

GRT 03

Ymgynghoriad ar ddarparu safleoedd ar gyfer cymunedau Sipsiwn, Roma a Theithwyr

Consultation on the provision of sites for Gypsy, Roma and Travellers

Ymateb gan: Garden Court Chambers

Response from: Garden Court Chambers

SENEDD CYMRU

WELSH PARLIAMENT

**INQUIRY INTO THE PROVISION OF SITES FOR
GYPSIES, ROMA AND TRAVELLERS**

**CONSULTATION RESPONSE FROM BARRISTERS SPECIALISING IN
ROMANI GYPSY & TRAVELLER LAW AT GARDEN COURT CHAMBERS,
57-60 LINCOLNS INN FIELDS, LONDON.**

INTRODUCTION

1. Garden Court Chambers Romani Gypsy & Traveller Team consists of barristers who have specialised in providing advice and representation to the Romani Gypsy and Traveller community since the 1980's, particularly following the West Glamorgan case. That decision addressed the relevance to an enforcement decision, of a county council's breach of statutory duty (under the repealed CSA 1968) to provide sites for Gypsies residing and resorting to their area. Members of the team are recognised for their outstanding commitment to, and expertise in, this and other areas of law, in particular housing law and discrimination. Our team have acted in a consultancy role with the EHRC and the CRE in relation to published studies concerning Gypsies and Travellers. The team includes the co-editor and a number of contributors to a textbook entitled "Gypsy and Traveller Law" which was first published by the Legal Action Group and the Commission for Racial Equality in 2004. The 3rd edition was published in 2020.
2. We have been involved in many of the leading cases in this area of law over many years, among them: *Coster v UK* (2001) 33 EHRR 20 ; *Wrexham CBC v National Assembly of Wales* [2002] EWHC Admin 241 & [2003] EWCA Civ 835; [2004] J.P.L. 65; *South Bucks DC v Porter (No. 1)* [2003] UKHL 26; [2003] 2 AC 558; *South Bucks DC v Porter (No. 2)* [2004] UKHL 33 [2004] 1 WLR 1953; *Connors v United Kingdom* (2004) 40 EHRR 189; *Codona v Mid-Bedfordshire* [2004] EWCA Civ 925; [2005] H.L.R. 1; *South Bucks DC v Porter (No. 2)* [2004]

UKHL 33; [2004] 1 WLR 1953; *McCann v United Kingdom* (2008) 47 EHRR 913; *Doherty v Birmingham CC* [2008] UKHL 57; [2009] 1 AC 367; *Wychavon District Council v The Secretary Of State For Communities And Local Government* [2008] EWCA Civ 692 [2009] PTSR 19; *Sheridan v Basildon DC* [2011] EWCA Civ 1374; (2012) Application No 40060/08, 18th September 2012; *Jane Stevens v The Secretary Of State For Communities And Local Government* [2013] EWHC 792 (Admin) *Elizabeth Collins v The Secretary Of State For Communities And Local Government* [2013] EWCA Civ 1193; *Moore v SSCLG* [2013] EWCA Civ 1194; *Lisa Smith v SSHCLG (with the EHRC, LGT, FFT, NFGLG and STAG intervening – an ongoing challenge to the planning policy definition; London Borough of Bromley v Persons Unknown, London Gypsies and Travellers and others* (2020) EWCA Civ 120; and *Moore and Coates v SSCLG and EHRC* [2015] EWHC 44 (Admin) in which it was decided that the Secretary of State had unlawfully discriminated against Romani Gypsies/Irish Travellers in breach of the Equality Act 2010 and Articles 8 and 14 of the European Convention on Human Rights ('ECHR').

3. In addition to the *Wrexham* and *Buckland* cases we have also been involved in a number of other Welsh cases. Most recently, in a county court case possession claim concerning application of the Welsh duty to provide sites reported on westlaw as [2021] 6 WLUK 52. In the area of the authority which brought that case, the number of caravans recorded on unauthorised encampments remained (in comparison to the rest of Wales) high after the duty became law, yet the relevant local authority had sufficient space with planning permission to accommodate a significant number of those who have spent a sustained period of time on the side of the road. The Judge observed “*the Council has been under a duty since 2016 to make land available for 32 pitches for mobile homes... Whether or not 32 actual pitches have been provided, the Council has the land for them on the site to which these proceedings relate*”. By 2019, only council owned land in that authority’s area had been allocated and only 4 of the 32 permanent pitches had been built on a new council site and none of the required 7 transits pitches had been provided either. One of the troubling and surprising aspects of that case, is that those whose accommodation needs have to be assessed under ss101-109 of the Housing (Wales) Act 2018 ('H(W)A 2014'), did not have to be provided for. This is at odds with the full title to the Act. That is a mis-match. It begs scrutiny. Time and resources is spent counting and assessing accommodation needs, including by the Welsh Government, of those who have to be counted, only for those within the s109 definition, whose accommodation need for a pitch has been properly counted, to find themselves ineligible for allocation of a pitch. Why is that, when they are on the side of the road, the duty was to meet the assessed needs and pitches are available for

