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## AN OPINION ON THE RIGHTS OF GYPSY AND TRAVELLER COMMUNITIES

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### **Introduction**

1. We are asked by the Good Law Project to advise on the legal framework around the rights of Gypsy and Traveller communities to practise a traditional way of life; the impact of recent legal developments on those rights (and particularly the likely impact of the Police, Crime, Sentencing and Courts Act 2022 (“PCSCA 2022”)); and how human rights and equality law guarantees may be used to protect the rights of Gypsies and Travellers<sup>1</sup>.
  
2. Gypsies and Travellers are some of the most marginalised people in the UK. Evidence consistently shows that they face difficulties across all areas of life, from accessing healthcare and education to experiencing racist abuse and overt discrimination. A recent report found that Gypsy and Traveller communities experience “*the worst outcomes of any ethnic group across a huge range of areas, including education, health, employment, criminal justice and hate crime*”<sup>2</sup>.
  
3. The detail of these complex and multi-faceted areas of disadvantage is outside the scope of this Opinion, save to note that a recurrent theme, and the cause of many problems for Gypsies and Travellers, is the shortage of culturally suitable, authorised accommodation for nomadic and caravan-dwelling communities, which makes it difficult for them to live their traditional way of life without falling foul of the law. Hence this Opinion focuses mainly upon the legal barriers which currently adversely affect enjoyment of the two main pillars of the traditional Gypsy and Traveller way of life – nomadism and the occupation of

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<sup>1</sup> We discuss how we use the term “*Gypsies and Travellers*” at §10 below.

<sup>2</sup> House of Commons Women and Equalities Committee, *Tackling inequalities faced by Gypsy, Roma and Traveller communities*, March 2019, p3. See also: the discussion at §§15 ff below; evidence in the EHRC’s 2016 report *England’s most disadvantaged groups: Gypsies, Roma and Travellers*, (<https://www.equalityhumanrights.com/sites/default/files/is-england-fairer-2016-most-disadvantaged-groups-gypsies-travellers-roma.pdf>); and Friends, Families and Travellers’ evidence to the Commission on Race and Ethnic Disparities of November 2020 (<https://www.gypsy-traveller.org/wp-content/uploads/2020/12/Friends-Families-and-Travellers-submission-to-the-Commission-on-Race-and-Ethnic-Disparities-Call-for-Evidence-on-Ethnic-Disparities-and-Inequality-in-the-UK-FINAL.pdf>).

caravans - and the legal protections established in international and domestic law which may be used to protect them.

## **Summary**

4. In summary, for reasons expanded upon below:
  - i. The twin pillars of the traditional way of life of ethnic Gypsies and Travellers – namely nomadism and the occupation of caravans – receive a significant degree of protection under the Human Rights Act 1998 (“**HRA 1998**”), which, by virtue of s1 and Schedule 1, gives further effect to Articles 8 and 14 of the European Convention on Human Rights (“**ECHR**” or “**Convention**”) as rights protected in national law (as well as some other relevant articles, discussed further below). Article 8 ensures respect for home, private and family life and Article 14 requires states to secure equal enjoyment of other Convention rights without discrimination on grounds of status.
  - ii. Caselaw of both the national courts and the European Court of Human Rights (“**ECtHR**”) establishes that Articles 8 and 14 impose a level of positive obligation on the state in certain circumstances to facilitate the Gypsy and Traveller way of life, and to secure for Gypsies and Travellers genuinely equal enjoyment of the right to respect for home and private life, having regard to the differences in their situation from that of non-Gypsy and Traveller populations, who are more likely to live a settled lifestyle.
  - iii. Article 7 of the ECHR guards against uncertain or retrospective penalties and Article 1 of the First Protocol of the ECHR protects the peaceful enjoyment of possessions (including caravans).
  - iv. The European Court of Human Rights must, and currently (by virtue of s2 HRA 1998) national courts should, interpret the incorporated Convention rights having taken account of other, more specialist, non-incorporated legal instruments to which the UK is a signatory. These instruments include in particular:
    - a) The Framework Convention for the Protection of National Minorities;
    - b) The United Nations Convention on the Rights of the Child 1989 (“**UNCRC**”); and

- c) The United Nations Convention on the Rights of Persons with Disabilities 2006 (“**UNCRPD**”).

The extent of the interpretative duty in national law has recently been limited by the observations of the Supreme Court in *R (SC) v Secretary of State for Work & Pensions* [2021] UKSC 26, [2021] 3 WLR 428 at §§73 ff.

- v. By virtue of s9(4) of the Equality Act 2010 (“**EqA 2010**”) Romany Gypsies and Irish Travellers, each a separate ethnic group, form racial groups for the purposes of s9 of that Act: see *Moore & Coates v Secretary of State for Communities & Local Government* [2015] EWHC 44 (Admin) (“**Moore & Coates**”). Thus, the Public Sector Equality Duty (“**PSED**”) in s149 EqA 2010 is relevant to the making and application of policies which have an impact on the rights of Gypsies and Travellers (including individual decisions) and a decision which has a particular adverse impact on Gypsies and Travellers in comparison with those who do not share that characteristic will amount to unlawful indirect discrimination unless it can be proportionately justified as a proportionate means of meeting a legitimate aim. The EqA 2010 has formed the basis of a number of successful challenges to central and local government policies and decisions on planning, as well as policies and decisions relating to the allocation of pitches on local authority Gypsy and Traveller sites. However, it cannot override primary legislation.
- vi. Despite the above legal protection, a series of legislative and policy measures adopted over the last 60 years has led to an endemic shortage of caravan sites enabling Gypsies and Travellers to practise their traditional way of life.
- vii. Moreover, various recent legal and policy developments put nomadism and caravan-dwelling under considerable pressure, especially when taken in combination. Particular issues which we have identified are:
  - a) The use of an amended definition of “*gypsies and travellers*” in the Government’s *Planning policy for traveller sites* (“**PPTS**”), which delimits the ambit of that policy in a way that threatens to undermine the obligations of local authorities to provide public sites and to restrict the

ability of some Gypsies and Travellers, particularly the elderly, women, or disabled people, to obtain planning permission to live on private sites;

- b) The increased number of wide injunctions to restrain unauthorised encampments granted by the courts in recent years and the legal uncertainty around very broad injunctions aimed at “*persons unknown*”; and
- c) The passing of the PCSCA 2022, which has broadened the circumstances in which trespass is addressed through the criminal law rather than through civil procedures; broadened and encouraged the wider use of police powers in response to unauthorised stopping contained in the Criminal Justice and Public Order Act 1994 (“**CJPOA 1994**”); and introduced a new criminal offence of trespass with intent to reside.

5. The combination of these developments means that members of the Gypsy and Traveller communities who wish to pursue a nomadic lifestyle or live in caravans face increased difficulties in obtaining planning permission for private caravan sites as well as reduced prospects of obtaining a pitch on a public caravan site; the risk of committal for contempt of court if they form unauthorised encampments on large swathes of public land; and the threat of criminalisation if they camp or intend to camp on private or public land and are perceived to have caused or be likely to cause significant damage, disruption, or distress. Underlying all of these issues is the long-standing shortage of authorised sites which forces Gypsies and Travellers onto unauthorised encampments and unauthorised developments in the first place.

6. There are some circumstances in which use of the PSED, indirect race discrimination law, the interpretative obligations in s3 HRA 1998, and/or the obligations on public authorities under s6 HRA 1998 may assist in requiring public authorities, including the Secretary of State, local planning authorities, and police authorities, to interpret their powers so far as is possible in ways which respect and protect the rights of Gypsies and Travellers. Some of the caselaw on factors to be taken into account in determining how to apply planning policy and whether and to what extent injunctive relief should be granted against unlawful developments reflects this legislative regime. Certain provisions in the PCSCA 2022 may well violate Gypsy and Traveller rights in a number of respects, as the Joint Committee on

Human Rights (“JCHR”) has found, and there may be some ability for these provisions to be “*read down*” so as to be compatible with the ECHR.

