

Briefing on Public Spaces Protection Orders

Response to Statutory Guidance

**in advance of 20 October enactment of Anti-Social Behaviour, Crime and Policing
Act powers**

September 2014

Introduction

The Manifesto Club, along with other groups¹, has previously expressed concerns about the open-ended nature of Public Spaces Protection Order (PSPO) powers contained in the Anti-Social Behaviour, Crime and Policing Act.² In a briefing document on this subject, we argued that the Act provides an unprecedented degree of power to local authorities to control activities in public spaces, posing a major threat to public liberties.³

The Home Office gave assurances – in parliament and in personal communication - that the Statutory Guidance would prevent these powers being used unreasonably or to target marginal groups.

The final version of the Statutory Guidance has now been published,⁴ and the date set for enactment of these powers is 20 October. However, unfortunately the guidance places minimal restrictions on the uses of PSPOs, leaving it open for these powers to be targeted against public activities that are merely considered unusual or unpopular, or with which the council disagrees.

1 Groups that have raised concerns about PSPOs include: Ramblers, Kennel Club, Liberty, Open Spaces Society, Keep Streets Live, Standing Committee for Youth Justice, British Naturism.

2 Anti-Social Behaviour, Crime and Policing Act 2014
<http://www.legislation.gov.uk/ukpga/2014/12/contents/enacted>

3 See the Briefing Document: <http://www.manifestoclub.com/asbpowersbriefing>

4 The guidance is available here:
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/332839/StatutoryGuidanceFroutline.pdf

This report details some of the ways in which local councils are likely to use PSPOs after 20 October, restricting a range of activities including busking, rough sleeping, parking outside schools, and charity collections. Given that the forms of consultation and appeal for PSPOs are extremely limited, we call on the public to be on high alert this autumn for unreasonable or unduly restrictive PSPOs.

1. **What are PSPOs?**

PSPOs replace three existing kinds of order: gating orders, which allow for the closure of alleys or other routes; Designated Public Place Orders (DPPOs), which allow for the confiscation of alcohol; and Dog Control Orders, which can prohibit dogs or require that they be on leads.

PSPOs cover a wider area than these orders; they can be used to ban or regulate any activity in public spaces which the local authority believes has a 'detrimental effect on the quality of life of those in the locality'. A single order covering a particular public space, such as a park, can regulate any number of different activities. The violation of a PSPO is a criminal offence.

PSPOs are also distinct from previous orders in that: they can impose positive as well as negative conditions; they can limit activities at certain times of day or week; and they can be targeted at particular groups or individuals, or exempt particular groups or individuals.

In scope, PSPOs treat a range of activities similar to that covered by local byelaws, made under the Local Government Act 1972. However, whereas byelaws must go through democratic procedures, and be sanctioned by the secretary of state, PSPOs are made in a summary manner by local authorities and can be punished through on-the-spot fines.

2. **What are the problems with PSPOs?**

- ***They are too broad***

The category of activity which could be judged to have a ‘detrimental effect on the quality of life of those in the locality’⁵ is extremely broad, including activities which are merely unusual or unpopular, or with which others may disagree. The question of ‘quality of life’ is subjective and the basis of substantial disagreement: one person’s favourite busker could be another person’s awful racket.

The hurdle of proving ‘detrimental effect on the quality of life’ is much lower than that previously used to justify restrictive measures, which required some significant public harm or public nuisance. If a council wanted to introduce a new byelaw it must show that the ‘nuisance’ was sufficiently serious to ‘merit criminal sanctions’⁶; that byelaws were ‘not partial or unequal in...application’; and that they did not ‘[interfere] with the rights of those whom they affect’.⁷ Here, the burden of proof lies with the local authority to justify the necessity of intervention, and to show that the intervention is in the public interest and not the enactment of a subjective preference.

