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RESPONSE OF THE CATHOLIC UNION OF GREAT BRITAIN TO THE RICHMOND COUNCIL CONSULTATION ON THE PROPOSED PUBLIC SPACES PROTECTION ORDER AROUND THE BPAS CLINIC

Introduction

1. The Catholic Union of Great Britain is an organisation of lay Catholics providing a Catholic viewpoint on issues of concern in politics and public life. It seems to us that a Public Spaces Protection Order ('PSPO') in the form that is currently proposed by Richmond Council would be neither in the public interest nor lawful.

2. We say that for the following reasons:

   (a) The materials disclose that there are variety of competing interests related to activity outside the BPAS facility and significant disputes of fact at least as to:

      (i) What is happening;
      (ii) Who is engaging in what conduct; and
      (iii) Its effect on users of the clinic (there is evidence of people objecting and evidence of potential users being thankful for the benefits they received from people outside the clinic);

   (b) A local authority is not equipped to resolve these issues. It does not have appropriate procedures to ensure that it is independent of both sides, that both sides are properly represented and it can objectively weigh admissible evidence. Where there are significant disputes such as these the proper forum for their resolution is a Court;

   (c) The 'Options Appraisal' produced by the Council sets out a number of other options including a negotiated agreement and applications that could be made to a court in relation to the conduct the subject of the Council's Motion. The statutory guidance (see section 73 of *Anti-social Behaviour, Crime and Policing Act 2014* ('ASBCPA')) produced by the Home Office and which the Council must follow, contains a number of references to 'necessity' and 'proportionality'. A PSPO cannot be regarded as 'necessary' or 'proportionate' in circumstances where there are substantial disputes of fact and none of the options for resolving the issues through the courts has been attempted (never mind found to be ineffective);

(d) The most significant evidence when considering 'necessity' and 'proportionality' is the evidence of children being born as a result of some of the activities outside clinics such as these. A measure that criminalises activity that has had this result would be almost impossible to defend as 'necessary' or 'proportionate' on any conventional public law ground;

(e) We expand on this, below, but the terms of the proposed order would appear to be clearly contrary to the European Convention on Human Rights.

3. We will deal with three aspects of the proposed order in a little more detail:

(a) The European Convention;

(b) The statutory test of 'reasonableness'; and

(c) The police evidence to the Home Affairs Select Committee and the Home Secretary's decision following the Home Office review.

The European Convention

4. Section 72 ASBCPA states that the local authority '*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*'. The statutory guidance requires (page 17) that '*any use of these powers must be compliant with the Human Rights Act 1998*'. While the original Home Office guidance states: '*Agencies…must have regard to the Articles 10 and 11 of the European Convention on Human Rights which provide for the right for lawful freedom of expression and freedom of assembly, ensuring that…the making of a public spaces protection order is not used to stop reasonable activities where no anti-social behaviour is being committed*'.

[Anti-social behaviour is defined in section 2 ASBCPA as '*conduct that has caused, or is likely to cause, harassment, alarm or distress to any person*' and some conduct in relation to residential premises. It does <u>not</u> extend to mere protests, to acts of 'approval / disapproval', to counselling or to prayer (all of which are to be made criminal by the proposed PSPO, see below)].

5. Therefore the Act and the statutory guidance (and the general obligation in the *Human Rights Act 1988* requiring a local authority to act compatibly with Convention Rights) <u>require</u> the Convention to be applied. The cases make clear that Article 10 is directly engaged in circumstances such as these (and is referred to expressly in the preamble to the draft PSPO).

6. The most relevant case is *Annen v. Germany* (application number 3690/10) decided by the European Court of Human Rights on 26th November 2015. The case is important both for its statements of general principle and its statements as to how those principles apply in the particular context of anti-abortion activity. As to general principle, the Court said this:

50. The Court considers, and it was not disputed by the Government, that the civil injunction issued by the national courts amounted to an "interference" with the applicant's right to freedom of expression as guaranteed by Article 10 of the Convention. Such interference

will infringe the Convention if it does not satisfy the requirements of paragraph 2 of Article 10.

…

52. *The fundamental principles concerning the question of whether an interference with freedom of expression is "necessary in a democratic society" are well established in the Court's case-law and have recently been summarised as follows (see Delfi AS v. Estonia [GC], no. 64569/09, § 131, 16 June 2015 with further references):*

"(i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'. As set forth in Article 10, this freedom is subject to exceptions, which ... must, however, be construed strictly, and the need for any restrictions must be established convincingly ...

