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09 October 2015

Dear Sirs,

### **Proposed Public Spaces Protection Order**

I write in relation to your proposed Public Spaces Protection Order ('PSPO'), as contained within the report prepared by your Executive Director of Community Services for the meeting of the City Executive Board on 15 October 2015. As you may be aware, I had the very useful opportunity to discuss the terms of the PSPO with your Jeremy Thomas and Richard Adams by telephone on 6 October, for which I am grateful. As requested during that telephone call, the purpose of this letter is to express Liberty's concerns regarding the proposed PSPO in writing, and we would be grateful if you would consider this letter prior to the Board meeting on 15 October 2015. Please note that this letter is not a comprehensive account of our concerns; it focuses on the most pressing issues.

In summary, we acknowledge that there has been some limited improvement to the terms of the PSPO since the version published in June and that the Council has attempted to address some of the issues raised within the legal opinion that we sent to you at that time. However, Liberty remains deeply concerned regarding the contents of the proposed PSPO and its legality if passed. In particular, the provisions relating to begging, public toilets and busking are insufficiently evidenced, unjustified and disproportionate. We urge you not to bring them into force.

#### **1. Insufficient evidence of detrimental effect**

As you know, you are required by s.59 of the Anti-social Behaviour, Crime and Policing Act 2014 to be satisfied on reasonable grounds that the activities which are to be proscribed by the PSPO have had, or are likely to have, a detrimental effect on the quality of life of those in the locality. The Report purports to provide new evidence on detrimental effect. In reality, it largely refers back to the original consultation responses in incomplete terms.

For example:

- Most of the detrimental effects listed in relation to the intended prohibition on remaining in a public toilet without reasonable excuse actually relate to other issues – alcohol misuse, drug misuse, arson and vandalism in public toilets. They would be relevant evidence of detrimental effect for a PSPO which was targeted at those activities. The proposed PSPO is, however, much broader and non-specific.
- At paragraph 42, in relation to the proposed prohibition of ‘aggressive’ begging, the Report relies on the fact that 40% of respondents to the Council’s online survey said that they have been “*affected*” by begging in the City. However, this ignores the fact that the survey did not ask whether respondents had been detrimentally affected – they were simply asked whether they had “*been affected*”. The wording of the survey question could well have led respondents to answer ‘yes’ to this question simply on the basis that they had been asked for money by someone begging in Oxford; they may have been perfectly comfortable with the approach and may not have considered themselves to have been detrimentally affected at all.
- Paragraph 42 also fails to note the fact that 54% of survey respondents stated that the Council should not seek to prohibit persistent begging through a PSPO. Paragraph 46 fails to note that 48% stated that sleeping in toilets should not be prohibited (only 33% were of the contrary opinion) and paragraph 60 fails to mention that 53% of survey respondents believed that busking and street entertainment should not be prohibited in a PSPO. It is doubtful whether you can reasonably be satisfied, in the face of such clear public opposition and on the basis of the very limited information in the Report, that there is sufficient detrimental effect to justify the provisions of the proposed PSPO.

## **2. Insufficient consideration of alternative and / or existing measures**

You are required by s.59 of the 2014 Act only to impose PSPO requirements that it is reasonable to impose. In our opinion, it will clearly not be reasonable to impose requirements that are sufficiently, and indeed more effectively, addressed by other existing powers.

You are also required by the Human Rights Act 1998 not to interfere disproportionately with rights protected by the European Convention on Human Rights. We set out in the earlier legal opinion the basis on which we consider that fundamental rights are engaged by the proposed PSPO and, for the sake of brevity, do not repeat those reasons here. It is trite law that any consideration of proportionality in this context requires consideration as to whether the interference with the right is the least intrusive means of achieving the particular aim of the interference (see paragraph 48 of our counsel’s legal opinion for the relevant authorities).

It follows that you must be satisfied that existing measures of achieving the purported aims of the PSPO are inadequate before you are able to pass a PSPO that meets the statutory criteria and is compliant with your human rights obligations.

You have insufficient evidence before you in this regard, namely:

- The Report does not set out why the existing powers available under the Vagrancy Act 1824 are inadequate to address any problems relating to begging. It notes, at paragraph 35, that there have been 41 arrests or voluntary interviews for begging under the 1824 Act

in a one year period. It does not provide any information as to the outcome of these arrests or interviews; in particular, there is no evidence before you as to how many of these cases resulted in charges being brought and / or successful prosecutions. Without any analysis as to how the Vagrancy Act powers are currently being used, you are simply not in a position reasonably to be satisfied that additional powers are needed.

