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NFGLG
c/o DGLG
Offices 1-3,
Ladygrove Mill,
Ladygrove Road,
Two Dales,
Nr Matlock,
DE4 2FG
natglg@outlook.com
04.02.2020

The Rt. Hon Priti Patel,
Secretary of State for the Home Department
House of Commons,
LONDON,

Dear Secretary of State,

Re: Home Office Consultation on the strengthening of police powers of eviction of Gypsies and Travellers

We write on behalf of the organisations listed at the end of this letter and regarding the above consultation. Many of these organisation work with the Gypsy and Traveller communities to assist the establishment of lawful sites and equal access to health and educational needs. We have taken legal advice and are also aware that three Gypsies and Travellers are seeking to challenge the consultation. For the reasons outlined in this letter, we request that this consultation be immediately withdrawn.

We make this request for two main reasons: -

1. Based on the Cabinet Office Consultation Principles and the relevant law, we consider that this consultation is seriously flawed and should be withdrawn for that reason alone.
2. Following the judgment in the Court of Appeal in the case of *The Mayor and Burgesses of the London Borough of Bromley v Persons Unknown and Others* [2020] EWCA Civ 12, it is clear that the criminalisation of trespass would be unlawful, as explained further below.

The Consultation Principles and the law on consultation.

We make reference here to the Cabinet Office Consultation Principles 2018 (“the Consultation Principles”) and the law on consultations, including, in particular, the Supreme Court judgment in the case of *R (Moseley) v London Borough of Haringey* [2014] UKSC 56.

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The following principles are well-established: -

- A consultation should occur when proposals are at a formative stage.
- A consultation should give sufficient reason for any proposal to permit proper consideration.
- A consultation should allow adequate time for consideration and response.
- Consultations should be clear. The questions should be easy to understand and easy to answer.
- The demands for fairness are likely to be higher when the consultation relates to a decision which is likely to deprive someone of an existing benefit; and
- Although the consultation is not required to canvass every possible option, every viable option ought to be included. Public bodies should, therefore, consider including realistic alternatives in the consultation document so as to allow consultees an opportunity for intelligent consideration of the proposals and to respond in a way which enables them to participate meaningfully in the decision-making process.

In addition it should be noted that in *R (Royal Brompton & Harefield NHS Foundation Trust) v Joint Committee of Primary Care Trusts* [2012] EWCA Civ 472, it was held that a consultation exercise of proposals to reconfigure paediatric congenital cardiac services was unlawful, because the way in which the expert data submitted by consultees – and which was central to the analysis of responses – had been analysed was fatally flawed.

Why this consultation is flawed

Firstly, several of the consultation questions (especially questions 1-4) are ambiguous and misleading. They are worded in such a way as to make it (1) impossible for consultees who oppose the proposal to answer and (2) impossible for any useful analysis to be drawn from the replies. For example, the first question asks, “*To what extent do you agree or disagree that knowingly entering land without the landowner’s permission should only be made a criminal offence if it is for the purpose of residing on it?*”. A consultee who opposes the criminalisation of trespass in all circumstances has no way of answering this question. If they indicate that they agree, then they *could* be seen as consenting to the criminalisation of trespass, albeit “only” where it is for the purpose of residence. If they indicate that they disagree, then they *could* be seen as desiring the criminalisation of trespass in all circumstances. Equally, how is the government to treat the responses? Is a person who “strongly disagrees” to be taken as wanting all trespass to be criminalised or precisely the opposite outcome?

Secondly, the consultation wholly fails to include any other options but that of criminalising trespass. The April 2018 MHCLG consultation paper on the subject of unauthorised encampments and unauthorised development did at least include one question which addressed site provision. By way of contrast, the Home Office consultation paper makes no mention at all of site provision. In our view, the failure to address such an important matter is a fatal flaw in the consultation paper.

It is obvious that the provision of pitches, both permanent and transit, and the use of emergency stopping places and “*negotiated stopping places*” are credible solutions to the perceived “*problem*” of unauthorised encampments and should be put to consultees. This was recognised by the Court of Appeal in *The Mayor and Burgesses of the London Borough of Bromley v Persons Unknown and Others* [2020] EWCA Civ 12, referred to in more detail, which stated that there was:

...an inescapable tension between the article 8 rights of the Gypsy and Traveller community, and the common law of trespass. The obvious solution is the provision of more designated transit sites for the Gypsy and Traveller community. It is a striking feature of many of the documents that the court was shown that the absence of sufficient transit sites has repeatedly stymied any coherent attempt to deal with this issue. The reality is that, without such sites, unauthorised encampments will continue and attempts to prevent them may very well put the local authorities concerned in breach of the Convention.

We also note that there is a fundamental conflict in these proposals. The Welsh Government have realised the simple truth that site provision is the only answer and enacted a duty to meet assessed needs in section 103 of the Housing (Wales) Act 2014. This has already led to an improvement in the situation in Wales. However, if trespass is criminalised then that would lead to a bizarre and iniquitous situation in Wales, where a local authority that had not met its statutory duty (some 5 years after the duty was brought into force) could nevertheless request that the police remove Gypsies and Travellers who are trespassing on its land simply because they have nowhere else to go.

The implications of the Bromley judgment

In this case, the London Borough of Bromley (“Bromley”) sought an injunction which would prohibit Gypsies and Travellers from establishing unauthorised encampments on 171 parcels of land. In the High Court, the Judge refused this borough-wide injunction. Bromley appealed to the Court of Appeal against the refusal of the injunction. In their judgment of 21st January 2020, the Court of Appeal dismissed Bromley’s appeal. They laid down clear guidance to local authorities as to how they should approach the question of applying for any such wide injunction. It is clear that this guidance creates a high hurdle for local authorities, and it deals with such matters as transit provision, welfare considerations, the best interests of children, and alternative provision, such as by means of “*negotiated stopping*”. Giving the unanimous judgment of the Court of Appeal, Lord Justice Coulson stated (at para 109):

Finally, it must be recognised that the cases referred to above make plain that the Gypsy and Traveller community have an enshrined freedom not to stay in one place but to move from one place to another. An injunction which prevents them from stopping at all in a defined part of the UK comprises a potential breach of both the Convention and the Equality Act and in future should only be sought when, having taken all the steps above, a local authority reaches the considered view that there is no other solution to the particular problems that have arisen or are imminently likely to arise”.

Given this judgment, it is now apparent that the automatic criminalisation of trespass would, in itself, amount to an immediate breach of the European Convention on Human Rights and the Equality Act 2010.

For all these reasons, we would ask you to confirm that this consultation will now be withdrawn.

We look forward to hearing from you as soon as possible, given that the consultation is ongoing.

Yours faithfully,

Dr Siobhan Spencer MBE NFGLG (Trustee)

LIST OF ORGANISATIONS



Friends Families and Travellers



Traveller Movement

The logo for London Gypsies & Travellers is a bright pink rounded rectangle containing the text 'LONDON GYPSIES & TRAVELLERS' in white, uppercase, sans-serif font.

LONDON
GYPSIES &
TRAVELLERS

London Gypsies and Travellers



Leeds GATE



Travelling Ahead

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**DERBYSHIRE
GYPSY LIAISON
GROUP**



MOVING FORWARD

Derbyshire Gypsy Liaison Group



Irish Community Care



GATE Herts



York Travellers Trust



Advisory Council for the Education of
Romany and other Travellers

Brentwood Gypsy Support Group

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