(ii) The adjective 'necessary', within the meaning of Article 10 § 2, implies the existence of a 'pressing social need'.

53. *Another principle that has consistently emphasised in the Court's case-law is that there is little scope under Article 10 of the Convention for restrictions on political expressions or on debate on questions of public interest*

(underlining added)

As to the particular context of anti-abortion activity, it said:

62…The Court also points out that the applicant's campaign contributed to a highly controversial debate of public interest. There can be no doubt as to the acute sensitivity of the moral and ethical issues raised by the question of abortion or as to the importance of the public interest at stake

…

64. Having regard to the foregoing considerations and, in particular, the fact that the applicant's statement, which was at least not in contradiction with the legal situation with regard to abortion in Germany, contributed to a highly controversial debate of public interest, the Court, in view of the special degree of protection afforded to expressions of opinion which were made in the course of a debate on matters of public interest…

7. In fact, in English domestic law, Article 10 occupies a privileged place. In *R v. Home Secretary Ex parte Simms* [2000] 2 AC 115 at 126 -7, Lord Steyn in the House of Lords said: '…t*he starting point is the right of freedom of expression*. *In a democracy it is the primary right: without it an effective rule of law is not possible...'*.

8. The terms of the proposed PSPO would appear to be directly inconsistent with these principles. Proposed paragraph 1 a) is in the following terms:

> *Protesting, namely engaging in any act of approval or disapproval or attempted act of approval or 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, any form of counselling or interaction with residents or BPAS clients on the street;*
>
> *"Protesting" is defined as including "prayer".*

9. An order by an English local authority in these terms which has the effect of making activities like 'approval / disapproval', 'prayer', 'counselling' and 'protesting' criminal should not require recourse to the European Convention. Most right-thinking members of the British public are likely to be horrified at government authority being used in this way. However, the European Convention provides a legal basis for this reaction. Such an order cannot be lawful.

Unreasonable

10. There is real doubt as to whether PSPOs were intended to be used in this context at all. They appear to be a tool a local authority can use to ensure that public spaces are free from what people generally would regard as anti-social behaviour. The sorts of activities envisaged would appear to be excessive public drinking, certain dogs, legal highs, public gambling or certain types of driving.

11. In keeping with this apparent intention, the test in section 59 (3) includes a requirement that the activity being prohibited be 'unreasonable'.

12. Expressing 'approval / disapproval', offering counselling, praying or handing a person a leaflet offering alternatives to abortion or other like activities do not fit easily within this scheme. As we say above, we understand that there is evidence that people have been born who would not otherwise have been as a result of activities such as these. Whatever a decision maker's view as to the current state of the law on abortion, a decision that activity having that effect is 'unreasonable' would seem hard to justify on conventional public law grounds either.

Duty to consult the Chief Officer of Police and the Home Office Review

13. Section 72 (3) and (4) ASBCPA require that the Chief Officer is consulted before making a PSPO. The written evidence from the Home Office to the Home Affairs Select Committee hearings on buffer zones contains the following passages:

> *[In December 2016]…all forces confirmed that they were not aware of any significant regional or local issues and felt that they had the necessary and appropriate powers to manage such protests*
> *…*

The police assessed that the overwhelming majority of demonstrations were conducted peacefully and lawfully, without any public order / criminal concerns or need for police intervention. Pro-life groups denied harassment and intimidation, claiming that they only seek to dissuade and offer support to those seeking the services of family planning clinics.

Complaints about the activities of pro-life demonstrators directly to police from those attending healthcare clinics were seemingly few.

On 13 September 2018, the Home Secretary announced the result of the Home Office "Abortion Clinic Protest Review". The Review found that anti-abortion activities are predominantly passive in nature and the Home Secretary said that in this country it is a long-standing tradition that people are free to gather together and to demonstrate their views within the law. He concluded that "national buffer zones" would be disproportionate and it is the view of the Catholic Union that the PSPO proposed by Richmond Council would also be disproportionate.

Conclusion

14. The proposal to make a PSPO fails to give proper weight to the interference in articles 9, 10 and 11 of the European Convention on Human Rights that it would represent. By contrast, the proposal gives disproportionate weight to the views of those local residents who would prefer that activities outside the BPAS facility did not take place. The fact that the activities are unpopular with some people is not a sufficient or lawful reason to ban a broad range of behaviour which is otherwise lawful and a peaceful exercise of human rights over an extensive area. The PSPO is not the appropriate or lawful way to deal with this situation.

The Catholic Union of Great Britain

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