

## **IN THE MATTER OF A PROPOSED PSPO IN EALING**

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### **NOTE**

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#### **INTRODUCTION**

1. This Note addresses the lawfulness of the proposed Public Spaces Protection Order (PSPO)<sup>1</sup> creating a “safe zone”<sup>2</sup> around the Marie Stopes clinic in the Mattock Lane area of Ealing.
2. Ealing Council’s consultation (required by s. 72 of the Act) closes at 5pm on Monday 26<sup>th</sup> March.
3. The terms of the proposed PSPO (the PSPO) provide that in the “safe zone” the following activities are prohibited:

- i. 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, including, without limitation, graphic, verbal or written means, and including, for the avoidance of doubt, prayer or counseling (sic).*
- ii. Interfering, or attempting to interfere, whether verbally or physically, with a service user or member of staff.*
- iii. Intimidating or harassing, or attempting to intimidate or harass, a service user or a member of staff.*
- iv. Recording or photographing a service user or member of staff of the clinic whilst they are in the safe zone, or*
- v. Displaying any text or images relating directly or indirectly to the termination of pregnancy.*

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<sup>1</sup> s. 59 Anti-social Behaviour, Crime and Policing Act 2014 (the Act)

<sup>2</sup> A term which appears in the consultation and draft PSPO but which is not included in the Act.

vi. *Playing or using amplified music, voice or audio recordings.*”

4. The PSPO includes the following definitions:

*“ ‘Protesting’ means being in the safe zone (whether by yourself or with others) and engaging in any act of approval/disapproval or attempted act of approval/disapproval, with respect to issues related to abortion services, by any means, including, without limitation, graphic, verbal or written means, and including, for the avoidance of doubt, prayer or counselling;*

*‘Displaying any text or images relating directly or indirectly to the termination of pregnancy’ includes but is not limited to, imagery or textual references to abortion, baby, mum, foetus, soul, kill, hell, murder;”*

5. The above prohibitions are subject to the following exception:

**“RESTRICTIONS APPLYING IN THE DESIGNATED AREA**

11. *A person must not be part of a group or groups which together total four or more persons at any one time.*

12. *No individual poster, text or image, singularly or collectively greater than one sheet of A3 paper may be displayed within the Designated area.*

13. *A person within the Designated area must not shout any message or words relating to the termination of pregnancy.*

*14. A person within the Designated area must not play or use amplified music, voice or audio recordings.”*

6. The “designated area” appears to be a narrow section of pavement at a distance from the Marie Stopes clinic.

7. The PSPO is to remain in force for 3 years.

8. The Council is able to make the PSPO without having to seek a court order or submit to any judicial oversight. The PSPO will only be considered by the courts in the event that an appeal is brought against it under s.66 or if it leads to the institution of criminal proceedings under s.67 (save for it being subject to an application for judicial review).
9. In terms of criminal liability, by s.67 of the Act:

*“67. Offence of failing to comply with order*

*(1) It is an offence for a person without reasonable excuse—*

- (a) to do anything that the person is prohibited from doing by a public spaces protection order, or*
- (b) to fail to comply with a requirement to which the person is subject under a public spaces protection order.*

*(2) A person guilty of an offence under this section is liable on summary conviction to a fine not exceeding level 3 on the standard scale.”*

10. Council Officers have the power to issue fixed penalty notices under s.68.

## **DISCUSSION**

11. In my view the PSPO proposed by Ealing Council is potentially unlawful on the grounds, firstly, that it is disproportionate to its avowed purpose and secondly, is unnecessary because other legal measures are potentially available to Ealing Council to address any actual unlawfulness on the part of the individuals / groups which it is seeking to target.

### **Disproportionality**

12. Section 72 of the Act provides that:

*“72. Convention rights, consultation, publicity and notification*

*(1) A local authority, in deciding—*

*(a) whether to make a public spaces protection order (under section 59) and if so what it should include,*

*...*

*must have particular regard to the rights of freedom of expression and freedom of assembly set out in articles 10 and 11 of the Convention.*

*(2) In subsection (1) “Convention” has the meaning given by section 21(1) of the Human Rights Act 1998.”*

13. Ealing has attempted to show that the proposed measure is proportionate to its aim and complies with s.72 by allowing the protesters a limited space (the designated area) to exercise their Article 10 and 11 rights subject to the limitations at paragraphs 11 to 14 of the PSPO.

14. Whilst I am not aware of the geography of the area in question in order to know whether or not the designated area is actually in sight or ear shot of any visitor to the clinic, it seems to me that these restrictions upon the protesters activities so curtail their freedoms of expression and assembly to be excessive and disproportionate. For instance, if there is no possibility of any visitor to the clinic being approached by a protester in the safe zone, why are paragraphs 11 to 14 strictly necessary?

15. Moreover, it would appear that Ealing has not had proper regard to the protesters' Article 9 right to exercise and manifest their religious beliefs. Whilst a qualified right (as in the case of Articles 10 and 11), it nonetheless warrants consideration and the consultation is potentially unlawful (and outwith s. 72 of the Act) by reason of overlooking it.<sup>3</sup> This is odd, not least as the Council's own definition of protest includes “prayer” (which only reinforces the potential breach of Article 9).