them to move onto? In that case and a related judicial review¹, it was held that the housing authority may (where there is a shortage of pitches) taper down who it will provide for². The duty does not contemplate a one size fits all but mixed tenure. The very nature of whose needs are being assessed and where they might be living, contemplates mixed tenure provision to meet existing and future accommodation needs by allocation of land for private provision for those who can afford it. The intention of the duty is not achieved if the duty is only met by pitches on council sites and those who cannot afford private land find themselves ineligible for allocation of a council pitch by application of narrow criteria designed to address an under supply of available pitches.

4. The related question is how to judge breach of the s103 duty? The duty was designed to reduce the need for unauthorised encampments, if not make them a thing of the past. To ensure that is the case and the duty is effective, we suggest that recent case law concerning the s103 duty in Wales, requires a Welsh Government response, including consideration of legislation to reverse the effect of those decisions.

5. We hope you find that our response assists in your deliberations. We first set out the provisions.

THE STATUTORY PROVISIONS AND GUIDANCE

6. The title to the H(W)A 2014 is very clear (emphasis added):

*“An Act of the National Assembly for Wales to provide for the regulation of private rented housing; to reform the law relating to homelessness; to provide for assessment of the accommodation needs of Gypsies and Travellers and to require local authorities **to meet those needs**; to make provision about the standards of housing provided by local authorities; to abolish housing revenue account subsidy; to allow fully mutual housing associations to grant assured tenancies; to make provision about council tax payable for empty dwellings; and for other housing purposes.”*

¹ The review was in relation to allocation criteria that did not form part of a strategy for meeting the needs which there was a duty under s103, to provide for: see *R (McDonagh) -v- Newport City Council* [2019] EWHC 3886 (Admin)

² This position contained in its allocation policy, was taken because the housing authority took the view (not shared by all of those affected) that those who have previously spent part of their life living in housing and cannot show an aversion to housing, do not need a pitch and so their accommodation need can be met by housing.

7. Part 3 of the Act makes provision for assessing and meeting the needs of Gypsies and Travellers. S101 provides, so far as relevant that:

"A local housing authority must, in each review period, carry out an assessment of the accommodation needs of Gypsies and Travellers residing in or resorting to its area" (s. 101(1)). The review period is 1 year after the coming into force of the section (22 Feb 2015) and every five years thereafter".

8. Gypsies and Travellers are defined in s108 as *"persons of a nomadic habit of life, whatever their race or origin, including- (i) persons who, on grounds only of their own or their family's or dependant's educational or health needs or old age, have ceased to travel temporarily or permanently, and (ii) members of an organised group of travelling show people or circus people (whether or not travelling together as such), and (b) all other persons with a cultural tradition of nomadism or of living in a mobile home"*.
9. After carrying out an assessment the authority must prepare a report which, among other things, *"details the accommodation needs identified by the assessment"* (s102(1)(c)). The report must then be submitted to the Welsh Ministers for approval (s102(2)-(4)).
10. With effect from 16th March 2016 s103 of the HWA 2014 has provided as follows:

"(1) If a local housing authority's approved assessment identifies needs within the authority's area with respect to the provision of sites on which mobile homes may be stationed the authority must exercise its powers in section 56 of the Mobile Homes (Wales) Act 2013 (power of authorities to provide sites for mobile homes) so far as may be necessary to meet those needs..."

11. S104 empowers the Welsh Ministers to issue a direction if they are satisfied that a housing authority has failed to comply with the duty in s103. The authority must comply with such a direction if it is given.
12. The duties in Part 3 of the 2014 Act are supplemented by statutory guidance. As explained in the guidance the drivers for the Act can be expressed in terms of ensuring equality of opportunity and as serving a functional need to address unauthorised encampments:

"14. The Welsh Government's Gypsy and Traveller Framework for Action, Travelling to a Better Future (2011), sets out a vision for culturally appropriate accommodation

for these communities. The Welsh Government seeks to ensure a wide choice of accommodation type is available to meet the needs of all members of the community. It is reflective of our commitment to ensure equality of opportunity for all sections of the community and in this instance, Gypsies and Travellers should have the same access to culturally appropriate accommodation as all other members of the community.

15. An understanding of Gypsy and Traveller accommodation issues is essential to make properly planned provision and avoid the problems associated with ad hoc or unauthorised provision. A comprehensive accommodation assessment (required under the Housing (Wales) Act 2014) and strategy to meet the need which is identified will greatly strengthen the ability of Local Authorities to respond swiftly and firmly to inappropriate unauthorised developments and encampments and help to avoid future unauthorised camping and development".