7. However, some of the issues which arise are multi-faceted matters of social and economic policy (eg the failure to provide sufficient Gypsy and Traveller sites) which, notwithstanding the potential use of the PSED described at §137 below, are not easily susceptible to legal challenge – especially where provisions are contained in primary legislation.
8. In our view, the UK Government’s current approach, in policy and national law, places the UK in breach of obligations which it has undertaken as a matter of international law to facilitate the Gypsy and Traveller way of life and to refrain from discriminating against disabled people, the elderly or women. The practical effect of the combination of circumstances and law described in this Opinion is such that they currently make this traditional way of life almost impossible to pursue.
9. In this Opinion we begin with a note on terminology before addressing the factual background. We then look at the impact of the Government’s planning policies before considering unlawful occupation of land and its consequences; the PCSCA 2022; and the recent cases on injunctions against persons unknown. The Opinion then turns to an analysis of the international law provisions and domestic legal protections under the ECHR, other international instruments to which the UK is a signatory, and (in national law) the HRA 1998 and EqA 2010 which affect the rights of Gypsies and Travellers and which may be used, at least in some contexts, to interpret or inform interpretation of laws in this context. We conclude that there are significant areas where the current domestic legal and policy framework in the UK places the UK in breach of its international legal obligations, and which prevent practical and effective enjoyment of the rights ostensibly protected by them.

### **Gypsies and Travellers: a note on terminology and protection from discrimination**

10. The term “*Gypsies and Travellers*” encompasses or is capable of encompassing a wide range of separate and distinct groups, including: Romani Gypsies, Irish Travellers, Scottish Gypsy Travellers, Welsh Gypsy Travellers and New Travellers. The term “*Roma*” is used by the Council of Europe and the European Union to include Roma, Sinti, Kale, and other related groups in Europe, as well as ethnic minorities that identify themselves as Romani

Gypsies, Irish Travellers, and Scottish and Welsh Gypsy Travellers. The courts have held that Romani Gypsies and Irish Travellers are protected against race discrimination because they constitute ethnic groups, in the sense that members of each group share the same history and cultural traditions: *Commission for Racial Equality v Dutton* [1989] 1QB 783 (CA) and *Moore & Coates v Secretary of State for Communities and Local Government* [2015] EWHC 44 (Admin) at §9. Scottish Gypsy Travellers have also been recognised as a distinct racial group: *MacLennan v Gypsy Traveller Education and Information Project*, 23 June 2008, unreported, case no S/132731/07.

11. This means that a provision which is directly aimed at ethnic Gypsies and Travellers as such and puts them at a disadvantage will be directly racially discriminatory.
12. However, most measures – such as the policy in PPTS - are aimed at all those with a nomadic lifestyle or a preference for living in caravans, rather than ethnic Gypsies and Travellers as such. Nonetheless, any such policy will be likely to have a disparate effect on ethnic Gypsies and Travellers, and consequently, any adverse effects of such a policy would amount to indirect discrimination on grounds of race against ethnic Gypsies and Travellers unless proportionately justified (see the analysis in *Moore & Coates* at §96).
13. We also consider that having a nomadic lifestyle and/or being a habitual caravan dweller are both capable of amounting to a “*status*” for the purposes of Article 14 ECHR.

## **Factual context**

### ***The vulnerable position of Gypsies and Travellers in the UK***

14. Gypsies and Travellers are widely recognised as being amongst the most vulnerable minorities in UK society. A report produced by the Department for Communities and Local Government in 2012 (*Progress report by the ministerial working group on tackling inequalities experienced by Gypsies and Travellers*, 2012) noted that:

*Gypsies and Travellers experience, and are being held back by, some of the worst outcomes of any group, across a wide range of social indicators.*
15. In March 2016, the Equality and Human Rights Commission (“EHRC”) published a spotlight report entitled *England’s most disadvantaged groups: Gypsies, Travellers and*

*Roma*. This found that Romani Gypsy, Irish Traveller and Roma children are less likely to achieve a “good level of development” in their early years or to achieve the GCSE threshold: p3. They were also amongst those most likely to be bullied or excluded from school: p4. Compared to the general population, they were more likely to experience poor health, including lower life expectancy, high infant mortality rates, higher prevalence of anxiety and depression, asthma, chest pain, diabetes, and higher maternal mortality rates: p5.

16. The House of Commons Women and Equalities Committee published a report on *Tackling inequalities faced by Gypsy, Roma and Traveller communities* in March 2019. This found:
  - i. “Gypsy, Roma and Traveller people have the worst outcomes of any ethnic group across a huge range of areas, including education, health, employment, criminal justice and hate crime”: p3.
  - ii. According to the Government’s *Race Disparity Audit*, first published in October 2017, pupils from Gypsy, Roma, and Traveller or Irish heritage backgrounds had the lowest attainment of all ethnic groups throughout their school years: p8.
  - iii. Research by the University of Bedfordshire showed that the health status of Gypsies and Travellers was “much poorer than that of the general population”, even when other factors such as socio-economic status were taken into account. “One in five Gypsy Traveller mothers will experience the loss of a child, compared to one in a hundred in the non-Traveller community”: p9.
  
17. In June 2019, the EHRC published another report entitled *Is Britain Fairer? The state of equality and human rights 2018*. This stated that “Gypsy, Roma and Travellers face multiple disadvantages across different areas of life. They achieve below-average results at school, experience difficulties accessing healthcare, worse health, and often have low standards of housing”: p10. It concluded that (p197):

*Gypsies, Roma and Travellers are particularly disadvantaged: they have the poorest attainment levels at school and are more likely to be excluded from school. They also face barriers to accessing healthcare and have poorer health outcomes. Gypsies, Roma and Travellers are also at higher risk of homelessness and experiencing poor housing. These findings are all indicative of a group experiencing extreme poverty but lack of available poverty data for this group means that they are invisible in official poverty statistics.*

18. Romani Gypsies, Roma, and Irish Travellers also experience significant levels of racism and prejudice. The DCLG's 2012 *Progress report* noted at §5.2 that:  
*Studies have reported that Gypsy and Traveller communities are subjected to hostility and discrimination and experience problematic relations with settled communities.*
19. The EHRC report of March 2016 observed that discrimination against and harassment of Romani Gypsies, Roma, and Irish Travellers was common across Britain: p6. Hostility towards these groups was often "*channelled through political rhetoric and the media*": p7.
20. The March 2019 report by the Women and Equalities Committee quoted a 2017 survey of Gypsies, Roma, and Travellers in the UK which found that 91% of respondents had experienced discrimination and 77% had experienced hate speech or hate crime: p10. It also quoted a 2009 EHRC report (*Inequalities experienced by Gypsy and Traveller communities: A review*) which stated that whilst most racism was "*hidden, less frequently expressed in public, and widely seen as unacceptable*", racism towards Gypsies and Travellers was "*still common, frequently overt and seen as justified*": p10.

### ***The traditional way of life of Gypsies and Travellers***

21. The disparate groups that fall under the umbrella term of "*Gypsies and Travellers*" have their own, often very different, cultures and customs but they also share certain similarities. Of these, perhaps the most obvious shared by Romani Gypsies and Irish Travellers in the UK is their pursuit of a traditional way of life characterised by two related, but distinct, traditions:
  - i. Nomadism; and
  - ii. Living in caravans.
22. Whilst the majority of Gypsies and Travellers now reside in conventional housing, a significant number (perhaps around 25%, according to the 2011 UK Census) still live in caravans in accordance with their traditional way of life. However, not all Gypsies and Travellers who live in caravans are nomadic. Many have ceased travelling for work with their caravans because of old age or ill-health, or perhaps to provide children with a stable education, but still wish to dwell in caravans.



23. Many of the Gypsies and Travellers who live in caravans have a strong cultural aversion to conventional housing. It has been recognised by the High Court that, for such people, bricks and mortar would be as unsuitable as a “*rat-infested barn*”: *Clarke v Secretary of State for the Environment, Transport and the Regions* [2002] JPL 552, per Burton J at §34.

