



Bar Council response to HM Government consultation: 'Powers for dealing with unauthorised development and encampments'

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the HM Government consultation on powers for dealing with unauthorised development and encampments.
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3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

Questions 1-8

4. We have not answered these questions as they lie outside our experience, which is advising on and representing clients in litigation before the courts.

Question 9: What barriers are there to the greater use of injunctions by local authorities, where appropriate, and how might they be overcome?

5. There are two principal barriers to the use of civil injunctions by local authorities as a means of protecting land from unauthorised encampments: (1) they are likely to prove difficult to enforce in many cases; and (2) they are likely to be more expensive and cumbersome than other available procedures.
6. The difficulties with enforcement come from the fact that the local authority will often not know the names of the parties who have set up an unauthorised encampment or who have threatened to do so. While, in principle, it may be possible to seek and obtain an injunction against 'persons unknown' (the formula used when possession of land is sought from

squatters whose identity is unknown), it will not be possible to enforce the order against them. The principal remedy for the enforcement of civil injunctions is committal for contempt of court. One cannot practically make a committal application against parties whose identity is unknown. For this reason, ordinary civil injunctions are rarely likely to be of use as a means of dealing with unauthorised encampments.

7. The enforcement of injunctions by committal must be contrasted with the ease of enforcing an order for possession. A committal application requires papers to be prepared, issued and served and then there must be a further hearing in court. But when a warrant of possession is enforced against trespassers, the enforcement officers will remove anyone found on the land, meaning that the land will be cleared as soon as enforcement can be arranged, which can potentially be on the same day as the order is made.

8. It will usually be simpler for a landowner to commence possession proceedings against trespassers than to seek an injunction. Possession proceedings against trespassers who have entered land without permission are very simple and inexpensive to prepare as the claimant need only prove it owns an interest in the land in possession and that the trespasser has no permission to be there. In contrast the preparation for an application for an injunction is likely to be more onerous, at least to some extent, and especially if the claimant seeks a pre-emptive injunction to prevent a threatened trespass. Furthermore, an application for an injunction is likely to be only for an interim injunction in the first instance, which means that the time and expense of further hearings may be necessary.

9. In our experience, there are two situations in which an injunction may be effective in a case of trespass. The first is when the landowner owns other land nearby and fears that the trespassers may move to that other land when a possession order is enforced. In these cases, while the injunction is no more capable of enforcement than in the ordinary case, it may deter them from moving onto the land that is subject of the injunction. The second is where the trespass is threatened, and has not yet taken place, in which circumstances possession proceedings would be premature, and an application for a protective injunction would be the only remedy available to the landowner.

Question 10

10. We have no comment in answer to this question.

Question 11: Are there ways in which court processes might be modified in a proportionate way to ensure unauthorised encampments can be addressed more quickly?

11. Yes. While some county courts are willing to make time for urgent trespasser-possession claims, other are not. Our experience is that it can often be difficult to have a trespasser-possession claim heard in less than a week or two weeks. This could be improved by county courts ensuring that such claims are listed in the shortest timescale possible. While it is understood that many courts are overburdened with cases, this kind of claim rarely needs more than a few minutes of court time. Very often the trespassers do not even appear at court.

12. In very urgent cases, where there is a risk of harm or serious property damage, a claimant is able to issue a claim for possession against trespassers in the High Court (see the Practice Note on Possession Claims against Trespassers: Civil Procedure 2018, vol. 1, page 2024). This is a very useful facility as it is usually possible for a claim to be heard on the same day as it is issued. However, it is rarely possible to follow the Practice Note procedure as the relevant Master will often (understandably) not be available on demand and, given the need to issue and serve the proceedings before the claim can be heard, it will often not be possible to wait for him or her to become available. In practice, in our experience, these claims will often end up being heard by the Judge dealing with the relevant interim-applications list.

13. This means that there will have been no opportunity to speak to the judge hearing the case before it is heard, in particular about how service of the claim is to be effected. Unless the property that is the subject of the claim is very close to the court, it will usually not be possible to serve the issued proceedings and to have the hearing on the same day or, at least, for the hearing to be long enough after service to allow the trespassers to travel to court. The claimant is left to improvise and to hope that the judge is satisfied with what has been done, for example by serving the unissued papers together with a notice informing the trespassers of the time that the claimant expects the claim to be heard. The unsatisfactory result is that the claimant is not certain of getting a possession order, the trespassers may choose not to react to the unissued papers that they receive, and judges are left to improvise solutions to balance the parties' interests, for example permissions-to-apply or return dates.

14. The Practice Note could be improved by setting out what is expected of claimants in this situation, perhaps with a checklist of the steps that a Judge will expect the claimant to have taken in order to attempt service. This would also benefit trespassers: often they are very well informed about their rights and about court procedures, as is evident from the notices they often place on the squatted land warning the landowner to obtain a court order before evicting them; if there were clear guidance about the court's expectations in these circumstances, they would be better placed to choose whether and how to react to receiving unissued court papers.

