

## **WRITTEN EVIDENCE FROM LIZ DAVIES (CJB0013)**

1. I have advised Crisis on the provisions of the Criminal Justice Bill (CJB) concerning nuisance begging (clauses 46 – 58 and 71 – 72) and nuisance rough sleeping (clauses 59 – 72) of the CJB. I am grateful to have been invited by the Committee to give written evidence and so I do so independently from Crisis, and without payment. These are my independent opinions.
  
2. I deal with the following issues:
  - a. the existing powers available to police and local authorities in respect of behaviour whilst begging or rough sleeping;
  - b. the extent to which these provisions might be challengeable under the Human Rights Act 1998;
  - c. the extent to which support is available from the state to alleviate the need for begging.
  
3. It is my opinion that these provisions are unnecessary and that the problem that they purport to address is sufficiently addressed by existing criminal offences and

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<sup>1</sup> Luba, Davies, Johnston & Buchanan, LexisNexis, 6<sup>th</sup> edition, 2022

other powers available under the Anti-Social Behaviour Community and Policing Act 2014 (ASBCPA 2014). In addition, I consider that the Courts are likely to find some, or all, of these powers result in breaches of Article 8 (right to respect for private life) and potentially breaches of other Articles at Human Rights Act 1998, Schedule 1. I also consider that State support to alleviate the need for such begging is not universally available and cannot be relied on.

### **Existing powers**

#### **Mischief**

4. In the Government's *European Convention on Human Rights Memorandum* for the CJB, the mischief that these clauses are intended to address is put as "*crime, disorder and the social ills associated with nuisance rough sleeping and begging*" and to "*protect the public from the disruptions and distress and any health or safety risks, which arise from nuisance rough sleeping and begging*" [174]. "*Criminalisation of nuisance begging will prevent harassment, alarm, distress and nuisance. Persons who beg often adopt a persistent attitude, or harass individuals, and position themselves close to payment stations (such as ATMs, entrances to shops, railway stations and other public buildings). Such behaviour may lead to individuals feeling intimidated or harassed and/or to prompt more or less angry reactions that may degenerate. Additionally, it enables other persons to freely participate in public life, for example in obtaining money from ATMs, attending restaurants, using retail services. It may also protect the rights and freedom of the beggar by lowering the risk of organised begging (by preventing persons from so begging), and by acting as a disincentive to persons from begging thus assisting them in engaging with State support services. Prohibiting begging which poses a health and safety risks protects the health of others. It is also intended to help drive down wider anti-social behaviour ('ASB') and criminality, including violence and/or disorderly conduct towards persons who are nuisance begging, and incidents of violence and/or ASB between or by persons who are so begging.*" [182]

#### **Criminal law**

5. I am not a criminal lawyer. However, it seems to me that these concerns are adequately addressed by the following criminal offences, which permit a police officer to arrest the individual suspected:

- a. Public Order Act 1986 s 4 *“fear or provocation of violence”*:  
*“(1) A person is guilty of an offence if he—*  
     (i) *uses towards another person threatening, abusive or insulting words or behaviour, or*  
     (ii) *distributes or displays to another person any writing, sign or other visible representation which is threatening, abusive or insulting, with intent to cause that person to believe that immediate unlawful violence will be used against him or another by any person, or to provoke the immediate use of unlawful violence by that person or another, or whereby that person is likely to believe that such violence will be used or it is likely that such violence will be provoked.*  
*(2) An offence under this section may be committed in a public or a private place....”*
- b. Public Order Act 1986 s 4A *“intentional harassment, alarm or distress”*:  
*“(1) A person is guilty of an offence if, with intent to cause a person harassment, alarm or distress, he—*  
     (i) *uses threatening, abusive or insulting words or behaviour, or disorderly behaviour, or*  
     (ii) *displays any writing, sign or other visible representation which is threatening, abusive or insulting, thereby causing that or another person harassment, alarm or distress.*  
*(2) An offence under this section may be committed in a public or a private place...”*
- c. Public Order Act 1986 s 5 *“harassment, alarm or distress”*:  
*“(1) A person is guilty of an offence if he—*  
     (i) *uses threatening or abusive words or behaviour, or disorderly behaviour, or*  
     (ii) *displays any writing, sign or other visible representation which is threatening or abusive ,*  
*within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby.*  
*(2) An offence under this section may be committed in a public or a private place...”*

- d. Protection from Harassment Act 1997, s 2 “*offence of harassment*” which is defined as a breach of the following requirements:  
*“A person must not pursue a course of conduct—*  
     *(a) which amounts to harassment of another, and*  
     *(b) which he knows or ought to know amounts to harassment of the other.”*  
 Or  
*“A person must not pursue a course of conduct—*  
     *(a) which involves harassment of two or more persons, and*  
     *(b) which he knows or ought to know involves harassment of those persons, and*  
     *(c) by which he intends to persuade any person (whether or not one of those mentioned above)—*  
         *(i) not to do something that he is entitled or required to do,*  
         *or*  
         *(ii) to do something that he is not under any obligation to do.”* (ss 1 and 1A Protection from Harassment Act 1997)
- e. Fraud Act 2006, s 2 “*fraud by false representation*”.