***Practical barriers to the pursuit of the traditional way of life***

24. It is widely recognised that there is a serious shortage of sites on which Gypsies and Travellers may lawfully live. This arises from the combination of a long-term failure by local authorities to provide sufficient suitable authorised sites and policy barriers to Gypsies and Travellers obtaining planning permission to reside in caravans on private sites.

25. A briefing by the Race Equality Foundation found that Romani Gypsies and Irish Travellers were 7.5 times more likely than white British households to suffer from housing deprivation: Race Equality Foundation, *Ethnic Disadvantage in the Housing Market: Evidence from the 2011 Census*, April 2015. The most recent Traveller biannual caravan count found that 12% of caravans in England were on unauthorised sites or developments: Department for Levelling Up, Housing and Communities, *Count of Traveller Caravans, July 2021 England*, December 2021. Consequently, approximately 12% of caravan-dwelling households may be homeless as defined by s175(2) of the Housing Act 1996, which provides that:

*(2) A person is also homeless if he has accommodation but—*

*(a) he cannot secure entry to it, or*

*(b) it consists of a moveable structure, vehicle or vessel designed or adapted for human habitation and there is no place where he is entitled or permitted both to place it and to reside in it.* (emphasis added).

26. Even where authorised sites do exist, they are often in unsuitable and unhealthy locations. The situation was described as follows by Sarah Spencer in *Gypsies and Travellers: Britain’s Forgotten Minority* [2005] EHRLR 335 at 337:

*The majority of the 15,000 caravans that are homes to Gypsy and Traveller families in England are on Sites provided by local authorities, or which are privately owned with planning permission for this use. But the location and condition of these Sites would not be tolerated for any other section of society. 26 per cent are situated next to, or under, motorways, 13 per cent next to runways. 12 per cent are next to rubbish tips, and 4 per*

*cent adjacent to sewage farms. Tucked away out of sight, far from shops and schools, they can frequently lack public transport to reach jobs and essential services.*

...

*In 1997, 90 per cent of planning applications from Gypsies and Travellers were rejected, compared to a success rate of 80 per cent for all other applications... 18 per cent of Gypsies and Travellers were homeless in 2003 compared to 0.6 per cent of the population... Lacking Sites on which to live, some pitch on land belonging to others; or on their own land but lacking permission for caravan use. There follows a cycle of confrontation and eviction, reluctant travel to a new area, new encampment, confrontation and eviction. Children cannot settle in school. Employment and health care are disrupted.*

27. This shortage of sites stems from a series of legislative and policy measures adopted over the last 60 years:
  - i. The Caravan Sites and Control of Development Act 1960 (“**CSCDA 1960**”) prohibited occupiers of land from using it as a caravan site without a site licence and gave local authorities the power to close common land to Gypsies and Travellers. As a consequence, it became increasingly difficult for members of the Gypsy and Traveller population to carry on their nomadic way of life.
  - ii. In 1968, having recognised the problems caused by the CSCDA 1960, Parliament passed the Caravans Sites Act 1968 (“**CSA 1968**”). This imposed a statutory duty on county councils to provide caravan sites for Gypsies and Travellers “*resorting to or residing in*” their area. Though sites were built as a result of the CSA 1968, a number of authorities failed to comply with their duty and there remained a significant shortfall in authorised accommodation. Per Sedley J in *R v Lincolnshire CC Ex p. Atkinson* (1996) 8 Admin. L.R. 529: “*For the next quarter of a century there followed a history of noncompliance with the duties imposed by the Act of 1968, marked by a series of High Court decisions holding local authorities to be in breach of their statutory duty, to apparently little practical effect*”.
  - iii. In 1994, Parliament passed the CJPOA 1994 which repealed much of the CSA 1968, including the duty imposed on county councils to provide authorised sites. It also gave both the police and local authorities additional powers to remove Gypsies and Travellers when they park their caravans on unauthorised encampments.

## **The impact of planning policies**

28. The Government's planning policies have also made it significantly harder for Gypsies and Travellers to live in accordance with their traditional way of life.
29. *Planning policy for traveller sites* contains the Government's policy on Gypsy and Traveller sites, which must be taken into consideration in preparing local plans and taking planning decisions: ss19(2)(a) and 38(6) of the Planning and Compulsory Purchase Act 2004 and s70(2) of the Town and Country Planning Act 1990 ("**TCPA 1990**"). It provides guidance on two matters: "*Plan-making*", namely the process by which local planning authorities plan for meeting the accommodation needs in their areas; and "*Decision-taking*", namely the making of decisions on individual applications for planning permission by Gypsies and Travellers.
30. The "*overarching aim*" of PPTS is stated to be "*to ensure fair and equal treatment for travellers, in a way that facilitates the traditional and nomadic way of life of travellers while respecting the interests of the settled community*": §3. This is supplemented by the following more specific aims:
  - a. *that local planning authorities should make their own assessment of need for the purposes of planning*
  - b. *to ensure that local planning authorities, working collaboratively, develop fair and effective strategies to meet need through the identification of land for sites*
  - c. *to encourage local planning authorities to plan for sites over a reasonable timescale*
  - d. *that plan-making and decision-taking should protect Green Belt from inappropriate development*
  - e. *to promote more private traveller site provision while recognising that there will always be those travellers who cannot provide their own sites*
  - f. *that plan-making and decision-taking should aim to reduce the number of unauthorised developments and encampments and make enforcement more effective*
  - g. *for local planning authorities to ensure that their Local Plan includes fair, realistic and inclusive policies*
  - h. *to increase the number of traveller sites in appropriate locations with planning permission, to address under provision and maintain an appropriate level of supply*

- i. to reduce tensions between settled and traveller communities in plan-making and planning decisions*
- j. to enable provision of suitable accommodation from which travellers can access education, health, welfare and employment infrastructure*
- k. for local planning authorities to have due regard to the protection of local amenity and local environment*

31. In accordance with these aims, PPTS requires local planning authorities to set pitch targets “which address the likely permanent and transit site accommodation needs of travellers in their area”: §9. PPTS also contains a more permissive planning regime under which permission may more readily be granted on individual applications for planning permission. The House of Commons Library note on *Gypsies and travellers: planning provisions* (19 December 2019) stated that PPTS:

*“encourages local authorities to form their own evidence base for Gypsy and Traveller needs and to provide their own targets relating to pitches required. If planning authorities are unable to demonstrate a five-year supply of deliverable Traveller sites, this may make it more difficult for them to justify reasons for refusing planning applications for temporary pitches at appeal.”*

32. However, PPTS only applies to “gypsies and travellers” as defined in Annex 1.

33. When the original version of the PPTS was published in 2012, Annex 1 defined “gypsies and travellers” as:

*Persons of nomadic habit of life whatever their race or origin, including such persons who on 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, but excluding members of an organised group of travelling showpeople or circus people travelling together as such.*

34. However, that policy definition was changed when PPTS was revised in August 2015 and the words “or permanently” were deleted so as to exclude those who, whatever their original habit of life, and whether or not they have a cultural preference associated with their ethnic identity for living in a caravan, no longer travel.

35. The deletion of the words “*or permanently*” from the definition has the following result: Gypsies and Travellers who have ceased to travel permanently on grounds of old age, disability or ill health can no longer rely on the beneficial planning policies contained in PPTS when applying for planning permission for the use of land as a residential caravan site.
36. In addition, the amended definition of “*gypsies and travellers*” in the PPTS also applies when local authorities assess the need for caravan site provision for Gypsies and Travellers. This has led to a very significant reduction in their assessments of the level of need for additional site provision. The EHRC report *Gypsy and Traveller sites: the revised planning definition’s impact on assessing accommodation needs* (September 2019) found that, across the 20 local planning authorities studied, the number of pitches assessed as required fell from 1,584 in 2015, before the definition was amended, to just 345 afterwards (p.7). This means that the “*supply of specific deliverable sites*” (PPTS 2015, §10(a)) identified in Local Plans will be far smaller than the number actually required by the Gypsy and Traveller communities.
37. The amended planning policy definition has been challenged on the grounds that it is unlawfully discriminatory. The claimant was unsuccessful at first instance (*Smith v Secretary of State for Housing, Communities and Local Government* [2021] EWHC 1650 (Admin)) but has been granted permission to appeal to the Court of Appeal.<sup>3</sup>
38. In addition to the changed definition, other amendments were made to PPTS in August 2015 which have made it more difficult for Gypsies and Travellers to obtain planning permission for the use of land as a residential caravan site. These included:
- i. Stating that decision makers will not be required to treat the lack of an up-to-date five-year supply of sites as a significant material consideration in planning decisions relating to proposals on land designated as Green Belt and other sensitive areas (§27);
  - ii. Providing that unmet need and personal circumstances are unlikely to clearly outweigh harm to the Green Belt so as to establish very special circumstances in favour of granting an application (§§16 and 24);

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<sup>3</sup> See also §99 below.

