

Response of the Equality and Human Rights Commission to the Consultation:

Consultation details

Title:	Response of the Equality & Human Rights Commission to the Department for Communities & Local Government's Consultation – 'Ensuring Fairness in the Planning System'
Source of consultation:	DCLG
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Introduction

1. The Equality and Human Rights Commission ('the Commission') is Britain's independent National Human Rights Institution. It has 'A' status under the United Nations' Paris Principles, and is under a statutory duty to encourage compliance with the United Kingdom's obligations under human rights law.
2. There are several international law obligations relevant to DCLG's proposals on the planning system, which are mentioned in this consultation response as they arise. In particular, the United Kingdom is a signatory to Article 27 of the United Nations' International Covenant on Civil & Political Rights, and to the Council of Europe's Framework Convention on Minority Rights. The Commission wishes to draw DCLG's particular attention to these provisions.
3. The Commission has published research on the difficulties facing Gypsies and Travellers in the context of planning law. This is available at the following links and, again, DCLG is invited to have

regard to its findings when considering how to respond to the outcome of this consultation.

- Inequalities experienced by Gypsy and Travellers Communities. A Review

http://www.equalityhumanrights.com/sites/default/files/documents/research/12inequalities_experienced_by_gypsy_and_traveller_communities_a_review.pdf

- Research report 13: Assessing local housing authorities' progress in meeting the accommodation needs of Gypsy and Traveller communities in England.

<http://www.equalityhumanrights.com/publication/research-report-13-assessing-local-housing-authorities-progress-in-meeting-the-accommodation-needs-of-gypsy-and-traveller-communities-in-england>

- Gypsies & Travellers: Simple solutions for living together.

http://www.equalityhumanrights.com/sites/default/files/documents/gypsies_and_travellers.pdf

4. Finally, the Commission draws DCLG's attention to the relevance of the public sector equality duty (PSED) in this context. The PSED requires public authorities, in the exercise of their functions, to have due regard to the need to:
 - Eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Equality Act 2010.
 - Advance equality of opportunity between people who share a protected characteristic and those who do not.
 - Foster good relations between people who share a protected characteristic and those who do not.
5. The Commission does not consider that these requirements are adequately considered in the Equality Impact Statement (EIA) which accompanies these proposals.

Q1 – Do you agree that the planning definition of travellers should be amended to remove the words “or permanently” to limit it to those who have a nomadic habit of life? If not, why not?

Overview

1.1 The Commission disagrees with the proposed amendment.

1.2 Gypsies and Travellers often find it difficult to practice a nomadic habit of life, because of difficulties in obtaining adequate stopping places, or because of the need to fit a nomadic habit of life around the educational needs of their children. In addition, older Gypsies and Travellers, or those with health problems or caring responsibilities may not be as able to travel.

1.3 If the proposed amendment were to be made, in order to be eligible for consideration under planning policies relating to Travellers, individuals would have to demonstrate, to the satisfaction of a planning officer, that they were at any particular moment in time practising a 'nomadic habit of life'. That added requirement would render it even more difficult for members of the Traveller community to enjoy conditions enabling them to practice their cultural traditions including a nomadic habit of life. Although many Gypsies and Travellers now live in conventional 'brick and mortar' accommodation, for many this is because of the lack of any viable alternative. The narrowing of existing planning guidance for Gypsies and Travellers would lead to further involuntary assimilation of individuals who wish to retain their traditions.

1.4 The Commission considers that the current definition of Gypsies and Travellers under the Planning Policy for Traveller Sites ("PPTS") is restrictive. To restrict it further would exclude an even higher proportion of Gypsies and Travellers from the policy.

Impact upon the most vulnerable

1.5 DCLG appears to recognise that the proposal would have the heaviest impact upon *“the elderly who no longer travel due to reasons related to ill health or disability. Similarly, it would also impact on children and young people including those with disabilities or special educational needs who use a settled base in order to access education; as well as*

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women who have ceased to travel in order to care for dependents". These people are still members of the Traveller community, but some of the most marginalised members. They may wish to live with other members of that community and some of the younger ones may wish to learn and in future enjoy a traditional nomadic way of life, having enjoyed the same educational opportunities as other children and had the opportunity to mix with them and to foster good relationships with them.

