 20

HON D A FEETHAM:

Mr Chairman, replacing "on an application by a police officer" with "on application by the Attorney-General".

Clause 20, as amended, was agreed to and stood part of the Bill.

Clause 21

HON D A FEETHAM:

Mr Chairman, I have amendments to this section. Again, replacing "on an application by a police officer" with "on application by the Attorney-General".

Clause 21, as amended, was agreed to and stood part of the Bill.

Clause 22

HON D A FEETHAM:

Mr Chairman the same amendment.

In clause 22 (1), delete the words "on an application by a police officer" and replace with the words "on an application by the Attorney-General".

Clause 22, as amended, was agreed to and stood part of the Bill.

Clauses 23 and 24 – were agreed to and stood part of the Bill.

Clause 25

HON D A FEETHAM:

In 25(3)(a), after the words "imprisonment for" insert "12".

Clause 25, as amended, was agreed to and stood part of the Bill.

Clauses 26 to 29 – were agreed to and stood part of the Bill.

Clause 30

HON D A FEETHAM:

Mr Chairman, I am also amending this Bill to insert a new section 30 on Codes of Practice, which I have spoken to during the course of the debate.

"Codes of practice.

30. (1) The Minister with responsibility for justice may issue one or more codes of practice relating to the exercise and performance of the powers and duties under this Act.

(2) Without affecting the generality of subsection (1), a code of practice made under this section may make provision limiting-

(a) the class of criminal offences in respect of which warrants and orders under this Act may be applied for;

(b) the class of criminal offences in respect of which notices under this Act may be issued;

(c) the class of person in respect of whom a notice under section 18 or an order under section 19, 20, 21 or 22 may be issued;

(d) the duration of notices under section 18 and orders under section 19, 20, 21 and 22;

(e) the number of persons to whom any of the material or data obtained by virtue of this Act may be disclosed or otherwise made available;

(f) the extent to which any of the material or data may be disclosed or otherwise made available;

(g) the extent to which any of the material or data may be copied;

(h) the number of copies that may be made; and

(i) the use that can be made of the material or data.

(3) The Minister may by order prescribe the circumstances under which and the time within which material or data obtained under this Act must be destroyed, and the penalties for failure to comply with the order.

(4) In issuing a code of practice or an order under this section, the Minister must have due regard to the fundamental rights and freedoms under the Constitution and in particular to the right of privacy and the requirement of proportionality in the investigation and prevention of crime.

(5) The Minister must lay before Parliament every code of practice issued by him under this section.

(6) A person exercising or performing any power or duty in relation to which provision may be made by a code of practice under this Section must, in doing so, have regard to the provisions (so far as they are applicable) of every code of practice for the time being in force under this section.

(7) A failure on the part of any person to comply with any provision of a code of practice issued under this section does not of itself render him liable to any criminal or civil proceedings but may be taken into account in deciding on the admissibility and weight of any evidence obtained in contravention of the provision.

(8) A code of practice issued under this section is admissible in evidence in any criminal or civil proceedings.

(9) Where the Minister has issued a code of practice under this section he may, by notice in the Gazette, revoke, replace or amend it (whether by adding to it, deleting from it, or otherwise).

(10) Where the Minister exercises his power to replace or amend a code of practice, pursuant to subsection (9), the replacing or duly amended code of practice, as the case may be, shall be laid before the Parliament.”.

Clause 30, was agreed to and added to the Bill.

The Long Title – was agreed to and stood part of the Bill.

THE MATRIMONIAL CAUSES (AMENDMENT) BILL 2009

Clause 1 to 3 – were agreed to and stood part of the Bill.

Clause 3A

HON D A FEETHAM:

Mr Chairman, again, I have spoken on the general merits of these amendments.

After Clause 3 insert "Clause 3A".

"Substitution of sections 4 and 5.

3A. The principal Act is amended by substituting the following sections for sections 4 and 5 –

Jurisdiction of the court in divorce, judicial separation and nullity.

4 (1) The court shall have jurisdiction to entertain proceedings for divorce or judicial separation if –

(a) the court has jurisdiction under the Council Regulation; or

(b) no court of a Member State has jurisdiction under the Council Regulation and either of the parties to the marriage is domiciled in Gibraltar on the date when the proceedings are begun.

(2) The court shall have jurisdiction to entertain proceedings for nullity of marriage if –

(a) the court has jurisdiction under the Council Regulation; or

(b) no court of a Member State has jurisdiction under the Council Regulation and either of the parties to the marriage -

(i) is domiciled in Gibraltar on the date when the proceedings are begun, or

(ii) died before that date and either was at death domiciled in Gibraltar or had been habitually resident in Gibraltar throughout the period of one year ending with the date of death.

(3) In this Section and in other relevant provisions of this Act –

"Council Regulation" means Council Regulation (EC) No 2201/2003 of 27th November 2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and matters of parental responsibility;

"Member State" means all Member States with the exception of Denmark and a reference to Member State shall be deemed to include Gibraltar.

Domicile.

5. (1) Subject to subsection (2), the domicile of a married woman as at any time after the coming into force of this section shall, instead of being the same as her husband's by virtue only of marriage, be ascertained by reference to the same factors as in the case of any other individual capable of having an independent domicile.

(2) Where immediately before this section came into force a woman was married and then had her husband's domicile by dependence, she is to be treated as retaining that domicile (as a domicile of choice, if it is not also her domicile of origin) unless and until it is changed by acquisition or revival of another domicile either on or after the coming into force of this Section.

Age at which independent domicile can be acquired.

5A. The time at which a person first becomes capable of having an independent domicile shall be when he attains the age of sixteen or marries under that age.

Dependent domicile of child not living with his father.

5B. (1) Where the father and mother of a person incapable of having an independent domicile are alive but living apart, his domicile is that of his mother if he has his home with the mother and has no home with the father.

(2) Where a person incapable of having an independent domicile had the domicile of his mother by virtue of subsection (1) but she is dead, his domicile is that which she last had, if he has not since had a home with his father.

(3) Nothing in this section prejudices any existing rule of law as to the cases in which a person's domicile is regarded as being, by dependence, that of his mother.

(4) In this section, in its application to a person who has been adopted, references to his father and his mother shall be construed as references to his adoptive father and mother.".

Clause 3A, was agreed to and added to the Bill.

Clause 4

HON D A FEETHAM:

In clause 4, in the amendment to section 16, insert the following new paragraph after paragraph (c):

"(ca) in subsection (3)(c)(i) and (ii), by substituting "3" for "5" where it appears twice,".

Clause 4**,** as amended, was agreed to and stood part of the Bill.

Clauses 5 to 14 – were agreed to and stood part of the Bill.

Clause 15

HON D A FEETHAM:

Mr Chairman, in clause 15, substitute the following section for section 31A and I have given notice and spoken on the merits of that particular amendment.

Delete the following:

"Interpretation for Part VIA

31A. In this Part –

"dealt with" includes the meaning given by section 31H(3); and "marriage" includes a void marriage.".

Replace with the following:

"Interpretation and application.

31A. (1) In this Part –

"dealt with" includes the meaning given by section 31H(3); and "marriage" includes a void marriage.

(2) Nothing in Part V of the Maintenance Act shall apply to any agreement made pursuant to any provisions of this Part.".

Clause 15, as amended, was agreed to and stood part of the Bill.

Clause 16 – was agreed to and stood part of the Bill.

Clause 17

HON D A FEETHAM:

Mr Chairman, in clause 17, amend section 46H(18), in the definition of "pension arrangement", by inserting after paragraph (d):

"and for the purposes of this Part, "pension arrangement" may include any gratuity that is part of the retirement benefits.".

Clause 17, as amended, was agreed to and stood part of the Bill.

Clauses 18 to 23 – were agreed to and stood part of the Bill.

The Long Title – was agreed to and stood part of the Bill.

THE PENSIONS (AMENDMENT) BILL 2009

Clauses 1 and 2 – were agreed to and stood part of the Bill.

The Long Title – was agreed to and stood part of the Bill.

THE EUROPEAN ARREST WARRANT (AMENDMENT) BILL 2009

Clauses 1 and 2 – were agreed to and stood part of the Bill.

The Long Title – was agreed to and stood part of the Bill.

THIRD READING

HON CHIEF MINISTER:

I have the honour to report that:

1. The Port Operations (Registration and Licensing) (Amendment) Bill 2009;

2. The Social Security (Insurance) (Amendment) Bill 2009;

3. The Crimes (Computer Hacking) Bill 2009;

4. The Matrimonial Causes (Amendment) Bill 2009;

5. The Pensions (Amendment) Bill 2009;

6. The European Arrest Warrant (Amendment) Bill 2009,

have been considered in Committee and agreed to, some with and some without amendments, and I now move that they be read a third time and passed.

Question put.

The Port Operations (Registration and Licensing) (Amendment) Bill 2009;

The Social Security (Insurance) (Amendment) Bill 2009;

The Crimes (computer Hacking) Bill 2009;
The Matrimonial Causes (Amendment) Bill 2009;

The Pensions (Amendment) Bill 2009;

The European Arrest Warrant (Amendment) Bill 2009,

were agreed to and read a third time and passed.

ADJOURNMENT

HON CHIEF MINISTER:

I have the honour to move that this House do now adjourn to Thursday 17th December 2009 at 9.30 a.m.

Question put. Agreed to.

The adjournment of the House was taken at 12.05 p.m. on Thursday 26th November 2009.

THURSDAY 17TH DECEMBER 2009

The House resumed at 9.30 a.m.

PRESENT:

Mr Speaker……(In the Chair)
(The Hon Haresh K Budhrani QC)

GOVERNMENT:

The Hon P R Caruana QC – Chief Minister
The Hon J J Holliday – Minister for Enterprise, Development, Technology and Transport and Deputy Chief Minister
The Hon F J Vinet – Minister for Housing
The Hon J J Netto – Minister for Family, Youth and Community Affairs
The Hon Mrs Y Del Agua – Minister for Health and Civil Protection
The Hon D A Feetham – Minister for Justice
The Hon L Montiel – Minister for Employment, Labour and Industrial Relations
The Hon C G Beltran – Minister for Education and Training
The Hon E J Reyes – Minister for Culture, Heritage, Sport and Leisure

OPPOSITION:

The Hon J J Bossano – Leader of the Opposition
The Hon F R Picardo
The Hon Dr J J Garcia
The Hon G H Licudi
The Hon C A Bruzon
The Hon N F Costa
The Hon S E Linares

ABSENT:

The Hon Lt-Col E M Britto OBE, ED – Minister for the Environment and Tourism

IN ATTENDANCE:

M L Farrell, Esq, RD – Clerk to the Parliament

STATEMENT BY THE CHIEF MINISTER

HON CHIEF MINISTER:

Yes Mr Speaker, I am grateful. I would like to make a statement. I am sure the House will welcome the opportunity given the momentous days that Gibraltar has experienced over the last few days and may experience, hopefully weather permitting, will experience again today in relation to Miss Gibraltar's election as Miss World. I am not sure that the proceedings of the House allow the members opposite to respond or to speak on a statement but in case that is so I will sit down and give way to the hon Member just when I am about to finish or just when I finish. I think, Mr Speaker, there are several aspects of the success of Kaiane Aldorino, in her huge success in being elected Miss World, that this House will want to take note of, at this earliest and happily coincidental opportunity. The first of course is that it is a stunning success for her personally but also and of course in that respect the House will wish to congratulate, and certainly I and the Government do and I will allow the hon Members to speak for themselves in a moment. The House congratulates her warmly. The Government congratulates her warmly and her family and her friends. But there are other aspects of this matter which I think are also noteworthy. Not least the fact that this is also a great achievement for Gibraltar as well. Here is a community, a small country of 30,000 people and as in so many other aspects of life, be it the arts or music or the extent to which this community

produces professional people in many walks of life, even the odd decent trade unionist and perhaps the odd not too bad politician. I think that Miss Gibraltar's achievement in being elected Miss World in competition with countries whose populations extend to hundreds of millions of people, is by any measure a stunning achievement which, quite apart from its significance in the worlds of beauty pageantry, has the effect of giving Gibraltar a profile, a status, a recognition which, I think, in a sense just explains the explosion of popular joy that has accompanied her election. The explosion of popular joy that Gibraltar has been gripped by, rightly gripped by, in my view transcends the importance, important as it is though in its own right of a beauty pageant. I believe that the reason is that this community receives this enormous achievement for Gibraltar as, in a sense, almost a confirmation, a relief from the constant attempt by others to deny this community its rightful place on the international stage. Whether it be in the world of politics, whether it be by our political status, whether it be by our ability to participate in artistic or sporting fora. This community constantly lives under the feeling that it is denied the same opportunities to prosper socially, politically as other peoples of the world. Then as if to do divine justice, or celestial justice, for those who may not believe in divinity, along comes Miss Gibraltar, not just to do astonishingly well in the Miss World contest which would have been enough, but to win the Miss World contest and therefore make a statement to the world that Gibraltar, that has participated in this event since 1959 in its own right, not as the fifth entry from the United Kingdom as the more hopeful frustrated, not to say, annoyed elements of the Spanish press that contrive to manufacture. Scotland, Wales, Northern Ireland, England and Gibraltar, why should the United Kingdom have five entries. The United Kingdom did not have five entries. The United Kingdom had four entries and others can debate whether four was too many or not. Gibraltar had one entry, in its own right, quite distinct from any other countries entry. Gibraltar won in its own right and this House, as the whole community I think will do later today, wishes to express at least for that part of the House for which I speak, wishes to express its enduring acclamation, gratitude and appreciation to Kaiane Aldorino for placing Gibraltar in the position in which she has placed us all today. I think also at some future date, appropriate date, this House will no doubt wish to consider other motions and resolutions to more fully and more properly and more appropriately recognise Kaiane's achievement. But rather than rush into that on the very first day, I would like to limit our intervention today just for this earliest possible flagging of this House's recognition and appreciation of her achievements both for herself, she is the principle person to be congratulated. The achievement is hers and only hers but the spin off for the whole of the rest of Gibraltar, thanks to her effort, are huge and I think the community will wish to show its congratulations and acclamations to her in respect of her personal achievement but also its gratitude to her for the collective sense of achievement that she has achieved for the rest of us and the community at large. I realise it is just a little unconventional to extend the invitation across the floor of this House but the Government has had only 48 hours in which to organise these events. There is a reception that I am hosting on behalf of the community for her this evening to which the hon Members are all invited and I hope they have each now received their invitation. For those members who wish to do so there will be a special enclosure in Main Street just in front of the Parliament building from which they and their spouses are welcome to view the parade if they wish to avail themselves of that facility. The family will be in an enclosure there too, next to the dignitaries' enclosure. So Mr Speaker, I now sit down. That is the end of my statement. Just to repeat the Government's congratulations and ecstatic sense of moment for Gibraltar and I give way to enable the hon Member to add whatever he may wish to.

HON J J BOSSANO:

Although the Chief Minister has said he is speaking on behalf of the Government, when he is being nationalist he does not have to fear that he is speaking on behalf of the Opposition. It is true that the achievement of Kaiane is unique since the commencement of the Miss World contest because in fact it

must be in the history of the event the smallest country that has presented a candidate for the Miss World title and won it, and no doubt something that will not be repeated in the sense that anybody smaller than us will win it in future. So that particular Guinness Record will always belong to Gibraltar and she has won it for us. In Gibraltar we produce many beautiful women. I think that, just like everything else that we do, we are better at doing anything that we do than anybody else in the world. It is just that it has taken the rest of the planet a little bit of time to recognise what we have always known. Of course, it is inevitable that those in Spain who insist in believing that Gibraltar is no different now than from what it was in 1704, that is, that it is a small unimportant town in one corner of Andalucia, should insist that there is something wrong with us being treated as if we were something different. Well, the reality of it is that our 305 year history has made us into a nation in our own right and that the sense of pride that we all feel about her achievement, as we do about every achievement academically, politically, sporting or in any event, because we identify as if it was our flesh and blood that has been successful. We identify it because the essence of our culture, of being Gibraltarian, is that we are interconnected as a family and like families we can have bitter disputes amongst ourselves but we take collective pride when one of us, when one of our people, when one of our family shines in the world and shows the genetic pool from which we all come, has got included in it, the ability to produce people talented in many spheres as the hon Member has said. Therefore, it is absolutely right that we should feel that sense of pride collectively and that the Parliament of Gibraltar, that represents the whole of Gibraltar, should express it in no uncertain manner. At the same time, because what we are here to do is to protect the interests of our people collectively, as politicians we should highlight the political importance that it has. In fact it shows, as I once remarked, that the reason why they do not let us play football is because they are afraid we will won the World Cup and they do not let us have dog shows because we will come out first in the dog shows. Therefore, this theory has been proved right by Kaiane's performance and we are delighted that has happened and delighted to join with the Government in wishing her the very best and in telling her how proud we are of her.