- iii. Stating that local planning authorities should “*very*” strictly limit new Gypsy and Traveller site development in the countryside (§25); and
  - iv. Stating that there is no assumption that local planning authorities will be required to “*meet their Traveller site needs in full*” where there is a large-scale unauthorised site in the area that has significantly increased the level of need (§12).
39. Consequently, whilst PPTS is designed to promote more private Traveller site provision, and does still bestow a more permissive regime on those to whom it applies, recent amendments – particularly the more restrictive definition – have seriously limited its effectiveness in facilitating the traditional way of life of Gypsies and Travellers.

### **Unlawful occupation of land and its consequences**

40. As has been repeatedly shown by the biannual Traveller caravan counts, and as appears to be a result of the under-supply of suitable pitches, a significant minority of Gypsies and Travellers occupy land unlawfully. There are two main types of unlawful occupation. The first is an “*unauthorised development*”, which occurs where a Gypsy or Traveller owns the land he or she lives on, or has the permission of the owner to be there, but residential occupation of the land is a breach of planning control contrary to Part III of the TCPA 1990. Gypsies and Travellers living on unauthorised developments are liable to be removed from the land via one or more of the enforcement measures available under Part 7 of the TCPA 1990. These include:
- i. Temporary stop notices - ss171E-171H TCPA 1990;
  - ii. Enforcement notices - ss172-182 TCPA 1990;
  - iii. Stop notices - ss183-187 TCPA 1990;
  - iv. Prosecution for breach of an enforcement notice – s179 TCPA 1990;
  - v. Direct action – s178 TCPA 1990; and
  - vi. Injunctions - s187B TCPA 1990.
41. The second main species of unlawful occupation is an “*unauthorised encampment*”, which occurs where the Gypsy or Traveller is occupying land without the consent of the owner (and, in many cases, also in breach of planning control). Such an occupier is liable to be evicted by:

- i. A possession claim brought in the County or High Court under Part 55 of the Civil Procedure Rules;
  - ii. Use of the police powers under ss61-62E and local authority powers under ss77-79 CJPOA 1994 (as – now – amended by PCSCA 2022 (see below)); or
  - iii. Use by landowners of their common law powers to evict trespassers.
42. The panoply of powers (as they existed until this year) available to remove persons who are unlawfully occupying land, whether by way of a development or an encampment, is described in guidance produced by the (then) Department for Communities and Local Government, Home Office, and Ministry of Justice, *Dealing with illegal and unauthorised encampments: A summary of available powers* (March 2015). Since the PCSCA 2022 came into force on 28 June 2022, they have been substantially expanded (see below).

### **The legislative background to, and likely impact of the Police, Crime, Sentencing and Courts Act 2022**

43. The PCSCA 2022 was given Royal Assent on 28 April 2022 and came into force on 28 June 2022: s208(5)(i) PCSCA 2022. Part 4 of the PCSCA 2022 is concerned with unauthorised encampments. It follows two consultations undertaken by the Government. The first, entitled “*Powers for dealing with unauthorised developments and encampments*”, ran from 5 April 2018 to 15 June 2018. The second, entitled “*Strengthening police powers to tackle unauthorised encampments*”, ran from 5 November 2019 to 5 March 2020.
44. Part 4 of the PCSCA 2022 operates by way of amendments to Part 5 of the CJPOA 1994. It adds to and extends the existing police powers contained in that legislation to restrain unauthorised encampments. Those existing powers are, in summary, as follows:
- i. Under s61 CJPOA 1994, if a police officer reasonably believes that two or more persons are trespassing on land with the common purpose of residing there, that reasonable steps have been taken by or on behalf of the occupier to ask them to leave, and that either (1) any of those persons has caused damage to land or property on land or used threatening, abusive, or insulting words of behaviour towards the occupier (or the occupier’s family member, employee, or agent) or (2) those persons have between them six or more vehicles on the land, then the officer may direct those persons to

leave the land and remove any vehicles or other property they have on the land. A person who fails to leave the land as soon as reasonably practicable or who, having left, re-enters within the period of three months, commits an offence. Pursuant to s62 CJPOA 1994, if a direction has been given under s61 and the person to whom it applies fails to remove their vehicle from the land or enters the land as a trespasser with a vehicle within three months, then the police may seize and remove the vehicle.

- ii. Under s62A CJPOA 1994, if a police officer reasonably believes that a person and one or more others are trespassing on land with the common purpose of residing on the land, the trespassers have at least one vehicle and one or more caravans, there is a suitable pitch on a relevant caravan site for that caravan or each of those caravans, and the occupier or a person acting on his or her behalf has asked the police to remove the trespassers, then he may direct the person to leave the land and/or to remove any vehicle and other property from the land. A person who fails to leave the land as soon as reasonably practicable, or who enters any land in the area of the relevant local authority as a trespasser before the end of three months with the intention of residing there, commits an offence: s63(1) and (2) CJPOA 1994. If a constable reasonably suspects that a person to whom a direction has been given under s62A(1) CJPOA 1994 has, without reasonable excuse, failed to remove any vehicle on the land or entered any land in the area of the relevant local authority with a vehicle as a trespasser before the end of three months with the intention of residing there, then the constable may seize and remove the vehicle: s62C CJPOA 1994.

45. S83 PCSCA 2022 inserts a new s60C into CJPOA 1994. This contains a new criminal offence relating to unauthorised encampments. The offence will be committed where:

- i. A person (“P”) aged 18 or over is residing or intending to reside on land without the consent of the occupier;
- ii. P has or intends to have at least one vehicle with them on the land;
- iii. Significant damage or significant disruption has been caused or is likely to be caused as a result of P’s actual or intended residence, significant damage or significant disruption has been caused or is likely to be caused as a result of conduct carried on



or likely to be carried on by P while on the land, or significant distress has been caused or is likely to be caused as a result of offensive conduct carried on or likely to be carried on by P while on the land;

- iv. The occupier, a representative of the occupier, or a constable requires P to leave the land and/or remove from the land property that is in P's possession or under P's control; and
  - v. P fails to comply with the request as soon as reasonably practicable; or
  - vi. P enters (or, having left, re-enters) the land within a period of 12 months with the intention of residing there without the consent of the occupier and P has or intends to have at least one vehicle with them on the land.
46. The offence is summary only and is punishable by a term of imprisonment not exceeding 3 months or a fine not exceeding Level 4 (currently £2,500). It is a defence for P to show that he or she had a reasonable excuse for failing to comply with the request as soon as reasonably practicable or for entering or re-entering the land with the intention of residing there without the occupier's consent.
47. Certain key terms are defined at s60C(8) CJPOA 1994. "*Damage*" is stated to include "*(a) damage to the land; (b) damage to any property on the land not belonging to P; (c) damage to the environment (including excessive noise, smells, litter or deposits of waste*". "*Disruption*" includes "*interference with - (a) a person's ability to access any services or facilities located on the land or otherwise make lawful use of the land, or (b) a supply of water, energy or fuel*". "*Offensive conduct*" is defined (exhaustively) as being "*(a) the use of threatening, abusive or insulting words or behaviour, or disorderly behaviour, or (b) the display of any writing, sign, or other visible representation that is threatening, abusive or insulting*". Distress is not defined; and an offence of "*causing distress*" is very broad and uncertain in its scope.
48. S83 PCSCA 2022 also inserts two new sections into Part 5 of the CJPOA 1994 which allow for the seizure and forfeiture of property in connection with an offence under s60 C CJPOA 1994. Pursuant to the new s60D, if a constable "*reasonably suspects that an offence has*

