

Westminster City Council Byelaws Consultation  
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Dear Sir or Madam,

**Consultation on Westminster City Council's proposal to introduce new and amending Byelaws for good rule and government**

We are writing to make written representations opposing Westminster City Council's proposal to introduce Byelaws providing powers to authorised officers and constables to deal with tents and other structures in the Parliament Square and Whitehall area and to seize noise equipment used in contravention of existing Byelaws throughout the city.

Liberty considers that the proposed Byelaws constitute an unjustified and disproportionate interference with the rights to freedom of expression, peaceful protest and peaceful enjoyment of possessions enshrined in the Human Rights Act. They are unnecessary, overly broad and their use is likely to lead to undesirable confrontation between protestors, the police and the Council.

The proposed Byelaws

The draft Byelaws replicate controversial provisions introduced in the Police Reform and Social Responsibility Act 2011 ("PRSRA") prohibiting certain activities on Parliament Square Garden and the adjoining pavements, but apply to a far larger area.

*Prohibited activities*

Byelaw 3 applies to a designated area covering most of the public spaces in the vicinity of the Houses of Parliament, Westminster Abbey and certain Government buildings around Whitehall. It provides that a constable or "authorised officer" (which includes employees of the Council) who has reasonable grounds for believing that a person is

doing or is about to do a “prohibited activity” in the area may direct the person to cease doing that activity or not to start doing that activity. Prohibited activities include:

- erecting, keeping erect or using a tent or another structure for the purposes of sleeping or staying in that area for any period; and
- placing, keeping or using any sleeping equipment (which includes any sleeping bag, mattress or other similar item) for the purposes of sleeping overnight in that area.

The Byelaw is intended to have retrospective effect and applies to tents and sleeping equipment etc which were in place before the Byelaw comes into force. A direction to desist from doing a prohibited activity can last up to 90 days and may be given orally. Failure to comply with such a direction without reasonable excuse is a criminal offence and is liable on summary conviction to a fine of up to £500. On conviction a court may also make a forfeiture order.

#### *Seizure of tents, etc.*

Byelaw 6 provides a power for a constable or an authorised officer to seize and retain “prohibited items” (tents, sleeping bags etc) inside the area if it appears that it is being, or has been, used in connection with the commission of an offence under Byelaw 3. An additional power is given to constables to remove these items in any public place in the City of Westminster if it appears that the item has been used in connection with the commission of an offence under Byelaw 3. Constables may use reasonable force in exercising their powers of seizure.

#### *Seizure of noise equipment*

Byelaw 9 introduces a new Byelaw 4A into the Byelaws for the Good Rule and Government of the City of Westminster (No.2) made on 20<sup>th</sup> July 2011, providing a power for a constable or an authorised officer to seize and retain noise equipment (e.g. a megaphone) if it appears that it is being, or has been used in connection with the commission of the offence of using noise equipment to the annoyance of others in public places in the city.

#### Interference with Articles 10 and 11 of the European Convention on Human Rights

As a public authority, Westminster City Council is required by the Human Rights Act to act compatibly with the rights set out in the European Convention on Human Rights.

Article 10 of the Convention provides:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by

law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 11 provides:

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

The Byelaws are clearly directed towards protest activity. The Explanatory Note on the consultation expressly states that the main issues the Council are seeking to address are:

- Displacement of the existing encampment in Parliament Square (which grew from Brian Haw's continuous peace protest) if the new powers under the PRSRA are used to remove it from the pavement immediately adjoining the gardens.
- The increasing threat of new encampments, e.g. outside Westminster Abbey, similar to the one outside St Paul's Cathedral.
- The use of megaphones and other noise amplification equipment as part of the protests in Parliament Square and elsewhere in the city.

The Note also states "The Council does not wish to prevent legitimate protest. That is why the Byelaws have been carefully drawn so that they are very similar to the relevant provision in the PRSRA 2011, specifically dealing only with the use of tents, other structures and sleeping equipment". It cannot be disputed, however, that these Byelaws (and, for that matter, the provisions in the PRSRA) prohibiting protest encampments constitute a substantial interference with the Article 10 and 11 rights of those who wish to protest in this way.

The Court of Appeal has rejected the notion of a clear distinction between the "essence" of a protest and the "manner and form" of its exercise. In *Tabernacle v Secretary of State for Defence* [2009] EWCA Civ 23, the Court noted that in some cases the distinction will be real but in others insubstantial. All depends on the particular facts. That case concerned a very similar Byelaw to the one now proposed by Westminster City Council, prohibiting camping within a "Controlled Area" where the Aldermaston Women's Peace Camp ("AWPC") had camped regularly for one weekend every month. Upholding AWPC's judicial review of the Byelaw, Lord Justice Laws held:

36. As I have said it is plain in this case that the Secretary of State has not sought to impose anything approaching a blanket ban on AWPC's rights of protest. They may protest as much as they like: all they are stopped from doing is camping in the Controlled Areas. In that sense it may be said that paragraph 7(2)(f) of the 2007 Byelaws [the ban on camping] only goes to the manner and form of the exercise of the appellant's rights under ECHR Article 10. It is not on its face directed towards the suppression of free speech, on the part of the AWPC or anyone else. It merely prohibits camping, which happens to be the mode or setting chosen by the AWPC for its protest. It happens also ... that there is a general prohibition of unauthorised camping across the Defence estate.
37. **But this "manner and form" may constitute the actual nature and quality of the protest; it may have acquired a symbolic force inseparable from the protesters' message; it may be the very witness of their beliefs.** It takes little imagination to perceive, as I would hold, that that is the case here. As I have said, the AWPC has been established for something like 23 years. Some of those involved may have been steadfast participants the whole time. Others will have come and gone. But the camp has borne consistent, long-standing, and peaceful witness to the convictions of the women who have belonged to it. **To them, and (it may fairly be assumed) to many who support them, and indeed to others who disapprove and oppose them, the "manner and form" is the protest itself.**
38. **In my judgment, therefore, the fact that the camp can be categorised as the mode not the essence of the protest carries little weight. ...**
39. In light of all these considerations I consider that if he is to show compliance with his obligations under the Human Rights Act **the Secretary of State must demonstrate a substantial objective justification for paragraph 7(2)(f) of the 2007 Byelaws, amounting to an undoubted pressing social need.** The byelaw's interference with the appellant's rights is far from being weak or insubstantial. ...

(Emphasis added)

The encampments that the Byelaws in question seek to address, including a potential encampment by the "Occupy" movement, are similarly likely to fall into the category of those where the "manner and form" *is* the protest itself. The Byelaws are therefore susceptible to challenge by way of judicial review and will be held to be unlawful unless Westminster City Council can demonstrate that the offences created by the Byelaws are "prescribed by law" and that they are proportionate to meet a "pressing social need" directed towards one of the aims set out in the Articles 10(2) and 11(2), such as the prevention of crime and disorder or the protection of the rights of others.

#### Interference with Article 1 of the First Protocol to the Convention

Article 1 of the First Protocol to the Convention provides:

1. Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

2. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

The seizure of tents, sleeping equipment or noise equipment would amount to a deprivation of property within the meaning of Article 1 of the First Protocol. As such it can only be justified if it is done “in the public interest and subject to the conditions provided for by law”. This means that the interference must be proportionate and the relevant law must be sufficiently precise and foreseeable.

#### Justification/ Proportionality

The right to peaceful protest at the geographical heart of power, around the Houses of Parliament and Whitehall, has been central to Britain’s strong political culture of peaceful protest and dissent. Powerful justification is therefore required for any restrictions on this right.

#### *Prohibition on tents, sleeping equipment, etc.*

The purported justifications set out in the Explanatory Note are vague, but the central focus appears to be on the “unsightly” nature of protest encampments. The Note refers to safeguarding “the interests of users of the highway” and “the amenity of the Parliament Square and Whitehall area” and refers to the fact that many of the buildings are architectural and historical landmarks of national importance. When explaining why the law on obstruction of the highway is insufficient, the Note states: “it must be emphasised that it is not just the element of obstruction that is the cause of concern, but also the effect on the appearance of the area.”

Liberty submits that none of the above reasons provides a sufficient justification to outlaw the use of tents, sleeping equipment, etc. in the area. To the extent that it is suggested that the Byelaws are necessary to make the area around Parliament Square and Whitehall more attractive to visitors, this argument is completely misconceived. Elected representatives should not be ashamed of peaceful dissent or wish to tidy it away. Further it is precisely the importance, location and symbolism of Parliament Square and Whitehall which demands that peaceful protest in its vicinity is protected. The right to peaceful protest cannot be divorced from the right to do so in locations where protest will be best heard.

Moreover, the Explanatory Note does not identify any actual harm which the Byelaws would prevent. Instead, they deliberately and disproportionately target particular protests and protesters who are considered to have become a nuisance. They are illustrative of an increasing desire on behalf of the authorities to *manage* protest and to determine what type of period, methods, noise levels etc. are acceptable. There are worrying similarities with the introduction of sections 132-138 of the Serious Organised Crime and Police Act 2005 (“SOCPA”), which were largely aimed at closing down the peaceful protest of Brian Haw. In this regard careful note should be taken of the observations made by the Court of Appeal in the *Tabernacle* case (paragraph 43):

Rights worth having are unruly things. Demonstrations and protests are liable to be a nuisance. They are liable to be inconvenient and tiresome, or at least perceived as such by others who are out of sympathy with them. Sometimes they are wrong-headed and misconceived. Sometimes they betray a kind of arrogance: an arrogance which assumes that spreading the word is always more important than the mess which, often literally, the exercise leaves behind. In that case, firm but balanced regulation may be well justified. In this case there is no substantial factor of that kind. As for the rest, whether or not the AWPC's cause is wrong-headed or misconceived is neither here nor there, and if their activities are inconvenient or tiresome, the Secretary of State's shoulders are surely broad enough to cope.

In the absence of any real harm, Liberty submits there can be no justification for the serious interference with protestors' rights which the Byelaws entail.