SUSPENSION OF STANDING ORDERS

THE HON J J HOLLIDAY:

I beg to move under Standing Order 7(3) to suspend Standing Order 7(1) in order to proceed with the laying of a Report on the Table.

Question put. Agreed to.

DOCUMENTS LAID

THE HON J J HOLLIDAY:

I have the honour to lay on the table the Civil Aviation Annual Report 2008/2009.

Ordered to lie.

BILLS

FIRST AND SECOND READINGS

THE INTERNATIONAL CO-OPERATION (TAX INFORMATION) ACT 2009

HON CHIEF MINISTER:

I have the honour to move that a Bill for an Act to provide for exchange of information that is foreseeably relevant to the administration and enforcement of certain taxes between Gibraltar and other countries with which Gibraltar has entered into an agreement to that effect; and for connected purposes, be read a first time.

Question put. Agreed to.

SECOND READING

HON CHIEF MINISTER:

I have the honour to move that the Bill be now read a second time. This is the Bill for an Act to provide the legislative structure for the administration and implementation by the Government of the commitments that it is undertaking in the tax information exchange agreements that we have signed and that we will continue to sign in the future. Indeed, as some hon Members may have heard yesterday Gibraltar signed another four TIEAs with Belgium, Sweden, Norway and Iceland bringing the total now signed to 17. The structure of the Bill is relatively straightforward and not different in shape, although obviously so in content, to many other enforcement Acts. In Part I, it establishes a series of definitions and there are some important definitions for the administration of the Act. Important amongst those definitions are the definition of information because that defines the range of material that other countries with which we sign these agreements are entitled to seek from Gibraltar. Also important is the definition of items subject to legal privilege because those are exempt from the provisions of the legislation and therefore constitute an important carve out for the protection of people, mainly that have given advice to clients in the context of litigation and for clients to be aware of their legal rights. In terms of the definitions, obviously they are all important to the operation of the Act of the Bill but I am just pointing out the ones that are most important conceptually in the sense of the scope of this legislative measure. The third, I think, important definition is the definition of taxation matters which is defined as including matters relevant to the administration and enforcement of tax laws including the determination, calculation, collection or assessment of a tax referred to in a scheduled Agreement or matters incidental thereto or to the investigation or prosecution of criminal tax matters or any other matters provided for in a scheduled Agreement. There is a provision in this Bill that the content of any scheduled Agreement, any tax information exchange agreement signed by the Government prevail and this Bill gives the Government and the authorities appointed under in this Bill, power to discharge whatever commitments are contained in any of these scheduled agreements because they are not all exactly the same. There is a standard OECD model but then in the bilateral negotiations there are amendments and changes made to it. Clause 3 of the Bill covers the application and scope of the agreement and sets out in detail who it applies to and what the Bill applies to. So clause 3(1) provides that the Act shall apply for the purposes of enabling the Authority to give effect to the terms of a scheduled agreement for the provision of assistance in tax matters and then it goes on to say what I have just explained about provisions for commencement and other provisions prevailing when they are set out in a particular scheduled Agreement. The Bill then goes on in Part II. In the end of Part I, there are provisions giving the importance of the content of the Agreements because they are different and the Government cannot just publish one model in the Act. The Act then imposes obligations at the end of Part I as to commencement and the information that has to be set out. So in clause 3(5), (6), (7) and (8) of the Bill there is the regime whereby, first of all, the Minister shall by notice in the Gazette publish the text of a scheduled Agreement. So before a scheduled Agreement can come into operation, these things must have happened. Firstly, the Minister must have published the text of the scheduled Agreement in full in the Gazette. All of these texts will eventually also appear on the Government's website once they come into operation and other countries have completed their own constitutional processes for doing so, but they have to be published in full, in the Gazette. In the schedule of this Bill, a schedule which can be amended and added to from time to time by notice in the Gazette as agreements come on stream and are signed and come on stream, we have got to publish, as the hon Members can see in Schedule 1 on page 780 of the Bill, the name of the country with which we have signed a tax information exchange agreement, the date of the agreement, the date on which the agreement become operative and also the date and number of the Legal

Notice in which the whole text of the agreement was published in full, in the Gazette. Moving now to Part II, clause 4 establishes the competent authority for the administration of this Act. The Authority is defined as the Minister for Finance or such person as the Minister for Finance may from time to time designate to be the Authority instead of him in the Gazette. Clauses 5 and 6 set out the duties and functions of the Authority. The duties are clear to carry out the duties established for the Authority by this Act and to discharge and carry out the obligations undertaken by the Government in connection with tax information exchange agreements. The functions which are set out in clause 6 are all the functions that the House would expect from an Authority focussed on the administration of a piece of legislation of this sort. Taking testimony, obtaining and providing information and articles of evidence, serving documents and executing searches and seizures. Enabling and ensuring compliance by the Government on scheduled Agreements, liaising as necessary with the requesting party. Making costs determination. Entering into agreements with other countries for the operation of the scheduled Agreements and also acting as the competent authority for Gibraltar in a case where Gibraltar is the requesting party and makes a request of another country because of course all of these tax information exchange agreements are symmetrically reciprocal. In other words, we have the same rights to ask of other countries the same information and on the same terms as they have to request from us. Now, in terms of the tools available for the implementation of these obligations that we undertake in the agreements, the agreements are intergovernmental but of course the Government then needs, and the Government enters into commitments, intergovernmentally, for example the first one we did was with the Government of the United States. But of course the Government then needs a legislative framework to give itself the power and the authority to do, within the law, what it is committed itself to do politically. That is what this Bill does. In other words, this Bill does not constitute the agreement. The agreement with the country is signed and comes into operation when each country confirms to each other that they have completed their constitutional requirements. Countries have got to ratify and things of this sort through their own peculiar processes and having placed the laws that we are putting in place today, to enable reciprocity of implementation. So, what are the, sort of, administrative and judicial mechanisms which this Bill gives to the competent authority in order to make good on those commitments that we have entered into the tax information exchange agreements. Well they are set out in Part III starting on page 762 of the Bill. The first provision of which in clause 7 provides that the competent authority, the Authority, when there is an incoming request, first and foremost has got to make a decision about whether the request should be attended to. In other words, not every request that comes in is automatically attended to. There has got to be an internal Government process to decide whether the Government at least feels or the Authority at least feels, that this is in compliance with and within the scope of the particular country bilateral agreement are pursuant to which this request is made. Obviously, if the authorities conclude that it is not in compliance or within the scope, then that is the end of the matter and will proceed no further. If the Authority comes to the conclusion that it is within the scope and terms of the particular TIEA under which it is made then he has to then follow one or more of the procedures set out in this Act. Firstly, he has to issue a notice to the person from whom the evidence or information is required of, in a very detailed way, of the nature of the information that he is required to produce, the person to whom it relates, the date by which he must provide it, the manner in which he must provide it and the place in which he must provide it, and it is very important that there is clarity for the person who receives a notice of this sort. This is not an area where either the Government believes it appropriate or the law would permit, sort of wishy washy, do not quite know what is required of me, sort of information. So the hon Members will see that in Schedule 2 at page 782 of the Bill, there is a detailed list of 13 items which these notices to provide information have got to set out explicitly and unambiguously when addressing a notice to provide information. So there is the notice to provide information but that itself is not the requirement. That itself does not trigger an

obligation to comply because then clause 8(3) gives the person upon whom such a notice is served, an opportunity to try and persuade the Authority who issued the notice that there are factors that he should take into account in order not to require him to provide the information. For example, at a time that information is requested from the United States or from France or whoever, the Authority has no way of knowing whether it is an item that enjoys legal privilege. This is something that the recipient of the notice must have an opportunity to bring to the notice of the Authority, that or any other view. For example, he might wish to make a case for the further consideration of the Authority that this is actually not within the scope of the Treaty. So, the Authority makes an initial view of its own of whether the request is within the scope of the Treaty. If he thinks it is, he issues the notice. The person who receives that notice then has the opportunity before the notice becomes live, so to speak, to come back to the Authority and bring to the attention of the Authority factors which the person receiving the Authority believes the Authority should take into account and may not have done so. The Authority is required to take these factors into consideration and then to decide whether he affirms his notice, withdraws his notice or varies his notice. So that is one administrative procedure and these agreements require us to have administrative and judicial procedures available to us. This one, the power to compel the production of information, is an administrative procedure. Because it is an administrative procedure and not subject to judicial oversight, there is a right of appeal from the decision of the Authority to issue the notice. There is a right of appeal that we will come to in a moment to the Courts. The other tool available to Government to make good on its commitments is the power to compel witnesses for the production of evidence under oath. So the first one was simply an administrative notice, we have received a request from the United States of America, they want you to produce the Chief Minister's bank account statements, you know et cetera. That is administrative, which in addition to the safeguards that I have mentioned earlier, is subject to a right of appeal to the courts because it is administrative. The second one is this power to compel witnesses for the production of evidence under oath. This is, in effect, a replication or close enough to a replication of the procedure that presently exists in respect of incoming requests from abroad under the Evidence Act for evidence. In other words, the special examiner process. When witnesses are being compelled to produce evidence under oath it is not a matter of administrative intervention, the competent authority appoints, as they do under the Evidence Act at the moment, a special examiner. Who can be appointed as special examiner? Well, either the Stipendiary Magistrate or a Barrister or Solicitor of at least five years standing or a public officer of at least Higher Executive Officer grade and then the procedure is more or less the same. The testimony is taken by the special examiner. A record of it is provided and it is produced and it is provided. Now, the provisions of clause 9(8) are interesting. The following persons shall be permitted to ask questions of a witness before a special examiner. Obviously, the special examiner himself, the Authority can do so too and then there are these xxxxx, a lawyer representing the witness or the employer of the witness but then there are these two other provisions (c) any person authorised to do so by the Authority or (e) any other person prescribed by regulations made under the Act. The purpose for that is that these tax information exchange agreements contain provisions enabling the attendance of officials from the requesting party to also ask questions in these procedures. So, a person authorised to do so by the Authority, it requires the permission of the Authority… In the Treaty of the TIEA, which is the Tax Information Exchange Agreement, there is no right for this to be the case, but there has to be provision to permit it which is why it is put there in this form because that is what the tax information exchange agreements require. The third tool is search and seizure. Search and seizure, if the hon Members are familiar with what that means, it is that these provisions are taken, are similar to provisions in other legislatures and that is exclusively under judicial oversight. In other words, that requires a warrant from a Court. So, in other words, there is no administrative possibility for the issue or the authorisation of search and seizure. So, at an administrative level and subject to a right of appeal to the Courts, we can issue a notice to provide information but always subject to appeal to

the Courts. Then there is this half-way house, quasi judicial, producing of evidence on oath through the special examiner procedure and thirdly, and entirely within the judicial domain, there is this search and seizure mechanism which requires a warrant et cetera. Then there are the usual sorts of provisions that you would expect to find there. There are some special provisions dealing with the seizure of information contained electronically, on computers, because by the nature of this sort of information that is likely to be requested, it is nowadays more than probable that it will be contained on some sort of electronic storage device. The fourth and final tool, in terms of compulsory mechanisms available to the Government, is this power to obtain production orders which is in section 11. Obviously, there is a legal compulsion to produce information, subject to the right of appeal to the Courts, in response to the administrative notice to produce information notice but in case these notices were not complied with, despite the fact that the Act requires them to be complied with, there is always the ability to go and get the same order to produce from the Courts before. In other words, it is a means of escalating the seriousness of the enforcement mechanisms for those who appear intent on not complying with the initial administrative elements of the regime created by the law. There is then in clause 12 important provisions which carve out the privileges. In other words, what you are not obligeable to provide under this Act. Firstly, it is an item subject to legal privilege, hence the importance of the definition of an item subject to legal privilege earlier, and then no person shall be obliged under this Act to provide testimony or information which would disclose any trade, business, industrial, commercial or professional secret or trade process, provided that information described in sub clauses (a), (b) and (c) of the definition of the term information in section 2 shall not by reason of that fact alone be treated as a secret or trade profession. In other words, you cannot allege that it is a secret or a trade profession simply by virtue of the fact that it is a statement, fact, document or record held by the bank. In other words, it has got to be the actual content of the information that gives it the characteristic of a trade secret or trade information and then clause 12(3) is important because it overrides, subject to items of legal privilege and subject to this exception of trade business, industrial or commercial, beyond those two things sub clause 3 overrides any statutory, contractual or professional duty of confidentiality that the person being required to give the information may have to the owner or object of the information. So it says, “save as aforesaid, the obligation of persons to provide testimony and information under this Act shall have effect notwithstanding any obligation as to confidentiality or other restriction upon the disclosure of information contained in any enactment of the common law or in any other relationship”, and this is vitally important in its impact to many institutions and professions around the world. It is a very important part of this regime that is being set up now around most of the world and then the rest of the provisions in clause 13 deals with testimony and information and how it is dealt with once it has been obtained by any of these proceedings. Clause 14 is important, it sets up the right of appeal. As I said earlier, clause 14(1)(a) gives a right of appeal to the Courts to anyone upon whom a notice under section 8 to produce information, that is the administrative notice to produce information, is served on. There is also a right of appeal to anyone who is the subject of the subpoena to give evidence or produce information under section 9. The appeal may be on one of the grounds set out in subsection 2 and they are: (a) that the notice issued is not in conformity with section 8; (b) the information to which the notice of subpoena relates is not in the possession or control or accessible to a person who is in Gibraltar; (c) the notice of subpoena includes or relates to items subject to legal privilege provided that, and to the extent that, this ground is relied upon, the appeal may relate only to such items and the notice of subpoena remains extant, valid and binding on that person in every other respect. In other words, if information is requested and some of it is subject to legal privilege but the other is not, you cannot appeal against the whole notice of the subpoena. You have got to comply with the bits that are not covered by privilege and appeal only in respect of the bits that are subject to that privilege. Then in conclusion, Part IV deals with general logistical issues about how notices are served. How official documents are authenticated. How notifications are given. Clause 18 importantly provides

protection of persons disclosing confidential information. In other words, if you are a lawyer or a banker or anybody else who has a contract or a professional relationship that imposes confidentiality obligations, this section protects you from suit from your counterpart to make sure that compliance with this law does not expose you to a legal claim of any sort by the person who is aggrieved by you giving that information. Clause 20 which is also a requirement of the standard model of TIEAs but is not included in the compulsory tools available to the Government because it is entirely voluntary. In other words, if there is a person in Gibraltar who consents to being interviewed, in other words, wishes to be interviewed voluntarily and consents for that voluntary evidence to be given in the presence of and with the participation of officials from the requesting party, then the Government has the power to authorise such a proceeding to take place in Gibraltar. But it is outside the Courts. It is by consent and it cannot be done unless the person giving the evidence, specifically and in writing, consents to it. So really, it is just a voluntary consensual mechanism to avoid having to have recourse where the person wanting to give……, to avoid in having to have recourse to all the legal architecture that the Bill otherwise creates. I do give notice now, orally, that I shall be moving a couple of amendments to sub clauses 10 and 11 of clause 20. In sub clause 10 which presently reads "a statement made to an official of a requesting party under this section shall not in any proceedings be used in evidence against the specified person making the statement", there I will be amending to add after the words "in any proceedings" the words "in Gibraltar". The law of Gibraltar is simply not efficacious to decide what may be used in evidence under the laws of another country and under sub clause 11 which says "In this section "specified person" means", remember that these are both subsections relating to this voluntary procedure. "In this section, "specified person" means a person who is subject to a notice to provide information or to a subpoena to provide information or testimony under this Act". I will be moving an amendment to that so that after the words "specified person" it reads as follows "In this section "specified person" means any person whether or not they are subject to". In other words, this voluntary procedure should not need to be preceded by an invocation of the legal procedure. If there is somebody……. If the Government receives a request from the United States of America saying, "we would like to question so and so about so and so" and the authority gets in contact with that person and that person says "Yes, I consent, and I am happy to do it and I am happy for the American officials to be present". It is not logical that in order for that to be possible we should have to go through…We should have to invoke against that person the legalistic procedure of issuing a notice et cetera. As it presently reads, it would require that. So in the amendments that I am proposing, it will be available both for persons who have and have not been the object of such a mechanism.

