

## **Is there a need to review the wording and application of guidance and legislation on Public Spaces Protection Orders (PSPO's)?**

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Is there a need to review the wording and application of guidance and legislation on Public Spaces Protection Orders (PSPOs)?

**1. Executive Summary**

1.1 The use of Public Spaces Protection Orders (PSPOs) by local authorities in England and Wales requires the application of a wider legal framework concerning human rights and principles of equality. Evidence suggests, however, that PSPOs are being used by local authorities in ways that are unfair and which undermine the rights and protections that should be afforded to a range of groups of people, in different ways. Reforming PSPOs would represent an opportunity to refine and clarify the balance between freedom of expression, the connected rights of individuals, and the obligation on local authorities to recognise the duties they owe to a variety of groups in our communities, and specifically under the European Convention on Human Rights (1950) ('the Convention'). In this evidence submission, in the main we address the 'right to protest', which is in our understanding an amalgam of rights under Articles 8, 9, 10 and 11 ECHR, as qualified rights; but also the rights of individuals and groups to use public spaces in an equal and dignified way. In light of this, our submission makes a number of recommendations, as follows:

1.2 We would recommend that:

a) The duty on local authorities, when creating a PSPO, to have "particular regard to the rights of freedom of expression and freedom of assembly set out in articles 10 and 11 of the Convention", should be augmented by another duty, in an amendment to section 72(1) of the Anti-Social Behaviour, Crime and Policing Act 2014, namely for local authorities to have *particular regard to the need to avoid penalising relevant groups of disabled people; groups of people from cultural, ethnic and national minorities; groups of people manifesting their religion or faith; and persons made vulnerable through homelessness.*

b) The duty to carry out 'necessary consultation' in making a PSPO, placed on local authorities by virtue of section 72(3) and (4) of the Anti-Social Behaviour, Crime and Policing Act 2014, should be amended to include a specific requirement to make *reasonable efforts to consult with the people whose Convention rights the PSPO will affect*, as well as, but not only "whatever community representatives the local authority thinks it appropriate to consult", as at present. This is because the evidence presented below denotes a failure to engage with *all* individuals whose Convention rights are likely to be affected with the PSPO.

c) Section 72 of the Anti-Social Behaviour, Crime and Policing Act 2014 should be supplemented by a new Section 72A, requiring the Home Secretary to collect statistics quarterly from local authorities, on the use of PSPOs, in such a way that this ensures the

Home Secretary is 'properly informed' in having 'due regard' to the Public Sector Equality Duty in promulgating statutory guidance under section 73 of the 2014 Act.

d) Section 72 of the Anti-Social Behaviour, Crime and Policing Act 2014 should be supplemented by a new Section 72B, requiring the Home Secretary to report annually to Parliament on the use of PSPOs by local authorities and on connected matters.

e) The statutory guidance published by the Home Secretary should be updated to reflect these legislative changes and emphases, as represented by a) to d), above.

## **2. Context**

2.1 We are academics from the Helena Kennedy Centre for International Justice, a leading centre for social justice and human rights. Based within the Department of Law and Criminology at Sheffield Hallam University, our multi-disciplinary team combines research expertise from the fields of anti-social behaviour, law, policing, victimisation, and human rights. Our group includes Fellows of the Sheffield Institute for Policy Studies, the Centre for Regional, Economic and Social Research, and a former solicitor.

## **3. The Evidence**

3.1 Our evidence shows the need to avoid PSPOs penalising:

### **a) Disabled people**

Currently local authorities must have due regard to the need to eliminate discrimination against disabled people under the Public Sector Equality Duty (under Section 149 of the Equality Act 2010). This is most pertinent to PSPOs that sanction behaviours associated with dog ownership (keeping dogs on leads, picking up after dogs, dog exclusion zones); with disabled people and their assistance dogs exempt. However, a review of PSPO notices highlights how local authorities fail to employ a consistent definition of disability for the purpose of exemption, which renders some disabled people subject to discrimination. For example, whilst assistance dogs trained by a 'prescribed charity' are exempt, owner trained assistance dogs are often not; as per the PSPO in Kirklees (2020).

### **b) People of cultural, ethnic and national minorities**

For ethnic and national minority groups, cultural differences are apparent with regard to permissible behaviour within public spaces. PSPOs frequently prohibit behaviours in a way that is targeted at these differences. For example, in 2017 Brighton and Hove Local Authority authorised a PSPO to prohibit occupying any vehicle, caravan, tent or other structure in an area well used by gypsies and travellers (Manifesto Club, 2017). Alcohol consumption is routinely banned within PSPO spaces; and whilst this is applicable to all users of the public space, certain ethnic and minority groups are found to be more likely to drink in a public space. For example since 2016 Derbyshire councils have been tackling a 'clash of cultures' regarding alcohol use between Eastern European migrants and local residents via what was

then a Direct Public Policing Order and which has now been replaced with a PSPO (Newton, 2015; BBC 2016).

c) People manifesting their religion or faith

In the London Borough of Ealing, a PSPO prohibited “Protesting, namely engaging in any act of approval/disapproval or attempted act of approval/disapproval, with respect to issues related to abortion services, by any means.” Whilst also preventing protests by non-religious groups, it could be argued that the PSPO specifically sought to limit religious protest groups. In *Dulgheriu v The London Borough of Ealing* [2019] EWCA Civ 1490, the Court of Appeal found that the Article 8 Convention rights of the service users outweighed the Article 9, 10 and 11 Convention rights of the protestors. In 2019, the Manifesto Club opposed the introduction of a similarly worded PSPO in Manchester arguing that its aims were already provided for by the Public Order Act 1986 which criminalises the ‘causing of harassment, alarm and distress’. Against this backdrop, we recommend that a particular regard is imposed, and clarification given to protect the Convention rights of religious and faith-based groups.

