Open Spaces Society response to *Strengthening police powers to tackle unauthorised encampments*

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1 Introduction

1.1 This is the response of the Open Spaces Society to the consultation by the Home Office on *Strengthening police powers to tackle unauthorised encampments*.

1.2 The Open Spaces Society was founded in 1865 and is Britain's oldest national conservation body. It campaigns to protect common land, village greens, open spaces and public paths, and people's rights to enjoy them.

1.3 In responding to this consultation, we have a particular interest in promoting public access to the countryside through England's network of public rights of way and public rights of access, and in providing for the better management of common land to reflect the many public goods which it can sustain.

1.4 In our response, we refer to common land, but similar principles, and similar concerns, apply to town or village greens.

1.5 We have interpreted the consultation paper in the light of the Conservative Party's manifesto commitment to 'make intentional trespass a criminal offence'.[1]

1.6 In relation to some questions in the consultation, we have no comments. However, we observe that some issues overlap the discrete questions posed in the consultation paper, and we have addressed them where we think it convenient to do so.

1.7 This response may be published in full if desired.

[1] 'We will tackle unauthorised traveller camps. We will give the police new powers to arrest and seize the property and vehicles of trespassers who set up unauthorised encampments, in order to protect our communities. We will make intentional trespass a criminal offence, and we will also give councils greater powers within the planning system.' *Conservative Manifesto*, 2019

2 The context

2.1 The society understands that the proposals in the consultation paper are put forward in the context of concern about unauthorised encampments on common and other land. Such encampments generally comprise Gypsy, Roma or Traveller communities. And they have taken place on common land, with which the society is particularly and historically interested, since time immemorial. Indeed, some of the earliest nineteenth legislation which provided for better management of common land was concerned, among other things, to address the question of encampments and to provide more effective mechanisms to remove them. For example, it was habitual for schemes made under the Metropolitan Commons Acts 1866–98 to provide for the exclusion of 'gipsies', while the first model scheme for the regulation and management of common land to be prescribed under Part I of the Commons Act 1899 provided for byelaws to be made 'For the exclusion removal and apprehension if necessary of gamblers card-sharpers gipsies squatters vagrants sellers and exhibitors of infamous books…'[2] It seems that the Government's then view of the merits of an itinerant way of life can be evaluated from the context of its regulation.

2.2 130 years on from the 1899 Act, and the position is little changed. Encampments continue to occur on common land, as on other land, not least because such land is both by character and by law unenclosed and so vulnerable to incursion by vehicles. Nevertheless, many commons, particularly in urban areas, have over time, and whether lawfully or not, been defended against incursion by ditches, bunds, railings, bollards or otherwise, and land which remains undefended is now more acutely vulnerable. Yet local authorities have consistently failed to fulfil their duty imposed under s.6 of the Caravan Sites Act 1968, until its repeal in 1994, to provide sites for 'gipsies residing in or resorting to their area'.

2.3 The repeal of that duty was effected by the Criminal Justice and Public Order Act 1994, which also introduced new powers for the police to deal with trespassers on land with intent to reside there (s.61), and subsequently (following amendment by the Anti-Social Behaviour Act 2003), to deal with residential trespass where alternative sites were available (s.62A). Special provision was made to apply such powers to common land (s.62D).

2.4 The society's view is that the existing powers under the 1994 Act available to the police (and those which always have been available to landowners and highway authorities) are sufficient to address the problem of encampments on common land. Insofar as encampments continue to occur on such land, we conclude that it is not hard to explain why — there is a gross insufficiency of legitimate sites for itinerant use, and a smaller number of vulnerable commons are now a target of more frequent encampments because many others are unavailable owing to physical measures to exclude.

[2] Commons Regulations 1899 (SR&O 1899/750), Sch., Form I, para.10(f).

2.5 Insofar as the consultation proposes the extension of powers to the police, no evidence is adduced which shows that the police habitually fail to take action under the existing legislation because they lack powers to do so. Instead, and understandably, it seems that the police decline to act, or to act decisively, because the situation may be complex and fragile, and because they are not obliged to act. New powers will not resolve that tension.

3 Qq1 & 2: criminalisation of trespass

Q1: 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?