Mr Speaker, the Bill also creates some offences, obviously, and also gives the Minister the power to make regulations for the purpose of carrying out the purposes and provisions of this Act and without prejudice to the generality of that, there are five specific areas where provision is made and then there is immunity to the Minister and to the Authority for liability and damages for anything done or omitted in the discharge of their functions under this Act unless it is shown that the act or omission was done in bad faith. In other words, there is no immunity for things done in bad faith. This is a piece of legislation which the Government believes carefully balances the obligations, the mechanisms necessary for the Government to be able to comply with the obligations contained in these tax information exchange agreements on the one hand but with the right of citizens to test these processes in the Courts and therefore enjoy judicial protection from any abuse or misapplication of this procedures. A lot of care and attention has gone into creating the greatest possible degree of balance and protection. But there is no getting away from the fact that this regime reflects the regime now unfolding as the requirement, the consensus for, so called, civilised behaviour in this area of activity in the world that it does create by reference to all historical circumstances, by all historical practices, an extremely intrusive regime in terms of the ability of countries

gaining access to tax information that may be available in other countries. I commend the Bill to the House in the sense that I think it is everybody's judgement, I have not heard anybody publicly or privately demure from this view, that entering into tax information exchange agreements and therefore having to pass legislation of this sort to implement them, is in the interests of Gibraltar and its future as a prosperous, reputable and therefore viable financial services centre and in that context, I commend the Bill to the House.

Discussion invited on the general principles and merits of the Bill.

HON F R PICARDO:

I think that the Opposition takes its cue from the last phrase that the Chief Minister has referred to the House, namely that there has been no objection, certainly from this side of the House and indeed from others, to the fact that the reality of today means that the signing of bilateral agreements on tax information exchange is, unfortunately, the only way forward. I say, unfortunately, simply because it appears that, as the hon Gentleman has said, this seems to be the consensus of the only civilised way forward. It may be that it is fortunate that we are going down that route, but I think that we are doing so without much choice but that may not be a bad thing in the long run. Therefore, having entered into those agreements, the Opposition of course supports that the legislation necessary to give effect to them should come to this House and we join with the Government side in hoping that the practical consequences of this Bill when it becomes an Act and of those agreements will be for the benefit of the community as a whole, not just for the finance centre, but that it will render our finance centre prosperous and continue to render it reputable. So, therefore, we shall be supporting the Bill I have no doubt, together with the hon Members Opposite and others in the wider community, monitoring how it is that this Bill, or this Act, develops and how its enforcement by the Authority and the reliance upon it by those authorities outside of Gibraltar that are our bilateral partners in those agreements, is pursued. In terms of the specific parts of the Bill which we have some question and concerns on, I have not heard the hon Gentleman tell us what the Authority should be. It maybe that I simply missed that part of his intervention, but I would be grateful if perhaps in his reply he could give us an indication… I think that we would all agree that there is a matter of practical enforcement. It would not make sense for the Hon Minister for Finance to be involved in dealing with these requests as they come. There is to be an Authority. I would be grateful if the hon Gentleman would tell us who it is that he is thinking of appointing. Clause 20(2) has language which I confess I have not seen before in legislation. The final phrase of that subsection says that "the decision on whether to permit officials of the requesting party to enter Gibraltar for the purpose stated in subsection 1, and if so on what terms, lies exclusively in the hands of the Minister". That is not language that I have seen in legislation before. I can understand that there is a desire to keep that away from the Authority and that that is not a matter that will be delegated but the language that I think that we would be used to seeing in legislation will be something in order of "shall be entirely in the discretion of the Minister". I wonder whether the hon Gentleman can tell us whether there is a specific legislative device that he is seeking to invoke by using that language rather than a much more common language to which I have referred. I do not expect that Standing Orders will allow me to stand up again so this is probably my last intervention this year. I take this opportunity to wish the hon Members Opposite and the wider community, a peaceful Christmas and a prosperous and healthy 2010. Of course, I wish the hon Members Opposite less political prosperity than I wish those on this side of the House but my good wishes as to health and peace are not limited in such a partisan fashion.

MR SPEAKER:

Does that mean the hon Member will not participate in the other Bills?

HON F R PICARDO:

I do not think so.

HON CHIEF MINISTER:

Well I think Mr Speaker, in the spirit of the extraordinarily affable greetings that have flown across the floor of the House from the lips of the hon Member, I think it would be discourteous for me not to reply to him the queries that he has raised on the Bill. I am grateful to the hon Member for his Christmas greetings and good wishes although obviously not for wishing us less political prosperity than him. I am also grateful to them for their support for the Bill in the same context as I said that I was commending the Bill and that was that at the end of the day this is a natural requirement, an inevitable requirement of the need to sign agreements and that that is itself, not that……. but I think the hon Member has said something which is probably true. I remember, you know the world has been organising itself to curtail previous practices for some years now and it started with money laundering and then it went on to regulatory standards and regulation of banking, insurance and things of this sort and now it has moved to exchange of information on tax. Each step, everybody has thought that the anti money laundering rules were going to put us out of business. That the regulatory regimes were going to put us out of business and no doubt they think the same of this now. Actually, the previous steps served to enhance our reputation to make us more attractive to reputable financial services providers and to make Gibraltar's presence within the world of international financial services more rather than less secure and I think we should all hope and expect that given that this is a global initiative…….. Obviously, if only Gibraltar were doing this it would be much more damaging but given that this is a global initiative, I think this will serve us in the same good stead as have previous initiatives that I have just outlined. Mr Speaker, yes, the hon Member does have a tendency to chat to the members next to him when I am giving him my best possible crack at explaining the Bill to him so it must have been one of those moments when I was explaining. I did mention it before, and I am very happy to repeat it. The provisions in respect of the competent authority. The competent authority is the Minister unless he appoints somebody else and I hear what the hon Member says about it not being practical for the Minister to do it. I actually disagree initially. This piece of legislation is so macro economically sensitive, at least until it beds down and until the rest of the world starts to do it as well, that I think that there is a very good case to be made for the Minister to retain an unusual degree of oversight over the way this works. The last thing we want is for this to be administered in the lower levels of the public administration in a way which is unnecessarily damaging to the interests of an industry that itself needs time to get to terms with these provisions, to understand how they are going to work in practice, to train their staff into responding to them, which is why I have instructed the inclusion of this formula that the Authority shall be the Minister until he appoints somebody else. It would be my hope and my wish to be able to say, "I can now move on, because as the hon Member……." I have no wish to be involved in this but I think there is a macro economic interest in ensuring that there is ministerial oversight over this process at least for a while. Now, who it would be thereafter has not yet been decided. It would be either the Financial Secretary or the Commissioner of Income Tax or any other official that the Government might create as a central gateway. One of the things that the Government……. There you are he is going to extract from me some information sooner than I would have otherwise given it to him. The hon Members will have noticed that there is a plethora now of legislation on our books that create gateways for international cooperation. Everything from the financial services legislation to the criminal legislation, now to the tax legislation, there are European Union Directives that require exchange of information.

Now, at the moment, departments are, in effect, swamped by the administrative burden of having to administer all these gateways. One of the things that the Government is thinking about, I have not yet decided to do it or not and if so how to do it, is the creation of a central gateway to act as the gateway for all inwards and outwards international requests for information so that we can create some specialist knowledge and specialist technicians in that and therefore every department does not have to have an expert in how to deal with these matters. If we do that, it may well be that that will be the Authority under this Act. So it will be one of the three that I have mentioned to him. I think that the words, "in the hands of……." is just the draftsman's choice. There is nothing in the……. Let me just check whether there is anything in the agreements that have used that phrase. I am sure it does not, but it maybe that this is just a draftsman's choice of language. The draftsman of that section choice of language in respect of dealing with……. I am wondering whether I will be able to find this……. I do not think I have here……. No. That phrase is not used. It simply uses the phrase "may permit". The agreements use the phrase "may permit" making it clear that it is not obligatory. That it is discretionary, and I would have no difficulty whatsoever……. If the Members of the House believe that the phrase "in the hands of……." is not a judicially definable phrase, I would have no difficulty with substituting it in Committee Stage for the phrase "on what term", "the decision whether to permit officials for the requesting party to enter……. and if so on what terms……."

HON F R PICARDO:

"…….exclusively in the discretion of the Minister."

HON CHIEF MINISTER:

Yes…….. "shall be exclusively in the discretion of the Minister". I am obliged to the hon Member for that suggestion.

Question put. Agreed to.

The Bill was read a second time.

HON CHIEF MINISTER:

I beg to give notice that the Committee Stage and Third Reading of the Bill be taken later today, if hon Members agree.

Question put. Agreed to.

THE PUBLIC FINANCE (CONTROL AND AUDIT) (AMENDMENT) ACT 2009

HON CHIEF MINISTER:

I have the honour to move that a Bill for an Act to amend the Public Finance (Control and Audit) Act in order to transpose into the law of Gibraltar Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings, and matters connected thereto, be read a first time.

Question put. Agreed to.

SECOND READING

HON CHIEF MINISTER:

I have the honour to move that the Bill be now read a second time. Mr Speaker, as the House now knows from the reading of the Long Title, this is a Bill for an Act to transpose into our laws a Commission Directive of November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain

undertakings. This Directive was designed to ensure that the financial relations between public authorities and public undertakings are transparent to make sure that there is a fair and effective application of EU state aid rules. The Bill fulfils this objective by requiring the maintenance of records and separate accounts and the provision of information to the authorities. The significance of this legislation will, most recently, have been seen in an international context in the support afforded by Member States to banks, car manufacturers and other ailing companies as a result of the global financial crisis. Clause 76 deals with interpretation and is lifted from Article 2 of the Directive. Under clause 77 the Financial Secretary must take steps to ensure that financial relations between public authorities and public undertakings are transparent and that the financial and organisational structure of any undertaking required under any statutory provision to maintain separate accounts is correctly reflected in those separate accounts. Clause 78 clarifies that the transparency referred to in clause 77(1) applies in particular to the following aspects of financial relations between public authorities and public undertakings. The setting-off of operating losses. The provision of capital. Non-refundable grants or loans on privileged terms, that is, the making of them. The granting of financial advantages by forgoing profits for the recovery of sums due. The forgoing of a normal return on public funds used and compensation for financial burdens imposed by the public authority. In other words, this Directive and therefore this Bill is designed to ensure that there is … It does not impose any new state aid obligation, but it is designed to ensure that Governments around Europe cannot hide or obfuscate state aid by the secret passing of public funds to Government companies, statutory agencies and other undertakings that the Government controls and dominates either by ownership or by statutory powers. This is really a transparency mechanism in order to facilitate the Commission's enforcement of state aid rules rather than creating a new prohibition of state aid. Clause 79 clarifies clause 77 further. It provides that to ensure the transparency referred to in clause 77, the Financial Secretary must ensure that, for any undertaking required to maintain separate accounts, the internal accounts corresponding to different activities must be separate. All costs and revenues must be correctly assigned or allocated on the basis of consistently applied and objectively justifiable cost accounting principles and the cost accounting principles according to which separate accounts are maintained must be clearly established. Clause 80 sets out exemptions. These include financial relations between the public authorities and (a) public undertakings as regards services the supply of which is not liable to affect trade between Gibraltar and Member States to an appreciable extent. The state aid rules only apply to cross border trade. So, aid given which does not impact on cross border trade is not unlawful state aid and is not therefore covered by these transparency rules. The Gibraltar Savings Bank is also exempt as are public undertakings whose total annual net turnover over the period of two financial years preceding that in which the funds referred to in Article 1(1) of the Directive are made or used, has been less than Euros 40 million, or in respect of the Gibraltar Savings Bank, the corresponding threshold shall be a balance sheet total of Euros 800 million. Clause 81 provides that information concerning the financial relations referred to in clause 77 are to be kept by the Financial Secretary at the disposal of the European Commission for five years from the end of the financial year in which the public funds were made available to the public undertaking concern, or where the same funds are used during a later financial year, the five year time limit shall run from the end of that financial year. Information concerning the financial and organisational structure of undertakings referred to in clause 77(2) are to be kept by the Financial Secretary at the disposal of the European Commission for five years from the end of the financial year to which the information refers. Clause 82 makes specific provision for the manufacturing sector. This includes the duty of public undertakings operating in the manufacturing sector to supply defined financial information to the European Commission on an annual basis within the timetable contained in the clause. Provision is also made in this clause for the Financial Secretary to ensure that the European Commission is supplied with a list of companies covered by this clause and their turnover. The list is to be updated by 31st March of each

year. In addition, the Financial Secretary must ensure the Commission is furnished with any additional information that it deems necessary in order to complete a thorough appraisal of the data submitted. I commend the Bill to the House.

Discussion invited on the general principles and merits of the Bill.

Question put. Agreed to.

The Bill was read a second time.

HON CHIEF MINISTER:

I beg to give notice that the Committee Stage and Third Reading of the Bill be taken later today, if all hon Members agree.

Question put. Agreed to.

THE MOTOR FUEL (COMPOSITION AND CONTENT) (AMENDMENT) ACT 2009

HON J J HOLLIDAY:

I have the honour to move that a Bill for an Act to amend the Motor Fuel (Composition and Content) Act 2001 in order to transpose into the law of Gibraltar's Directive 2005/33/EC of the European Parliament and of the Council of 6 July 2005 amending Directive 1999/32/EC of 26 April 1999 relating to a reduction in the sulphur content of certain liquid fuels, be read a first time.

Question put. Agreed to.

SECOND READING:

HON J J HOLLIDAY:

I have the honour to move that the Bill be now read a second time. Mr Speaker, the purpose of this Bill is to transpose Directive 2005/33/EC which in itself amends an earlier Directive, namely Directive 1999/32/EC relating to a reduction in the sulphur contents of certain liquid fuels. The earlier Directive was transposed into the laws of Gibraltar by the Motor Fuel (Composition and Content) Act 2001 and this Bill therefore amends that Act. The reason for adopting this Directive is due to the fact that the emissions from shipping due to the combustion of marine fuel with high sulphur content contributes to air pollution in the form of sulphur dioxide and particulate matter, harming human health, damaging the environment public and private property and culture heritage in contributing to acidification. Human beings and the natural environment in coastal areas and in the vicinity of ports are particularly affected by pollution from ships with higher sulphur fuels. Specific measures are therefore required in this regard. Mr Speaker, reducing the sulphur content of fuels has certain advantages for ships, in terms of operating efficiency and maintenance costs, and facilitates the effective use of certain emission abatement technologies such as selective catalytic reduction. This Directive should be seen as a first step on an on-going process to reduce marine emissions offering prospects for further emission reductions through lower fuel sulphur limits and abatement technologies. Therefore, the amending Directive seeks to segregate the provisions that govern the sulphur content of fuels used in land based activities by providing a new regime for marine based activities. Mr Speaker, now going through the Bill in itself. Clauses 1 and 2 of the Bill are introductory. Clause 3 of the Bill amends section 2 of the Act so as to provide definitions which are in consonance with the Directives and the amended Act. Clause 4 of the Bill substitutes existing sections 9, 10 and 11. New sections 10 and 11 provide limits on the sulphur content of heavy fuel oil and gas oil which are used in a land based context. This contrasts with the

provisions of clause 6 which inserts a new Part III A dedicated to the sulphur content in marine fuels. Sections 12C and 12D restrict the placing on the market, that is, offering for sale, marine diesel oil and marine gas oil where the sulphur content exceeds the prescribed limits. New sections 12E to 12H provide a system for the maintenance of records and samples relating to the supply of marine fuel so that the use of appropriate fuels can be monitored. In the first instance, all supplies of marine fuel in Gibraltar must be entered into a register that is to be created for this purpose. Upon the supply of marine fuel to a vessel, both the supplier and the master of the vessel must maintain records of the sulphur content of the fuel supplied in addition to retaining sealed samples of the fuel supplied. In the event of a breach of the relevant obligations, recourse can be had to the samples. Whilst a ship is in Gibraltar's territorial waters, the master has a duty to record the type of marine fuel used in the ship's log book. Failure to do so may result in the refusal of entry into the port of Gibraltar under section 12G. The Bill further provides for the recognition of a more restricted pollution control regime that applies to the Sulphur Oxide Emission Control Areas. These areas are designated by the International Maritime Organisation, the IMO, pursuant to Annex VI of MARPOL Convention due to the particular characteristics and susceptibility of these regions to the effects of sulphur pollution. Gibraltar registered vessels will have to abide by the sulphur content requirements for such areas, presently, the Baltic Sea and North Sea have such areas designated, or risk being persecuted in Gibraltar for breaches occurring in designated areas. Passenger ships which operate a regular service between the port of Gibraltar and another EU port are required to comply with the maximum sulphur content in marine fuel provided for under section 12J. With respect to ships at berth, a new section 12K requires compliance with maximum sulphur content requirements save that subsection (2) sets out the circumstances where the obligation does not arise. For example, where the ship operates a regular service and it is due to be berthed for under two hours. The new section 12L seeks to promote new technological advancements and a dispensation can be given subject to certain limitations where emission abatement technologies are being trailed. Under section 12M, the owner of a ship may be allowed to use emission abatement technologies that meet the required standards of pollution control. The new section 12N provides for the appointment by the Government of an enforcement authority to oversee the various provisions of the Act. New section 12O provides for the use of compliance notices where there are irregularities which the enforcement authority seek to have rectified. Section 12P will make provision for penalties in respect of breaches of various provisions of the Act, including the failure to adhere to a compliance notice. Clause 7 introduces a new section 12N which in turn provides relief from the rigours of the Act where there is a sudden change in the crude oil and petroleum markets rendering it difficult to comply with the maximum sulphur content standards being applied. Where such an eventuality materialises, the Minister will liaise with the European Commission and may vary the limits imposed by Part III and Part III A through the issue of regulations. Mr Speaker, overall, the Bill will affect bunkering services in Gibraltar because suppliers of fuel oil will have to comply with the new standards in common with all other fuel suppliers in the EU. Nevertheless, the industry is aware of the new standards and is ready to comply with them. There are three small amendments to the Bill, Mr Speaker, to which I have given notice and I will move at Committee Stage. I commend the Bill to the House.