- We note, in this regard, that you have pursued individualised anti-social behaviour measures against individual homeless people in the past, including in relation to begging near cash machines. For example, it was reported in the Oxford Mail on 22 June 2015 that Oxford Magistrates' Court had considered the case of Mark Smith, a 38 year old homeless man who admitted persistently begging in a public place and breaching an antisocial behaviour order ('ASBO') which prohibited him from sitting within 10 metres of a cash machine. Mr Smith was sentenced to 30 days in prison and ordered to pay a £150 Criminal Courts Charge.<sup>1</sup> The Report simply does not give any such examples, or explain why existing powers are insufficient.
- The Report also fails to note a crucial distinction between the disposals available at Court under the Vagrancy Act and those available under the PSPO. Prosecution for an offence committed under the Vagrancy Act can give rise to the imposition of a community sentence as an alternative to a fine or sentence of imprisonment. Prosecution for breaching a PSPO cannot, other than in the most exceptional circumstances, lead to the imposition of a community sentence<sup>2</sup>. It is therefore a much less appropriate means of intervention if the intention is to deal with the root causes of offending behaviour.
- The Report mentions, at paragraph 43, the problems that have already been experienced in relation to the proper use of public toilets: substance misuse, vandalism and sleeping. The former two issues are, of course, already criminal offences. There is no analysis within the Report as to whether enforcement action has already been taken, under existing laws, against such activities.
- Paragraph 45 of the Report also states that existing dispersal powers have already been used in the area of a toilet block in order to deal with the issues which the PSPO is aimed towards. Again, there is no analysis available as to the effect that the dispersal power had on this occasion, or in what way this existing power is insufficient.
- I understand from my aforementioned conversation with your officers on 6 October that you intend to carry out a consultative review of the Busking Code of Conduct over the next few months, and that you hope to engage with buskers, street entertainers and other stakeholders in an attempt to address any issues around nuisance busking without resorting to criminal sanctions. In these circumstances, it would seem patently disproportionate to include a provision against nuisance busking in a PSPO at this stage. The prospects of positive and constructive engagement with relevant stakeholders will surely be significantly harmed by such a measure. Consultation and engagement should come before the criminalisation of such activities in a PSPO, which may ultimately prove unnecessary.

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<sup>1</sup>[http://www.oxfordmail.co.uk/news/13344056.Scales\\_of\\_Justice\\_16\\_cases\\_heard\\_at\\_Oxford\\_Magistrates\\_Court/](http://www.oxfordmail.co.uk/news/13344056.Scales_of_Justice_16_cases_heard_at_Oxford_Magistrates_Court/)

<sup>2</sup> ss.150A and 151 of the Criminal Justice Act 2003

### 3. Disproportionate breadth of PSPO terms

Our counsel also set out in our earlier legal opinion our concerns regarding the breadth of the PSPO, as it was then worded. Our concerns have not been addressed by the amended provisions. The provision relating to aggressive begging is currently drafted in entirely subjective terms. On the face of the current provision, anyone's perception of 'intimidating' or 'aggressive' behaviour, however sensitive or unreasonable, will be enough to justify enforcement action under the PSPO. This is clearly overbroad and disproportionate. Similarly, it is very unclear what kind of reason for being in a public toilet will amount to a 'reasonable excuse' under paragraph 1(b) of the proposed PSPO, and there is no objective standard for what will constitute a 'nuisance' under paragraph 1(e). Such vague terms are clearly open to arbitrary enforcement and may, therefore, contravene the Human Rights Act.

Furthermore, the nature of a PSPO is such that very few safeguards will be in place to ensure that criminal sanctions are only applied in appropriate circumstances. If issued with a Fixed Penalty Notice in circumstances where they should not have been (for example, an individual may have a reasonable excuse for sleeping in a toilet, may wish to dispute that they were begging aggressively or may dispute that their busking amounted to a nuisance), they will be faced with a choice between simply paying the fee or attempting to challenge it in the courts; the latter will inevitably involve a risk that they will be convicted. There are strong incentives simply to pay without attempting to raise a defence: a Fixed Penalty Notice will not give rise to a criminal record and is limited to a maximum fine of £150, whereas conviction in the Magistrates' Court will give rise to a criminal record and carries a risk of being fined up to £1,000, in addition to a mandatory Criminal Courts Charge of £520. Realistically, therefore, even if someone has a strong defence the PSPO framework itself will strongly incentivise them not to raise it. Such a framework is inherently unsuitable for the criminalisation of such vague terms as intimidating begging, nuisance street entertainment and being in a toilet without reasonable excuse.

In conclusion, therefore, I would encourage you to give very careful consideration to the points raised above before adopting this PSPO. You cannot properly be satisfied, on the evidence before you, either that it is needed or that it will effectively target the issues that you wish to address. We urge you not to pursue this measure.

Yours faithfully,



**Rosie Brighthouse**  
**Solicitor**  
**LIBERTY**

**Cc: Jeremy Thomas**  
**Richard Adams**