3.1 The consultation goes beyond proposing the strengthening of police powers, and commends 'the so-called 'Irish model' for dealing with unauthorised encampments [which] criminalises trespass in certain circumstances', and would create 'an offence of trespassing when setting up an unauthorised encampment.'[3]

3.2 We pause at this point to observe that it is not clear why the criminalisation of encampment is considered to be either necessary or effective. It has been an offence for the best part of a century, under section 193(4) of the Law of Property Act 1925, to camp on any 'urban' common[4]. But we know of no recent case in which those involved in an itinerant encampment on an urban common have been prosecuted under the 1925 Act. If existing criminal sanctions do not deter, and are not relied upon, why are new sanctions expected to function any more effectively?

3.3 It is not hard to understand why criminal sanctions do not, and will not, work. Prosecution, or the threat of prosecution, does not resolve the immediate disruption caused by an encampment. Indeed, the present functioning of the criminal justice system might mean that a prosecution would occur long after the encampment had moved on. Nor is it clear who might be selected for prosecution. If several families are involved in an illegal encampment, presumably all those over the age of criminal responsibility will be liable to prosecution — but who will be prosecuted? And prosecution will require the police to engage with those involved in an encampment in a pro-active and combative approach which they have hitherto been reluctant to espouse, and which is unlikely to assist in the immediate resolution and dispersal of the encampment.

3.4 The consultation seeks to go beyond the criminalisation of trespass in relation to unauthorised encampments. It suggests in the Introduction that the intention is to 'broaden

[3] Consultation paper, p.7–8.

[4] By 'urban' common, we mean a common in a former urban district or borough, or in the Metropolitan Police area as originally defined: see s.193(1). The vast majority of commons in or near built-up areas are urban commons.

the existing categories of criminal trespass to cover trespassers on land who are there with the purpose of residing in their vehicle for any period, and to give the police the relevant powers to arrest offenders in situ and to seize any vehicles or other property on existing unauthorised encampments (or those in the process of being set up) immediately'.

3.5 S.4.1 of the consultation goes further, and contemplates 'an offence to enter or occupy land subject to certain conditions being met'. And…

3.6 Q1 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?'

3.7 The premise of the question is that trespass should be criminalised, but that a possible concession is to criminalise only residential trespass.

3.8 Moreover, in the light of the Government's manifesto commitment 'to make intentional trespass a criminal offence', we are deeply concerned that the Government intends to criminalise all trespass, provided that an intent can be shown.

3.9 Trespass as such, in England and Wales, has never been a criminal offence. In certain circumstances, legislation has been passed to criminalise trespass (or to secure an outcome which has that effect) — for example (and what follows are only examples):

- trespass with a firearm (Firearms Act 1968, s.20)
- squatting in residential premises (Legal Aid, Sentencing and Punishment of Offenders Act 2012, s.144)
- trespass with an offensive weapon (Criminal Law Act 1977, s.8)
- aggravated trespass (Criminal Justice and Public Order Act 1994, s.68)
- trespass on operational railway (British Transport Commission Act 1949, s.55)
- trespass on nuclear or designated Crown sites (Serious Organised Crime and Police Act 2005, ss.128–131)
- trespass under byelaws (*e.g*. Forestry Commission Byelaws 1982 in relation to a place as to which entry is prohibited by notice[5])

3.10 The effect of existing legislation is that trespass, without more, remains a civil wrong, capable of being addressed in the same manner as any civil wrong: through communication (asking the trespasser to leave, writing to a trespasser asking him or her to desist), through abatement (using reasonable force if a request is ignored), or through the courts (seeking damages, or an injunction to enforce removal or to prohibit repetition).

3.11 Trespass has been criminalised only where particular harm or the risk of harm can be shown: for example, trespass where the intention is or may be to commit serious criminal

[5] See SI 1982/648: see byelaw 5(i).

offences, trespass where the intention is to disrupt the landowner's operations or way of life, trespass which may put the trespasser or others at risk.