6. In addition, there are of course offences such as common assault, actual bodily harm etc. I understand that the Modern Slavery Act 2015 and other legislation would cover crimes such as forcing another to beg.

### **Civil powers**

7. The ASBCPA 2014 contains a number of relevant powers, exercisable by the police and by local authorities:
- a. anti-social behaviour injunctions (which replaced anti-social behaviour orders (ASBOs)) whereby a Court can grant an injunction if satisfied on the balance of probabilities that the person has engaged or threatens to engage in anti-social behaviour and it is just and convenient to grant the injunction for the purpose of preventing the person from engaging in anti-social behaviour, and thus prohibit the person from doing anything described in the injunction (s 1), anti-social behaviour being defined as “*conduct that has caused, or is likely to cause, harassment, alarm or distress to any person*”, or

similar definitions which relate to nuisance behaviour experienced by neighbours/residents (s 2), a power of arrest can be attached where the Court is satisfied that the behaviour consists of or includes the use or threatened use of violence or there is a significant risk of harm (s 4), and breach of the injunction is a contempt of court;

- b. a power to direct a person who is in a public place in a specified locality to leave the locality, or part of it, and not to return for a specified period, where the constable has reasonable grounds to suspect that the behaviour of the person has contributed or is likely to contribute to members of the public in the locality being harassed, alarmed or distressed or to the occurrence of crime or disorder in the locality, and that the constable considers that giving the direction is necessary for the purposes of removing or reducing the likelihood of these events (s 35) and if the person fails to reasonable excuse to comply with it, she or he commits an offence (s 39), there are safeguards in that there must have been authorisation and the direction is limited to 48 hours;
- c. community protection notices, issued by police and/or local authorities, which require individuals to stop doing specified things, to do specified things, to take reasonable steps to achieve specified results, where the giver of the notice is satisfied that the conduct of an individual is having a detrimental effect, of a persistent or continuing nature, on the quality of life of those in the locality and the conduct is unreasonable (s 43), if the person fails to comply with it, she or he commits an offence (s 48), safeguards require the person has first been issued a written warning, and has continued with the conduct (s 43(5));
- d. public spaces protection orders, made by local authorities where they are satisfied that activities carried out in a public place have had a detrimental effect on the quality of life of those in the locality or it is likely that such activities will be carried on and will have such an effect, and that the effect or likely effect of the activities is, or is likely to be, of a persistent or continuing nature, is or likely to be, such as to make the activities unreasonable and justifies the restrictions, the order can prohibit specified things from being done in the restricted area and/or require specified things to be done, so as to prevent the detrimental effect from continuing,

occurring or recurring or to reduce that detrimental effect or reduce the risk of its continuance, occurrence or recurrence (s 59), again breach of the terms of the PSPO is a criminal offence (s 67).

8. The Court of Appeal has recently considered the scope of s 1 anti-social behaviour injunctions in the case of *Swindon Borough Council v Abrook*<sup>2</sup>. In that case, Mr Abrook had been made subject to several anti-social behaviour injunctions prohibiting him from begging, sitting on the ground or pavement in any public space, sitting within 20 metres of any pay and display parking machine, acting in a way which was likely to cause alarm harassment or distress to any person, having any needle or sharp or pointed object in any public places (other than objects required for the purposes of administering medication which had been lawfully prescribed), discarding any needle or sharp or pointed object in any public place, defecating or urinating in any public place, other than a public convenience. He breached the order and was sentenced. Subsequently a District Judge discharged the order because he was not satisfied that begging *per se* – including both passive and aggressive begging – could constitute anti-social behaviour. The Court of Appeal held that he was wrong to have discharged the order on procedural grounds, but also on substantive grounds. The test that the Court had to apply was firstly whether the person had engaged or threatened to engage in anti-social behaviour but secondly whether it was just and convenient to grant the injunction for the purpose of preventing that behaviour. That second condition required that the Court consider the seriousness of the behaviour, whether it warranted the Court's intervention and whether it would be better to make an order requiring positive action from the person rather than restraining conduct. The Court rejected the submission that passive begging could not fall within the definition of anti-social behaviour. It was a matter of fact to be considered in each individual case.
  