16. As to the six prohibited activities within the safe zone, all except i) “Protesting” and v) “Displaying any text or images relating directly or indirectly to the termination of pregnancy” can be adequately addressed by alternative legal measures (see below).

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<sup>3</sup> Albeit that the right as well as the fact that religion is a protected characteristic under the Equality Act 2010 are noted within Ealing's “Options” document.

17. Prohibitions i) and v) are in direct conflict with the protesters Article 9,10 and 11<sup>4</sup> rights. It is unclear to me how it can be said by Ealing Council that either measure is justified.
18. Merely exercising the right to protest by use of words or images, which whilst possibly offensive, are plainly not unlawful per se, cannot sensibly be said to transgress even the low threshold required to implement a PSPO under s.59 (having a “detrimental effect on the quality of life of those in the locality”). Whilst s.59 has not been the subject of judicial scrutiny (to my knowledge) I don’t think a Judge would concur with the Council’s view of this threshold given that s.72 specifically recognises the balance which needs to be struck with Articles 10 and 11.
19. Therefore, whilst it might be possible for Ealing Council to introduce a PSPO in respect of those activities proscribed at ii) to iv) and vi), in my view the prohibitions at i) and v) cannot be justified.

### **Alternative remedies**

20. Also relevant to the issue of proportionality is the question of whether there are alternative legal measures which serve the purpose sought by the PSPO.
21. Ealing Council’s own “options” document<sup>5</sup> considers the following alternative legal powers at its disposal:
- a) Section 222 of the Local Government Act 1972 to prosecute legal proceedings where it considers that it is expedient for the promotion of the interests of the inhabitants of the local area.

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<sup>4</sup> Note Article 11 protects the right to “peaceful” assembly.

<sup>5</sup><http://ealing.cmis.uk.com/Ealing/Document.ashx?cz=JKcaeAi5tUFL1DTL2UE4zNRBcoShgo=SbB8SOFjWQmCx0kb63bXnBbC9gUOAFHnj4tzU5GGuupZ8SHiGuRYTg%3d%3d&rUzwRPf%2bZ3zd4E7lkn8Lyw%3d%3d=pwRE6AGJFLDNIh225F5QMaQWCiPHwdhUfCZ%2flUQzqA2uL5jNRG4jdQ%3d%3d&mCTIbCubSFFXsDGW9IXnlq%3d%3d=hFflUdN3100%3d&kCx1AnS9%2fpWZQ40DXFvdEw%3d%3d=hFflUdN3100%3d&uJovDxwdjMPoYv%2bAJvYtyA%3d%3d=ctNJf55vVA%3d&FgPIIEJYlotS%2bYGoBi5oIA%3d%3d=NHdURQburHA%3d&d9Qjj0ag1Pd993jsyOJqFvmyB7X0CSQK=ctNJf55vVA%3d&WGewmoAfeNR9xqBux0r1Q8Za60lavYmz=ctNJf55vVA%3d&WGewmoAfeNQ16B2MHuCPMRKZMwaG1PaO=ctNJf55vVA%3d>

b) Civil injunctions under s.1 of the Anti-Social Behaviour, Crime and Policing Act 2014 used against specific individuals identified as causing, or likely to cause, harassment, alarm or distress.

c) Civil injunctions under the Protection from Harassment Act 1997.

22. Interestingly, one of the stated reasons for not proceeding by way of seeking of seeking an injunction under the Protection from Harassment Act 1997 is because:

“Evidence may not meet harassment threshold as defined in the Act”

23. It therefore appears that the Council is seeking to institute a PSPO for reasons of expediency and ease. In my view this is impermissible. According to the consultation document published by the Council, it passed a motion in October 2017 in the following terms:

*“It is a motion that seeks to protect the rights of individuals from harassment and intimidation when accessing legally existing health services and of local residents not to be exposed to related disruption and distress on a daily basis.”*

24. In order to amount to harassment under the 1997 Act a person must pursue a course of conduct (on at least two occasions) causing alarm or distress. Therefore, even allowing for the fact that in the motion “harassment” was used in a colloquial rather than a strict legal, sense, it would appear that the Council did mean to condemn the protesters as meeting the threshold in the 1997 Act (at least regarding those visitors to the clinic as opposed to local residents).

25. Accordingly, the Council should seek redress under the 1997 Act (or alternatively under s.1 of the Anti-Social Behaviour, Crime and Policing Act 2014 which simply requires the Council to show that it is intending to prevent anti-social behaviour, a lower threshold than under the 1997 Act).

26. The Council is not permitted to simply implement a PSPO under s.59 of the 2014 Act as a shortcut in order to avoid the potential cost and judicial scrutiny involved in obtaining an injunction from the Court.

27. Separate from the Council, the Police have the power to prevent any type of public order offence. However, it seems unlikely that these powers will be used in circumstances where, according to the Council's own assessment, "Evidence may not meet harassment threshold as defined in the Act."

## **CONCLUSION**

28. For the reasons set out above, it is my opinion that the proposed PSPO is unlawful. Once issued a PSPO can only be challenged before the High Court by "an interested person" defined as "an individual who lives in the restricted area or who regularly works in or visits that area" at s.66 of the Act.

DAVID MITCHELL

24<sup>th</sup> March 2018