3.12 The society believes that such provisions more than adequately cover the circumstances in which criminalisation of trespass is justified — indeed, we have concerns that in some circumstances, the provisions go further than is justified. For example, the society is concerned that a path user who inadvertently strays from a public right of way but insists on exercising the perceived right of way so as to disrupt a shoot may be guilty of aggravated trespass. The society also found it necessary to object to the designation of part of the Prime Minister's estate at Chequers which was also access land.[6]

3.13 Trespass is commonplace. Many people trespass without realising it — for example, sitting on the wall of an adjacent dwelling while waiting for a bus; walking across a forecourt of private premises to cut the corner; reversing a vehicle into the driveway of a home in order to turn the vehicle around. In the context of the society's realm, people trespass by straying, however fractionally, from the legal line of a public path, or going on to land which appears to be open to the public but over which there are no access rights. They may also trespass intentionally — for example, to take a short cut through woodland between two public rights of way, to avoid an awkward stile or gate on a public path, to make recreational use of land which is under or unused by its owner, or to reach access land from a public place. Criminalisation of trespass — even if applied only where intention can be shown — would have an absurd and chilling effect on public access in both town and country. It would expose ordinary people to prosecution by landowners (regardless of whether the police or Crown Prosecution Service proposed to bring proceedings). And it would vastly increase the burden on the police service, which would be obliged to deal with complaints of trivial trespass which nonetheless constituted a criminal offence.

3.14 We also note that 'intention' is an uncertain concept in law, and demands definition. Is it sufficient to act of one's own volition (*i.e*. not under duress), or must it be shown that the trespasser knew that what was done was a trespass — and if so, how can proof be adduced of that knowledge? Is it enough that the trespasser had some vague understanding of an absence of (but requirement for) permission, or must there be a deliberate, provocative act?

3.15 We do not therefore consider it appropriate directly to answer a question which relies on a premise that trespass should be criminalised, whether or not 'intent' (however defined), or an intention to reside, is a necessary ingredient to commission of the offence.

3.16 Neither the consultation, nor the Government, has adduced any evidence as to why a draconian reform of the law relating to trespass generally is necessary, justified or desirable, and in those circumstances, the society wholly opposes the premise, whether or not it is moderated as envisaged in Q1.

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[6] In consequence, an amended designation was made in SI 2007/1387.

Q2: To what extent do you agree or disagree that the act of 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 with vehicles?

3.17 Again, this question relies on a premise that trespass should be criminalised, but that respondents are invited to favour either general criminalisation or 'only' criminalisation of residential trespass with vehicles.

3.18 We note (as does the consultation) that residential trespass with six or more vehicles already constitutes grounds for a senior police officer to direct that the trespassers vacate the land[7], and a criminal offence is committed where the direction is not complied with. The consultation provides no evidence as to the extent to which these existing powers have been used by senior police officers, and where used, their efficacy. Either such powers have been widely employed — in which case, the Government should analyse their use and efficacy and publish the findings. Or they have not, in which case, the Government should investigate officers' reticence, and again, publish their findings. It is hopeless to propose extending the use of powers, which have been in place for 15 years, without reviewing the performance of the existing powers.

3.19 We also have some concern that the proposal would criminalise those who reside overnight in their vehicles in places where they have no express right to park. For example, the proposals may cause it to become an offence to stay overnight in a privately-provided car park where a notice is displayed 'no overnight stays'. While we accept that landowners should be able to provide car parking facilities on their own terms, it is not appropriate to confer criminal penalties for minor infractions of those terms.

4 Other measures

Q3: To what extent do you agree or disagree that the landowner or representatives of the landowner should take reasonable steps to ask persons occupying their land to remove themselves and their possessions before occupation of the land can be considered a criminal offence?

4.1 This proposal appears to be founded in requirement that an offence is committed only where there is 'occupation' of land. In the society's view, 'occupation' of land requires more than mere trespass with the intention of residing on the land. For example, a homeless person may camp on an out-of-the-way piece of land for an extended period of time, but without any intention to occupy the land to the exclusion of others. Similarly, a wild camper may stay one or two nights on land which is open country without any such intention. But both may be said to 'reside' on the land for a brief period.

[7] Criminal Justice and Public Order Act 1994, s.61.

4.2 It is thus unclear how this proposal connects with previous questions, and the premise of the consultation as a whole, that trespass, or residential trespass, should be criminalised.

