

23 June 2023

Dear Councillor Shrivastava,

Re: Proposed Public Spaces Protection Order in Lewisham

Thank you for your letter dated 9 June asking me to provide written comments about the proposed Public Spaces Protection Order (PSPO) for Lewisham, detailed in the evidence pack and corporate report you supplied. I have discussed the proposals with my colleague Benjamin Archer, Lecturer in Law, who is on the verge of completing his PhD on the implementation of PSPOs. This is our joint response, based on the findings from our combined body of research in this area. These are our comments, not those of the university, and they do not constitute legal advice. This submission may be tabled and published when the Safer Stronger Communities Select Committee meets on 27 June 2023.

We have provided a range of comments related to different aspects of the PSPO proposal. From the outset it is important to clarify our perspective on the ASB tools and powers. First, we are of the opinion that ASB victimisation should be taken seriously and, in some cases, requires an enforcement response. All enforcement should be proportionate to the behaviour in question and implemented in the most productive and least harmful way to marginalised communities (e.g., people experiencing street homelessness). Our comments are grounded in the concept of legal literacy (Braye and Preston-Shoot, 2016), which promotes:

- Doing things right and in the spirit of the law
- Doing the right thing in terms of professional ethics
- Rights thinking, which respects human rights and social justice.

Second, PSPOs and other ASB powers are blunt tools. They deal with the symptoms of behaviour (e.g., drug use), rather than the causes (e.g., addiction). It is unclear from the evidence pack and corporate report what wider measures are in place to tackle the causes of the ASB problems reported. For example: if public urination and defecation is a problem, what public toilet facilities are available or required in the areas with increasing numbers of incidents? Similarly, alcohol consumption in public spaces; people experiencing street homelessness (generally) have no option but to drink outside, so what provision is made for them to do so in a safe manner for themselves and members of the wider community? Enforcement action against these types of behaviours will not necessarily deter the perpetrator, therefore the long term, most productive and least harmful approach is to solve the problem. This notion is borne out by the proposal to re-introduce a PSPO, which was previously in place between 2018 and 2021.

Geographical scope of the order

The proposed scope of the PSPO is borough-wide. From looking at the evidence pack, some ASB incidents occur across the borough (i.e., alcohol-related anti-social behaviour and disorder, consumption of drugs and psychoactive substances, dog-related anti-social behaviour and, to an extent, public urination and defecation). This would suggest that a borough-wide order would be an appropriate imposition. However, the accompanying maps indicate that some behaviours are more locationally specific (i.e., amplified music or speech and illegal encampments) and are not as widespread. In these circumstances, it would be disproportionate to place all users of the borough under the jurisdiction of a PSPO, especially as the evidence states that "[U]nauthorised encampments occur relatively infrequently". Instead, alternative targeted measures should be considered for these behaviours when required. For example, different and more appropriate legislation can be used to disband unauthorised encampments. A further point about borough-wide PSPOs stems from Archer's research, specifically that the effectiveness of borough-wide orders is perceived to decrease without appropriate resourcing for enforcement. We return to comment on resourcing later.

Consultation process

It is unclear from the documents circulated if a new consultation about the proposed PSPO has already taken place. There are several considerations for this process. Archer's study found that local authorities consulted primarily through online platforms, such as SurveyMonkey, due to financial constraints. Both of our studies have underlined how local authorities have insufficiently consulted with marginalised groups likely to be subject to enforcement under a PSPO. From the evidence provided here, it is unclear whether any vulnerable groups will be consulted, particularly those experiencing street homelessness who could be disproportionately represented in any enforcement action should the PSPO be implemented and often lack consistent internet access (Dyce, 2019). The ability for vulnerable groups to participate in the consultation should be considered in any equality impact assessment. Furthermore, Archer's findings uncovered that police officers, particularly those responsible for enforcing a PSPO, were sometimes insufficiently consulted by local authorities during the implementation phase. It would be beneficial to canvas the perspectives of those enforcing the PSPO as well as the public and to begin a dialogue surrounding the feasibility of resourcing a proposed borough-wide order at this juncture. Other groups to consider specifically targeting to participate in the consultation include: The Kennel Club (who have commented/advised on dog-related prohibitions in other areas), Gypsy, Roma, and Traveller communities, as well as homelessness charities, drugs and alcohol services, and youth services on a borough-wide basis. For the consultation to be as accurate as possible, the responses should represent the opinions of those living/operating in the geographic area being considered for the PSPO, which in this case should be the whole borough.

Prohibitions and requirements

The proposed prohibitions (particularly alcohol-related anti-social behaviour and disorder, consumption of drugs and psychoactive substances, public urination and defecation, and illegal encampments) are all regulations that can potentially target vulnerable groups, notably people experiencing street homelessness (Sanders & Albanese, 2017). Revisiting our earlier point about addressing the causes as well as tackling the symptoms of the behaviour, what measures are in place to ensure that marginalised groups are not disproportionately punished, and that support is provided to those facing different and/or multiple forms of vulnerability? For example, street homelessness and addiction.