Furthermore, the PSPO allows for the regulation of potential activities and potential effects: the council can restrict activities which have not yet taken place, which it judges ‘*are likely to have...a detrimental effect on the quality of life of those in the locality*’.⁸

The ‘test’ included in the guidance is that the activity ‘Is, or is likely to be, persistent or continuing in nature’ and ‘Is, or is likely to be unreasonable’. The ‘is likely to be’ qualifier means that these tests present a low bar. (It should also be noted that another section of the guidance gives the example of somebody playing music and refusing to stop as evidence of ‘persistent or continuing’ activity.)

The guidance, and enacted law, contain some welcome protections for certain activities, including:

5 Anti-Social Behaviour, Crime and Policing Act 2014

<http://www.legislation.gov.uk/ukpga/2014/12/part/4/chapter/2/crossheading/public-spaces-protection-orders/enacted>

6 Home Office Circular 25/1996: Arrangements for Confirmation of Local Authority Byelaws

<http://www.nationalarchives.gov.uk/ERORecords/HO/421/2/P2/CIRCULARS/1996/HOC9625A.HTM>

7 Current Application for provisional approval of byelaws:

<https://www.gov.uk/government/publications/application-for-provisional-approval-of-byelaws>

8 See the Statutory Guidance:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/332839/StatutoryGuidanceFroutline.pdf

- Councils should ‘have particular regard to the rights of freedom of expression and freedom of assembly and association before making a public spaces protection order’.⁹ This will provide some limitation on the use of PSPOs to restrict public protest.
- When restricting dog walking, the council ‘will need to consider whether there are suitable alternatives for dogs to be exercised without restrictions’.¹⁰ This means that councils are dissuaded from prohibiting dog walking if there are no alternative local sites.
- If the council wishes to issue a PSPO restricting public rights of way, it must consider questions including: ‘what impact will the restriction have?’ and ‘are there any alternatives?’. It is also subject to additional consultation requirements for ‘potentially affected persons’.¹¹

These restrictions are welcome, but they are minimal when compared with the scope of potential uses of these powers.

Indeed, some who work in local authorities themselves say that the powers are too vague. One community safety officer told us that: ‘The lack of guidance is a concern for practitioners – we want to know that we are using powers in line with parliament’s intention’. A community safety consultant said that ‘these powers are very broad’, and there is a danger that ‘people will be looking to councils to put in PSPOs to deal with things they don’t like’. Another ASB manager described the guidance as ‘woolly and undefined’, and said there is a danger that ‘councils just use it to their own ends’.¹²

When some practitioners themselves think that the powers could be too broad, this suggests a real cause for concern.

9 Explanatory notes: <http://www.legislation.gov.uk/ukpga/2014/12/notes/division/5/5>

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/332839/StatutoryGuidanceFroutline.pdf

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/332839/StatutoryGuidanceFroutline.pdf

12 Quotes from telephone interviews with council officers and consultants, August 2014

- ***PSPOs are issued without checks or balances***

Unlike byelaws, there are no democratic or other procedures required for the passing of PSPOs. This means that local authorities will be left to design their own systems for designating PSPOs, as they do with controlled drinking zones (Designated Public Place Orders, DPPOs) at present. Some authorities could require that PSPOs be passed through council or a particular committee (such as the licensing committee), while others could delegate the power to make PSPOs to a particular council officer.

Hence, in some councils a single officer (such as an anti-social behaviour officer or community safety officer) could have the power to make PSPOs, in consultation with their colleagues.¹³ This would mean that this power is removed from all significant judicial or democratic oversight.

Where other measures can be enacted in this manner, we have seen powers brought through against the wishes or indeed without the knowledge of the local mayor or elected councillors. For example, a single council officer enacted a ban on unlicensed leafleting in Oxford city centre, against the wishes of the mayor and two of the main parties, and without opportunity for debate.¹⁴ This means that, depending on the arrangements in place, the empowering of 'local authorities' to issue PSPOs could just mean the empowering of a small number of individuals.