Discussion invited on the general principles and merits of the Bill.

Question put. Agreed put.

The Bill was read a second time.

HON J J HOLLIDAY:

I beg to give notice that the Committee Stage and Third Reading of the Bill be taken today, if all hon Members agree.

Question put. Agreed to.

THE PUBLIC HEALTH (HUMAN TISSUES AND CELLS) ACT 2009

HON MRS Y DEL AGUA:

I have the honour to move that a Bill for an Act to transpose into the law of Gibraltar Directive 2004/23/EC of the European Parliament and of the Council of 31 March 2004 on setting standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells; Commission Directive 2006/17/EC of 8 February 2006 implementing Directive 2004/23/EC of the European Parliament and of the Council as regards certain technical requirements for the donation, procurement and testing of human tissues and cells; Commission Directive 2006/86/EC of 24 October 2006 implementing Directive 2004/23/EC of the European Parliament and of the Council as regards traceability requirements, notification of serious adverse reactions and events and certain technical requirements for the coding, processing, preservation, storage and distribution of human tissues and cells; and for connected purposes, be read a first time.

Question put. Agreed to.

SECOND READING

HON MRS Y DEL AGUA:

I have the honour to move that the Bill be now read a second time. Mr Speaker, this Bill transposes into the law of Gibraltar Directive 2004/23/EC of the European Parliament and of the Council of the 31 March 2004 on setting standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells. Along with this, the Bill also transposes into the law of Gibraltar, Commission Directive 2006/17/EC of 8 February 2006 implementing Directive 2004/23/EC of the European Parliament and of the Council as regards certain technical requirements for the donation, procurement and testing of human tissues and cells; and Commission Directive 2006/86/EC of 24 October 2006 implementing Directive 2004/23/EC of the European Parliament and of the Council as regards traceability requirements, notification of serious adverse reactions and events and certain technical requirements for coding and processing. The Bill, by way of transposing these three Directives, seeks to introduce a harmonised regulatory framework to ensure the safety and quality of human tissues and cells intended for transplantation for human application. The Directives set a benchmark for the standards that must be met when carrying out any activity involving tissues and cells for human application. That is patient treatment. The Directives also require that systems are put in place to ensure that all tissues and cells used in human application are traceable from donor to recipient. They do not cover organs, blood or blood products or animal tissues and cells. This Bill has 29 clauses and 11 Schedules. Clauses 1 to 4 deal with preliminary matters. Article 4 of Directive 2004/23/EC which is transposed by clause 3, provides for a competent authority responsible for implementing the requirements of the Directives. The Minister with responsibility for Health is designated the competent authority but the Minister as a competent authority may enter into a contractual arrangement with any person for the purposes of assisting the competent authority to perform his functions under this Act. Clauses 5 to 7 deal with authorisation for tissue establishments to carry out prescribed activities specified in clause 4. Those activities are the donation, procurement, testing, processing, preservation, storage or distribution of tissues or cells for human application and for use in manufactured products where these products are not covered by other EC Directives. Clauses 8 to 10, 13, 14, 16, 18, 19 and 20 provide for the duties and responsibilities for the tissue establishments including designating a person who would be responsible for carrying out the authorised functions of the tissue establishment. Clauses

11, 12, 17, 21, 22, 24, 25 and 28 provide for the duties and functions of the competent authority. One of the important functions of the competent authority is to conduct regular inspection of tissue establishments of which the interval between the two inspections must not exceed two years. The proposed Act would require tissue establishments to be accredited, designated, authorised or licensed on statutory basis for testing, processing, preservation, storage or distribution of human tissues and cells. The competent authority would introduce a system accreditation, designation, authorisation or licensing of tissue establishments. Clauses 26 and 27 provide for offences and penalties and having said all that may I add that the GHA does not perform tissue transplantation and is therefore not considered to be a tissue establishment. This Bill deals with the preparation and transplantation of tissues from one person to another such as bone marrow, skin grafts, bone grafts and cornea transplantation procedures that are not carried out in Gibraltar. I commend the Bill to the House.

Discussion invited on the general principles and merits of the Bill.

HON N F COSTA:

Yes Mr Speaker, simply to say that the Opposition will be voting in favour of the Bill.

Question put. Agreed to.

The Bill was read a second time.

HON MRS Y DEL AGUA:

I beg to give notice that the Committee Stage and Third Reading of the Bill be taken today, if all hon Members agree.

Question put. Agreed to.

THE CONSTITUTION (DECLARATION OF COMPATIBILITY) ACT 2009

HON D A FEETHAM:

I have the honour to move that a Bill for an Act to make provision for the making of a declaration by the Supreme Court regarding the compatibility of any Act or subsidiary legislation or any Bill for an Act or any provision thereof with the Constitution; and for connected purposes, be read a first time.

Question put. Agreed to.

SECOND READING

HON D A FEETHAM:

I beg to move that the Bill for the Constitution (Declaration of Compatibility) Act 2009 be read a second time. Mr Speaker, this short but important Bill enables the Supreme Court to make a declaration as to whether any act or subsidiary legislation or proposed piece of legislation is compatible or incompatible with the Constitution. Whilst we would certainly expect courts, generally, to make decisions of incompatibility when they find an Act to be incompatible with the Constitution, as will all declaratory relief, the Court will have a discretion to be exercised in accordance with all the circumstances of the case. Applications can be made on behalf of the Government by either the Chief Minister or any Minister authorised by the Chief Minister to do so. The Supreme Court will have original jurisdiction to hear and determine applications and such applications can be made even where there are no respondents to the application or defendants to the proceedings. Indeed, for reasons that I shall develop during the course of this speech, it is likely that most applications of this nature will involve situations where there will be no respondents or defendants but that does not prevent the Court from ordering service of any proceedings on interested parties. Although we take the view

that it is possible for such an application under existing provisions of the Civil Procedure Rules to be made and, in particular, a combination of rules 40.20, which is the rule in relation to declarations, and 8.2A, which is the rule pursuant to Part 8, the issue of proceedings without a defendant or respondent, this Bill seeks to simplify and formalise the process and the route by which the Government may seek declarations from the Court on the compatibility of legislation with the terms of the Constitution, particularly, in circumstances where there are no other parties to the proceedings. I say no other party to the proceedings because, of course, section 16 of the Constitution already provides that if a person alleges that any provision on the chapter on individual rights and freedoms, and I quote, "has been or is being or is likely to be contravened in relation to him" and I emphasise the words "in relation to him", "then without prejudice to any other action, with respect to the same matter that is lawfully available, that person may apply to the Supreme Court for redress". I emphasised the words, "in relation to him" because it is clear to us that the section is intended to allow individuals whose constitutional rights are contravened or likely to be contravened by administrative action, indeed legislation, to apply to the Supreme Court for redress. The redress available may well take the form of a declaration of those rights being contravened or are likely to be contravened but the Government itself cannot rely on section 16 to make such an application because of the words "contravened in relation to him". In other words, the section can only be used by an aggrieved person or in European Court of Human Rights language, "a victim". This places the Government at a severe disadvantage in cases where it would wish to see an evaluative view from the Courts on the constitutionality of a particular statutory provision. It is certainly true that Governments generally act on advice and it is usually for aggrieved individuals with a genuine interest in the decision to challenge Government by way of a judicial review. That is certainly so in a vast majority of cases. Indeed, it is a well established principle that Strasbourg in constitutional jurisprudence is case specific and generally requires a person aggrieved to bring and have sufficient interest in the action. The European Court, as indeed other Courts considering constitutional issues, will ordinarily refuse to consider issues in the abstract unless there are genuine private rights at stake. That is indeed an additional reason, quite apart from the section 16 point, why it is difficult for the Government to obtain a declaration on the constitutionality of a particular statutory provision. The Courts are generally concerned with adjudicating on real rights affecting individuals rather than the abstract even if the subject matter is one of great public interest and importance. There may well be cases of public importance where the advice the Government receives is not clear cut or differing views are expressed by those whose duty it is to advise the Government and the issue while abstract in the sense that no one has challenged the decision, either in response to a prosecution or in a judicial review, it is nevertheless desirable for the Government to seek a declaration one way or the other from the Courts. In those circumstances, it is entirely right and proper in our view that the Government should have a clear mechanism allowing it to apply to the Court for a declaration as to whether the legislation in question is compatible with the Constitution, even though there is no individual who has challenged the Government on the issue or the legislation does not contravene that individual's rights in a way that would engage section 16 of the Constitution. Indeed, in some cases it might even be wrong to expect a private individual to spend considerable sums seeking to establish that a piece of legislation is unconstitutional because it contravenes or is likely to contravene his or her rights, when the Government has a readily available route to do so and its own advice on the issue is not clear cut. I should also add that, in fact, the provisions in this Bill are broadly based on section 4 of the UK Human Rights Act and that under the UK Human Rights Act, that particular section, it is open to the UK Government itself to make an application to the Court. In short, this Bill does not detract from any rights that any individual may have to issue proceedings seeking a declaration that a statutory provision is unconstitutional, which continues under section 16 of the Constitution, but it gives the Government itself clear procedural route to seek such a declaration where it feels the need to do so and in circumstances where it cannot make an application under

section 16. Subsection 3 of section 3 provides that a declaration under this section does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given and I would like to say a few words about this subsection. This is taken from section 4(6) of the UK Human Rights Act. Section 4, on which the Bill is broadly modelled although not identical and this particular subsection, was described by the Lord Chancellor Lord Irvine during the Second Reading of the Bill, that is the UK Human Rights Act in the House of Lords, as a careful compromise between parliamentary sovereignty and supremacy and the need to give proper effect to the European Convention. It gives the Court an evaluative role in respect of the legislation in question but if the legislation is held to be incompatible on Convention grounds, then it is for Parliament, which is sovereign and supreme, to remedy that defect. In other words, in UK they took the view that it would not be appropriate for a judge to apply the blue pencil test and, effectively, rewrite the terms of the statute but it was for Parliament to effectively remedy any constitutional defect. Indeed, in the UK such declarations are not even binding on the parties to the proceedings and it is for the UK Government to then move amendments to the legislation in question. If the UK Parliament does not respond, then any affected party would then have to take a complaint to Strasbourg. Mr Speaker, that of course is not the position with section 16 of the Constitution where once the Court declares a provision to be unconstitutional that provision would be unlawful and in fact there have been cases in Gibraltar, under the old Constitution, where the Court has struck down provisions of local legislation because it infringed the old Constitution. I am thinking in particular, Mr Speaker, of the Rojas case and the women jury case. That will continue, of course, to be the position when the applicant is an aggrieved individual under section 16, and therefore, aggrieved individuals in Gibraltar are in a better position than their UK counterparts. However, whether Government itself is seeking what is in the nature of an evaluative opinion under this Act, then it is for the Government itself to come back to Parliament to remedy the unconstitutionality of the statute or if it is a Bill to go back to the drawing board. Of course, the Government will seek to come back to Parliament with amendments to unconstitutional legislation in a timely manner. Finally, section 1 of the Bill provides for a commencement date of the 1 November 2009. As we have announced publicly, the Government has already filed an application in the Supreme Court for a declaration on the rules 40.20 and 8.2A of the Civil Procedure Rules on the age of consent issue. It is our intention to amend the details of claim on the age of consent issue to seek a declaratory view under this statute as an alternative but without abandoning the claim under rule 40.20. It is trite that any amendment would not take effect on the date it is made. It would relate back under ordinary principle and be deemed to have been made on the date the proceedings are issued and hence we have gone for a commencement date which predates the date the application was filed. In fact, this is probably entirely academic for this reason. The lawyers amongst us may know that under rule 8.2A of CPR, that is the issue of proceedings without defendant, requires the leave of the Court. To date, the application for leave has not been listed by the Court and so the point may be academic because proceedings are only deemed to have been issued when leave is granted and then the claim form is issued, otherwise there is no claim. The Government, however, prefers to keep its powder dry on the issue and that is why there is a commencement date of the 1 November. I commend this Bill to the House.

Discussion invited on the general principles and merits of the Bill.

HON J J BOSSANO:

Mr Speaker, we will be voting against the Bill. For us the point of principle here is the fact that it is something that is available only to the Government. It is all very well to say that at the moment under section 16 anybody that is aggrieved can personally take the matter to court. That is, when the Parliament approves legislation which is in breach of the Constitution. Indeed, I had the unfortunate experience in this

House of voting with the Government, as the only member of the Opposition that did, on a piece of legislation that then turned out to be contrary to the Constitution and which was thrown out. I thought the purposes that they were trying to achieve merited my support and, although the rest of the Opposition voted against, it was when I had the only seat for the socialist party, I supported a Bill brought to the House by Adolfo Canepa and this was challenged by the Chamber of Commerce and it was thrown out. There was no attempt to bring back the legislation to achieve the purpose in a way that was compatible. The law was simply struck out and that was the end of the matter. So, certainly, in terms of the supremacy of Parliament on that particular occasion there was no doubt who was supreme. As regards the arguments that have been put for the necessity of this, I must say that it all seems to stem from where the Government is getting advice that is not clear cut. Let me say that when we had a previous debate in relation to the age of consent, the impression I got from the Chief Minister was that the advice that he had was clear cut for some people but not clear cut enough to persuade him, and that therefore there were different views, but I got the impression he would not tell me what the advice was. But the impression that he gave me was that the advice tended to side with the argument that there was a constitutional obligation and a human rights obligation to equalise. I have to say that, it seems to me, that it is not a bad idea that there should be a right for entities other than aggrieved individuals to be able to go to court to get a view from the court as to the constitutionality of a law. But I do not see why that should be limited to the people who are bringing the law where there must be a majority who think it is constitutional because if there is within the Government a majority that thinks it is not, they should not bring it. If there is a majority within the Government that think that it is but a minority that does not, then they can bring it with the consent of the Chief Minister who presumably belongs to the majority and not to the minority. Therefore, I cannot see that there is a need for this other than to say, what we were intending to do, we cannot do. The hon Member in moving the Bill has told us that as far as they are concerned they believe they can already do it even without this legislation and that they are just trying to simplify and formalise the process. I am not sufficiently familiar with the proceedings of the court that he has quoted, to know whether the procedure that has been used by the Government is available to anybody else with the leave of the court. But if it is, then this is doing more than simply formalising what is already there. This is creating a privileged position for the Government. Indeed, not even for the Government but for the individual who happens to be the Chief Minister of the day, because nobody else in the Government, even if there was a situation where nine members of the Government thought they should go to court and one member does not, this cannot happen because the consent will not be forthcoming. It also seems very odd that even when a Bill is brought to the House, before the Bill has been approved by Parliament and been made law, the Government is unable to make its mind up as to whether to proceed with the Bill or not, without, presumably, publishing the Bill and then going to court to be told by the court whether they should proceed to defend the Bill that they have published in Parliament or not do it. Whether they do it in the United Kingdom or not, again, I am not familiar with whatever section 4 of the UK Human Rights Act says, but as has been pointed out already, our Constitution, of course the United Kingdom does not have a Constitution, already gives a clear right to the individual aggrieved by a decision of the Parliament in implementing a law so that the effect of the law is stopped by a decision of the Supreme Court that it is not constitutional. I think that is how it should be. If something is not constitutional, then surely all of us who believe that our Constitution has to be respected would not want to give effect to a legislation……. Therefore, the fact the person that brings or the entity that brings the matter to the court is not the aggrieved person, if the court then decides that it is unconstitutional, and under the provisions of section 3(3) the enforcement and the continued operation still is possible, then it is possible for the Supreme Court to say, this law is in breach of the Constitution, and then after that for the Government to choose, or the people, or the officials in the law that are required to do so, to enforce it to the prejudice of somebody who presumably then would have to use section 16 to have to go

back and get the law stopped. That does not seem to me a way of simplifying or clarifying or making the process any better. So, I would have thought that the fact the law is not immediately declared invalid is one issue, but whether it continues to be enforced against people in the knowledge that it should not be there, does not seem to be the kind of thing any Government would want to do and I do not know why it should be there. In terms of the arguments that have been used as to when it is going to be made use of, this new power that is being created is not being created on the basis that it is triggered by advice not being clear cut or by there being great public interest. There are no caveats, conditions or requirements other than that the Chief Minister wants it done, period, and that it can apply to any law. So, our view is that the idea of providing something in addition to what is already there in the Constitution for entities other than directly affected aggrieved parties is something that we would welcome, and we think it is a good idea that somebody has thought of bringing this forward, and if it may be possible now, but it is important to make it clear that it is possible by having primary legislation saying it, then that is fine. But we cannot support this as long as it is limited to either the Chief Minister or somebody that the Chief Minister gives permission to, to do it. We do not think that we should have that kind of concentration of power in a law on something where, ultimately, it is to go to court to get a clear cut ruling on whether the whole population is protected by the Constitution, or not protected by the Constitution, or in fact being told that something is illegal when it ought not to be illegal because the Constitution permits it. I would have thought, at the very least, this requires much more thought on the part of the Government before it proceeds.