1.6 At present, neither the proposal nor the EIA treats the best interests of children as a primary consideration. The ability of children to live with their family and to enjoy their culture without the price for this being a loss of educational opportunities is an important one. The Minister is required to treat the best interests of these children as a primary consideration and not to override it without truly proportionate justification (see United Nations Convention on the Rights of the Child; *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4).

1.7 Despite recognising the disproportionate impact that the change would have on children, the discussion of the proposed amendment does not address their best interests, and in the Commission's analysis, proportionate justification is not advanced for putting it forward.

1.8 The proposed amendment would further limit the economic opportunities available to Gypsies and Travellers. Indeed, applicants for planning permission to stay in one place already have to show they are nomadic for economic purposes, but they need somewhere permanent to live precisely because it is increasingly impossible to live an economically viable nomadic life.

Contrary to the overarching aim of facilitating the traditional and nomadic way of life

1.9 The stated aim of the PPTS is as follows:
"the Government's overarching aim is to ensure fair and equal treatment for travellers, in a way that facilitates the traditional and nomadic way of life of travellers...".

However, the proposed amendment would exclude from the protection of the PPTS ethnic Gypsies and Travellers who have travelled but have ceased to do so for health or other reasons; and others who identify with the cultural traditions of the Gypsy and Traveller group. This would specifically affect Romani Gypsies and Irish Travellers, both of whom have been held to be a separate ethnic group for the purposes of equality law (see *Commission for Racial Equality v Dutton* [1989] QB 783 CA; *P O'Leary v Allied Domecq* (unreported) 29 August 2000 (case no CL 950275-79)).

1.10 These individuals would no longer benefit from policies whose rationale is to protect their traditional way of life. This would also make it more difficult for other members of the group to enjoy the traditional way of life, since it would be difficult for them to do so if other (perhaps dependent) members of the community were not also protected. The proposed amendment would therefore defeat the stated aim of the PPTS.

Legality of the definition

1.11 The EHRC considers that the proposed amendment would be inconsistent with the Government's obligations under both domestic and international law in relation to the protection of minorities.

1.12 The Ministerial Code places an "overarching duty" on Ministers to comply with international law and treaty obligations of the United Kingdom (see paragraph 1.2 of the Ministerial Code of May 2010).

1.13 The UK is party to several international instruments, which impose obligations in respect of the protection of minority groups, such as Gypsies and Travellers:

- There is a relevant obligation owed to Gypsies and Travellers under Article 8 of the European Convention on Human Rights (ECHR), binding on all public authorities pursuant to section 6 of the Human Rights Act 1998. This obligation was summarised by the European Court of Human Rights in *Chapman v UK* (2001) 33 EHRR 18 as follows:

The vulnerable position of gypsies as a minority means that some special consideration should be given to their needs and their different lifestyle both in the relevant regulatory planning framework and in arriving at decisions in particular cases. To this extent there is thus a positive obligation imposed on the Contracting States by virtue of Article 8 to facilitate the gypsy way of life [96].

- The UK is a party to the European Framework Convention for the Protection of Minorities (“Framework Convention”). Article 4(2) states:

The Parties undertake to adopt, where necessary, adequate measures in order to promote, in all areas of economic, social, political and cultural life, full and effective equality between persons belong to a national minority and those belonging to the majority. In this respect, they shall take due account of the specific conditions of the persons belonging to national minorities.