Finally, PSPOs are not subject to the evidence requirements of DPPOs and gating orders, which require the local authority to gather evidence to show the presence of alcohol-related disorder or criminal activity in the designated area. There are no requirements for local authorities to gather evidence to prove that a particular activity has a 'detrimental effect on the quality of life' of the locality.

- ***Lack of public consultation***

Gating orders, DPPOs and dog control orders must be all subject to a period of formal public consultation. This requires that the proposed order be advertised in a local newspaper, and that objections to the order be acknowledged and considered.

This consultation requirement has provided a significant check on the use of these powers; many proposed orders have been abandoned after objections were raised from members of the public in the consultation period.

¹³ Document submitted to Barnsley Metropolitan Council 18 June 2014 considers that the power could be 'delegated to a senior officer in consultation as appropriate with elected members'
<http://edemocracy.barnsley.gov.uk/Oxac16000b%20x005852f4>

¹⁴ Communication with Elise Benjamin, Green Party councillor and former Oxford mayor

By contrast, councils wishing to enact a PSPO must consult only with the police, and ‘whatever community representatives the local authority thinks it appropriate to consult’.¹⁵ This means, in effect, that local authorities *may* consult groups if they want to, but there is no statutory obligation for them to have a consultation period, to consult affected groups, or to consider objections. (The only exception is in cases of closing public rights of way, where residents and others directly affected must be consulted).

The Guidance also suggests that local authorities should consult before bringing through PSPOs on certain categories of land. The guidance states that, if a local authority is considering an order on Open Access land or village greens, they ‘should consider discussing this with relevant forums and user groups (eg Local Access Forums, Ramblers or the British Horse Society)’.¹⁶ Janet Davis, senior policy officer at the Ramblers, observes that ‘while discussions with user groups are welcome, the application of these measures to open spaces is a worrying development’. She adds, ‘Our experiences with Gating Orders, which could be applied only to linear routes such as public rights of way, leads us to believe that advice to “consider discussing” orders with users is insufficient to protect the public interest. Permanent Orders to close public rights of way require that a whole series of organisations be served with formal notice, with objections determined by a Planning Inspector. We fear that PSPOs make it all too easy for local authorities to restrict access to public spaces.’¹⁷

- ***PSPOs can be enforced through on-spot fines issued by private security guards***

Violations of PSPOs can be enforced through on-the-spot fines, and it is likely that – as with Dog Control Orders and DPPOs – the on-the-spot fine will be the preferred mechanism of sanction. By contrast, byelaws are enforced through a court, which means that they are subject to judicial oversight and interpretation from an independent party. On-the-spot fines possess all the inherent dangers of summary punishment, where the officer’s view of events is not tested or proven.¹⁸

15 Statutory Guidance:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/332839/StatutoryGuidanceFr-online.pdf

16 Statutory Guidance:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/332839/StatutoryGuidanceFr-online.pdf

17 Email to Manifesto Club, 29 August

18 See the Manifesto Club report on On-the-Spot Fines: <http://www.manifestoclub.com/node/1000>

This danger is heightened by the increased number of officials who can enforce PSPOs, including not only police officers, but also Police Community Support Officers, council officers and private security guards employed by the council. This is a significant shift from the situation at present, where controlled drinking zones (DPPOs) can only be enforced by police officers or ‘accredited persons’ designated by the police.

This also presents a significant shift for councils, with council officers taken more directly into the realm of law enforcement and policing. A report to the City of Lincoln Council stated that this represented a ‘game changer’ for local authorities, and that ‘workload is expected to increase significantly’.¹⁹

What is perhaps most concerning is that local authorities can delegate enforcement power to private contractors, as some councils do currently for litter fines. These private contractors generally work on a commission basis, and receive a portion of fines issued. In every case, the employment of private contractors has led to a large increase in fines issued, as well as allegations of unfair fines and aggressive/rude behaviour.²⁰ Private contractors employed to enforce PSPOs would also have the power to confiscate alcohol, raising the possibility that these discretion-based powers will be abused or unfairly applied.