Question 12: In your view, what would the advantages and disadvantages be of extending the IPO process to open land?

15. The obvious advantage to the landowner is that any deterrent effect of an IPO can be extended to open land. IPOs will become far more available and may be used more often against the travelling community, as unauthorised encampments will more usually be on open land than in buildings and the land appurtenant to them. The corresponding disadvantage from the perspective of that community is that the severe penalty contained in S.76(4) of the Criminal Justice and Public Order Act 1994 may be applied to many more people than before.

16. But we would comment that the IPO is not an especially useful tool for dealing with trespassers unless there are large numbers of them. The procedure for obtaining an IPO is longer than for a simple possession claim. If the court can accommodate an urgent hearing of a possession claim (even without abridging the timescales in Part 55 of the Civil Procedure Rule 1998), that is likely to be quicker.

17. Often an IPO will be less easy to enforce than a possession order. The effect of an IPO is that trespassing on the land becomes a criminal offence 24 hours after the order has been served. Enforcement of the order depends on the availability of sufficient police willingness and resources to clear the land. Sometimes these are lacking, or they take time to arrange. By contrast a possession order against trespassers can be enforced immediately (subject to the terms of the order) by enforcement officers arranged and paid for by the landowner. Often these officers will be on standby waiting to enforce the order immediately after the hearing.

18. Given the limited number of open sites that can be accessed by the travelling community and given that sometimes – even with the best planning – it may be unavoidable to pass a night at a particular location, the criminalisation of trespass on such open land and the disproportionate effect on the members of that community may not be justified by the benefits to landowners in protecting their property rights.

Question 13: Are you aware of any specific barriers which prevent the effective use of current planning enforcement powers?

Question 14: If you are aware of any specific barriers to effective enforcement, are there any resourcing or administrative arrangements that can help overcome them?

Question 15: Are you aware of any specific barriers which prevent the effective use of temporary stop notices? If so, do you have a view on how these barriers can be overcome?

19. These questions appear to be directed towards local planning authorities and aimed at understanding what might discourage or indeed prevent some of them from utilising the existing enforcement powers available under Town and Country Planning Act 1990 ('the 1990 Act'), outside of the powers themselves (as set out in the Government's Summary Powers document "*Dealing with illegal and unauthorised encampments*" ('the Summary Powers document')).

20. It is noted that some authorities do make effective use of these powers, which are amongst the wider range of powers listed in the aforementioned document, which were described as robust. The sorts of barriers therefore that the consultation is seeking examples of do not in our view relate to the nature of the powers themselves being a 'barrier' as such. To that end, therefore, we consider that these questions are clearly best answered by the planning authorities.

21. However, for completeness and in light of the question below, which is directed at the nature of the legislation and legal process, we have given consideration as to whether lawful compliance with any of the legislative requirements under the 1990 Act per se might act as 'barriers' to using these powers in respect of addressing unlawful development by Gypsies & Travellers.

22. In our view, the statutory process and the checks and balances required of authorities taking any enforcement action are important and necessary. We would also seek to discourage the development of a separate enforcement process in respect of different types of unlawful development, in particular on the basis of the cultural identification of the persons carrying out that specific type of development, in light of the Equality Act 2010 and in accordance with basic rule of law.

23. We would make the general observation in this context, however, that there are many examples of unauthorised Gypsy & Traveller encampments which arise where the land has been lawfully purchased and an application for retrospective planning permission is submitted at the same time as or shortly after the owners move on to the land. As a matter of law, there is clearly no trespass or criminal activity in this action — a breach of planning law only becomes an offence after a valid enforcement notice has not been complied with within the relevant period.

24. This feature of planning law is not in our view a ‘barrier’ to effective enforcement but helps to provide further context for the options presented to planning authorities in terms of taking any more direct action to remove Gypsies & Travellers from sites or at least to address any planning harm. In other words, in such circumstances the service of an enforcement notice and thereafter allowing any appeal process to be gone through is the clearest action an authority can properly take. The authority clearly also does have the option of seeking an injunction which prevents further development from taking place.

25. Again, in terms of the context for effective enforcement action, we would point out that once an enforcement notice is in place however and, if it has been subject to any appeal or statutory challenge, has been upheld, then s.70C of the 1990 Act operates to prevent what was seen as an abuse of the planning regime. The abuse in question was the delay to further direct enforcement action caused by applications for retrospective planning permission once an enforcement notice was validly in place (as noted by the courts e.g. R (Wingrove) v Stratford-on-Avon District Council [2015] EWHC 287 (Admin) Cranston J [30]).

26. On a select issue however, we would point to the difficulty the courts have with regard to committal proceedings in respect of early interim injunctions to prevent further development taking place prior to determination of a retrospective application or an enforcement appeal. The issue is often that the requisite service upon the relevant parties cannot be easily achieved, as it is not always possible to identify them at the time. This issue can right itself, but at a much later stage when further unlawful development may well have taken place.