HON CHIEF MINISTER:

Mr Speaker, if the hon Member's decision to vote against the Bill is based on the last thing that he has said, then he is making the wrong decision for the wrong reasons. Yes, the hon Member tries to make a vice out of what is a virtue. It is a virtue and not a vice that the Government should want to test the constitutionality of what it has done. Not in order to oppress the innocent citizenry but in order to ensure that the innocent citizenry is not oppressed by what the Government has already done or may propose to be doing, which may be unconstitutional. I have never heard anybody more elegantly, or rather more inelegantly but more articulately, argue to convert a virtue into a vice and he does so because he thinks that the Government is doing this to wriggle off a hook and he is damned if the Government is going to wriggle off a hook because he has said so. He thinks that the Government is doing this because otherwise our action, which he thinks is a device which he tried to defeat in the Parliament on the age of consent, will not work. He is turning his back on an important piece of architecture to ensure that Gibraltar's law complies with the European Convention on Human Rights and with the Constitution, on the simple ground, as always, that he thinks that there is some hidden gain for the Government here that he is damned if he is not going to try and deny the Government. Well he is wrong. The Government does not need this Bill or this Act in order for the litigation that we have found xxxxx and I suppose that there are lawyers on his benches that can advise him.

HON J J BOSSANO:

In the litigation?

HON CHIEF MINISTER:

In the litigation…yes, Mr Speaker. He has said to the hon Member that he thinks that the purpose for doing this is that we cannot do what we are intending to do in the litigation, the court claim that has been started.

HON J J BOSSANO:

I have not said that.

HON CHIEF MINISTER:

Mr Speaker, you have said that what we are intending to do, we cannot do, in reference to this retrospective correction of the court action and giving the Government the right. That is what he has said.

HON J J BOSSANO:

No.

HON CHIEF MINISTER:

You are doing this because what you are intending to do, you cannot do.

HON J J BOSSANO:

I have got a Point of Order. The Point of Order is that the hon Member is incorrectly quoting me because he is saying the opposite of what I have said. I have said, "in introducing the Bill we have been told that they can already do this and that some rules that were quoted with which I am not familiar, and that it is just for the purpose of simplifying and formalising and clarifying what they can already do." That is what I have said.

HON CHIEF MINISTER:

No. I do not withdraw my words and we shall have to leave to Hansard to decide. The hon Member is wrong in describing what he has said. He has said that as well, but he also said that he believes, or words to the effect, that he believes that the purpose of this Bill is that because we cannot do what we are intending to do, and I stand by this assertion and when Hansard is available, we can have a debate about whether his Point of Order is justified, which I hereby express the view it is not, and whether what I have said is correct, which I maintain. I do not withdraw the words that I have uttered. I make myself fully responsible for them. Mr Speaker, the fact of the matter is that this has got…….

MR SPEAKER:

Point of Order! What was the Point of Order?

HON J J BOSSANO:

Mr Speaker, my Point of Order is, if the hon Member says that I have said something five minutes ago when in fact he is misquoting me because the entire argument is that he is saying I have said something and I have said the opposite of that, then I think that is a Point of Order that I am entitled to make. The hon Member is attributing to me a statement which is false because he is misquoting me to the extent of putting in my mouth the opposite of the words that I used and we do not have to wait until next year. We can play back the last ten minutes of the tape.

MR SPEAKER:

My recollection of the debate is, the words that the hon Chief Minister has quoted are the words that I heard but his attribution of those words to the litigation which has been embarked upon was not what I understood the hon Member to say. Attribute to that particular litigation is not what I understood him to say. But the words quoted by the Chief Minister are the words that I heard about doing and intending to do.

HON CHIEF MINISTER:

Well, when Hansard is available, what Mr Speaker understood is of course a matter for him, but the words were uttered and I maintain that that is what they meant and the only thing that they could have meant. But when Hansard is available we will know. This piece of legislation is not to do with the case. This is a much wider…….. For a start it applies to Bills and the case relates to an Act that is already law. The point of the matter is that the Government and this Parliament should be the most interested and, speaking for ourselves, we are the most interested in knowing whether legislation that we have previously put on the statute book or legislation in the form of Bills that we intend to put on the statute book, we wish to have a mechanism to be sure that what we are doing is lawful because I do not think, well certainly the Government has, I do not think that anybody in this Parliament should have any interest in this Parliament legislating that which is unlawful and waiting for somebody to decide to challenge it in x year's time if they bother to decide whether it is unlawful or not, and if nobody decides to challenge it, then we are stuck with unlawful laws for ever.

HON XXXXX:

XXXXX

HON CHIEF MINISTER:

Well Mr Speaker, I am sorry. I am entitled not to be shouted down by the hon Member from the other side of the…….

HON XXXXX:

XXXXX

MR SPEAKER:

Order. Order.

HON CHIEF MINISTER:

The fact of the matter is that here is a Bill that enables the Government…….. The Government may publish a Bill of proposed legislation and people may express the view that they think that the Bill is unconstitutional. The Government may not be convinced, at all or entirely, that the Bill is unconstitutional but if it is an area of the law which is very significant or creates considerable disruption or has significant impact on the lives of people, the Government may want to say, well alright, I do not think it is unconstitutional, but given that there is a body of opinion out there that thinks it may be, the Government just wants to make sure before it converts it into law which binds everybody, the Government wants the opportunity and wants the mechanism to be able to go the court and say, court look, obviously, I do not think this is unconstitutional because if I thought it was unconstitutional I would not have published the Bill in the first place. But there are people out there who appear to believe that it may be. We the Government do not wish to legislate in a way that might be unconstitutional, will you please express a view. If you think it is unconstitutional, obviously, we will not proceed with the Bill. For the hon Member to seek to convert that mechanism into some sort of scenario whereby the Government is capable of abusing this. How can it be abusive by the Government to delay promulgating the law that it has already decided to promulgate and to impose on citizens, and that they have the majority in the House to do it, how can it be abusive of citizens for the Government to say, "hang on, before doing that, I am going to go and check with the court to see if what I am doing would be constitutional, or to see if what I am intending to do and have the power to do, would be a breach of the European Convention on Human Rights?" How can the hon Member…….? The hon Member can approve or disapprove of the Bill, as he pleases. But for the hon Member to try and

pretend that, somehow, this is a dangerous mechanism to be placed in the hands of one person, when it is only capable of being used for the protection of citizens, and is incapable of being used……. No, I am sorry, the hon Member is wrong. It can either be used for a Bill which is not yet law, and no one can challenge that. There is no citizen that has the right to challenge something before it has become law. So the Government that presumably wants to pass the law, otherwise it would not have published the Bill, and if somebody else publishes, if there is a Private Members' Bill, the Government has the means to stop it. So here is a situation where something is not yet law but the Government intends to make it law and has the power through its majority in Parliament to make it law and the Government says, "hang on, I am going to check with the court that this is okay for the Government to do this." That is one of the two circumstances it can be……. How can that be abusive? The other circumstance in which it can be used…….

HON S E LINARES:

XXXXX

HON CHIEF MINISTER:

I know the hon Mr Linares is a recent lawyer but he does not have to …

MR SPEAKER:

Order. Order.

HON CHIEF MINISTER:

The other circumstance in which it can be used is that something is already law, already binds people, already obliges citizens to comply with it. There is a view expressed that it may be unconstitutional and the Government says, for the benefit of citizens who are already affected by it, caught, is this unconstitutional or not? Because if it is, the Government would wish to remove it or change it and not leave ordinary citizens with the cost, uncertainty and trouble of doing it and these are the only two scenarios in which this alleged, oppressive power can be used. The problem is that the hon Member takes his cue from other NGO's who rush into judgement on a non-existent understanding or knowledge of what the Government intends to do and indeed on any reasonable interpretation of what the law says. We therefore regret that the hon Members seek to deny the Government the simple mechanism which everybody else already has. I mean, citizens that are already affected by laws have the power, yet the Government that is in a position to do something about it apparently should not have the power to test the constitutionality of its own proposed legislation. I just do not understand it. This is intended as a bow in the Government's armoury to improve the quality of Government. To make sure that the Government can take initiative in ensuring, without having to be taken to court by citizens, to ask the court to adjudicate on whether the laws of which the Government is the custodian are or are not constitutional. If they are constitutional, the court will say so. If they are unconstitutional, the court will say so. In any event, the outcome is not decided by the Chief Minister or the Minister that he approves or the Government. The outcome is decided by the court in accordance with the law. I would have thought that this is something that everybody would welcome. But of course there are people in Gibraltar who, without understanding even what they are talking about, rush, not to local comment, but to international comment, on a completely fictitious, false, indefensible basis and regardless of the damage that it causes. Yes, the hon Member knows who I am talking about and the Government does not believe, as no other constitution and no other Governments in the world appear to believe, that NGO's should have rights that citizens do not have and that NGO's should have the right to challenge the legality of a proposed piece of legislation that this House has not yet passed. The Government is entitled to go to the court and

say, “I, the Government, propose to move in Parliament that this Bill should become law. Before I do so, given that I am responsible for moving it in Parliament, is it constitutional?” But to give citizens or even NGO’s the right to challenge the validity of Bills even before they have been adopted into law which exists in no other country, is simply to undermine the sovereignty and the role of this Parliament. There is a distinction between the citizen doing that and the Government doing that because it is the Government’s Bill and it is for the Government to say, “this is my Bill, I propose to move it, before I move it, I would like the court to tell me whether I am proposing to do something which is lawful or whether I am proposing to do something which is unlawful”. Therefore, we reject the Opposition’s criticism of this important, valuable and helpful piece of legislation which will significantly contribute to the quality of the laws of Gibraltar, which will significantly contribute to the protection of citizens from unconstitutional laws. Let the record show that it is the hon Members opposite from the Opposition benches who appear want none of that to be the case.

HON F R PICARDO:

To be limited to you!

MR SPEAKER:

Order. Order.

HON G H LICUDI:

Mr Speaker, let me just deal with one of the last points that the Hon the Chief Minister has made. Where he has said that NGO’s, not in Gibraltar, nowhere in the world, have the right to apply to have issues or to have constitutional rights determined.

HON CHIEF MINISTER:

Bills.

HON G H LICUDI:

Bills! Oh right. The hon Member was not referring to existing rights but bills.

MR SPEAKER:

The reference was to Bills undermining the supremacy of Parliament.

Question put. The House voted.

For the Ayes:
The Hon C G Beltran
The Hon P R Caruana
The Hon Mrs Y Del Agua
The Hon D A Feetham
The Hon J J Holliday
The Hon J J Netto
The Hon E J Reyes
The Hon F J Vinet

For the Noes:
The Hon J J Bossano
The Hon C A Bruzon
The Hon N F Costa
The Hon Dr J J Garcia
The Hon G H Licudi
The Hon F R Picardo
The Hon S E Linares

The Bill was read a second time.

HON D A FEETHAM:

I beg to give notice that Committee Stage and Third Reading of the Bill be taken today, if all hon Members agree.

Question put. Agreed to.

COMMITTEE STAGE

HON CHIEF MINISTER:

I have the honour to move that the House should resolve itself into Committee to consider the following Bills clause by clause:

1. The International Co-operation (Tax Information) Bill 2009;

2. The Public Finance (Control and Audit) (Amendment) Bill 2009;

3. The Motor Fuel (Composition and Content) (Amendment) Bill 2009;

4. The Public Health (Human Tissues and Cells) Bill 2009;

5. The Constitution (Declaration of Compatibility) Bill 2009.

THE INTERNATIONAL CO-OPERATION (TAX INFORMATION) BILL 2009

Clauses 1 to 19 – were agreed to and stood part of the Bill.

Clause 20

HON F R PICARDO:

Yes. I am moving an amendment so that the final phrase would become, "and if so, on what terms shall be exclusively in the discretion of the Minister" and I think that is what the hon Gentleman said he would agree to.

HON CHIEF MINISTER:

I am not sure the word "exclusively"…….

HON F R PICARDO:

I agree, Mr Chairman.

HON CHIEF MINISTER:

Exclusively, cannot mean exclusive of the court's power to judicially review, for example, so it is not …….

HON F R PICARDO:

I agree.

HON CHIEF MINISTER:

We could delete the word "exclusively" as well.

HON F R PICARDO:

"So shall be in the discretion of the Minister". I think that is the more usual wording.

MR SPEAKER:

The Chief Minister also gave notice of amendments to sub clauses 10 and 11.

HON CHIEF MINISTER:

Oh yes, Mr Chairman. In sub clause 10, after the word "proceedings" add the words "in Gibraltar", and in sub clause 11, sorry that was sub clause 10, and in sub clause 11, after the word "means" the word "a" becomes "any". So that it reads "means any person", and the words "who is" are deleted and becomes the word……. delete the words "who is" and substitute the words "whether or not they are". So that it all reads "means any person, whether or not they are subject to, et cetera."

Clause 20, as amended in sub clauses 2, 10 and 11, were agreed to and stood part of the Bill.

Clauses 21 to 24 – were agreed to and stood part of the Bill.

Schedules 1 and 2 – were agreed to and stood part of the Bill.

The Long Title – was agreed to and stood part of the Bill.

THE PUBLIC FINANCE (CONTROL AND AUDIT) (AMENDMENT) BILL 2009

Clauses 1 and 2 – were agreed to and stood part of the Bill.

The Long Title – was agreed to and stood part of the Bill.

THE MOTOR FUEL (COMPOSITION AND CONTENT) (AMENDMENT) BILL 2009

Clauses 1 to 5 – were agreed to and stood part of the Bill.

Clause 6

HON J J HOLLIDAY:

Mr Chairman, I had given notice that under the new section 12I, subsection (3)(a), substituting the figure "2007" by "2009" and then under the same Section 12I, subsection (3)(b)(i), there is a typo error in that we should substitute the word "month" by "months" in order to reflect the plural. Then in subsection 12M(2)(b), I wish to put a full stop after the word "appropriate" and delete the words "to the trial in question".

MR CHAIRMAN:

You mean a semi colon, not a full stop.

HON J J HOLLIDAY:

Semi colon, correct.

Clause 6, as amended, stood part of the Bill.

Clause 7 to 10 – were agreed to and stood part of the Bill.

The Long Title – was agreed to and stood part of the Bill.

THE PUBLIC HEALTH (HUMAN TISSUES AND CELLS) BILL 2009

Clauses 1 to 29 – were agreed to and stood part of the Bill.

Schedules 1 to 11 – were agreed to and stood part of the Bill.

The Long Title – was agreed to and stood part of the Bill.

THE CONSTITUTION (DECLARATION OF COMPATIBILITY) BILL 2009

Clauses 1 to 4 – stood part of the Bill.

The Long Title – stood part of the Bill.

THIRD READING

HON CHIEF MINISTER:

I have the honour to report that:

1. The International Co-operation (Tax Information) Bill 2009;

2. The Public Finance (Control and Audit) (Amendment) Bill 2009;

3. The Motor Fuel (Composition and Content) (Amendment) Bill 2009;

4. The Public Health (Human Tissues and Cells) Bill 2009;

5. The Constitution (Declaration of Compatibility) Bill 2009

have been considered in Committee and agreed to, some with, some without amendments and I now move that they be read a third time and passed.