*been committed*” under s60C, then he or she may “*seize and remove*” any relevant property that appears to him or her to belong to P, to be in P’s possession, or to be under P’s control: s60D(1) CJPOA 1994. “*Relevant property*” is defined at s60D(2) as being “*a vehicle (wherever located)*” which the constable suspects P had or intended to have with them on the land: s60D(2) CJPOA 1994. That property may be retained for three months, unless before then P is notified that he or she is not to be prosecuted under s60C CJPOA 1994, or until the conclusion of proceedings relating to the offence: s60D(4)-(7) CJPOA 1994. The new s60E provides that a court that convicts a person of an offence under s60C may order any property which was seized and retained under s60D(1) “*to be forfeited and dealt with in a manner specified in the order*”: s60E(1) and (2) CJPOA 1994. Before making any such order, the court must “(a) *permit anyone who claims to be its owner or to have an interest in it to make representations and (b) consider its value and the likely consequences of forfeiture*”: s60E(3) CJPOA 1994.

49. Amendments to the existing powers contained with Part 5 of the CJPOA 1994 are made by s84 PCSCA 2022:

- i. As described above at §44(i), s61 CJPOA 1994 gives the police the power to direct trespassers to leave land and remove any property with them on the land where two or more persons are trespassing on land with the common purpose of residing there and reasonable steps have been taken by or on behalf of the occupier to ask them to leave. However, this power is currently only exercisable where “*any of those persons has caused damage to the land or to property on the land or used threatening, abusive or insulting words or behaviour towards the occupier, a member of his family or an employee or agent of his*” (or where the persons have between them six or more vehicles on the land). As amended by s84(3) PCSCA 2022, from 28 June 2022 the power may be exercised where any of those persons “*has caused damage, disruption or distress*” (or, as before, where the persons have between them six or more vehicles on the land). The same definitions of “*damage*”, “*disruption*”, and “*distress*” as apply to s60C CJPOA 1994 will apply to s61 CJPOA 1994, pursuant to a new s61(10) CJPOA 1994.
- ii. As originally enacted, s61 CJPOA 1994 provides that if a person to whom a direction has been given under s61 re-enters the land as a trespasser within a period of three

months, he or she will commit an offence. S84(4) and (5) PCSCA 2022 extends that period to 12 months. This same extension to 12 months also applies to s62 (power to seize the vehicle of a person to whom a direction under s61 CJPOA 1994 has been given where he or she enters the land with a vehicle within the prohibited period), s62B (commission of an offence where a person to whom a direction under s62A(1) CJPOA 1994 has been given enters any land in the area of the relevant local authority within the prohibited period as a trespasser with the intention of residing there), and s62C (power to seize the vehicle of a person to whom a direction under s62A(1) CJPOA 1994 has been given where he or she enters the land with a vehicle within the prohibited period) by virtue of s84 PCSCA 2022.

iii. As originally drafted, s61 CJPOA 1994 did not apply to highways: s61(9) CJPOA 1994. This exception has been removed.

50. Finally, a new s62F CJPOA 1994 provides that the Secretary of State must issue guidance relating to the exercise of the functions of the police under ss60C-62E and associated regulations: s62F(1) and (2) CJPOA 1994. The police must have regard to that guidance when exercising any of those functions. Draft guidance was produced in October 2021: *Statutory Guidance for Police on Unauthorised Encampments: a summary of available powers* (Home Office).

51. That document sets out the powers contained in the CJPOA 1994 (as amended by the PCSCA 2022) and contains some, fairly limited, guidance as to the circumstances in which it might be appropriate to use such powers. It reminds officers that even if the criteria for the offence under s60C CJPOA 1994 are not met, enforcement action may be taken under the “broadened” s61 CJPOA 1994 or under other powers: “*If there are no significant harms committed, then section 61 powers can be used by police and local authorities can use other existing powers available to them*” (pp9-10). On “*Welfare issues*”, the guidance states:

*Police should ensure that, in accordance with their wider Equalities and Human Rights obligations, proper welfare enquiries are carried out to determine whether there are pressing needs presented by those on unauthorised encampments and that, where necessary, the appropriate agencies (including Local Authorities) are involved as soon as possible.*

*However, the police, alongside other public bodies, should not gold-plate human rights and equalities legislation. The police have been given strong powers to deal with unauthorised encampments and when deciding whether to take action, they should consider the harms caused by the unauthorised encampment (including those listed on page 12) and that the state may enforce laws to control the use of an individual's property where that is in accordance with the general public interest.*

*Each case should be dealt with on its own merits by police. This includes considering the potential impact issuing a direction to leave, arresting a person or seizing a vehicle may have on the families involved and on the vulnerable, before taking an enforcement decision.*

*If necessary, enforcement action against those on the unauthorised encampment could be delayed while urgent welfare needs are addressed.*

*The police have the powers to take action where significant harms have been caused. It is for the police to decide on proportionate enforcement action based on the circumstances and evidence of each case.*

52. By substantially expanding the reach of the criminal law and by rendering its scope (in relation to “*distress*”, for example) so uncertain, Part 4 PCSCA 2022 will make it very much more difficult for Gypsies and Travellers, who are constrained by the absence of suitable legal stopping-places, to live a nomadic way of life and to live in caravans. The draft guidance which says that the police should not “*gold-plate*” human rights standards, in our view, gives a clear “*spin*” on the proportionality exercise which should always be exercised on a case-by-case basis.

53. We note that:

- i. S60C CJPOA 1994 does not specify any minimum number of trespassers, meaning that the power can be used against the smallest of encampments, including one comprised of a single occupier.
- ii. The prohibited period, within which entry or re-entry to the land following a direction or request to leave is penalised, is extended from three to 12 months for ss61, 62, 62B, and 62C CJPOA 1994.

- iii. The PCSCA 2022 makes the commission of a criminal offence dependent upon the nebulous and subjective concepts of “*disruption*” and “*distress*”. “*Disruption*” is defined, non-exhaustively, at ss60C(8) and 61(10) CJPOA 1994 as including “*interference with - (a) person’s ability to access any services or facilities located on the land or otherwise make lawful use of the land, or (b) a supply of water, energy or fuel*”. This definition may be capable of encompassing a wide range of circumstances – from an encampment which in some way interferes with the utility supply for a large area to an encampment which takes up a small corner of a large public car park – and whilst s60C carries the safeguard that such disruption must be “*significant*”, s61 does not. The meaning of “*significant*” – a word which has already required clarification from the Court of Appeal in at least one other context (*Panayiotou v Waltham Forest London Borough Council* [2017] EWCA Civ 1624) – is not defined, either in the statute or in the draft guidance. The term “*distress*” is not defined in the PCSCA 2022 at all. The meaning of “*distress*” has been considered in the context of the offence of Intentionally Causing Harassment, Alarm or Distress contrary to Section 4A of the Public Order Act 1986 . In *R(R) v DPP* [2006] EWHC 1375 (Admin) it was held that it was a “*relatively strong word*” that was “*befitting of an offence which may carry imprisonment or a substantial fine*”. Toulson J stated that: “*I would hold that the word ‘distress’ in this context requires emotional disturbance or upset. The statute does not attempt to define the degree required. It does not have to be grave but nor should the requirement be trivialised. There has to be something which amounts to real emotional disturbance or upset.*” (at [12]). Even with this guidance, which provides little by way of further clarity, it is obvious that the caselaw sets a low bar.
- iv. The amendment of s61 CJPOA 1994 to allow for the police to take action in response to “*damage, disruption or distress*” represents a notable lowering of the threshold for criminality under that section.
- v. Under s61 CJPOA 1994, an offence will not be committed until a direction from the police to leave the land is disobeyed. By contrast, the new offence under s60C CJPOA 1994 can be committed at the say-so of a private individual. Under s60C, a request from the occupier or a representative of the occupier is sufficient. This is a significant departure from the previous powers with which the draft guidance fails, in our view, to grapple. The draft guidance states that one of its aims is to “*help the police decide*

*on proportionate action*” (p3). It provides that whether or not damage, disruption, or distress is significant will depend on the facts of each case *“and this will be for police and the courts to assess”* (p6). It furnishes a list of factors *“that the police could consider when assessing whether damage, disruption or distress is significant”* (p7). It also reminds the police to carry out *“proper welfare enquiries...to determine whether there are pressing needs presented by those on unauthorised encampments”* (p13). However, this ignores the fact that the request for a Gypsy or Traveller family to leave an encampment – which triggers the commission of a criminal offence and imposition of criminal penalty if disobeyed – can be made by a private individual or company, to whom the *“wider Equalities and Human Rights obligations”* which bind the police are irrelevant.