- ***Very limited means of appeal***

The only means of appeal of PSPOs is through the High Court. The challenge must be brought within 6 weeks, by an ‘interested person’, who is ‘someone who lives in, regularly works in, or visits the restricted area’.²¹

High Court actions can cost tens of thousands of pounds, so even a significant national organisation would hesitate before challenging a PSPO. Such a challenge would certainly be out of reach of most individuals, especially those such as the homeless or young people who are likely to be most affected by these orders.

19 <http://democratic.lincoln.gov.uk/documents/g1499/Public%20reports%20pack%2028th-Jul-2014%2018.00%20Executive.pdf?T=10>

20 See the Manifesto Club report about the outsourcing of litter fines to private companies, ‘The corruption of Punishment’: <http://www.manifestoclub.com/litterfinesreport>

21 Statutory Guidance:
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/332839/StatutoryGuidanceFr-online.pdf

Furthermore, the grounds of appeal are limited: the plaintiff must show either that the council 'did not have the power to make the order', or that 'one of the requirements (for instance, consultation) had not been complied with'. Given the broad nature of the powers, and the limited consultation requirements, this is a minimal grounds of appeal. Finally, the plaintiff must show that their interests were 'substantially prejudiced' by the order.²²

These are mechanisms of appeal are weak in comparison with other European states within which local authorities possess open-ended powers. In France, for example, local authorities can prohibit activities judged to pose a threat to 'public order', but these measures (known as *arrêtés*) can be challenged on a series of principled grounds, including: excess of power (unreasonable extension of state power); misuse of power (for example, the use of a power for a function other than that intended); violation of established rights (such as the right of free expression); or use of power for private ends (such as profit or personal animosities).²³ Appeals can be cheaply and easily launched in administrative courts created for this purpose. *Arrêtés* are frequently challenged by individuals such as shopkeepers²⁴ or artists, who would not be in a position to launch a comparable High Court action.

Potential for discriminatory use

PSPOS can be targeted directly at particular groups or individuals, which means that there is an inherent potential for discriminatory use: certain activities would be a crime only for certain groups.

The most obvious victims of this are likely to be groups such as the homeless, travellers and young people, whose activities or presence are often perceived as having a 'detrimental effect on the quality of life of those in the locality'. PSPOs could be framed, for example, stating that travellers must not park in a particular area, or that street drinkers or young people must not enter a square at certain times of day.

Summary

When these limitations are considered together, this means that:

²² Anti-Social Behaviour, Crime and Policing Act 2014
<http://www.legislation.gov.uk/ukpga/2014/12/part/4/chapter/2/crossheading/public-spaces-protection-orders/enacted>

²³ *Precis de Droit Administratif*, by Maurice Haurion, 6th ed, 1907

²⁴ For example, a shopkeeper challenged Montpellier municipality's prohibition on late-night drink sales
<http://www.20minutes.fr/montpellier/938075-20120522-on-respectera-arrete-maire>

A single council officer could bring through a PSPO which bans a certain group from a park, which is then enforced through fines issued by private security guards on commission. It would be extremely difficult for anyone to launch a legal appeal. Only if somebody is arrested under the order would the measure be brought within the bounds of the justice system and formal legal procedure.

In effect, the PSPO means that UK local authorities will possess the most open-ended powers in Europe – a dramatic reversal England’s status as historically the most limited state – yet without any of the easily accessible means of appeal that are available within Continental states.

3. How will PSPOs be used?

Given the open-endedness of these powers, there is a large degree of uncertainty about how they will be used. However, many local authorities have started to discuss and prepare measures for the October launch of these powers.

Below are a summary of the uses currently being considered by local authorities. These were obtained through: a search of council minutes for discussions and briefing documents about PSPOs; contacting council officers in areas considering PSPOs; and talking to community safety consultants who are working with councils on the implementation of PSPOs.

