

# Public spaces protection orders: what have we learned?

Kuljit Bhogal and Tara O'Leary

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## Legislation cited

[Anti-social Behaviour, Crime and Policing Act 2014 \(c.12\) s.59](#)

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### **\*J.H.L. 7 Background**

Public Spaces Protection Orders (PSPOs) are designed to stop individuals or groups engaging in anti-social behaviour (ASB) in public spaces. By placing controls on the use of a space and on everyone within it, they allow local authorities to target nuisance and "problem behaviour" which is causing particular detriment to quality of life in the district.

In some respects PSPOs are similar to byelaws, being a mechanism for local law-making about local problems. Introduced by the [Anti-Social Behaviour, Crime and Policing Act 2014](#), they have now been around for several years and are in place in numerous local authority districts around the country.

In the housing context, local authorities have used PSPOs to deal with groups congregating in the communal areas of tower blocks within their district, the use of mopeds/go-peds and car racing (or "cruising") in their estates.

Recently however PSPOs have generated considerable public interest following the adoption by Ealing LBC of a PSPO which creates a "buffer zone"<sup>1</sup> to restrict the activities of protesters outside a Marie Stopes abortion clinic in West London. On the one hand, pro-life activists and other campaigners including Liberty<sup>2</sup> criticise PSPOs for what they see as the criminalisation of an overly broad range of conduct in spaces used by all members of the community. On the other, the Government has reaffirmed the use of PSPOs in many circumstances through its *"Statutory Guidance for Front Line Professionals"*.<sup>3</sup> On 13 September 2018 the Home Secretary announced that he would not legislate for "buffer zones" at all abortion clinics nationally, partly because the Government sees PSPOs as a more proportionate response which can be adopted in those districts which need them.<sup>4</sup>

Meanwhile the High Court has recently handed down its first two judgments on PSPOs: *Summers*<sup>5</sup> concerning dog controls in public parks, and *Dulgheriu*<sup>6</sup> which dismissed a challenge *\*J.H.L. 8* to the lawfulness of the abortion clinic PSPO. *Dulgheriu* is currently awaiting a decision on permission before the Court of Appeal.

In short: 2018 has been a big year for PSPOs. Here are some of the emerging lessons to be learned.

### Passing the test

By *s.59 of the 2014 Act*, local authorities may make a PSPO if satisfied "on reasonable grounds" that two conditions are met (our emphasis in italics below).

The first condition is that

"activities carried on in a public place within the authority's area have had a *detrimental effect on the quality of life of those in the locality*, or it is likely that activities will be carried on in a public place within that area and that they will have such an effect".

The second condition is that

"the effect, or likely effect, of the activities (a) is, or is likely to be, of a *persistent or continuing nature*, (b) is, or is likely to be, such as to *make the activities unreasonable*, and (c) *justifies* the restrictions imposed by the notice".

PSPOs may prohibit certain actions or may require specified things to be done: *s.59(4)*. In either case however, the provisions must prevent or reduce the identified "detrimental effect".

These tests were subject to considerable debate in *Summers* and *Dulgheriu*.

Firstly both cases confirm that it is for local authorities, exercising a broad discretion and weighing up competing factors, to assess what amounts locally to "detrimental effect". There is no requirement for that assessment to consider only "objective" or "reasonable" detriment. Local authorities can and should consider the impact of behaviour on vulnerable people, despite the fact that they might be less resilient and more easily upset than a "reasonably" or "ordinarily" robust person.

Secondly, in *Dulgheriu* the applicants argued that the phrase "quality of life of those in the locality" must be limited to the effect of behaviour on persons living, working or repeatedly visiting the relevant place or its immediate vicinity. Ingeniously, this interpretation would have excluded people using services at Marie Stopes, who each attend the clinic only once or twice.