Further, in light of the powers already available to deal with potentially harmful protests, the Byelaws are entirely unnecessary. Under the Public Order Act 1986 ("POA") the police have the power to impose conditions on public assemblies of 2 or more people. Conditions may specify the place at which an assembly may be held, its maximum duration and the maximum number of persons who may constitute it. Such conditions may be imposed where a senior police officer reasonably believes that the assembly may result in serious public disorder, serious damage to property or serious disruption to the life of the community, or that the purpose of the assembly is to coerce by intimidation. "Serious disruption to the life of the community" is a broad concept and potentially confers on the police a wide discretion to impose conditions. Additional common law and statutory powers are available to deal with obstructions of the highway and public nuisances. In any case where there is a genuine concern about the ability of others to access the area or where a protest causes inordinate disruption, therefore, there are ample legal measures already in place to deal with the situation.

The Joint Committee on Human Rights expressed its concern that the provisions in the PRSRA providing for equivalent powers in respect of Parliament Square were disproportionate to the aim. The Committee held that the Government had failed to provide sufficient explanation illustrating why the current powers available to it are insufficient such that new offences with such broad discretion are justified, especially considering the Metropolitan Police have already indicated the provisions will be difficult to administer and may lead to arbitrary application. Accordingly, the Committee concluded that without "such justification or tighter definition, we consider that there is a significant risk of arbitrary application, further costly litigation and violation of the right to respect for freedom of expression and assembly...and the right to respect for private life and the enjoyment of possessions." (11<sup>th</sup> Report of 2012, para 1.38) Liberty submits that the same risks apply in respect of the proposed Byelaws.

### *Noise equipment*

The alleged "problems" associated with the use of noise equipment are not explained, and it is not at all clear why the Note refers to amplified noise in the Piazza at Covent Garden;

this would appear to be a completely unrelated issue to the overall purpose of the Byelaws. As to the use of noise equipment by protestors, the Explanatory Note acknowledges that the ordinary law on statutory nuisances provides an exemption for loudspeakers or loudhailers used for demonstrations. It is not clear whether the Council has ever sought to prosecute those breaching the existing Byelaws relating to noise in the streets, whether in Covent Garden or against protestors.

The Note relies heavily on the fact that Parliament, by passing the PRSRA, has “acknowledged that the law relating to statutory nuisance is insufficient to deal with the issue as regards the pavement immediately surrounding Parliament Square Gardens, and by implication that the exemption mentioned above for political demonstrations should be qualified to some extent”. But this limited (and in any event highly controversial) qualification of the exemption cannot possibly provide justification for much wider enforcement of noise prevention laws, when Parliament clearly intends the exemption for demonstrations to stand.

Further, on this issue too, the Council has not identified any actual harm which a Byelaw providing broad powers of confiscation would address. Liberty submits that the proposal to extend powers to enforce Byelaws that should not be used against protestors in any event is wholly unjustified.

#### Irrationality/ Arbitrariness

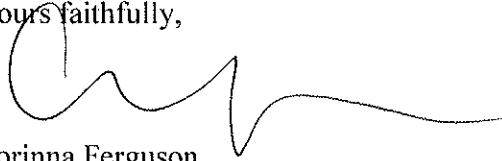
The mechanism for criminalisation is highly problematic. The direction not to use a tent or sleeping bag etc. effectively acts as an on-the-spot injunction, breach of which is criminal. There is no requirement for the activity to be causing or be likely to cause crime or disorder, restrictions on the rights of others to express themselves, or even to spoil the vista. Instead mere possession or use of the items leads to a direction being made, and failure to obey such a direction without reasonable excuse is a criminal offence. That a direction can be given orally is likely to cause problems in practice. It is easy to imagine how someone to whom a direction is given may not realise that a direction has been made or fully understand the consequence of the direction and non-compliance with it.

There are serious concerns about arbitrary or discriminatory use of the powers. Notwithstanding the assertion in the Explanatory Note that “the purpose of these byelaws is not to control rough sleeping”, the Byelaws as drafted would clearly apply to homeless people in the area. They would even cover those who sleep out in advance of major events such as the Jubilee celebrations. Given the justifications put forward in the Explanatory Note it seems unlikely, however, that directions will be issued against such people. This creates a situation in which the police and Council officials have enormous discretion, and one person may be criminalised where another engaging in identical conduct for another reason would not be. This offends basic notions of legal certainty and impartial application of the law. We consider that the Byelaws would therefore violate Articles 10 and 11 and Article 1 of the First Protocol to the Convention, as well as being susceptible to challenge on ordinary judicial review grounds.

Conclusion

For the reasons given above Liberty strongly opposes the introduction of the proposed Byelaws on the basis that they are wrong in principle, unnecessary and incompatible with Articles 10 and 11 and Article 1 of the First Protocol to the Convention.

Yours faithfully,

A handwritten signature in black ink, appearing to be 'Corinna Ferguson', written in a cursive style.

Corinna Ferguson  
**LIBERTY**

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