- vi. There is also no requirement for the request under s60C CJPOA 1994 to be made in writing or with any degree of formality.
  - vii. The new offence is (at least intended to be) prospective in reach. S60C CJPOA 1994 will be engaged where P is *“intending to reside”* on the land, if he or she *“intends to have”* at least one vehicle and *“it is likely that significant damage or significant disruption would be caused as a result of P’s residence if P were to reside on the land”*. This would appear to mean that a person who has not actually committed any wrongdoing could nevertheless be committing a criminal offence if the requisite future intention is established. That being said, it is in our view difficult to see how the provision as drafted could ever capture such a person. The offence is only committed if a request is made for *“P to do either or both of the following - (i) leave the land; (ii) remove from the land property that is in P’s possession or under P’s control”*. The offence does *not* capture a request made to P not to go onto the land in the first place. Given that a person who has not yet gone onto, or placed any property, on the land cannot sensibly be asked to leave the land or remove their property from it, it is difficult to envisage a situation in which s60C CJPOA 1994 could ever actually be applied to a purely prospective trespasser. Nevertheless, it does appear to be the Government’s intention that it should do so.
54. Our view is that the expanded police powers brought into force by the PCSCA 2022 will significantly increase the difficulties already faced by those seeking to lead a nomadic or

caravan-dwelling life. The significant shortage of lawful sites means that many Gypsies and Travellers have no authorised place on which to stop and are thus forced onto unauthorised encampments. All persons in such encampments will now be vulnerable to actual or threatened criminalisation if they do not leave the land at the request of the occupier or if they return within 12 months. Although a criminal offence would only be committed where the encampment caused - or would be likely to cause - significant damage, disruption, or distress, it is doubtful that this will offer much protection to Gypsies and Travellers seeking a place to stay. “*Distress*” is a wide and nebulous phrase which is not qualified by any reasonableness requirement. As noted above, there is significant direct discrimination against and hostility towards Gypsies and Travellers in society and any “*distress*” at the arrival of Gypsies and Travellers could well be the consequence of discriminatory attitudes, but the law would still appear to criminalise behaviour causing or likely to cause such distress. In any event, it is unlikely that many itinerant Gypsy or Traveller families will wait around to test the point, risking as they would a criminal conviction and the seizure of their homes.

55. We note that there is no evidence of a pressing social need for these further draconian provisions. Indeed, they were brought in in the face of significant opposition. According to the Government response to the consultation on *Strengthening police powers to tackle unauthorised encampments*, of the 9,421 online and emailed respondents to the consultation:

- i. 54% of people disagreed or strongly disagreed with the question “*To what extent do you agree or disagree that knowingly entering without the landowner’s permission should only be made a criminal offence if it is for the purpose of residing on it?*”;
- ii. 55% disagreed or strongly disagreed with the question “*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?*”;
- iii. 70% disagreed or strongly disagreed with the question “*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?*”;

- iv. In response to the question “*Should the police be able to seize the property of...Anyone whom they suspect to be trespassing on land with the purpose of residing on it*”, 81% answered no; and
  - v. 72% thought that the proposed amendments to ss61 and 62A CJPOA 1994 would have a negative or highly negative impact on the health or educational outcomes of Gypsy and Traveller communities.
56. In addition to this, the Government received: 10,620 responses to a “*targeted engagement*” run by Friends, Families, and Travellers, of which the overwhelming majority opposed the measures; 6,268 emails that either followed a template drafted by or were forwarded by Liberty, all of which opposed the measures; and 150 other emails of which 73% opposed the measures.
57. It is right also to note that the responses to the first consultation, *Powers for dealing with unauthorised developments and encampments*, suggested some support for the proposals, with 52% of respondents in favour of criminalising encampments – although, as only 1,226 of 2,198 respondents actually answered the question in issue, it would appear that this figure still represented only a minority (approximately 29%) of a small number of respondents.
58. In addition, we note that the proposals were not supported by the National Police Chiefs Council, which stated:
- The lack of sufficient and appropriate accommodation for Gypsies and Travellers remains the main cause of incidents or unauthorised encampments and unauthorised developments by these groups.*
59. Following legislative scrutiny of Part 4 of the PCSC Bill concerning unauthorised encampments, the Joint Committee on Human Rights produced a report (HC/478/HL Paper 37, 9 September 2021) in which it concluded that “*the Government’s proposals are likely to violate Article 8 of the European Convention on Human Rights*” and that there was “*a significant risk that the Bill could be found to be in contravention*” of Article 14 read with Article 8 (p3). The JCHR also considered that there was a risk of violation of Articles 7 (retrospective criminalisation), Article 10 (right to freedom of expression), and Article 1 of



the First Protocol of the ECHR (right to property). This analysis is considered further in §§101-104 below.

### **Caselaw on the use of injunctions against “persons unknown”**

60. A further relatively recent pressure on the traditional way of life of Gypsies and Travellers has arisen from the increase in applications for, and the courts’ response to, wide injunctions by local authorities seeking to restrain unlawful encampments by “persons unknown” – sometimes, but not always, in addition to named defendants – and covering large swathes of a local authority’s area.

61. The situation was described as follows by Coulson LJ in *Bromley London Borough Council v Persons Unknown* [2020] EWCA Civ 12 (“**Bromley**”) at §§10-11:

*10. In the South East, the recent spate of wide-ranging injunctions has been aimed at the [Gypsy and Traveller] community. This process began in 2015 with Harlow District Council v Stokes [2015] EWHC 953 (QB). The prohibition on encampments in that borough, and the subsequent perception that the injunction had been effective, led to a large number of similar injunctions in 2017–2019. Most of these injunctions, such as the injunction granted in the recent case of Kingston upon Thames London Borough Council v Persons Unknown [2019] EWHC 1903 (QB), as well as the interim injunction granted in this case, did not identify any named defendants. The second and fourth interveners in this case all obtained similar injunctions following what were uncontested hearings.*

*11. It appears that, in total, there are now 38 of these injunctions in place nationwide. It would be unrealistic to think that their widespread use has not led to something of a feeding frenzy in this contentious area of local authority responsibility. First, these injunctions have had the effect of forcing the [Gypsy and Traveller] community out of those boroughs which have obtained injunctions, thereby imposing a greater strain on the resources of those boroughs or councils which have not yet applied for such an order. Secondly, they have created an understandable concern amongst those local authorities who have not yet obtained such injunctions to seek them forthwith.*

62. This spate of copy-cat injunction applications has, however, encountered two hurdles. The first was the Court of Appeal’s decision in the *Bromley* case itself and the relatively rigorous

guidance that the Court gave as to the relevant procedural safeguards and the circumstances in which it would be proportionate to grant these wide injunctions. The Court of Appeal held as follows:

- i. There was an “*inescapable tension between the article 8 rights of the Gypsy and Traveller community...and the common law of trespass*”. The “*obvious solution*” was the provision of more designated transit sites. It was a “*striking feature of many of the documents that the court was shown that the absence of sufficient transit sites has repeatedly stymied any coherent attempt to deal with this issue. The reality is that, without such sites, unauthorised encampments will continue and attempts to prevent them may very well put the local authorities concerned in breach of the Convention*”: §100.
- ii. Government guidance (*Gypsy Sites Policy and Unauthorised Camping* (Department of the Environment Circular 18/94), *Guide to Effective Use of Enforcement Powers (Part 1: Unauthorised Encampments)* (Home Office, February 2006), and *Guidance on Managing Unauthorised Camping* (Department for Communities and Local Government, May 2006) “*presupposes that there will be unlawful encampments, and does not suggest, save as a last resort, that such encampments should be closed down, unless there are specific reasons for so doing*”: §101.
- iii. Local authorities should not seek injunctions as a first resort. They must engage with Gypsy and Travellers and “[t]hrough a process of dialogue and communication...it should be possible for the need for this kind of injunction to be avoided altogether”: §102. If the authority still considered an injunction the only way forward, then it would “*still be of the utmost importance to seek to engage with the [Gypsy and Traveller] community before seeking any such order if time and circumstances permit*”: §103. Having regard to the potential indirectly discriminatory consequences of such an injunction against Gypsies and Travellers, and the consequent need to comply with the PSED (see further this Opinion at §§131-137 below), an up to date equality impact assessment would also be very important: §103.
- iv. Borough-wide injunctions were “*inherently problematic*” because they give the Gypsy and Traveller community “*no room for manoeuvre*”: §105.

63. The Court of Appeal did not accept that such injunctions should never be granted, but instead provided the following summary as a “*useful guide*” to when such injunctions should be granted (at §108):

*(a) When injunction orders are sought against the [Gypsy and Traveller] community, the evidence should include what other suitable and secure alternative housing or transit sites are reasonably available. This is necessary if the nomadic lifestyle of the [Gypsy and Traveller] community is to have effective protection under article 8 and the Equality Act 2010.*

*(b) If there is no alternative or transit site, no proposal for such a site, and no support for the provision of such a site, then that may weigh significantly against the proportionality of any injunction order.*

*(c) The submission that the [Gypsy and Traveller] community can “go elsewhere” or occupy private land is not a sufficient response, particularly when an injunction is imposed in circumstances where multiple nearby authorities are taking similar action.*

*(d) There should be a proper engagement with the [Gypsy and Traveller] community and an assessment of the impact of an injunction might have, taking into account their specific needs, vulnerabilities and different lifestyle. To this end, the carrying out of a substantive EIA, so far as the needs of the affected community can be identified, should be considered good practice, as is the carrying out of welfare assessments of individual members of the community (especially children) prior to the initiation of any enforcement action.*

*(e) Special consideration is to be given to the timing and manner of approaches to dealing with any unlawful settlement and as regards the arrangements for alternative pitches or housing.*

64. The Court of Appeal concluded at §109:

*...it must be recognised that the cases referred to above make plain that the [Gypsy and Traveller] community have an enshrined freedom not to stay in one place but to move from one place to another. An injunction which prevents them from stopping at all in a defined part of the UK comprises a potential breach of both the Convention and the Equality Act 2010, and in future should only be sought when, having taken all the steps noted above, a local authority reaches the considered view that there is no other solution to the particular problems that have arisen or are imminently likely to arise.*

65. The second check on the grant of wide injunctions against persons unknown prohibiting unauthorised encampments arose – or appeared to arise - from another decision of the Court of Appeal, *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 2802. In that case, which concerned a protest against a clothing shop, the then Master of the Rolls (Sir Terence Etherton), David Richards LJ, and Coulson LJ held that final injunctions could not in fact be granted against unidentified persons unknown at all:

*89. A final injunction cannot be granted in a protestor case against “persons unknown” who are not parties at the date of the final order, that is to say Newcomers who have not by that time committed the prohibited acts and so do not fall within the description of the “persons unknown” and who have not been served with the claim form. There are some very limited circumstances, such as in Venables v News Group Newspapers Ltd [2001] Fam 430 , in which a final injunction may be granted against the whole world. Protestor actions, like the present proceedings, do not fall within that exceptional category. The usual principle, which applies in the present case, is that a final injunction operates only between the parties to the proceedings: Attorney General v Times Newspapers Ltd (No 3) [1992] 1 AC 191 , 224. That is consistent with the fundamental principle in Cameron [2019] 1 WLR 1471 , para 17 that a person cannot be made subject to the jurisdiction of the court without having such notice of the proceedings as will enable him to be heard.*

*90. In Canada Goose's written skeleton argument for the appeal, it was submitted that Vastint Leeds BV v Persons Unknown [2019] 4 WLR 2 (Marcus Smith J) is authority to the contrary. Leaving aside that Vastint is a first instance decision, in which only the claimant was represented and which is not binding on us, that case was decided before, and so took no account of, the Court of Appeal's decision in Ineos [2019] 4 WLR 100 and the decision of the Supreme Court in Cameron. Furthermore, there was no reference in Vastint to the confirmation in Attorney General v Times Newspapers (No 3) of the usual principle that a final injunction operates only between the parties to the proceedings.*

66. If this were the settled approach of the courts, relatively rigorous safeguards would be in place to protect Gypsies and Travellers against wide, unspecific injunctions prohibiting unauthorised stopping. However, the situation was cast into doubt by the recent decision of another Court of Appeal in *Barking and Dagenham London Borough Council v Persons Unknown* [2022] EWCA Civ 13 (“**Barking and Dagenham**”), in which the Court of Appeal held that this aspect of *Canada Goose* had been decided wrongly. The current

Master of the Rolls, Sir Geoffrey Vos, held that final injunctions *could* be granted which bound persons unknown who were unknown and unidentified at the date of the order.

67. The Master of the Rolls also doubted, at §§104-106, that Coulson LJ had been right to say in *Bromley* that “*i) there was an inescapable tension between the article 8 rights of the Gypsy and Traveller community and the common law of trespass, and (ii) the cases made plain that the Gypsy and Traveller community have an enshrined freedom not to stay in one place but to move from one place to another*”. In other words, the Master of the Rolls somewhat downplayed the relevance of Gypsy and Traveller identity and the particular circumstances and needs of Gypsies and Travellers by emphasising that the legal structure of the UK protects human rights on an individual not a group basis.

68. It is, however, important to note that the Master of the Rolls did not reject the important guidance given by Coulson LJ in the *Bromley* case on the proportionality of granting borough-wide injunctions in the light of the Convention rights of the Gypsy and Traveller communities. He accepted (at §105) that even where a Gypsy or Traveller could not establish a right to a settled home, they could rely on a private and family life claim to pursue a nomadic lifestyle (see *Chapman v UK* (2001) 33 EHRR 18 – discussed below at §§88-89). He emphasised at §106 that in considering the validity of persons unknown injunctions against unauthorised encampments, courts would take into account other legal considerations such as duties imposed under EqA 2010. And he stated at §107 that:

*Nothing I have said should, however, be regarded as throwing doubt upon Coulson LJ's suggestions that local authorities should engage in a process of dialogue and communication with travelling communities, undertake, where appropriate, welfare and equality impact assessments, and should respect their culture, traditions and practices. I would also want to associate myself with Coulson LJ's suggestion that persons unknown injunctions against unauthorised encampments should be limited in time, perhaps to one year at a time before a review.*

69. The substance of the *Barking and Dagenham* appeal was about whether persons unknown injunctions could be granted on a final basis at all. Permission has been sought to appeal the Court of Appeal's decision in *Barking and Dagenham* to the Supreme Court. As matters stand, however, there are now two inconsistent, recent Court of Appeal decisions as to the extent of local authorities' powers to seek wide injunctions to prevent any persons wishing

to pursue a traditional nomadic way of life in an area with insufficient authorised stopping places.