9. In short, therefore, anti-social behaviour injunctions are available to deal with any behaviour which a Court considers falls within "*conduct that has caused, or is likely to cause, harassment, alarm or distress to any person*". There is no doubt that this can include aggressive requests for contributions, or angry reactions.

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<sup>2</sup> [2024] EWCA Civ 221

10. The Committee will also know that local authorities have made PSPOs prohibiting rough sleeping (as Poole Borough Council did in 2017, see *R (Liberty) v Director of Legal Aid Casework*<sup>3</sup>). Government guidance on PSPOs subsequently advised against prohibiting begging or rough sleeping.

### **Conclusion on existing powers**

11. My conclusion is that existing powers, both in the criminal law and the various options available under the ASBCPA 2014, are sufficient to deal with the mischief at [182] of the *Human Rights Memorandum*. Persistent harassment (more than one occasion) is a criminal offence under Protection from Harassment Act 1997. Any form of abusive language or angry reaction would constitute a criminal offence under the Public Order Act 1986. Consumption of alcohol, display and use of needles in public can be prohibited by an anti-social behaviour injunction, community protection orders, dispersal directions or public space protection orders under ASBCPA 2014.

### **Human rights**

#### **Article 8: right to respect for private and family life**

12. The *Memorandum* acknowledges that these provisions are likely to engage Article 8 of the European Convention on Human Rights: right to respect for private and family life. This is correct from the European Court of Human Rights' decision in *Lăcătuș v Switzerland*<sup>4</sup>. In that case, a young woman was fined for begging on public streets on five occasions (she served a sentence of five days' imprisonment as she was unable to pay for the fine). There was no allegation of any threat to public order or inappropriate behaviour. The European Court of Human Rights found that there was an interference with her right to respect for her private and family life (Article 8). It found that the interference was not justified. The domestic provision was a blanket ban "*any person who has engaged in begging shall be punished by a fine*". The Court noted that bans in other Member States were usually, although not exclusively, bans on begging in aggressive or intrusive ways. In response to an argument that a blanket ban was necessary in order to combat human trafficking and in particular the exploitation of children, the Court doubted that penalised the victims of these

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<sup>3</sup> [2019] EWHC 1532 (Admin), [2019] 1 WLR 5185, Admin Ct.

<sup>4</sup> 14065/15

networks was an effective measure for combatting the phenomenon. It found that less intrusive measures were available. It concluded that the blanket ban was not justified as not proportionate and Article 8 had been interfered with. Having found that, the Court saw no reason to consider further arguments that the ban interfered with Article 10 (right to freedom of expression) or Article 14 (prohibition of discrimination).

13. As the Committee will know, Article 8 is a qualified right. Once engaged, the issue for the Court is whether interference can be justified ie the interference is in accordance with the law, necessary in a democratic society in the interest of national security, public safety, the economic well-being of the country, the prevention of disorder or crime, the protection of health or morals or for the protection of the rights and freedom of others (legitimate aims) and whether it is proportionate. When considering whether a measure is proportionate, the test to be applied is *“(1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter”*<sup>5</sup>.

14. This is the approach applied by the European Court in *Lăcătuș*. As set out above, the Court found that there was no direct link between the act of begging (without allegations of breach of public order etc) and the blanket ban, that less intrusive measures were available, and that the balance between the severity of the measure and the importance of the objective meant that the blanket ban was not proportionate.

#### Proportionality

15. I acknowledge that the provisions of the CJB do not amount to a complete blanket ban. However, parts of the provisions come close to amounting to a blanket ban. In addition, less intrusive measures are, in my opinion, available. It is also my view that

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<sup>5</sup> *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39, [2014] AC 700, per Lord Read at [74].



a Court is likely to find that the severity of the measure and its effect on an individual's rights outweighs the stated objective.

#### *Arguable blanket ban*

16. The part of the provision coming close to, or indeed amounting to, a blanket ban is the definition of "*nuisance begging*" at clause 57(2). A person will have committed "*nuisance begging*" if she or he begs at any of the ten locations specified. There is no additional requirement that the person has begged in a way that has caused or is likely to cause harassment etc. That is a separate part of the definition of "*nuisance begging*" at clause 57(3). It follows that a person merely sitting or standing at one of those location, and engaging in an act of asking for money (whether holding out a hand, asking passers by or simply sitting silently with a cup or cap or sign or some other indication) will have committed nuisance begging and thus be liable to removal, prevention orders and the possibility of a fine or sentence of imprisonment if he or she does not comply.