- **Homeless** – This is often the first suggested use of PSPO powers. ‘The main target would be street drinkers, mainly in the daytime hours’, said one ASB manager. Possible measures include alcohol control zones targeted at **street drinkers**, as well as broader restrictions on **rough sleeping** or ‘**vagrancy**’. Westminster Council had planned a byelaw banning rough sleeping²⁵; now other London and south-east councils have suggested using PSPOs to limit rough sleeping, or to prohibit **traveller encampments**.²⁶ Other councils are considering restrictions on **begging** or ‘aggressive begging’. The Statutory Guidance does not dissuade councils from using the powers in this manner.

25 Guardian, 28 February 2011: <http://www.theguardian.com/society/2011/feb/28/westminster-council-soup-run-ban>

26 Daily Mail, 21 December 2013: <http://www.dailymail.co.uk/news/article-2527629/Britains-new-no-areas-warn-Roma-rough-sleepers.html>

- Buskers** – In the Lords stage of the Bill, peers raised concern about PSPOs being used to restrict busking.²⁷ The Home Office minister assured peers that powers would not be used to this end, and that this would be made clear in the Guidance.²⁸ In fact, the guidance on PSPOs does not mention busking, aside from including buskers in the list of groups which councils ‘may’ wish to consult. On the contrary, the guidance seems to suggest that PSPOs could legitimately be used to restrict music: the diagram illustrating the PSPO process mentions ‘noise’ as one of the three examples of ‘detrimental’ activity restricted by a PSPO (along with alcohol and dogs), a restriction which is broken by ‘playing music’. Birmingham City Council has already sent a letter to buskers, threatening to introduce a PSPO to place ‘further restrictions/bans’ on busking in the city centre.²⁹ Jonny Walker, busker and director of Keep Streets Live, said: ‘these powers could easily be used to target buskers. The “reasonable grounds” for introducing these new powers are so wide-ranging and open to subjective interpretation that they could be used to target informal performances of art and music on the grounds that some people don’t like buskers and find them annoying.’³⁰
- Spitting** – This use of PSPOs was suggested in the explanatory notes to the Act (‘It [the PSPO] could also prohibit spitting in certain areas (if the problem was persistent and unreasonable)’).³¹ After Enfield Council successfully passed a bylaw banning spitting, a number of councils have expressed a wish to follow suit, including Croydon, Doncaster, and Havering. Hillingdon and Waltham Forest, meanwhile, are currently issuing fines for spitting by classifying it as ‘litter’. It is likely that these councils and others could use PSPO powers to

²⁷ See discussions reported in Hansard, 21 Jan 2014

<http://www.publications.parliament.uk/pa/ld201314/ldhansrd/text/140121-0001.htm#14012175000753>

²⁸ The Home Office Parliamentary Under-Secretary of State Lord Taylor of Holbeach stated: ‘I can certainly give my noble friend the assurance that the guidance will achieve what he and the Government wish to see from it... We believe that the tests and safeguards set out in the new anti-social behaviour powers will ensure that they will be used only where reasonable. Where behaviour is having a positive effect on a community, and I see busking as having that effect, it would not meet the tests for the new powers.’ 21 Jan 2014

<http://www.publications.parliament.uk/pa/ld201314/ldhansrd/text/140121-0001.htm#14012175000753>

²⁹ This was in a letter addressed to buskers, signed by Simon Cooper, Environmental Health, Birmingham City Council

³⁰ Email to Manifesto Club, 23 August

³¹ <http://www.legislation.gov.uk/ukpga/2014/12/notes/division/5/5>

prohibit spitting in certain areas.