- Article 5 further states:
 1. *The Parties undertake to **promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture**, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage.*
 2. *Without prejudice to measures taken in pursuance of their general integration policy, the Parties shall **refrain from policies or practices aimed at assimilation** of persons belonging to national minorities against their will and shall protect these persons from any action aimed at such assimilation.*
- The UK is party to the International Covenant on Civil and Political Rights (“ICCPR”). Article 27 of that treaty sets out:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other

members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

- In general comment 23 on Article 27, the Human Rights Committee clarified:

...positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise their religion, in community with the other members of the group. In this connection it has to be observed that such positive measures must respect the provisions of articles 2.1 and 26 of the Covenant both as regards the treatment between different minorities and the treatment between the persons belonging to them and the remaining part of the population. However, as long as those measures are aimed at correcting conditions which prevent or impair the enjoyment of the rights guaranteed under article 27, they may constitute legitimate differentiation under the Covenant, provided they are based on reasonable and objective criteria [6.2].

1.14 Thus, the United Kingdom has duties in international law to which it has subscribed to protect the Gypsy way of life. These obligations include the duty to take positive measures where necessary, and include an obligation on the Government to support caravan-living, which is one of the fundamental cultural traditions of this minority group. In *Chapman v UK*, a case relating to the refusal of planning permission for a gypsy to station a caravan on her land, the European Court of Human Rights stated:

*The Court considers that the applicant's occupation of her caravan is an **integral part of her ethnic identity as a gypsy**, reflecting the long tradition of that minority of following a travelling lifestyle. **This is the case even though, under the pressure of development and diverse policies or from their own volition, many gypsies no longer live a wholly nomadic existence and increasingly settle in one place** in order to facilitate, for example, the education of their children. Measures which affect the*

applicant's stationing of her caravans have therefore a wider impact than on the right to respect for home. They also affect her ability to maintain her identity as a gypsy and to lead her private and family life in accordance with that tradition [73].

1.15 However, even the current definition excludes a substantial proportion of the Gypsy and Traveller minority group from the benefit of the PPTS aimed at facilitating the "traditional and nomadic" way of life (including caravan-living). The proposed amendment to exclude individuals who have ceased to travel, whether permanently or temporarily, would be a positive departure from the UK's international law obligations.

1.16 The question of whether an individual is a member of a minority cannot simply be a functional test as the Government proposes. Gypsies are not Gypsies merely because they travel – their membership of that group is also both a question of ethnicity and cultural identity.

1.17 Thus Article 3(1) of the Framework Convention states:

*Every person belonging to a national minority **shall have the right freely to choose to be treated or not to be treated as such** and no disadvantage shall result for this choice or from the exercise of the rights which are connected to that choice.*

1.18 This Article recognises the universal right of self-identification.

1.19 The protection in Article 27 of the ICCPR expressly includes **ethnic** minorities. Its protections extend to ethnic members of the Gypsy and Traveller community, such as Romani Gypsies and Irish Travellers (as recognised above). The United Nations has held that those who identify as members of a minority ethnic group on objective grounds will be also regarded as such in international law.

1.20 The Commission therefore has reservations that the UK would breach Article 27 ICCPR were it to amend the definition of 'gypsy and traveller' as proposed for the purposes of planning policy, in a way which excluded those who had been brought up to regard themselves as Gypsies and Travellers, who had kept ties with that community and wished to maintain them.

The 'Berry' case

1.21 DCLG will wish to consider the likely approach of courts in the light of the *Berry* litigation. That case was decided before the European Framework Convention on Minority Rights was in force.

1.22 The proposed amendment would return the definition of Gypsy status to something very similar to that which was in force prior to the introduction of the present definition, which was introduced in its present form by Circular 1/06 in 2006.

1.23 The previous definition was subject to challenge in *Wrexham CBC v The National Assembly for Wales and Berry* [2002] EWHC 2414 Admin, on the basis that it excluded Mr Berry because he had become too old and too ill to travel for work. An expert planning judge in the High Court, Mr Justice (now Lord Justice) Sullivan allowed Mr Berry's appeal, stating:

*I can see nothing in the judgments [of earlier cases] to suggest that had the Court of Appeal been confronted with what might be described as a "retired" gypsy, it would have said that he ceased to be a gypsy because he had become too ill and/or too old to travel in order to search for work. **In my judgment such an approach would be contrary to common sense and common humanity.** As a matter of common sense, the time comes for all of us, gypsy and non-gypsy, when we become too old and/or too infirm to work. Old habits, whether nomadic or not, die hard. It could not be right for a gypsy who had been living all his life on a gypsy caravan site or sites while he was young enough and fit enough to travel to seek work to be told when he reached retirement age that he had thereby ceased to be a gypsy for the purposes of the application of planning policy. **It would be inhuman pedantry to approach the policy guidance in circulars 2/94 and 76/94 on that basis** [20].*

1.24 Ultimately the Court of Appeal overturned Sullivan J's decision, but nonetheless the Government responded by introducing Circular 1/06 which amended the definition to include persons who "on the grounds only of their own or their family's or dependants educational or health

needs or old age have ceased to travel temporarily or permanently” (the current PPTS definition).

1.25 The Commission urges DCLG to consider substituting for the current definition a more inclusive one, in line with the definition currently adopted in the Housing Act 2004.

Practical problems of enforcement

1.26 The Commission also considers that there would be practical problems of enforcement in the application of the proposed definition by local authorities.

1.27 The change would introduce a considerable burden on already overstretched local authorities which would have to demand, and assess, significant amounts of information relating to “gypsy status”. Even after such an assessment, it would not always be clear-cut whether an individual had ceased travelling permanently.

Q2 – Are there any additional measures which would support those travellers who maintain a nomadic habit of life to have their needs met? If so, what are they?

2.1 The Commission’s analysis is that the best way to ensure that Travellers have their needs met is to reintroduce the duty on local authorities to provide sites for Gypsies and Travellers, as was previously required under the Caravan Sites Act 1968 (and as has occurred in Wales). Reintroducing this duty would also relieve the pressure of inappropriate private applications for development in the green belt, which the Commission is aware are a matter of concern to DCLG. It is unlikely that the 350 local authority Gypsy and Traveller sites which currently exist in England would have existed without that duty. Unless suitable provision is put in place to ensure that Gypsies and Travellers have equal access to land available to meet their reasonable housing needs, enforcing with particular vigour against planning applications by Gypsies and Travellers may be unlawfully discriminatory.

2.2 Provision of adequate sites for Gypsies and Travellers would also remove the pressure upon those who wish to practise a nomadic habit of life from parking illegally on roadsides or as visitors at other Gypsies’

sites. This would contribute to the need (mandated by section 149(1)(c) Equality Act 2010) for DCLG to foster good relations between Gypsies and Travellers and other communities.

2.3 Reintroduction of the duty should be supported by top-down monitoring and enforcement by central government, to ensure compliance. Strong central oversight of the provision process is necessary if Gypsies and Travellers' needs are to be met. The failure of successive governments to ensure local authorities complied with the duty when it was in place meant that insufficient sites were built, and this has led to the current situation of inadequate provision of sites.

Q3 – Do you consider that a) we should amend the 2006 Regulations to bring the definition of “Gypsies and Travellers” into line with the proposed definition of “travellers” for planning purposes, and b) we should also amend primary legislation to ensure that those who have given up travelling permanently have their needs assessed? If not, why not?

3.1 The Commission strongly disagrees with either suggested amendment. For the reasons set out in the answer to question 1 above, any such amendment would weaken the protection of traditional lifestyles, especially for some of the most marginalised Gypsies and Travellers, and would be contrary to the United Kingdom's international obligations.

PROTECTING SENSITIVE AREAS AND THE GREEN BELT

Q4 – Do you agree that Planning Policy for Traveller Sites be amended to reflect the provisions in the National Planning Policy Framework that provide protection to these sensitive areas? If not, why not?

4.1 We do not consider that there is any need for PPTS to be amended in this way. It is already intended to be, and capable of being, read consistently with the protections contained in the National Planning Policy Framework. Paragraph 1 of the PPTS specifically states “*This document sets out the Government's planning policy for traveller sites. It should be read in conjunction with the National Planning Policy Framework*”. There is no evidence that the protections for sensitive

areas are not being applied in the context of applications for permission for Traveller sites

Q5 – Do you agree that paragraph 23 of Planning Policy for Traveller Sites should be amended to “local authorities should very strictly limit new traveller sites in the open countryside”? If not, why not?