This argument was rejected. It is enough if the behaviour has a "persistent and continuing" effect on persons in the area, even if these are not always the same persons, or if it has a long-term personal impact on those affected after they have left the area. This is particularly useful for local authorities who may wish to deal with nuisances for tourists in high-profile areas. For example in 2016 Lambeth and Westminster councils jointly adopted a PSPO to address "street gambling" and pick-pocketing on Westminster Bridge and the South Bank.<sup>7</sup>

### Consultation is key and evidence is everything

In deciding whether to make a PSPO and formulating its contents, local authorities must (a) consult; (b) publicise; and (c) notify their intentions.<sup>8</sup> In particular there must also be consultation with: *\*J.H.L. 9*

- the chief officer of the police and the local policing body for the police district which includes the area covered by the PSPO;
- the owner or occupier of land within the area covered by the PSPO; and
- whatever community representatives the local authority thinks it "appropriate" to consult.

The level of "appropriate" consultation will vary depending on the particular issues involved in any given PSPO. Applying the principles derived from *Moseley*,<sup>9</sup> consultation must permit meaningful public participation in the decision-making process, particularly by providing consultees with sufficient information about the draft scheme, the realistic alternatives and the main reasons for the proposals so that they can reply constructively.<sup>10</sup>

In reality this exercise should form a central component of evidence-gathering as to the extent of the problem and the provisions needed to address it.

*Dulgheriu* at §54 confirmed that there is no particular burden of proof to satisfy in making a PSPO: it is enough that there is a

"considerable tranche of evidence and information ... of activities which many would reasonably consider to be fully capable of having a detrimental effect on the quality of life of those who were exposed to them".

Clearly it may be insufficient merely to run an online consultation inviting comments by way of a standard form. An authority may have to show instead that it has pro-actively identified and contacted those who are most likely to be affected. In the case of dog control orders, this may include the Kennel Club, Dogs Trust and/or RSPCA. PSPOs intending to address crime and disorder will need particular support and input from the police. Those targeting youths should consider probation services and local schools and colleges. Where the persons who will be affected are vulnerable, transient, or may not speak English as a first language, local community organisations working with them may be relevant.

The more controversial the PSPO, the more extensive the requirements. Ealing spent over six months pro-actively gathering evidence and speaking to persons from all sides, including pro-life and pro-choice activists; healthcare providers; local church and faith groups; residents living closest to the clinic and, finally, the general public through an online consultation. Several debates also took place before meetings of full Council, which were addressed by the key stakeholders.

### **Mind the Convention rights**

Local authorities making a PSPO must have particular regard to the rights of freedom of expression and freedom of assembly safeguarded by [arts 10 and 11 of the European Convention on Human Rights: s.72\(1\)](#).

These rights are very likely to be engaged by any Order which restricts forms of protest, including marches, vigils or gatherings of groups of people. Depending on the context however these rights may also be relevant to less obvious activities such as putting up posters and signs, spraying graffiti, loitering or using foul language. \*[J.H.L. 10](#)

PSPOs outside abortion clinics will usually engage [art.9](#) due to the Christian or other religious beliefs of many pro-life activists: Ealing's PSPO explicitly prohibits prayers and religious vigils near the clinic.

[Article 8](#) rights to privacy or family life may also be relevant. Ealing successfully argued that it was entitled to protect the [art.8](#) rights of people using services at the clinic, on the basis that their rights to privacy were engaged by protesters' activities outside.<sup>11</sup> More controversially, *Statutory Guidance* now provides that PSPOs should not be used to target rough sleepers,<sup>12</sup> after a number of early PSPOs included measures which encouraged homeless persons to move on from parks and town centres. Brent LBC recently extended a PSPO intended to address nuisance caused by migrant workers seeking casual labour in the area. These types of Orders need to be subject to very careful scrutiny and review to ensure that they do not disproportionately impact on or discriminate against certain ethnic, racial or other protected groups.