#### *Evaluative judgment on intention and future actions*

17. In addition, the various definitions of nuisance are not confined to specific acts which have taken place. A nuisance begging direction can be given where the authorised person is satisfied that a person is likely to engage in nuisance begging (so an assessment that someone was likely to sit in one of the ten locations and ask for money is sufficient). Similarly, "*nuisance begging*" at clause 57(3) (which does contain a requirement that there be some sort of offensive action) is not limited to past or present acts but includes the person being "*likely to cause*" harassment, alarm etc.

18. In respect of "*nuisance rough sleeping*", direction can be given where the authorised person is satisfied that a nuisance rough sleeping condition has been or is likely to be met (clause 59(1)). A nuisance rough sleeping condition can include where a person "*is intending to sleep rough (or gives the appearance that P is sleeping rough or is intending to sleep rough*" along with having committed a nuisance, or a member of P's group having committed a nuisance (clause 69(2) and (3)). The authorised person need only be satisfied that P is intending to sleep rough, or that P

has given the appearance that she or he is sleeping rough or intends to sleep rough. Further, although the definition at clause 69 refers to a nuisance having been, or being committed, in order to give the direction, there is no requirement that the nuisance has been, or is being committed. The authorised person must simply be satisfied that the condition (sleeping rough or intending to sleep rough and the commission of a nuisance) is likely to be met. This requires a great deal of evaluative judgment into P's future intentions by the authorised person. Is P intending to sleep rough? If P is intending to sleep rough, is it likely that she or he (or a member of a group) will commit a nuisance?

#### *Less intrusive measures*

19. I also consider that, since the provisions are aimed at “*nuisance*” begging and rough sleeping, and on the face of it, not at begging and rough sleeping in general, a Court will consider that the existing criminal law and civil remedies set out above constitutes less intrusive measures to combat the mischief described in the *Memorandum*. Those measures are sufficient to deal with nuisance behaviour and it would follow that the provisions are not proportionate.

#### *Balance between severity of measures and importance of objective*

20. Finally, on the Article 8 proportionality analysis, there is the issue of the severity of the measures (and impact on the person's right to respect for private and family life) as against the importance of the objective. The criminal offences are punishable by a fine and/or imprisonment. If a fine is imposed, , they will be driven to beg elsewhere in order to raise the money. In the case of a “*nuisance beggar*” who, for example, has simply requested money whilst sitting in one of the ten specified locations, the severity of a sentence of imprisonment seems disproportionate.

#### **Article 6: right to a fair trial**

21. Article 6 of the ECHR is also relevant. Article 6 provides “*[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law*”. It is my opinion that the making of these directions, notices and orders will be very difficult for an individual to challenge. As

set out above, a challenge might be appropriate, both in respect of the factual issues (was the person actually requesting money, sitting in the prohibited locations or committing nuisance?) and a human rights assessment.

#### Nuisance begging direction: no right to appeal

22. There is no challenge available to a nuisance begging direction at clause 46. It follows that anyone aggrieved having received a notice, and believing it to be unlawful, could only challenge by way of a judicial review claim, alleging an error of law. It is wholly unlikely that anyone served with a nuisance begging direction would be able to obtain legal advice, apply for legal aid and bring a judicial review challenge. As such, the legality of nuisance begging directions would simply never be considered or reviewed by a Court, either in general or in respect of an individual direction. It follows that there is no check on the authorised person's judgment that the test has been met or on his or her human rights assessment.

#### No legal aid available

23. There is provision for appeals against nuisance begging prevention notices and nuisance rough sleeping prevention notices. I cannot see, however, that legal aid would be available for these proceedings. There is no provision amending Schedule 1 Legal Aid Sentencing and Punishment of Offenders Act 2012, which sets out the scope of civil legal aid. Without legal aid being made available to bring an appeal, it is unlikely that many individuals would bring an appeal even to challenge the factual assessment of whether the test was met.

24. Further, without legal aid being made available for an individual to be represented when the Magistrates' Court is asked to make nuisance begging prevention orders and nuisance rough sleeping prevention order, there is a risk that a full judicial scrutiny of the test to be met, and of the human rights assessment when deciding whether to make those orders, will not take place if the individual is not represented. The Committee will understand that this is a cohort of people who are not in a position to pay for legal representation.