4.3 Leaving aside the uncertainty, the society believes that no offence should be committed in relation to trespass, where no harm has been caused or is likely. Where harm has been caused, prosecution will be available for criminal damage, and a senior police officer may exercise the powers already available to direct the trespassers to leave[8].

4.4 The purpose of the proposal therefore appears to be to question whether, prior to a senior police officer exercising the powers of direction already available to that officer, the occupier has taken steps to ask the trespassers to leave.

4.5 While it may be said that trespass is obvious, and that it should not be necessary to ask trespassers to leave, this is far from correct universally. Much trespass, if not causing harm, is innocuous. It may often be tolerated by the landowner (in which case, strictly, it is not trespass), or the landowner may be unaware of it. The ownership of the land may be unknown, and no-one may either be in a position to ask trespassers to leave, or to wish them to leave. Thus it is unreasonable to remove any requirement for the landowner or occupier to signal opposition to the trespass, because there may not be any such opposition. Indeed, it is far from clear whether the proposal would enable a senior police office to direct trespassers to leave land notwithstanding that their presence is not, in fact, 'trespass' at all.

Q4: To what extent do you agree or disagree that a criminal offence can only be committed when the following conditions have been met? [conditions omitted]

4.6 The conditions relate to things done which, where present in relation to trespass, already enable a senior police officer to direct trespassers to leave or which already give rise to a criminal offence. The purpose of the proposal therefore appears to be to relax the ingredients required for criminalisation to circumstances where those ingredients are not met. For the reasons discussed in s.3 above, we are opposed to the proposal.

Q5: What other conditions not covered in the above should we consider?

4.7 No response offered.

5 Amendment of s.62A of the Criminal Justice and Public Order Act 1994

5.1 Qq6–10.

5.2 The society has no views on the operation of s.62A of the Criminal Justice and Public Order Act 1994.

[8] Under the Criminal Justice and Public Order Act 1994, s.61.

6 Only two vehicles to enable a direction

Q11: To what extent do you agree or disagree that the number of vehicles needing to be involved in an unauthorised encampment before police powers can be exercised should be lowered from six to two vehicles?

6.1 Again, the consultation offers no analysis of the use of the existing powers to direct the departure of trespassers with six or more vehicles. Thus it is inappropriate to propose widening the availability of those powers without analysis of the performance of the existing powers.

Q12: To what extent do you agree or disagree that the police should be granted the power to remove trespassers from land that forms part of the highway?

6.2 It is not clear how this proposal would operate in relation to highway land. In what circumstances would those who are on highway land be 'trespassers'? Who would be authorised to confirm that those present on the land were there without the consent of the owner of the land: the owner of the subsoil of the highway, or the highway authority (where the highway is maintainable at public expense)? Or both? Or neither?

Q13: To what extent do you agree or disagree that the police should be granted the power to seize property, including vehicles, from trespassers who are on land with the purpose of residing on it?

Q14: Should the police be able to seize the property of [etc.]?

6.3 The consultation presents no explanation of how these proposals would actually assist in resolving trespassory occupation of land. if the police seize vehicles, how will those trespassing on the land leave? If the police seize living accommodation, where will those trespassing subsequently reside?

Q15: To what extent do you agree or disagree that the proposed amendments to sections 61 and 62A of the Criminal Justice and Public Order Act 1994 contained in this consultation are sufficient measures to tackle the public disorder issues which are associated with unauthorised encampments without the requirement for introducing specific powers that criminalise unauthorised encampments?

6.4 The society has nothing to add to its previous responses.

7 Impacts on the Gypsy, Roma and Traveller communities

Q16: Do you expect that the proposed amendments to sections 61 and 62A of the Criminal Justice and Public Order Act 1994 contained in this consultation would have a

positive or negative impact on the health or educational outcomes of Gypsy, Roma and Traveller communities?

Q17: Do you expect that criminalising unauthorised encampments would have a positive or negative impact on the health or educational outcomes of Gypsy, Roma and Traveller communities?

7.1 We have no information to enable us to respond to these questions.

8 Other

Q18: Do you have any other comments to make on the issue of unauthorised encampments not specifically addressed by any of the questions above?

8.1 No.

Open Spaces Society
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