If challenged before the High Court ([s.66](#)), a PSPO is ordinarily amenable only to *Wednesbury* review. However *Dulgheriu* confirmed that where Convention rights are engaged, the court will conduct a full proportionality assessment, applying the "structured proportionality test" summarised in *Huang*.<sup>13</sup>

It will thus be necessary to show that the PSPO and its provisions strike a fair balance between the interests of the community on the one hand, and the rights of the persons affected on the other. In practice this means showing that alternative, less intrusive measures have been considered, and producing credible reasons and justification for the interference with fundamental rights. A detailed options appraisal should be placed before decision-makers.

Conscientious efforts should also be made to build mitigating features into any Order. Local authorities might commit to reviewing the operation of their PSPO after six or 12 months, or could initially make the Order for a short period or within a limited area on a pilot basis. To mitigate the impact of provisions which prohibited walking multiple dogs, Richmond agreed to issue a number of professional licences and residents' permits which allow up to six dogs to be walked. Within its "buffer zone", Ealing created a small "designated area" where limited protests are allowed to continue near the clinic.

### **Get your (Equality) act together**

Local authorities also need to remember their other statutory duties. This may include [s.11 of the Children Act 2004](#), which requires them to ensure that their functions are discharged having regard to the need to safeguard and promote the welfare of children.

More often it will concern the [Equality Act 2010](#). Proposals for PSPOs should be accompanied by a detailed Equality Impact Assessment, and care must be taken to ensure that PSPOs do not directly or indirectly discriminate against groups sharing protected characteristics such as disability, race and ethnicity or gender. The assessment of "detrimental effect" is also intrinsically linked to equalities: as highlighted in [Dulgheriu](#), there should be consideration of how problem behaviour is impacting vulnerable and protected persons in the local area.

Where necessary, reasonable adjustments must be made to cater for disabilities. Dog control orders invariably make exceptions for disability assistance dogs and for the persons in control of those dogs, who may be limited in their ability to comply with the Order by reason of their disability. *\*J.H.L. 11*

Interestingly, in [Summers](#), at §87, it was held that the High Court did not have jurisdiction on a challenge to a PSPO under [s.66 of the 2014 Act](#) to consider allegations that the PSPO directly discriminated against persons with disabilities. That is because the County Court has exclusive jurisdiction to consider claims alleging discrimination in the provision of public services. <sup>14</sup>

However the High Court accepted that it does have jurisdiction to consider the Public Sector Equality Duty (PSED). <sup>15</sup> Therefore we expect that future equality challenges to the lawfulness of PSPOs will likely be formulated through the lens of the PSED, although it is arguably easier for public bodies to demonstrate compliance with the PSED than to justify any findings of direct or indirect discrimination.

### What about enforcement?

Those who breach the rules can be issued with fixed penalty notices of up to £100 by police or council officers: [s.68](#). Alternatively, local authorities can choose to prosecute offenders summarily at the Magistrates' Court, where they may be sentenced to a fine of up to £1,000: [s.67](#). In practice this option is likely to be reserved for persistent offenders.

One gap arising from the [2014 Act](#) is that it makes no provision to replace the powers previously contained in [s.61 of the Clean Neighbourhoods and Environment Act 2005](#), the "old" regime used to create dog control orders which has now been repealed. This gave police and council officers power to request the name and address of any person if they had reason to believe that person had breached the order: anyone who failed to do so committed a criminal offence.

Today, only uniformed police officers have power <sup>16</sup> to demand the name and address of persons suspected of engaging in ASB as defined by [s.2 of the 2014 Act](#): i.e. causing harassment, alarm or distress, or causing nuisance or annoyance in the context of occupation of residential premises. This power will not apply to much of the conduct addressed nationally by PSPOs, and in any event does not extend to council officers who may be patrolling the restricted area.

For cases which do make it to prosecution, it is a defence to show "reasonable excuse" for failing to comply with a PSPO. <sup>17</sup> Moreover, no offence is committed by failing to comply with a provision which the local authority did not have power to include in the PSPO. <sup>18</sup> It is thus likely that the Magistrates' Court will be asked to consider public law defences concerning proportionality, discrimination, the PSED and the application of the [s.59](#) test. In such cases, all sides may wish to consider stating a case to the High Court on the lawfulness of the PSPO as a preliminary issue. No doubt, however, local authorities will also consider the expediency of launching prosecutions instead of issuing fixed penalty notices.