d) Persons made vulnerable through homelessness

Despite Home Office guidance (2019: 52) stating that PSPOs ‘should not be used to target people based solely on the fact that they are homeless or rough sleeping’, many do. More than 30 local authorities have PSPOs in place with prohibitions relating to behaviours associated with street sleeping homeless people such as: begging, obstructing doorways, and unauthorised encampments. Breach of a PSPO results in a Fixed Penalty Notice (FPN) of up to £100, which a homeless person is unlikely to be able to pay. FPNs were not created to sanction nuisance or disorderly behaviour, which has been the remit of Penalty Notices for Disorder (PND) issued by the police since the Criminal Justice and Police Act (2001). Superficially, there appears to be only semantic differences between FPNs and PNDs. However Ministry of Justice (2014: 12) guidance states that a PND can only be given to a ‘suitable person’ and that ‘a PND *will not* be appropriate ... where the constable has reason to believe that the person is homeless or sleeping rough’ [original emphasis]. FPNs for ASB have no such restrictions, as per Section 68 of the Anti-Social Behaviour, Crime and Policing Act (2014).

3.2 Our evidence shows that the standard of consultation used by local authorities prior to the creation of PSPOs is generally weak. Section 149 of the Equality Act 2010 requires that local authorities must, in relation to their creation of PSPOs, have due regard to the need to (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act; (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it. This ‘due regard’ standard requires local authorities to be ‘properly informed’ as to the equality impacts of their creation of PSPOs involving particular requirements and prohibitions<sup>1</sup>. As a matter of law, local authorities should be making more efforts to consult

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<sup>1</sup> On the requirements to be ‘properly informed’ with respect to satisfying the ‘due regard’ nature of the Public

with the people their PSPOs will actually affect, and potentially criminalise. Initial analyses from Archer's ongoing PhD research has found local authorities fail to adequately consult with vulnerable groups; particularly ethnic and national minority groups, and homeless people. Consequently, their views are not represented in the PSPO implementation process.

3.3 Our evidence shows that the standard of transparency and accountability concerning PSPOs is poor. The revised statutory guidance published in 2017 emphasised the importance of accountability and transparency for local authorities when using these powers; especially with regards to the prevention of disproportionately targeting vulnerable people. With no statutory obligation on local authorities to report the introduction of a PSPO and its effects to the Home Office, in practice there is limited transparency of the PSPO process and limited accountability for actions undertaken as a consequence of it.

More fundamentally, evidence gathered shows that the government does not monitor the use of *any* of the powers introduced under the Anti-Social Behaviour, Crime and Policing Act 2014 and thus offers no scrutiny of the scale, outcome or impact of use (Heap & Dickinson, 2018). Where statutory annual reporting is in place, for the Community Trigger ASB Case Review, evidence suggests non-compliance by more than half of local authorities (ASB Help, 2019). Consequently, greater accountability and transparency is required. In order to have 'due regard' to the Public Sector Equality Duty in assessing the equal impact of PSPOs, the Home Secretary must be 'properly informed' in updating and revising the relevant statutory guidance. Our recommendations made in Section 1.2 necessitate a requirement for the Home Office to collect statistics surrounding PSPOs on a quarterly basis, and to report annually to Parliament on the use of PSPOs by local authorities.

Details about the nature and amount of data to be collected by local authorities about PSPOs on a quarterly basis should be set out by the statutory guidance. Specifically, we recommend this includes: the number of PSPOs in operation with copies of the Orders, and per PSPO: the number of ASB incidents recorded by the responsible authorities, the number of FPNs issued with details of the prohibition/requirement breached, the number of prosecutions, and the percentage reduction in ASB incidents compared to the previous quarter. This will provide greater transparency and accountability as well as an evidence base to assess the effectiveness of the power, which is currently lacking.

3.4 The evidence presented here highlights how the statutory guidance issued under the 2014 Act is ignored and/or disregarded in practice and needs to be reworked and extended in key areas. Despite being presented as a 'how to' guide, the requisite information about the Human Rights Act 1998 and freedom of expression are not detailed in relation to PSPOs. Similarly there is scant detail provided about the Equality Act (2010) and specifically the Public Sector Equality Duty, and as such the guidance requires greater prominence and more detail on the

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Sector Equality Duty, please see, for example, *R (LH) v Shropshire County Council* [2014] EWCA Civ 404 and *R (Bridges) v South Wales Police* [2020] EWCA Civ 1058.

consideration of a wider range of protected characteristics. For example, disability is not mentioned in relation to PSPOs, but is present for guidance on Civil Injunctions. The creation and inclusion of a statutory definition of disability for use in determining dog-related PSPOs, based on the Equality and Human Rights Commission's (2017) guidance on assistance dogs, would help to address this issue.

The statutory guidance should contain greater clarity about the PSPO consultation process by providing a standardised framework for local authorities to use in identifying where due regard should be given. We recommend that guidance is provided about how local authorities can effectively engage with *all* groups affected by the implementation of a PSPO.

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