## Criminal offences

25. A person commits a criminal offence if she or he breaches any of the directions, notices or orders. There is authority that it is not possible to raise the validity of the notice or order (which it is alleged that she or he has breached) within those criminal proceedings: *Stannard v CPS*<sup>6</sup>. An individual could therefore be convicted for breach of a direction, notice or order, and fined or imprisoned without a judicial inquiry ever having taken place into whether the authorised person had been right to be satisfied that the test for making the direction or notice had been met and whether any human rights assessment had been lawfully carried out. This is a further concern in relation to the proportionality assessment under Article 8 as well as in relation to Article 6.

## **Other human rights Articles**

26. Finally, there may be interference with Article 9 (right to freedom of thought, conscience and belief, freedom to manifest one's religious or beliefs) if the effect of the measures were to prevent a person from being able to attend religious services, or pray as required etc. There may also be interference with Article 10 (freedom of expression) in so far as a person may want to explain the reasons for begging or even the simple expression of soliciting contributions (verbally or by way of a sign) and/or with Article 1 of the First Protocol (protection of property) if possessions are removed<sup>7</sup>.

## **Support available from local authorities and others**

27. I note that part of the Government's assessment that these provisions are compatible with Article 8, because they are proportionate, relies on support being available: "*state and third party support (such as financial support available through universal credit to assist with living costs and housing support from the State, or available charitable or familial support) is in many cases available in England and Wales*": *Memorandum* at [181].

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<sup>6</sup> [2019] EWHC 84 (Admin), [2019] 1 WLR 3229, Admin Ct.

28. I leave aside the factual issue as to whether a person might be begging if family or charitable support were available, and turn to the support available from the State.

### **Homelessness: Part 7 Housing Act 1996 (England)**

29. In terms of homelessness assistance from local housing authorities in England, it cannot be assumed that the State will provide accommodation. Part 7 Housing Act 1996 requires accommodation to be secured to a person who is homeless, eligible for assistance and has a priority need<sup>8</sup>. Being a rough sleeper is not a category of priority need in England<sup>9</sup>. A person would have to be vulnerable, or have some other form of priority need, for a local housing authority to accept an accommodation duty towards her or him under Part 7 Housing Act 1996<sup>10</sup>. The definition of “*vulnerable*” is where a person is significantly more vulnerable than an ordinary person if made homeless, or more at risk of harm without accommodation than an ordinary person will be<sup>11</sup>. By definition, this test is based on the assumption that there will be people who are street homeless who are not vulnerable. In addition, many people begging will have immigration statuses that render them not eligible for assistance under Part 7 Housing Act 1996.

### **Care Act 2014 support**

30. Assistance under Care Act 2014 is confined to those individuals whom the local authority assess as having a need for care and support which meets the relevant eligibility criteria: Care Act 2014 s 8. A need for accommodation is not a need for care and support falling with the eligibility criteria<sup>12</sup>. If the applicant has a need for care and support falling within the eligibility criteria, then accommodation may be

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<sup>7</sup> There would be domestic remedies in the form of an action for trespass to goods if goods are removed, not returned, destroyed or damaged but again this would require someone taking that action, possibly with the assistance of legal advice.

<sup>8</sup> Where a person does not have a priority need, but is homeless and eligible for assistance, the duty is to help that person to secure her or his own accommodation, but not to accommodate: s 189B(2) Housing Act 1996.

<sup>9</sup> In Wales, the categories of priority need were amended in 2022 to include “*a person who is street homeless*” (s 70(1)(k) Housing (Wales) Act 2014).

<sup>10</sup> The categories of priority need are at s 189(1) Housing Act 1996 and Homelessness (Priority Need for Accommodation) (England) Order 2002, SI No 2051.

<sup>11</sup> *Hotak v Southwark London Borough Council* [2015] UKSC 30, [2016] AC 811, SC.

<sup>12</sup> Set out at Care and Support (Eligibility Criteria) Regulations 2015, SI No 315.

provided but only where any care and support provided by the local authority would be effectively useless without also providing accommodation<sup>13</sup>.

### **Eligibility for welfare benefits**

31. Some people begging will not be eligible for Universal Credit or other DWP welfare benefits on the basis of their immigration status.
32. State provision, in order to alleviate the need for begging, cannot therefore be assumed to be available.

*(May 2024)*

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<sup>13</sup> *R (G) v Camden London Borough Council* [2015] EWHC 2579 (Admin) following the approach taken by the Supreme Court in respect of the predecessor statutory provision s.21 National Assistance Act 1948: *R (SL) v Westminster City Council* [2013] UKSC 27, [2013] 1 WLR 1445, SC.