Question put.

The International Co-operation (Tax Information) Bill 2009;

The Public Finance (Control and Audit) (Amendment) Bill 2009;

The Motor Fuel (Composition and Content) (Amendment) Bill 2009;

The Public Health (Human Tissues and Cells) Bill 2009,

were agreed to and read a third time and passed.

The Constitution (Declaration of Compatibility) Bill 2009.

The House voted.

For the Ayes:	The Hon C G Beltran The Hon P R Caruana The Hon Mrs Y Del Agua The Hon D A Feetham The Hon J J Holliday The Hon J J Netto The Hon E J Reyes The Hon F J Vinet
For the Noes:	The Hon J J Bossano The Hon C A Bruzon The Hon N F Costa The Hon Dr J J Garcia The Hon G H Licudi The Hon F R Picardo The Hon S E Linares

Absent from
the Chamber: The Hon L Montiel

The Bill was read a third time and passed.

PRIVATE MEMBERS' MOTION

HON J J BOSSANO:

I have the honour to move the Motion standing in my name which reads as follows:

> "This Parliament is fully committed to the principle of implementation of legislation which does not discriminate on the grounds of sexual orientation;
>
> AND
>
> The Parliament considers that proceeding with legislation to produce such equalisation in respect of the age of consent should be deferred to enable wider consultation to take place with the community on what such age of consent should be."

Mr Speaker, I brought this Motion a very long time ago and a number of things have happened since, not least the Bill that we have just passed with Government votes and with us voting against. I still think that this is an issue which is relevant and on where I do not see why there should be a division in Parliament on the basis of where we stand. I would have thought that, certainly it may not be the position of the Government, the position of the Government may be that if the discrimination is not in breach of the Constitution, or in breach of the Human Rights Act, then it is alright. I think there has to be a reason for discrimination, even if it is not illegal. There is unlawful discrimination and there is discrimination which is not unlawful, simply because there is no law prohibiting it. But discrimination must have some logic to it and therefore our position is that nobody has made a case. These things happen simply because they have been there for a very long time and when the law was brought to the Parliament, which was carried unanimously, allowing consensual sex between consenting adults of the same sex at the age of 18, it was because that was in fact a position that I think even at that time may have been ahead of the United Kingdom, and we decided to go for 18. In the UK I think it might have been 21 at that time but these situations change with the passage of time and with changing attitudes in society. Today, I think we should be moving in the direction of treating people the same, independent of their sexual orientation. Treating them the same requires, in this particular area, that we recognise the right in private of people to conduct their sexual lives as they choose on the basis that it is not for us in Parliament or indeed for people of a different view to try and impose views on others where there is no effect on anybody else as would be the case with things being done in public. On that basis, we would support the need to have the same age. When the Bill to reduce the age was brought to Parliament, we were not convinced that the support for the same age translated into necessarily that the age should be 16 or 17 or 18. Therefore, the debate was not as to whether the age should be the same for both, and therefore equal treatment, but whether that should be brought about by reducing the age for homosexual sex to 16 as it is for heterosexual sex. Although it was said in that debate that there were enormous difficulties in doing this, other than saying it, there was no detailed explanation given or argument put, but I think that it is something that we need to consider. We need to consider whether, in fact, what most people would support, given that I think most people would support……. It is not……. I cannot imagine anybody objecting to harmonisation at the age of 18 since it has been there at the age of 18 for donkeys years and that is now part of what is accepted as normal in Gibraltar, and has been since we introduced that. In fact, when we introduced it, it was carried unanimously and, to my recollection, there was no great public outcry about it. So, the move to 18 is something that those who have got misgivings about the age of consent in homosexual partnerships or situations would not be affected by that decision. The 16 seems

to worry a lot of people, and therefore I think we should listen to them. The 17 would be the half-way house to try and keep the concerns of those who are against the reduction, at least, attenuated, and all that the Motion is doing is trying to establish that we accept that we need to move in the direction of having the same age for both but that, before we take a decision like this, we ought to have wider consultation. That is what our view is and, therefore, we are seeking the support of the Government so that we have got a common view. I commend the Motion to the House.

Question proposed. Debate ensued.

HON CHIEF MINISTER:

Mr Speaker, the hon Members on this side of the House are not going to vote in favour of the hon Member's Motion and intend to amend it. I think the boot is now on the other foot. The hon Members are constantly saying to us that we do things, usually wrongly they say, as political devices, to do this and that. Well, this is what we think this Motion is. The hon members have for many years, in and out of their Manifestos I think I am right in saying, expressed support for the views in Gibraltar that believe broadly in support of the Gay Rights Movement, that gay people should be treated in the same way as non-gay people, and then the law already says something about ages for non-gay people. So, when in the past you have expressed the view that gay people should not be discriminated against and that they should be put in the same position as non-gay people, what you have been saying for all these years, and promising the gay community in Gibraltar for all these years, is that you think that the law should be the same for them as it has always been for others. On the first occasion that you get the opportunity to do precisely that, by voting in this House for a piece of legislation that would have done precisely that, you abandon your so-called principles and political doctrines because you think you can score a cheap political point against the Government. Now to window dress your behaviour, you go on about this 16 and 17 and 18, and how there are people concerned by all years. Well, how do you reconcile that with the fact that you have had Manifesto commitments in the past to put gay people in the same position as non-gay people which is what the Bill offered the hon Members of the Opposition to do, and they declined. There is nobody in Gibraltar, including the gay community, that does not believe that the hon Members have sacrificed their alleged principles, if indeed it is a principle at all, but whatever it is, principle or not, they have sacrificed it at the alter of denying what they thought was a face-saving, political device for the Government to get off a hook, because they think the Government is divided on this question. Always, as always putting short-term political tactic ahead of adherence to their alleged principles. This is the reality of it, and it is inescapable, and there is nobody in Gibraltar that has thought of these issues. Yes, because when the hon Members opposite put in their Manifesto about equality of rights for gays, they did not say, "hang on, equality of rights for gays, which may take the form of changing the law for everybody else to bring them up to the gays and not the gay xxxxx". That is not what they have been saying for 15 years. What they have been saying for 15, or five or three or four, however the number of years, is that they do not think gays should be discriminated against. Gays should be the same as non-gay. Well, that is what we tried to do, or the Private Members' Bill tried to do, which the Government agreed that he could bring, and I voted against, but I do not have the position that he has been advocating politically. I did not go to the last election seeking the support of gay people on the basis of their sexual orientation, but he did, and on the first occasion that he gets the opportunity to make good on his electoral promise to them, he lets them down by voting to what he thinks is to cause political difficulty for the Government. Well, he can extricate himself from that political predicament, all by himself, and without the support of the Government, for a Motion designed exclusively to provide him with political cover for the shameful betrayal of his principles and the shameful betrayal of his commitment to the gay community that he issued before the election. So the Government will not vote in favour of the Motion, and indeed, we are proposing an amendment to the

Motion, to delete all the words after the word “principle” in the first line, so that it will read “This Parliament is fully committed to the principle that all the laws of Gibraltar should be in full compliance with all human rights as established in the Constitution and the European Convention of Human Rights”, and I commend my amended Motion to the House.

MR SPEAKER:

If I may attempt to repeat what I understood is the proposed amendment. The proposed amendment is the deletion of all the words after the word “principle” in the first line of the Motion and the replacement of those deleted words by the words “that…….

HON CHIEF MINISTER:

Yes. I will read it.

MR SPEAKER:

Perhaps it would be helpful.

HON CHIEF MINISTER:

Well I do not think the Clerk has got it.

MR SPEAKER:

I think I have, but anyway.

HON CHIEF MINISTER:

You think you have. “that all the laws of Gibraltar should be in full compliance with all human rights as established in the Constitution and the European Convention of Human Rights”.

MR SPEAKER:

And the second part of the Motion?

HON CHIEF MINISTER:

It is all deleted.

MR SPEAKER:

It is all deleted. Everything after……. I was not quite sure of that. Okay.

Question proposed in terms of the amendment moved by the Hon the Chief Minister.

Debate ensued.

HON F R PICARDO:

Mr Speaker, yes, I think that the hon Gentleman has either, for dramatic effect or for some other reason, wanted to raise the level of debate and the volume of debate, quite unnecessarily. Clearly, nobody on this side of the House is going to object to a Motion that reads as the hon Gentleman has suggested but we are also not going to agree to amend our Motion. So I think what we are going to do on this side of the House is abstain on the proposed amendment but we will of course be voting in favour of a Motion, if one is then before the House, with

Government majority, in the terms that the hon Gentleman has suggested. But really, Mr Speaker, it is quite a pity that it is not possible in this House, on the eve of 2010, at the end of the first decade of the second millennium, to agree a Motion that says that the Parliament is fully committed to the principle of the implementation of legislation that does not discriminate on the grounds of sexual orientation. Now, the hon Gentleman may have wanted to impute motive to this side of the House, of course, in flagrant breach and disregard of the rules of this House, as to debate, where it is not proper to impute motive, but so be it. If the hon Gentleman wishes to do that, it is clearly up to him to wish to do so. He wants to impute motive. He wants to suggest that we had an opportunity to vote for something and then we did not, for whatever reason, and he wants to talk about political principles sacrificed at the alter of short-term political gain. Well, Mr Speaker, there could be nothing clearer than what the hon Gentleman is doing, is trying to reflect onto the Opposition, actually, exactly what he has done. We have seen in this House how the hon Gentleman has voted against a Bill brought by one of his Ministers. Although he allowed the Bill to enter the Parliament, and has sought to refer to the court, and with xxxxx at some length now with our debate on the Bill and the Private Members' Bill as well, sought to refer to the court the issue of whether it is proper to discriminate on grounds of equalisation of age of consent. Well, Mr Speaker, why has he done that? Well, he has done that as a short-term political tactic, for short-term political gain. Now, he has the political honesty, at least, to get up in this House and to say that he does not believe in the principle of equality. He, of course, cannot say that he does not believe that it should be legal for homosexual men to be able to engage in consensual acts of sex after the age of 18 because he voted in favour of it when he was on the Opposition benches when the GSLP in Government moved to change the law and decriminalise such acts. So really Mr Speaker, the hon Gentleman is caught in a bit of a vice and his attempted changes to this Motion today are no more than a device to get out of that vice, because what he will not support, and it is becoming abundantly clear, is a straight forward Motion on the clear and unequivocal principle that the implementation of legislation that does not discriminate on the grounds of sexual orientation, is something that this House should clearly be in favour of. Now, how could it be that this House might want, at the end of the first decade of the second millennium, to do the opposite? Is it that the hon Gentleman is reserving the position that this House should be able to enact legislation that does discriminate on the grounds of sexual orientation? If that is the position, then there is a very clear dividing line between the two parties. The hon Gentleman should at least then recognise that on this side of the House our principle is that this House should never legislate to create a discrimination on grounds of sexual orientation going forward. For us to now find that this straight forward Motion is going to be amended with the language that we have been referred to is frankly, in our view, a retrograde step, but of course nobody can be against language that says that all the laws of Gibraltar should be in full compliance with all human rights as established in the Constitution and the European Convention of Human Rights. Perhaps, we can go a step further. Is it not clearly the case that in being in full compliance with our Constitution and with the European Convention of Human Rights, this House must be bound, not just in principle, but in international legal obligation and in law, not to legislate on grounds that do not discriminate on the grounds of sexual orientation, other than in respect of the specific carve out which have been recognised in respect thereof, on grounds of tradition et cetera. Is it not also the case, that clearly the other side are politically divided on the issue amongst themselves? I will always remember that at the beginning of his speech on the Equalisation Private Members' Bill, the Hon Mr Montiel, who is not here today so I will not say much in his absence, said that he agreed with the Hon the Minister for Justice with his interpretation of the law. A few moments later, the Hon Chief Minister got up and told the House that he disagreed with the Hon Minister for Justice's interpretation of the law. That is the position on the other side as to these very fundamental issues of principle. So, the short-term political gain is the plaster that the hon Gentleman is seeking to apply to the cracks that are appearing amongst the hon Members opposite and for that reason we will be abstaining

on this proposed amendment. But, Mr Speaker, if the amendment does survive, and I am sure it will prosper with Government majority, then this side of the House cannot disassociate itself from a Motion such as will stand before us.

HON G H LICUDI:

Mr Speaker, in introducing…….

HON CHIEF MINISTER:

Mr Speaker, can we just make clear now, historically we used to have discussions about these things, whether we are now speaking to the amendment, not to the original Motion.

MR SPEAKER:

To the amendment, yes! It is all speaking to the amendment right now. We have got to take a vote on the amendment before we can go anywhere else.

HON G H LICUDI:

Yes, Mr Speaker, I am proposing to speak on the amendment but I am assuming that all the comments that the Chief Minister made to which I will respond, were…….

HON CHIEF MINISTER:

My response was not entitled to prevent you from saying whatever you want. It is just that it is procedurally…….

HON G H LICUDI:

I understand that. I understand we have an amendment which is proposed and we have to speak to that amendment but in introducing the amendment, and I am taking the assumption that the Chief Minister, the words that he pronounced in answer to the original Motion were also in proposing the amendment that he was making. The issue that the Chief Minister has mentioned, which is not the first time that he has mentioned it, but he mentioned it on the debate on the age of consent issue, e has also mentioned it in public pronouncements in comments in interviews. Is this what he calls betrayal, or shameful betrayal of principle? The Chief Minister seems to believe that the more he repeats an allegation, the more truthful it becomes, even though it is a false allegation. It is a false accusation and it is clearly a false accusation because it is true that for many years this side of the House has supported principles of equalisation. Have supported principles which go towards treating everyone, regardless of sexual orientation, in the same way. That has been a principle from which we have not detracted once. We have not detracted from that principle once. Not in election campaigns. Not in public pronouncements. Not in any part of the debate which we had in this House in response to the Private Members' Bill which was introduced by the Hon Mr Feetham. Not once did we detract and therefore I resent, Mr Speaker, and I reject what is quite clearly a false accusation which is made for pure political machination and for political purposes. It is made, quite simply, to detract from their own infighting and disagreements, because we have a situation where the Hon the Minister for Justice gets up in this House and clearly gives us the impression that he believes we have a law which is discriminatory. The words, before he gets up and corrects me as he did the last time, he used were "this probably offends the Constitution". When somebody, a politician or a lawyer says, "this probably offends the Constitution", it means that he believes that it offends the Constitution. So the Minister for Justice, taking off this official hat and trying to don a private capacity hat, if that is possible, but sitting in his safe chair as Minister for Justice, tells us in a private capacity that he believes

we have a discriminatory law. We have disagreements, because we have Mr Montiel and I seem to recall we have Mr Netto. I cannot remember whether there was anyone else. So forgive me. But certainly at least two members of the Government agreed with the Hon the Minister for Justice. Not the Chief Minister, of course. The Chief Minister gets up and makes this bold accusation that we are betraying our principles and we are voting against our principles. I have described that as a false allegation, and it is quite simple to demonstrate that it is a false allegation. There are two issues here at stake. One is the issue which the Government has now chosen to put before the court, and in case there was any defect in the proceedings they have started, we have now this Bill which has now become law today, which allows this other avenue of the declaratory relief as explained by the Hon Minister for Justice earlier. So we have a matter which has been brought before the court for a declaration of incompatibility. That principle has absolutely nothing to do and we believe that it is right, that the court should declare that the law we have, as it stands, is incompatible with our Constitution because we said so and we have pronounced ourselves publicly on that. The Hon the Minister for Justice has also pronounced himself publicly for that. It is somewhat ironic, as an aside, that we have the Minister for Justice today proposing a Bill which facilitates that process. So facilitates the process of the Chief Minister taking something to court with which the Hon the Minister for Justice disagrees. So it facilitates the Chief Minister going to court asking for a declaration of incompatibility or compatibility when the Minister for Justice believes that this law is incompatible with our Constitution. That is ironic and I would have thought might well cause the hon Member a little bit of embarrassment. But the point at stake in those proceedings is quite different as the hon Member well knows. Is quite different to the point that we debated when the Private Members' Bill came before the House, and the hon Members are well aware of this. The issue for determination now and the point of principle at stake is whether there should be equalisation. Whether it is at 16, 17, 18 or 25, the principle is the same. That is the point that is being taken to the court. That is the point that the original Motion addresses, and that is the point with which we agree as a matter of principle and we will defend and continue to defend inside this House and outside this House. The only thing that the Private Member's Bill did was to seek to equalise the age at 16. It did not do anything else. The hon Member did not present a Motion setting out a point of principle on equalisation generally. The Bill was specific, to change the law, to amend the law to equalise at 16. That is all it did, and I challenge the Chief Minister who has said, on more than one occasion, that we have betrayed our principles. I challenge the Chief Minister to find one occasion when members of this House or I have said publicly, 16 is the right age. Where have we said that? Where have I ever said that? How can the hon Member dare publicly accuse me because in tainting this side of this House with this brush he is accusing me personally of betraying my principles, and the hon Member confirms that that is correct. So, can the hon Member point anywhere where I have said that 16 is the right age, and therefore conclude from that, that in voting against the Private Members' Bill, which only had the effect of making 16 the equalised age, that I was voting against my principles. It is a false accusation and the hon Members know it. They do it for political purposes. For political machination, and only to deflect attention. To deflect the smoke away from their own internal disagreements and tangles that they find themselves in. Now we have a Motion, so I would hope that the hon Member is sufficiently politically honest to recognise that there is that distinction between the principle involved, which he accuses us of betraying, and which we have never betrayed, and the specific issue on which we have said, what is needed is public consultation, because I do not know whether 16 is the right age. I would like to know what the community thinks. Might be 16, might be 17, might be 18. What this amendment does and as the hon Colleague Mr Picardo has said, although we will abstain, we certainly do not disassociate ourselves with the sentiment behind this amendment that all laws in Gibraltar should be in full compliance of all human rights established in the Constitution and the European Convention of Human Rights. It is ironic that the Government is proposing this Motion which refers to laws when the Government itself engages in