13. Planning for Gypsy, Traveller and Showpeople Sites Welsh Circular 005/2018 provides:-

"8....Gypsies and Travellers should have equal access to culturally appropriate accommodation as all other members of the community.

9. The Welsh Government is committed to working with local authorities to deliver new Gypsy and Traveller sites. This commitment is addressed through the availability of Sites Capital Grant funding for the development of new sites.¹ Changes to legislation through the Housing (Wales) Act 2014 and the Mobile Homes (Wales) Act 2013 have also supported this objective.

10.....Where a lack of appropriate sites and insufficient provision exists within local authority areas, this has a significant detrimental impact on the lives of Gypsies and Travellers. Delivering appropriate Gypsy and Traveller site accommodation will have a beneficial impact on the communities' ability to access other essential services. Delivery of appropriate site accommodation for Gypsy and Traveller communities could also have a beneficial impact on the settled community by reducing the number of legal challenges and costs incurred in challenging unauthorised encampments.

...

13....Delivering more Gypsy and Traveller sites, whether public or private, is an issue for local authorities to address, as they have to find local solutions for local needs. The Welsh Government has developed a suite of supporting information encompassing grants and guidance documents³ which will aid local authorities to meet their responsibilities in relation to accommodation provision for Gypsy and Travellers.

14. The Housing (Wales) Act 2014 places a legal duty upon local authorities to ensure that the accommodation needs of Gypsies and Travellers are properly assessed and that the identified need for pitches is met.

...

18 By utilising this Circular and the two Welsh Government guidance documents detailed below, local authorities should be equipped with the tools to undertake the accommodation assessment and to meet the identified pitch needs.

...

35 Where a GTAA identifies an unmet need, planning authorities should allocate sufficient sites in development plans to ensure that the identified pitch requirements for residential and / or transit use can be met.

...

69. In considering whether to enforce against land being used as a Gypsy and Traveller sitePlanning authorities should have regard to the duty in Section 103 of the Housing (Wales) Act 2014 – requiring an authority to exercise its powers to meet any needs for site provision that are identified through its Gypsy and Traveller Accommodation Assessment – in deciding on an appropriate course of action to take”

THE CONSULTATION QUESTIONS

14. The Consultation asks for a response to the following questions:

1. Are Welsh local authorities and Gypsies, Roma and Travellers communities managing to work together successfully to:
 - a) identify sustainable residential and transit sites, and
 - b) discuss Gypsies, Roma and Travellers' accommodation needs?
2. Gypsy and Traveller Accommodation Assessments (GTAAs) are intended to assess the accommodation needs of the Gypsy, Roma and Traveller community. In your view, are Welsh local authorities as a whole, implementing, monitoring and reviewing GTAAs effectively?
3. Does the current statutory and policy framework ensure sufficient culturally-appropriate Gypsy, Roma and Traveller residential and transit sites across Wales and within individual local authorities?

4. What are the key challenges for Welsh local authorities, and the Welsh Government, in providing suitable and sufficient accommodation sites for Gypsy, Roma and Traveller communities?
5. Do you anticipate that when/if the UK Government's Police, Crime, Sentencing and Courts Bill comes into force there will be:
- a) specific challenges to overcome, and/or
 - b) in certain locations in Wales, related to Gypsy, Roma and Traveller sites?
6. Do you have any additional comments or observations about the provision of accommodation sites in Wales for Gypsy, Roma and Traveller communities?

GARDEN COURT CHAMBERS TRAVELLERS LAW SPECIALISTS' RESPONSE

15. We are barristers, we are not involved in site provision, so there is a caveat to all we might say. We have no first-hand experience of councils' arrangements and the extent to which the duty has been success. That said we respond as follows:

Q1. (a) subject to the above caveat, our impression is that the answer to this question is No, because

- (i) There should be greater willingness to use compulsory purchase powers to widen the scope of land that is considered;
- (ii) The brief for considering locations where a new Traveller site might conform with relevant local plan policies is not standardised and is vulnerable to an over precious consideration. We make the following further points on the way finding suitable land may be advanced.
 - Sifting should be done on a more structured basis such is the importance of the considerations at stake including the public interest in reducing the need for road side encampments. In comparison to the families being roadside only 'show-stopping' considerations – e.g. irremediably sub-standard access visibility and consequent risk of an RTA should be identified in the 1st round.
 - This may be then followed by further sifting by way of a comparative evaluation of all potential remaining locations; against the extent of need and how acute it is, rather than each location being eliminated in isolation of the wider picture.