- **Dog walking** - A number of councils are waiting until October before bringing through restrictions on dog walking. PSPOs could be used to gain more severe restrictions on dog walking than Dog Control Orders, given the limited consultation requirements of the new powers. A Carmarthenshire County Council report, for example, suggested using PSPOs to ban dog walking on all beaches: 'it was suggested that the Local Authority implement orders requiring dogs to be kept on leads in all public areas as well as extending dog bans on all beaches through the new Public Spaces Protection Orders (PSPO).'³² PSPO controls on dog walking could also be more precise, and therefore potentially more confusing for dog walkers, with restrictions on dog walking at particular times of day or on particular kinds of dogs. One council noted that 'the [PSPO] order could state the times and/or days when dogs must be on a lead'.³³
- **Skateboarding/ball games/young people** – This was suggested as a possible use of PSPOs in the White Paper for the Anti-Social Behaviour Crime and Policing ASB Bill.³⁴ One community safety consultant said that councils are considering PSPOs targeting activities including '**Boy racers, skateboards, ball games, congregating in car parks**', all of which would affect young people's recreational use of public spaces.
- **Charity collectors** – Islington Council has previously attempted to use a byelaw to restrict charity collectors ('chuggers'). Rugby Borough Council has proposed this use for PSPOs, with its scrutiny and management committee suggesting that PSPOs could 'help control the areas and times charity "chuggers" may operate' in the town centre.³⁵

³² The suggestion was made in a report on Environmental Enforcement & Dog Control Orders, April 2014 <http://online.carmarthenshire.gov.uk/agendas/eng/ENMT20140516/REP05.HTM>

³³ FAILSWORTH & HOLLINWOOD DISTRICT EXECUTIVE, meeting on 26 June 2014 <http://committees.oldham.gov.uk/documents/g5531/Public%20reports%20pack%2026th-Jun-2014%2019.00%20Failsworth%20Hollinwood%20District%20Executive.pdf?T=10>

³⁴ The White Paper suggested that PSPOs could be used 'To prevent groups from using a public square as a skateboard park'. Putting Victims First, May 2012, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228863/8367.pdf

³⁵ Overview and scrutiny management board, Rugby Borough Council, 20 January 2014

Other uses considered by councils include prohibitions on or regulations of –

- **Off-road motorbikes, mini-motos**; suggested by Barnsley Metropolitan Borough Council and others;³⁶
- **‘Anti-social parking’ – parking on verges, ‘parking outside schools’, parked ‘cars for sale’**;
- **Grazing of horses** – for example, targeted at travellers grazing their horses;
- **Inappropriate dress** – towns frequented by hen and stag nights are considering PSPOs requiring that people be dressed properly. The British Nudist society is concerned about the possibility of bans on **nudist beaches**.³⁷
- **Buying or selling of legal highs** - this was mentioned by a number of councils;
- **Disposable barbecues**.

This list is just an indication of how these new powers will be used; there are many more possibilities, unfortunately limited more by the imagination of local authorities than by the rule of law.

Conclusion

In the light of the danger represented to public liberties by these new powers, the Manifesto Club will work with other interest groups to attempt to introduce greater safeguards against the use of PSPOs in the Statutory Guidance.

At the very minimum, this could include measures such as: protections for groups such as buskers, young people or homeless people; the raising of the bar for the seriousness of public nuisance required before an activity can be subject to a PSPO; a more easily accessible system of appeal; and the requirement that PSPOs take account of rights such as the freedom of expression and movement in public spaces.

We will also be monitoring the use of PSPOs after 20 October. It is possible that, until formal checks and balances can be obtained, the main recourse for the general public

36 Report to Barnsley Metropolitan Borough Council, 18 June - <http://edemocracy.barnsley.gov.uk/0xac16000b%20x005852f4>

37 ‘Such an order could prohibit nudity and could be applied not just to beaches and very large areas of countryside, but also to the outdoor areas of clubs and other naturist venues, and possibly even to your own garden’, British Naturism, Second call to Action on ASB Act
http://lakelandoutdoorclub.co.uk/docs/clubs_second_call_to_action.rtf

is likely to be in online petitions, Facebook groups and letters to the local paper. We call on the public to be on high alert to the potential abuse of PSPOs.

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