discriminatory practices. When the Government still has policies in place which are discriminatory in nature, and only this week have the Government been told… The Government have been told loud and clear by the highest Court of the land, they may engage in discriminatory practices on the grounds of sexual orientation. That is what the Privy Council has found in a judgement issued this week. How much has it cost the tax payer? Tens, hundreds of thousands of pounds for this matter to come before the Privy Council. For the Privy Council to have to tell this Government that the policy of the Housing Allocation Committee, in denying joint tenancies to people who have a stable long-term interdependent relationship should have equal rights. Why does this Government pursue these matters? Why is this Government now involved in spending other tens, possibly hundreds of thousands of pounds in taking the matter to Court, to be told what is obvious? To be told what we believe the Chief Minister has already been told because we know he has been given advice. He has refused to share that advice with anyone. Is he going to withhold this advice from the Court? Is that not a relevant document? Is he going to claim privilege? What is the public interest in claiming privilege when there is a document, an advice from a senior lawyer, which assists the Court? There is no public interest in that. There is only the partisan political interest of this Chief Minister who is only doing this for political purposes to appease his lobbyists that he does not want to give the impression that he agrees that there should be equalisation. So he wants to be dragged to this Parliament, kicking and screaming, saying "I am being dragged against my will". "I do not agree with what is being done". "I disagree fundamentally with the Minister for Justice, but I am now being told by the Supreme Court that I have to do it". He knows he has to do it. Let him have the political bottle to do it now. What we are experiencing with this, without the Government's support for this Motion, is a sign of extreme political weakness. What Gibraltar needs is leadership. What Gibraltar needs is a Government, a Chief Minister that grabs the bull by the horns and does not pass the buck to the Supreme Court or anybody else. When we have people in Government who have said, before this House and publicly, that we have a law that discriminates and ought to be changed, what is wrong with supporting a Motion which says precisely that? Why do they not have the courage of their principles to support a Motion that says, "Laws must provide, we have to provide legislation with equalisation in respect of the age of consent". Are they not betraying, shamefully, their own principles? As regards consultation, is this not a matter that the Chief Minister himself has recognised may be necessary? Why do we have this charade of having to go to court for the Chief Minister to be told, what he has already been told on advice, and what he has already been told by his own Minister for Justice, who should know about these matters? Then for the Chief Minister to tell us, "once we have that determination from the Courts, we have to consider the age, and that may be a matter for consultation. That may be a matter for a Referendum". Well, that is precisely what we have been telling the hon Members from day one, in this House, in response to the Private Members' Bill. That the principle is agreed but the age has to be determined and we need consultation. Who is betraying their principles? What this House needs is political maturity, political honesty and political responsibility. That is only achieved by the hon Members opposite recognising that what we have done throughout in this whole process has been honest, mature and responsible and in accordance to principle. Whereas they, in particular those who believe that we have a discriminatory law, are now abandoning their principles and taking refuge behind these court proceedings and a statement with which we agree, that all laws should be in compliance with human rights, but which does not take the matter far enough, because it is not a statement of principle that we need equalisation on the age of consent. We stand by that.

MR SPEAKER:

Does any other hon Member wish to speak to the amendment?

HON D A FEETHAM:

The hon Gentleman speaks about weakness, weakness in the Government's position. I have to say that I have never heard such a weak analysis of quite serious matters of principle emerging from the Opposition benches as I have heard on the debate on this particular Motion today. What the hon Gentleman is really saying is this, he says, "you need to distinguish between the principle involved", when he is talking about the Private Members' Bill which is relevant to the Motion, "you need to distinguish between the principle involved and the specifics". "We all agree with the principle of equalisation, but then again we did not agree with the specifics". What he is really saying is and this is really underpinning the entire policy of the Opposition on this particular issue, "we are quite prepared to pay lip service to the principle of equalisation but when we get the first opportunity in this House to place homosexual men on the same footing as lesbians and heterosexuals have been for the last 120 years, we fluff and we duck the issue". That is what they have done. Let us not lose sight of the fact of what the Private Members' Bill did. The Private Members' Bill, what it attempted to do was to place homosexual men on the same footing to where heterosexuals and lesbians had been for 120 years. That is why we chose on this side of the House, those who supported the Private Members' Bill, 16 as the appropriate age. Now, the hon Member, the Leader of the Opposition, supporting or justifying having voted against the Private Members' Bill, he then says, well you see, and I quote "16 seems to worry a lot people". Well, Mr Speaker, 16 has not worried anybody for as long as we were talking at 16 for heterosexuals and lesbians. So therefore, what he is really saying is that he is concerned about 16 for homosexuals. [*Interruption*].

HON CHIEF MINISTER:

You voted with us.

HON D A FEETHAM:

When the Leader of the Opposition…….

MR SPEAKER:

Order. Order.

HON D A FEETHAM:

Well at least we are all having fun Mr Speaker. When the Leader of the Opposition talks about consultation, let us consult. What he really is talking about is, let us consult on whether homosexuals should be reduced from 18 to 16. It is inevitable because there has never been in Gibraltar a popular movement for increasing the age of consent from 16 to 18. He is betraying the very same people that he professes to be representing and advancing the rights of … because it is inevitable that when you look at a consultation process on this particular issue, for as long as homosexuals are not on the same par as heterosexuals, that you are going to be focussing on whether we should be reducing homosexuals from 18 to 16. It would have been different, for instance, if the hon Gentleman would have said, which would have been, in my view, far more logical, "we are going to support the Private Members' Bill reducing it to 16 but our view is that now we should consult on whether the age of 16 for everybody is too low". But that is not what they are saying. The sole motivating factor for consultation on the age of consent must be because they do not want to reduce from 18 to 16 for homosexuals or because in Gibraltar there is an element of public opinion that do not want to reduce homosexual age of consent from 18 to 16. That must be inevitable. In my view, that is a betrayal of homosexual men in Gibraltar.

HON CHIEF MINISTER:

We must have debates of this sort more often Mr Speaker. It brings some sparkle into the proceedings of the House. Well, a valiant but wholly unpersuasive effort by the hon Members Opposite to once again disguise and escape from their extraordinary act of political hypocrisy and betrayal of people whose vote they seduced on the basis of the expression of one view which they then declined to consummate at the very earliest opportunity that they had to do so. There is no escaping that. Even though the Hon Mr Picardo wants to escape it by keeping the volume low because he was worried that I had raised the volume of the debate. Even though his colleague Mr Licudi wants to try and escape it by shouting from the roof tops and raising the volume even higher than I have done so. So there is clearly… I know what the divisions are on this side of the House about this issue of conscience. What I do not know, and I do not even know if they know what the differences of policy there are on that side of the House about the appropriate volume in which Parliamentary debate should take place. Now, it does not surprise me that the Hon Mr Picardo thinks that the Government's position is a device, because I do not think the Hon Mr Picardo would recognise a principled position if it hit him like a 15 ton juggernaut. I do not think the Hon Mr Picardo knows the difference between a position based on principle and a position based on political expediency, because I do not think he cares about the difference. The Government's position as almost the entire population of Gibraltar by now knows, except apparently him, could not be camped on a more principled position and it is no point the hon Members trying to score political points by saying, there must be divisions, there are divisions. It is obvious there are personal divisions on this side of the House. We have said so ourselves. I have said so. Of course, there are personal differences of opinion on this side of the House on this issue of conscience. Why they keep on saying that as if this was a very damaging political thing. I suppose it must mean that on that side of the House the Hon the Leader of the Opposition tells them all how they have got to think and they all go away and think it and they are not used to be allowed to think anything other than what the Hon the Leader of the Opposition thinks. That is the only explanation that I can think of for their apparent consternation at the fact that there are on this side of the House different opinions on matters of conscience. Now, the Government's position could not be more principled and it is this. There are members on this side of the House who personally believe that the age of consent should be equalised at the age of 16 which is what it has been for all other sexual categories for as long as we have had laws. There are people on this side of the House who are opposed to the lowering of the age of homosexual consent to 16, and they are their personal views, to which they are entitled, all to be distinguished from the Government's policy which is that it has not reached a policy that the homosexual age of consent should be reduced to 16 but believes that the laws of Gibraltar should comply with the European Convention of Human Rights and the Constitution. My personal position which I have also explained in this House and he tries to embarrass me, well I do not find it at all embarrassing, is very simple. I am opposed to the lowering of the age of consent to 16 and will only do so by compulsion of law. It cannot be a more principled position because we politicians are not entitled to have our personal views prevail over the law, and therefore if anybody wants me …

HON G H LICUDI:

If the hon Member will give way!

HON CHIEF MINISTER:

No. I will not give way, and therefore, if anybody wants me to vote for a law that says that the homosexual age of consent should be reduced from where it is today, I will not do it unless I am compelled by a ruling of a court of competent jurisdiction to do so. It is as simple as that. That is my personal position but there are other members of this House who regret that their votes to achieve that very same thing when the House had the

opportunity to do so were frustrated by the refusal of the hon Members opposite to vote with them because by now this could already be the law, despite the omnipotent, the allegedly omnipotent Chief Minister's desire to control everything and to impose his will on everything. So, on the one occasion, according to them, unique, unprecedented and rare, where the Chief Minister allows his view not to prevail, they gang up against their own consciences and their own principles to defeat it from happening and that is the inescapable reality of what has happened here. Therefore, for the hon Members to insinuate that the Government does not have a principle, that this is a device, it is not a device. Of course the Government is seeking ways forward which allows it to do what the law requires it to do if the law requires it to be done, despite the fact that there are members of this House who have problems of conscience with doing it. It is as if the hon Members are seeking to oblige those members on this side who have a problem of conscience to nevertheless breach their conscience as a requirement for complying with the law. That is what their position looks like. That is the device. Instead of supporting delivering this result to the homosexual community that they have been promising it to for years, they would rather wait to see if they can force the Chief Minister and other members of this House to have to act voluntarily against their conscience and it is frankly a shameful tactic. It will not work but do not describe our position as a device and unprincipled. Our position is entirely clear and entirely principled, unlike theirs who, and I repeat it, and I will take the Hon Mr Licudi's challenge again, to explain to him what he challenged me to explain. The hon Members, I repeat it, the hon Members who for years and decades, because they think it is part of their left wing doctrine, have been of the view that homosexuals should be in the same position as non-homosexuals chose, as a matter of cold blooded, conscious, political calculation, to prevent that from happening because they thought that they were causing internal, divisive, political problems for the party of Government. There is nobody in Gibraltar who does not think it and it is to the shame of the Gay Rights Movement that they applied more value, and indeed they have lost a lot of credibility, both locally and internationally, that they chose to apply greater premium value to their cuddly political relationship with the GSLP but to the principles of their supposed to be representatives. Certainly, as far as the Government is concerned, the Gay Rights Movement in Gibraltar has lost, as a result, a huge amount of interlocutory credibility with the Government for that politically motivated abrogation of their principles. So, this new Motion, amended Motion, is not a retrograde step because it is wider than theirs. If they are right, whatever the law requires on this question is encapsulated in this Motion together with everything else that the law may require in terms of human rights. The hon Member said that the House was bound not to legislate in breach of the Constitution and in breach of human rights. Well, entirely correct, and then I ask myself, so why did they vote just an hour and a half ago against the Bill that was allowed to allow the Government to make sure that the House would never have to be in a position to legislate in breach of the Constitution. It makes them so unprincipled, so ad hoc, so word of mouth, is their political position adopting, that it takes no more than two hours to expose the devices which motivate their voting decisions. Never based on principle! Always based on what they think at that precise moment of that precise day, is the most politically, tactically, expedient vote to cast. Never based on principle! If the hon Member really believes what he said about the House being bound not to legislate against, he should have voted in favour of the previous Bill which gave the Government the power to test the Bills, would test the Bills before the House votes, thereby making sure that the House would not have to pass laws that were in breach. The problem with the hon members is that… I do not see why we should all suffer the consequences of the continuous power struggle that rages within the GSLP to decide who is going to succeed the leader. Well, the reality of it is that what Gibraltar needs is not leadership which it does not have, Gibraltar already has strong leadership. What Gibraltar needs is for the GSLP to decide once and for all on its leadership so that we do not have this constant tweedle dee and tweedle dum act between the two contenders. Mr Speaker, but given that the hon Members insist on making this House preside over this unseemly power

struggle between the two colleagues, I would rate the Hon Mr Licudi's political performance this morning, seven out of ten, and the Hon Mr Picardo's, Mr Speaker…….

HON XXXXX:

Point of Order, Mr Speaker.

MR SPEAKER:

Order. Order.

HON CHIEF MINISTER:

…….The Hon Mr Picardo's, three out of ten.

HON C A BRUZON:

What is the relevance of all this to the amendments to the Motion.