- Input from third parties into searching for suitable land, for example from the police where appropriate should also be on a structured basis.
- Consideration of temporary permissions or long term tolerated sites that could be made permanent should be included in the search which may also be for a temporary period for example in advance of town extension areas.
- All large scale housing development may be required to include space for a small family Travellers' site to encourage diversity and make it the norm.
- The amount of land required to meet the land use requirements of Gypsies and Travellers in Wales is tiny in relation to the size of Wales. The amount spent on enforcement costs, year in year out, should be reviewed and the figure spent may then be used to justify use of compulsory purchase powers.
- There needs to be more incentive to find the necessary land. There could be more teeth. The Welsh Government may consider it appropriate to impose financial penalties – commensurate with enforcement costs that would otherwise be avoided - on those authorities who fail to comply with the duty.

Q1. b) It is not wise to generalise on this question and subject to the above caveat our impression is that the answer may vary from one authority to the next. We suggest that meaningful discussion of needs is only achieved by face to face interview. This requires confidence (with support of local groups) in how the information will then be used. Since no duty is owed to any individual, this means being counted in the assessment does not mean a site will be allocated to the person interviewed. That is a disincentive. Assessments may undercount those in housing (who only went into housing because there was no suitable site for them).

Q2. Again subject to the above caveat, the Welsh Government should know from its own approvals the answer to this question. Each of the duty related GTAAs may have met with Welsh Government approval with their first submission; or not, as the case may be. We know not. Getting a GTAA wrong delays provision. A comparison of GTAA's would be required. We suggest that GTAAs should reflect the fact that accommodation needs are an evolving issue. A GTAA therefore has a shelf life. We can observe that Covid considerations in 2020 & 2021 have significantly delayed matters so the answer to this question is subject to the pandemic, which means catching up has to be done. The time spent by the Welsh Government in approving a GTAA may be overlong or vulnerable to staff shortages. The process for approval of a GTAA and a

report of problems, if any, that have led to a referral back, should be part of published policy

Q3. The Welsh Government may again find itself in possession of the information to know the answer to this question. There is a need to interrogate the existing data. We venture that the answer may be available from studying how many pitches were meant to be provided by 2021 in a particular housing authority's area and comparing that figure with how many in fact were provided by that date. When the Westminster Coalition Government published its Planning Policy for Traveller Sites on the heels of the reforms in the Localism Act 2011, it initially considered 6 months would be long enough to put in place a five year supply, it then changed the timeframe to 12 months. Can late compliance within 4 years and 11 months of the GTAA being approved mean there is no breach, or should breach occur from within 6 months of knowing how many pitches have to be provided for. If no breach is recognised until midnight on the last day for compliance, then provision will be slower. Understanding unauthorised developments where planning permission is sought may be read as evidence of an accommodation need. Whereas not all those on unauthorised encampments want a permanent pitch, they may just need a transit one, as they are camping on a traditional travelling route. An enduring number of caravans recorded on long term unauthorised encampments would suggest the answer varies authority to authority.

Q4 The key challenge is being prepared to recognise that as things stand, finding land for provision of sufficient pitches, is a political issue. It could be done but there is opposition to it. Use of compulsory purchase powers would be the concerted way to meet the assessed land use requirements of Gypsies and Travellers in Wales. So too would tougher powers for the Welsh Ministers, including financial penalties to deal with breach of the s103 duty. There is also the option to make the extent of compliance or breach of the s103 by the authority in which the site is located, a statutorily relevant consideration to enforcement decisions or relevant planning decisions concerning Traveller sites. The *West Glamorgan* case encouraged authorities in breach of their duty, to look first to provide alternative sites instead of trying to defend an unsustainable decision to evict when there was no place except some other roadside location for the residents to go to.

Q5. Has this question been overtaken by a recent Welsh Government decision regarding implementation? The impact of the new offence, which comes into effect from 28th June 2022 and relates to unauthorised encampments on public or private land, will depend

on how the police and the Courts construe the word “*significant*” when deciding if those on a site have caused or are likely to cause, significant damage, disruption, or distress (including anti-social behaviour). To comply with Article 6 of the ECHR, elements of an offence should be capable of being objectively assessed; not subject to the standards of a sensitive neighbour who is unfamiliar with Travellers or having a perception based on stereotypes, is very distressed by their mere presence.

Q6. The additional observation we make about the provision of accommodation sites in Wales for Gypsy, Roma and Traveller communities is that: the Welsh Government lay down in statute that in any relevant planning decision a conflict with development plan policy is outweighed by breach of the s103 duty whilst it persists (the relevant time), unless to allow residential use as a Travellers site in that location, would cause unacceptable damage to interests of acknowledged importance that could not be tolerated for the relevant time. Such a provision may incentivise compliance with the s103 duty, particularly if authorities wish to more easily defend their decisions on appeal.

GARDEN COURT CHAMBERS

19th MAY 2022