One of the more concerning prohibitions relates to drug and psychoactive substance consumption. The evidence pack states that:

Any person who, without reasonable excuse, fails to surrender any such substance in their possession, and if requested, leave the area and not return for 48 hours when asked to do so by a Constable, Police Community Support Officer (PCSO) or Council Officer, commits an offence and may be liable to prosecution or may be issued a Penalty Notice for Disorder or arrested, either under the Misuse of Drugs Act 1971 or issued a Fixed Penalty Notice [FPN] for failure to comply with a PSPO (local authority FPN).

The proposal of this restriction is ultra vires (beyond the scope of the power) and could be subject to challenge and wider criticism. Neither the Anti-Social Behaviour, Crime and Policing Act 2014 nor the Home Office (2023) ASB guidance state that the Misuse of Drugs Act 1971 can be combined with the jurisdiction of a PSPO, as the 1971 statute has criminal jurisdiction, and the PSPO is a civil power. The proposal circumvents the law by layering these two powers together in a perceivably disproportionate manner. An arrest is, however, a consequence of breaching a Section 35 Direction to Leave Notice, but these powers are authorised by police officers following a Section 34 dispersal authorisation and are active for 48 hours, representing a more targeted dispersal measure than the proposed PSPO.

Furthermore, the borough-wide nature of the proposed PSPO results in a lack of specification. In particular, what would "leav[ing] the area" constitute in practice:

- Does it mean the whole borough or only a certain area of it?

If it is the whole borough, this is a disproportionate use of the powers. If only part of the area, however, further concerns are:

- Who decides the remit of the area that a perpetrator must leave?; and,
- How will someone required to "leave the area" be informed of its boundaries?
- How will this be enforced over a wide area?

Giving enforcement officers the discretion to decide the scope of dispersal in this prohibition increases the potential for inconsistent application of the power and risks the disproportionate punishment of perpetrators through ad hoc dispersals. It also has the potential to exclude people experiencing street homelessness from accessing support such as food or prescribed medicine. Heap et al.'s (2022) research found that dispersal measures were temporary, often causing displacement of the behaviour, which returned to the original site once the time period had expired. Participants talked of a 'cat and mouse' scenario which created more ASB and the strained relationship between perpetrators and the policing bodies. Again, the underlying problem was not solved.

Layering different anti-social behaviour tools and powers

The use of a PSPO with other anti-social behaviour tools and powers can be problematic. As the corporate report states:

... a PSPO would allow the serving of a Fixed Penalty Notice, Community Protection Warning [CPW] and Community Protection Notice [CPN]. It must be noted that if this power does not resolve the matter, there are other options such as seeking an injunction at a Magistrates Court, however the implementation of a PSPO would save time and resources.

The penalty for breaching a PSPO is a fixed penalty notice or fine on conviction, but CPWs and CPNs, whilst notably similar in some legislative respects, are distinctly separate powers to a PSPO and can be issued to individuals without a PSPO in place. Similarly, Civil Injunctions are more serious penalties than those associated with a PSPO and can also be pursued without a PSPO. The wording within the corporate report conflates and layers the available anti-social behaviour powers. Both Archer's and Heap et al.'s (2022) findings have explored the layering of formal and informal tools, with the latter highlighting how these practices disproportionately affect people experiencing street homelessness. Moreover, there was often a lack of clarity on the part of the recipient about exactly *which* power they were being subject to enforcement through.

Resourcing the PSPO

The resourcing required to enforce PSPOs is substantial, and whilst the evidence pack acknowledges the importance of avoiding "*regulations that cannot be enforced*", the corporate report also suggests that local authority enforcement will only occur "*where it is more appropriate for the Service to do so instead of the Police*". In Archer's study, police officers were frustrated by being tasked to enforce the PSPO alongside the increased enforcement expectations placed on them by local authorities, especially for sub-criminal behaviour. For example, in the study, a PSPO that prohibited urination and defecation failed because police officers could not dedicate the time and resources towards its enforcement. When considering the imposition of the proposed order, will sufficient resources be available to enforce the order and all the proposed behaviour? A lack of enforcement was also found in Heap et al.'s (2022) research, whereby PSPOs were implemented but not proactively enforced, with the powers often held in reserve and/or used on 'days of action'. Without consistent enforcement, many participants did not adhere to the prohibitions, which delegitimised the PSPO in the eyes of potential perpetrators. This has the potential to create a gap between public expectations of the PSPO and the reality of how it is enforced, which can damage public confidence. Further, whilst implementing an order could save "*time and resources*" compared to individual Civil Injunction applications, this is a potentially disproportionate use of this power against the rights of all public space users within the borough.

In conclusion, the proposals being put forward for a borough-wide PSPO in Lewisham demonstrate a range of conflicts with the research evidence generated by our empirical work. Anti-social behaviour is a difficult problem to tackle, but we hope you can navigate the tools and powers to ensure any enforcement action takes place in the least restrictive and most proportionate fashion for all members of your borough.

We would be happy to clarify any of our comments if necessary and have provided hyperlinks to published works below, where available.

Yours sincerely,

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