5.1 In the Commission’s analysis there is no need for this proposed amendment. Development in open countryside, whether for new Traveller sites or for new settled housing, is already appropriately and strictly controlled.

5.2 Tightening the restrictions on Traveller sites alone in the open countryside would, in our analysis, further contribute to the already acute shortage of available Traveller sites.¹ Indeed, it is difficult to find such sites within urban areas, given the cost of land within settlements, the competition for such land from developers and the likely conflict that a proposed site for Gypsies and Travellers would cause to policies designed to ensure that such land is used to its capacity.

Q6 – Do you agree that the absence of an up-to-date five year supply of deliverable sites should be removed from Planning Policy for Traveller Sites as a significant material consideration in the grant of temporary permission for traveller sites in the areas mentioned above? If not, why not?

6.1 The Commission disagrees with this proposal. In the absence of any enforceable duty upon local authorities to provide sufficient Traveller sites, the absence in fact of any such sites is a material consideration in deciding whether in practice a Gypsy or Traveller can practise his or her traditional lifestyle. It would impose a disproportionate detriment on Gypsies and Travellers not to take this factor into account as a significant material consideration as to the grant of temporary planning permission while a permanent site was sought: indeed, it would risk criminalising Gypsies and Travellers (for breaching enforcement notices) simply because they have nowhere else to go.

¹ See P Brown and P Niner, “Assessing local housing authorities progress in meeting the accommodation needs of Gypsy and Traveller communities in England” (2009)

6.2 It would also remove one impetus upon local authorities to take practical and realistic steps to deliver the necessary five-year supply of land so as to afford to Gypsies an equal opportunity with members of the settled community to live in ways they value and would choose.

Q7 – Do you agree with the policy proposal that, subject to the best interests of the child, unmet need and personal circumstances are unlikely to outweigh harm to the Green Belt and any other harm so as to establish very special circumstances? If not, why not?

7.1 Gypsies and Travellers are proportionately far more likely than members of the settled community to have an unmet need for housing.

7.2 The Commission therefore disagrees with the suggestion that 'unmet need and personal circumstances' are unlikely to amount to very special circumstances.

7.3 The test for identifying 'very special circumstances' has been developed through the courts. It ensures that permission is granted in only the most meritorious cases.

7.4 The proposed change would appear to be setting a higher threshold for the grant of planning permission for Gypsy sites in the Green Belt than that which applies for housing developments.

Q11 – Would amending Planning Policy for Traveller Sites in line with the proposal set out in paragraph 4.16 above help that small number of local authorities in these exceptional circumstances? If not, why not? What other measures can Government take to help local authorities in that situation?

11.1 Aside from Dale Farm case, the government has put forward no evidence that there is a significant problem with large-scale unauthorised sites. Such large-scale sites are very unusual. Indeed the government itself recognises this as it refers to those cases as "highly exceptional" in the consultation [4.12].

11.2 There are already adequate enforcement powers to deal with any situations of unauthorised occupation, and the government has not put

forward evidence to demonstrate that those powers are incapable of addressing cases of large-scale occupation, if there are examples apart from the one-off Dale Farm incident.

11.3 The Commission considers that if significant changes are to be made to planning policy, proper evidence should be provided by the government to support those changes.

11.4 The Commission considers that the proposed policy would undermine local authorities' responsibility to meet Traveller needs. In particular, the consultation has not provided sufficient information as to how large-scale sites are to be defined, or when such sites will be deemed to have "significantly increased [a local authority's] need". There is a significant risk that local authorities could apply this policy as a wide exemption from their responsibility to meet the Travelling community's needs, contributing further to an already significant shortage of Traveller sites.

11.5 If DCLG has concerns about the position of one or two local authorities who have borne an exceptional financial burden of taking enforcement action, a more proportionate way of addressing this without imposing unnecessary collateral disadvantage on other Gypsies and Travellers would be to make central government financial assistance available in those exceptional situations.