Question 16: How do you think the existing enforcement notice appeals process can be improved or streamlined?

27. The consultation refers at paragraph 37 without detail to a proposal that the enforcement notice appeals process be “*streamlined so that [Gypsy & Traveller related enforcement] appeals can be determined more quickly, and action against unauthorised development taken sooner*”.

28. We note and agree with the specific recognition in paragraph 37 of the consultation that any changes to the planning enforcement regime and the appeal process under Pt VII of the 1990 Act would have to apply to all enforcement notice appeals. In other words, any changes proposed, in order to be lawful and in accordance with the rule of law, could not differentiate between the speed with which an appeal under s.174 of the 1990 Act by a gypsy or traveller is addressed and an appeal by a member of the settled community. To that end, a wider review of the enforcement appeal process as a whole would be the appropriate means of addressing this issue in the Bar Council’s view.

Question 17: How can Government make existing guidance more effective in informing and changing behaviour?

Question 18: If future guidance was issued as statutory guidance, would this help in taking action against unauthorised development and encampments?

29. The Guidance referred to in paragraph 38 of the consultation is the Summary Powers document. Further guidance to planning authorities is also clearly provided in “*Planning policy for traveller sites*” published in August 2015 which is mentioned then in paragraph 40. As a general comment, the Bar Council would support the production of any guidance which provides greater clarity to authorities and Gypsies & Travellers. The Summary Powers document is not guidance as such but a helpful list of the powers available to authorities.

30. In terms of changing behaviour (both of authorities and Gypsies & Travellers) we would make the general point again that clear information in respect of the likely consequences of any action can only assist in the choices made.

Question 19: Are there any specific barriers to the provision of more authorised permanent and transit sites? If so, is there any action that the Government could take to help overcome those barriers?

31. The Department for Communities and Local Government’s Planning Policy for Traveller Sites (PPTS) provides policy which must be taken into account in the preparation of development plans and is a material consideration in planning decisions. It sets out under

Policy B the approach to be adopted by planning authorities to the issue of Gypsy & Traveller needs and site provision in preparing their development plans.

32. In our view, it is clear that there are a number of tensions within this policy document which do not in themselves create 'barriers' as such to effective authorised Gypsy & Traveller site provision but which potentially allow for there to be confusion as to what authorities need to do or the assessments to be made as to the suitability and acceptability of sites for Gypsies & Travellers.

33. The Bar Council makes these points below under Q22.

Question 20: What impact would be extending local authority, police or land owner powers have on children and families and other groups with protected characteristics that public authorities must, in the exercise of its functions, have due regard to under their Public Sector Equality Duty?

Question 21: Do you expect that extending the powers referred to above would have a positive or negative impact on the health or educational outcomes of Gypsy, Roma and Traveller communities? If so, do you have any evidence to support this view, and/or suggestions for what could be done to mitigate or prevent any negative impacts?

34. The consultation does not make it clear what is envisaged by these questions or in what way local authority and police powers or landowner rights would be extended or altered. We therefore would simply refer back to the points made above with regard to ensuring fairness and equality of treatment.

Question 22: Do you have any other comments to make on the issue of unauthorised development and encampments not specifically addressed by any of the questions above?

35. There is a direct tension in the PPTS, in the Bar Council's view, in terms of the identification of the need for suitable sites for Gypsy & Travellers required of local authorities and the limits placed upon what can amount to a suitable site. This can consequently lead to a local authority being able to show it cannot address these needs.

36. We would draw attention to for example the guidance given in respect of potential sites in the Green Belt (see paragraphs 24 and 16). The test for altering the Green Belt is one of exceptional circumstances at the plan making stage and, in light of Gypsy & Traveller sites being inappropriate development per se, the requirement to show very special circumstances at a planning application stage. The PPTS confirms the Government's view in relation to the latter requirement that "*personal circumstances and unmet need are unlikely to clearly outweigh harm to the Green Belt and any other harm so as to establish very special circumstances*" subject only

to “*the best interests of the child*”. With regard however to the plan making stage, no guidance is given as to what or how that test would translate to meet the slightly different test or even if it could. It would appear therefore that Green Belt sites would never be considered suitable for allocation in local plans.

37. In addition, in terms of limits on how to address the assessed Gypsy & Traveller needs, policy C and paragraph 25 also make it seemingly very difficult for authorities to allocate Gypsy & Traveller sites in their local plans on sites outside of settlements.

38. This is because on the one hand authorities are told they must “*very strictly limit new traveller site development in open countryside that is away from existing settlements or outside areas allocated in the development plan*” but also “*should ensure that sites in rural areas respect the scale of, and do not dominate, the nearest settled community, and avoid placing an undue pressure on the local infrastructure*”. As a consequence, large sites are discouraged from being allocated to avoid being dominant, but equally whilst smaller individual sites may be acceptable there is a risk of a cumulative impact having a dominating effect or undue pressure from a series of smaller sites.

39. We would suggest that clarity is required such that authorities can more effectively seek to meet identified need.

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