HON CHIEF MINISTER:

Well, relevance has nothing to do with whether they like what I am saying or not. Now, the hon Member said that what Gibraltar needs was leadership. This is the Hon Mr Licudi, another example of how it takes not more than 15 minutes to demonstrate the simple emptiness, the simple unprincipled position, that they adopt at the moment that it suits them. What Gibraltar needs is leadership, not to pass the buck to the Supreme Court or anyone else. This was not five minutes after he had said that they did not know whether it should be 15, 16, 17 or 18 and they wanted to ask the people to know what position they should adopt. Well, if I cannot pass the buck to the Supreme Court, and that is lack of leadership, well is it not the same degree of lack of leadership that he, despite offering himself as Government to the people, has no apparent view on whether it should be 16, 17, 18, 19 or 30, and will find out when he sticks his head out of the window and ask the people… What is he going to do when half of them say one age and the other half say the other, is only that sort of schizophrenic problem……. will be some of the problems that he will have to resolve. But, in the meantime, that is not lack of leadership and that is not passing the buck. A complete absence, apparently, of view on his part as to what the position should be. It is not us that lack leadership, it is them. It is not us that lack a clear position, it is them. It is not us that lack a principled position, it is them. Of course, the problem with this leadership struggle is that the reality is that the present leader thinks neither of them is suitable, because he reckons he has got to hang around to make sure that neither of them does anything crazy if they get elected leader. So this is a real problem, and they have the gall to call for leadership from the Government when they cannot even lead an Opposition party. Well, I think that that is a bridge too far, and from that stance to call for political honesty and for political maturity when there is not a shred of honesty in their position. First of all, they choose to sacrifice an objective which they claim to hold dear. Vote against it in order to cause the Government difficulty, and then when the Government moves this agenda forward by some other means, they oppose that as well, and when the Government says, "I am going to ask the court to tell me what and to what extent the existing law is unlawful", they say that we lack leadership and are passing the buck. When we ask them what is their view, they say, "we do not know, we are going to ask the people". Well, they have got a fat chance of getting 30,000 people in Gibraltar to express one view for them. So there is no changing the fact that they are going to have to……. Yes, but that is my position, not theirs. It is true that repetition does not enhance the truth of things but it is also true that repetition does not reduce the truth of things. The hon Member may not like repetition because they do not want to be constantly reminded of their lack of principle and of the betrayal that they have inflicted on the gay community of

Gibraltar. But I can repeat it as often as I like, because it is true. It is absolutely true, and the Hon Mr Licudi's attempt at political gymnasia to try and extricate are completely unpersuasive. Completely unpersuasive! What we are saying is not a false accusation. What they have done and what we have accused them of doing is to constantly promise, and not promise for political expedience, promise because they said it was their conviction, their ideological conviction that homosexuals should not be discriminated against. Well look, we have had certain laws for many years and if somebody says, "look if everybody in Gibraltar is paying five pence for a loaf of bread, and there is a category of citizen who are being charged ten, and the Opposition comes out for 15 years saying, we think it is wrong, there should not be discrimination", clearly what they are saying is that the people who are being made to pay ten should be allowed to pay whatever everybody else is paying. It does not mean that the people who paying five should have to pay ten as well. I do not think that there is a single gay in Gibraltar or a single lesbian in Gibraltar or a single heterosexual in Gibraltar, who has ever believed that when the hon Members were professing support for the Gay Rights Movement, what they were actually saying is that everybody else's age of consent should be raised and not theirs. Do they really think that anybody in Gibraltar interpreted their subscription to those principles as meaning that? Not even they could believe that. It is just politically expedient for them because what they are trying to do, back to the device, is to extricate themselves from this debate without offending gays, which they have already done, without offending lesbians and without offending heterosexuals either. So we do not want to lower one because it offends the other. We do not raise the other because it offends the one and then there are lesbians in the middle and they will be affected whichever way it goes. Well, I am sorry. This is a real catch twenty-two predicament that the hon Members have put themselves in. I do not claim left-wing credentials but certainly other organisations in Gibraltar that are based on left-wing credentials have come and made the same analysis as I am now making of the hon Members refusal to vote in favour of the Hon Mr Feetham's Private Members' Bill. So, the hon Member challenged me, "when have I betrayed the principle at 16?" Look, the hon Member has never expressed the principle that it might be achieved by lowering it down. This is the whole essence of the point. That by any objective, honest analysis of their political position over the years to which he has subscribed as a member of a party, and with which he went to an election with certain remarks in the Manifesto, that puts out political statements and has bilateral meetings with the Gay Rights Movement and tells them things. He has therefore also personally subscribed to the view that everybody else understood that equalisation should be downwards and not upwards or in the middle. So, of course he has betrayed the principles. Unless he honestly can put his hand on his heart and say to himself that when he has coupled his personal political wagon to the GSLP train policy on this issue, he can honestly say to himself that it was a reasonable interpretation of the unspecified, the xxxxx policy of the party was not that homosexual age would be lowered to be the same as everybody else's but that everybody else's would be raised to meet the homosexual age. Does the hon Member really, can he really honestly say to himself, yes, that is what the GSLP has meant over the years when it has spoken of the need to eliminate the discrimination of homosexual men and to bring them into line with the rest, so that people are not discriminated against. It is incredible, and I do not believe that the hon Member can honestly answer that question to himself in the way that he would need to be able to answer it to himself in order to make good his accusation of me that I have made a false accusation against him. So, policies that rely on public consultation are never policies based on principle, ideology or view. I have a very strong view on these matters, personally, but on matters on which I have a very strong view that I want the Government to do, I did not go out and ask the people, I say to the people you voted me in office. If I exercise judgements, adopt policies and pass laws that the community as a whole does not like, I stand to be removed from office at the next election. But Government political leaders, political leadership of the sort that he calls for, does not consult every member… that would go the Swiss route. Yes, I am willing to consult if I am obliged to do something here.

I am willing to consult because I do not have an ideologically based view of the need to equalise, but the hon Members have been articulating an ideologically based view for years which is tantamount to the view that the age should be equalised downwards.

HON G H LICUDI:

Would the hon Member give way?

HON CHIEF MINISTER:

Yes, I will.

HON G H LICUDI:

This issue which he has mentioned now and he mentioned before about compulsion of law. He obviously recognises that the court will not assist him on that. The court will not tell him it has to be equalised at 16. So, by analogy with his own argument, is he saying that if the court tells him the law is discriminatory, it has to be equalised, he is now going to consult and he is going to contemplate the possibility of increasing what he is accusing precisely us of not being clear about. Let us be clear as to the Government's position. Is he going to ask the people……. Is he expecting everybody to believe that he is going to be bound by a process whereby he is contemplating the possibility of increasing the age of equalisation to 17 or 18? Is that what he is asking us to believe that that possibility exists as a result of this consultation process?

HON D A FEETHAM:

Mr Speaker, may I?

MR SPEAKER:

I think the hon member…….

HON CHIEF MINSITER:

I will give way to him, yes.

HON D A FEETHAM:

May I say this, that, in fact, I could be wrong on this, but I do not necessarily agree with the hon Gentleman's analysis that if the matter that comes before the court, that the court necessarily has to say, "you need to equalise, you need to equalise 16, 17 or 18". In fact, there is an argument that if the court comes to the conclusion this is not constitutional it is precisely because heterosexuals and lesbians at 16 and it could conceivably say, "you need to reduce from 18 to 16". So I do not necessarily agree with the hon Gentleman's analysis.

HON CHIEF MINISTER:

I do not mind answering the hon Member's question hypothetically. It is hypothetical because his whole question was predicated on the premise that the court is bound to find grounds straight down the middle. But that is not what I have……. What I have told him is not what he was deducing from my remark. What I have told him is that I personally would not vote for the reduction of the age of homosexual consent unless I was under a legal compulsion to do so. That is what I have said and that is my position and it will remain my position and that is all that I have said so far. Now, I have just one more point to make in response to the hon Member. Of course, it is another example of the way he hops around contradictory positions when the moment suits him. "You see, the Government", which he was at that moment in time trying to

portray as a serial breaker of human rights, particularly human rights based on sexual orientation because obviously he thinks that we sit in our offices all day machinating ways to oppress people on the basis of their sexual orientation. "You see, only recently the Privy Council has xxxxx the Government," in referring to the lesbian housing case, "clear on the grounds of discrimination. These are policies that the Government has……. and the Privy Council has told how much money, it must have been obvious to the hon members." Well look, Mr Speaker, it was not obvious to the High Court Judge. It was not obvious to three Court of Appeal Judges and it was not obvious to the GSLP who wrote the Housing Allocation Rules with that distinction in it. It is no good the hon member telling me how … I am not the author of this rule. They are. The GSLP did these rules. I did not do these rules. The rule, since he wants to know, that the Housing Allocation Committee does not give joint tenancies to unmarried people. That is not of our creation. What the Privy Council has just put down as being a breach is nothing that is either obvious to me but we xxxxx and it was not obvious to them when they were in Government because they wrote it I am told. Well, that is the position. In all democracies around the world, Governments are adjudicated against sometimes and in favour sometimes. It was only two hours ago that the hon Member was saying that the right way for this to be established is precisely for Governments to be taken to court. So before it was right for Governments to be taken to court and not to give the Government the chance to test constitutionality of its own Motion and now, an hour and a half later, when it suits him, how terrible it is for the Government to allow itself to be taken to court and waste tax payers money. Well, it seems to me that what the hon Member simply wants to take is whatever opposite view is the Government's position at that time. That is all. That is all they want to do. They do not want to help us establish of our own Motion and when we cannot establish of our own Motion… Does the hon Member believe that the Government should simply change the laws of Gibraltar on the basis of the first NGO pressure group that alleges that they are unconstitutional and unlawful. This is not a possible way of running the affairs of Gibraltar. What is clear is that the hon Members opposite will align themselves to whoever and whatever cause at that moment of time is aligned against the interests of the Government. That is all. That is the only common thread and the only common denominator that lies at the core of the hon Members political tactic. They offer no policies. They offer no alternative vision for the governance of Gibraltar. They offer no constructive criticism of the Government's policies. Everything is simply, whatever the Government is building, whatever the Government is doing, whatever is being argued against the Government, take and support the opposite position to that that the Government is taking. That is all they know how to do. That is all they do and that is all they offer Gibraltar which is why when they come out on their party political broadcasts saying that it is time for change, the people of Gibraltar know that it is never time for the wrong change.

Question put in terms of the amendment proposed by the Chief Minister.

The House voted.

For the Ayes:	The Hon C G Beltran
	The Hon P R Caruana
	The Hon Mrs Y Del Agua
	The Hon D A Feetham
	The Hon J J Holliday
	The Hon J J Netto
	The Hon E J Reyes
	The Hon F J Vinet
Abstained:	The Hon J J Bossano
	The Hon C A Bruzon
	The Hon N F Costa
	The Hon Dr J J Garcia
	The Hon G H Licudi
	The Hon F R Picardo
	The Hon S E Linares

Absent from
the Chamber: The Hon L Montiel

The Motion was carried.

MR SPEAKER:

Does any hon Member wish to speak to the original Motion as it now stands amended?

HON C A BRUZON:

Mr Speaker, may I ask you, I did stand on a Point of Order and I would like to be told whether it was valid or not valid. Do the Standing Orders only allow the question of relevance to apply to questions and answers implying that of course that, in other words my Point of Order was not really a Point of Order?

MR SPEAKER:

Well Standing Orders……. Well a Point of Order……. Standing Orders, my understanding is that all matters before this House must be addressed on matters of relevance really. But again in a debate of this nature, where does one begin to draw the line and say, that particular statement is relevant, that statement is not relevant. There was talk in the course of the debate about leadership or lack of leadership and then remarks were addressed as to leadership on another score. It is not entirely irrelevant and therefore I allowed it.

HON J J BOSSANO:

What must be obvious to anybody that bothers to listen to what is happening in their Parliament is that in this Parliament, I think particularly since the arrival of the member opposite in Opposition in 1991, whether you are on this side or that side, if you have the misfortune to be facing him and sometimes I imagine if you have the misfortune of looking sideways to him, you open up yourself to a huge attack on your integrity, on your honesty, on your principles.

HON CHIEF MINISTER:

You made those attacks. Not us.

HON J J BOSSANO:

No, Mr Speaker, I brought a Motion to the House which simply says that we in this House do not believe in having discrimination on grounds of sexual orientation and that there is a difference in my judgement, he may have a different view from me, but in my judgement there is a difference between discriminating on grounds of sexual orientation and having to cure that discrimination only and exclusively by reducing the age from 18 to 16. I do not think they are the same thing and therefore, if the hon Member can go on television and say, as he did on the last occasion that we debated this, that one of the things that he was considering was having a Referendum. He can consider a Referendum. We cannot even mention the word “consultation” because that shows we have got no leadership, no principles, no integrity and no nothing and that everything that we are doing here shows that we are betraying the Gay Movement. The Gay Movement that according to him is in cahoots with us, in order to make us betray them, presumably.

HON CHIEF MINISTER:

Correct!

HON J J BOSSANO:

Correct. Of course it must be correct. How else, what else could it be? It is possible that it could not be correct. That is impossible. In the world in which the hon Member lives, he is almost endowed with revealed truth which may appear to him and not to the rest of us. But he does not even conceive of the possibility that there could be honest, dissenting views from his. Betrayal! He is going to make an issue of betrayal! Certainly, if I wanted to go down that road, which I do not think is necessary or relevant, into the issue that we have got before us, I could take advantage to answer all the accusations of betrayal by asking him, what does he think of the views of the people that sit beside him there, and the views they held of him in the past. Have they betrayed all those views, when people went to the electorate asking them not to put him back in power because Gibraltar needed to be rid of him? People can change their mind. Or is it that they can only change their mind on his side. Or is it that we are here to debate one issue and that we should concentrate…….

HON CHIEF MINISTER:

If you changed your mind say so!

HON J J BOSSANO:

Well no, Mr Speaker. We do not need to say, but I have changed my mind about this. What I can tell him is that if he says, we put in a Manifesto we will bring down the age to 16 or we will equalise the age of 16, he is lying, or he has not read the Manifesto. Because what it says in the Manifesto, going back to 2003, is that we will give people equal property rights, and equal property rights is what they have just been told by the Privy Council they should be given. So we put in our Manifesto we would give them equal property rights and he claims that we changed the housing rules in 1988, which in fact were there before 1988. If we say we agree that you should give equal property rights to same sex couples, we said it in 2003 and that is what we put in our Manifesto. We said people should not get, the state should not treat people differently because of their sexual orientation. That is the basic principle.

HON CHIEF MINISTER:

Correct!

HON J J BOSSANO:

But an issue that goes to court, which he wants to take to court is not whether the age of consent for a married heterosexual couple and for a same sex couple should be 16 but whether it is constitutional for there to be different ages. That is to say, I remember perfectly the arguments he put when we were discussing this before. He explained to me, which I was not aware of, that in fact the ruling that was being referred to was not a ruling that had necessarily universal application because it was dealing with the specific situation in Austria, I think he said, and that that was something that he was not convinced necessarily meant that we had a duty to equalise the age. So there are two different issues here. Our position is that we think the age should be equalised but that we acknowledge that in taking that step we need to consult more widely, and that is all we have asked him to do. He came out saying he was willing to consider having a Referendum and when we suggested here that he should consult more widely then he converts that into a censor motion against me into discussing the internal workings of our party. Well look, I am not interested in what competition he has or does not have. I can tell him I am only interested in one thing and that thing is liberating Gibraltar from his pernicious influence on our society. Every time he stands up and speaks, I am afraid all he does is, in fact, lower my opinion of him all the time. He seems to be totally incapable of rising to an occasion and actually assuming, for one moment, that it is possible for

people to think differently from him and not be traitors or dishonest. In his book that is not possible because he thinks he is always right and he is perfect. So when he says, "I want to go to court", this is not something, and I bring this in Mr Speaker because he has brought it in himself, he was saying that shows how dictatorial I am. Well, yes it does, because it is not just that you want to go to court to be told by the court whether the Bill that you bring to the House is incompatible with the Constitution, because you may be unsure, because you had conflicting advice, no. It is that you are saying that if we, the rest of the Parliament, feel unsure, we do not have the right to do what you have the right to do. Why? Why should we in the Opposition agree to give you a power that you want to limit to yourself and deny to everybody else in this Parliament? Are the laws of Gibraltar not the product of the Parliament and not just of the executive? If there is a Private Members' Bill you can stop it without having to go to court, but you cannot stop it on the grounds that the court thinks it is unconstitutional, because that is not an option open to the mover of the Private Members' Bill. Therefore all that I asked, Mr Speaker, all that I asked, before I brought down on myself that avalanche of insults was, "perhaps the Government ought to think a little bit about giving themselves more time and thinking a little bit more".

HON CHIEF MINISTER:

How reasonable you are!

HON J J BOSSANO:

The hon Member cannot escape the fact that those are the very words I ended my contribution with and what followed was the equivalent of a speech on a censor motion on me, and that is all I had said to him. Heaven help me if I had said anything more demanding than that. That he might think it worthwhile to have second thoughts.

HON CHIEF MINISTER:

Well, for a start, I have not said anything about what he has said. I have not said anything about what he has said. I have answered what his colleagues have said.

HON J J BOSSANO:

No, no. I am referring to the way that he has reacted to the contributions on the Motion which are the exact parallel of the way that he reacted to my contribution on the Bill on going to court and he has drawn parallels and contradictions between one thing and the other. I am saying to him, well look, here in the Motion I said perhaps you should consult more widely and you have already said on television that a Referendum on the age is something you were willing to consider. It cannot be so outrageous that I should suggest that. You say that there is a contradiction between the position that we have taken in the Motion and the fact that we voted against the Bill which gives the Government the right and the power to go to court to get an opinion of the court as to whether an Act passed by the Parliament is unconstitutional. Well look, I said very clearly that it was a good idea, that we welcomed the idea but that we would not vote for it if it was limited to the Chief Minister or a Minister approved by the Chief Minister. That was the only objection I raised and that makes me a traitor, unprincipled. All I can say is that, although I am sorry that he could not support my Motion, I am glad that the record of this Parliament will show that what we are voting now by unanimity is still my Motion. I commend it to the House.

Question put in terms of the original motion as amended.

The House voted.

The motion, as amended, was carried unanimously.

Absent from the Chamber: the Hon L Montiel.

ADJOURNMENT

HON CHIEF MINISTER:

Assuming that the Hon Mr Picardo continues to subscribe to the warm sentiment of festive spirit with which he finished his first intervention, they are warmly, warmly reciprocated in favour of himself and all his colleagues on the other side despite their view of my debating techniques and my view of theirs. So, Mr Speaker, I now wish the House and Mr Speaker, Mr Clerk and all the members of staff of the Parliament, a happy Christmas and a prosperous new year and I move that the House do now adjourn sine die.

Question put. Agreed to.

The adjournment of the House was taken at 1.15 p.m. on Thursday 17th December 2009.