### Conclusion

The discussion above shows that PSPOs are not intended to deliver a "quick fix". It is a considerable endeavour for a local authority to develop and implement proposals for a PSPO in its area. Early legal advice should be taken on consultation, alternative options, convention rights and equalities implications. When successful however, PSPOs provide an important tool to address behaviour which may have lasting and serious consequences for those affected. As emphasised by the *Statutory Guidance*: *\*J.H.L. 12*

"The powers introduced by the [2014 Act](#) are deliberately local in nature. Those who work within and for local communities will be best placed to understand what is driving the behaviour in question, the impact that it is having, and to determine the most appropriate response. *\*J.H.L. 13* " <sup>19</sup>

**Kuljit Bhogal**

Tara O'Leary

Footnotes	
1	<a href="https://www.ealing.gov.uk/downloads/download/4795/mattock_lane_public_spaces_protection_order">https://www.ealing.gov.uk/downloads/download/4795/mattock_lane_public_spaces_protection_order</a> [Accessed 26 November 2018].
2	<i>Rosie Brighouse, "Challenging public spaces protection orders" Legal Action, October 2018, pp.10–11.</i>
3	<i>Home Office, "Anti-social Behaviour, Crime and Policing Act 2014: Anti-social behaviour powers Statutory guidance for frontline professionals", updated December 2017.</i>
4	<a href="https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2018-09-13/HCWS958/">https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2018-09-13/HCWS958/</a> [Accessed 26 November 2018].
5	<i>Summers [2018] 1 W.L.R. 4729; [2018] 4 WLUK 123.</i>
6	<i>Dulgheriu v Ealing LBC [2018] EWHC 1667 (Admin); [2018] 4 All E.R. 881; [2018] 7 WLUK 1.</i>
7	See <a href="http://www.london-se1.co.uk/news/view/8881">http://www.london-se1.co.uk/news/view/8881</a> [Accessed 26 November 2018].
8	Anti-Social Behaviour, Crime and Policing Act 2014 s.72. Statutory definitions are given for each of these three requirements. Notification requirements include local parish and district councils.
9	<i>R. (on the application of Moseley) v Haringey LBC [2014] UKSC 56[2014] 1 W.L.R. 3947; [2014] P.T.S.R. 1317.</i>
10	It may be inappropriate to make PSPOs by way of delegated powers: the <i>Statutory Guidance (p.49)</i> encourages direct involvement by elected members, particularly by putting the final decision to Cabinet or full Council. The Local Government Association has also provided useful guidance on consultation and evidence in its: " <i>Public Spaces Protection Orders: Guidance for Councils" on PSPOs</i> , available at: <a href="https://www.local.gov.uk/sites/default/files/documents/10.21%20PSPO%20guidance_06_1.pdf">https://www.local.gov.uk/sites/default/files/documents/10.21%20PSPO%20guidance_06_1.pdf</a> [Accessed 26 November 2018].
11	<i>Dulgheriu [2018] 4 All E.R. 881; [2018] 7 WLUK 1</i> at [§61].
12	See p.51.
13	<i>Huang v SoS for the Home Department [2007] UKHL 11</i> at [§19]
14	Pursuant to the Equality Act 2010 ss.29(6), 113 and 114.
15	Equality Act 2010 s.149.
16	Pursuant to the Police Reform Act 2002 s.50.
17	2014 Act s.67(1). In <i>Dulgheriu [2018] 4 All E.R. 881; [2018] 7 WLUK 1</i> at [§88] the court considered that this provided an important safeguard which mitigated against many of the applicants' criticisms of the wording of the PSPO.
18	2014 Act s.67(3).
19	<i>Home Office, "Anti-social Behaviour, Crime and Policing Act 2014: Anti-social behaviour powers Statutory guidance for frontline professionals", updated December 2017, p.1.</i>