70. If the Supreme Court grants permission to appeal and concludes that *Barking and Dagenham* was wrongly decided, then courts will not be able to grant final injunctions restraining unauthorised encampments except in a case which names, or at least identifies, the defendants. If however, the Supreme Court concludes that this later Court of Appeal decision (which for the moment is the current binding decision) is correct, then the power to grant final injunctions against persons unknown will be available to the courts.
71. However, the practical guidance given in *Bromley* as to when such injunctions should be granted – which has not been disturbed – must still be followed. Such injunctions should still be granted only rarely and only after a careful process of dialogue and engagement and welfare assessments and equality impact assessments.

### **Support for the legal rights of Gypsy and Traveller communities in international and national human rights and equality law**

72. The approach of the Court of Appeal in these injunction cases at least demonstrates that the twin pillars of the traditional way of life of Gypsies and Travellers – namely nomadism and the occupation of caravans – receive a significant degree of protection from international and domestic law human rights law, and from domestic equality law. The next section of this Opinion analyses the content and scope of these provisions.

### ***The European Convention on Human Rights and the Human Rights Act 1998<sup>4</sup>***

73. The ECHR is of course the most relevant international human rights law instrument because it has been incorporated into national law by the HRA 1998. The rights scheduled to the Act by virtue of s1 and Schedule 1 HRA are designated “*Convention rights*”, and all legislation must be read and given effect to in a way which is compatible with Convention rights so far as it is possible to do so: s3(1) HRA 1998. It is unlawful for a public authority to act in a way which is incompatible with a Convention right unless mandated to do so by

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<sup>4</sup> This opinion was drafted and finalised before the announcement on 22 June 2022 of the bringing forward of a Bill to repeal and replace the HRA 1998. This section may need revisiting in the light of the terms of the Bill.

primary legislation which cannot be read compatibly with Convention rights: s6(1) HRA 1998. If the High Court, Court of Appeal, or Supreme Court is satisfied that a statutory provision is incompatible with a Convention right and cannot be read down using s3 HRA 1998, it may make a declaration of incompatibility: s4 HRA 1998. The caselaw of the ECtHR is also relevant to national courts interpreting Convention rights by virtue of s2 HRA 1998<sup>5</sup>.

74. The most material Convention rights in this context are Articles 8 and 14, though as the JCHR noted in its report on Part 4 of the PCSC Bill (referred to above at §59 and below at §§101-104), Article 7 (rights not to be subject to retrospective or uncertain criminal legislation), and Article 1 of the First Protocol of the ECHR (right to peaceful enjoyment of property) may also be relevant in this context.

#### *Article 7 ECHR*

75. Article 7 ECHR provides:

1. *No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.*
2. *This article shall not prejudice the trial and punishment of any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.*

76. Article 7 embodies the principle that only the law can define a crime and prescribe a penalty and that the criminal law must not be extensively construed to an accused person's disadvantage: see *Kokkinakis v Greece* (1994) 17 EHRR 397 at §52.

#### *Article 8*

77. Article 8 of the ECHR provides:

1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*

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<sup>5</sup> It has been announced that the Bill referred to above will repeal s2 HRA and amend the scope of s3, but this advice proceeds on the basis of the HRA 1998 as it currently stands.

2. *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

#### Article 14

78. Article 14 ECHR provides:

*The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*

79. As with Article 8, Article 14 has been enshrined in national law in Schedule 1 HRA 1998.

80. Article 14 has no freestanding existence: in order for it to be engaged, the facts at issue must fall within the ambit of one or more of the other rights protected by the ECHR. However, the duty under Article 14 is a wide one: to secure equal enjoyment of other rights within the ambit of another Convention right.

81. Ambit is to be widely construed. It is not necessary to show a breach of the other right, but the matter must have a connection which is more than tenuous to the core values which that other right protects: *Smith v Lancashire Teaching Hospitals NHS Foundation Trust* [2017] EWCA Civ 1916. If the facts come within the ambit of a Convention right, and a complainant can point to a realistic disparity of his or her enjoyment of that right on the grounds of a status (such as ethnic identity, or a nomadic habit of life), then it is for the public authority to justify the failure to secure equal enjoyment of the underlying right. Article 14 may be breached even if the measure does not breach the underlying right or is more than would have been required to comply with that underlying right: *Smith v Lancashire Teaching Hospitals NHS Foundation Trust* [2017] EWCA Civ 1916.

82. Article 14 encompasses indirect as well as direct discrimination, as confirmed in *JD and A v United Kingdom* [2020] HLR 5 at §85:



*The court has also held that a policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory, regardless of whether the policy or measure is specifically aimed at that group. Thus, indirect discrimination prohibited under art.14 may arise under circumstances where a policy or measure produces a particularly prejudicial impact on certain persons as a result of a protected ground, such as gender or disability, attaching to their situation. In line with the general principles relating to the prohibition of discrimination, this is only the case, however, if such policy or measure has no “objective and reasonable” justification.*

83. A further vital aspect of Article 14 when interpreting the rights of a minority community whose situation and needs differ from those of the majority is that a person’s right under Article 14 not to be discriminated against in the enjoyment of their Convention rights may be infringed not only where like cases are treated alike, but also where a defendant public authority unjustifiably fails to treat differently persons in different circumstances, as held in *Thlimmenos v Greece* (2001) 31 EHRR 15 at §44:

*The Court has so far considered that the right under Article 14 not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is violated when States treat differently persons in analogous situations without providing an objective and reasonable justification (see the Inze judgment, cited above, p. 18, § 41). However, the Court considers that this is not the only facet of the prohibition of discrimination in Article 14. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.*

84. Where the facts of the case come within the ambit of another Convention right, therefore, a measure which is apparently neutral but which has a differential impact on persons with a relevant status will be unlawful if it is not justified.

#### *Article 1 of the First Protocol*

85. Article 1 of the First Protocol provides:

*Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*

*The preceding provisions shall not, however, in any way impair the right of the State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure payment of taxes or other contributions or penalties.*

86. Article 1 of the First Protocol of the ECHR has sometimes been used to emphasise that there are rights and interests of others (landowners) which may conflict with the rights of Gypsies and Travellers for respect to their private and family life. But equally, the confiscation provisions in PSCSA 2022 are arguably a disproportionate infringement of the property rights of caravan owners, and Article 1 of the First Protocol may be used by Gypsies and Travellers to argue against specific orders sought under the PSCSA 2022 on the basis that they are disproportionate on the particular facts of a particular case.

*Relevance of the ECHR and HRA 1998 to issues affecting Gypsies and Travellers' occupation of land*

87. Gypsies and Travellers who are lawfully residing in their caravans on land with the benefit of planning permission are unlikely to have to rely on Article 8. If such a person owns the land on which they lawfully reside, they are at no more risk of eviction than the owner-occupier of a bricks and mortar house. If he or she does not own the land but has a licence to occupy it, then his or her position is likely to be safeguarded by the statutory protection afforded by the Mobile Homes Act 1983. Article 8 has, therefore, primarily been relied upon in cases where Gypsies and Travellers are living in their caravans on land without the benefit of planning permission or where they have otherwise been occupying land without consent.
88. Eviction of a Gypsy or Traveller from an unlawful development or encampment by a public authority is likely to engage Article 8. It will be an interference with the Gypsy or Traveller's home. A dwelling may still fall within the scope of Article 8 even if it was established unlawfully: *Buckley v United Kingdom* (1997) 23 EHRR 101 at §§51-54. Measures which affect a Gypsy or Traveller's stationing of their caravan will impact upon the right to respect for their home: *Chapman v United Kingdom* (2001) 33 EHRR 18 at §73.
89. Even where the Gypsy or Traveller's occupation of land does not amount to a home, however, Article 8 may still assist. *Chapman* is clear authority – recently affirmed by the Court of Appeal in *Barking and Dagenham* – that eviction will also have an impact upon

the right to respect for the Gypsy or Traveller's private and family life, which includes some respect/protection for autonomy and personal identity as a person with a traditional way of life. The ECtHR held in *Chapman v United Kingdom* (2001) 33 EHRR 18 ("*Chapman*") at §§73-74:

*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 for long periods 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.*

90. However, although Article 8 rights are engaged by decisions which interfere with a Gypsy or Traveller's occupation of their home, Article 8 rights are qualified and may be restricted if the limitation is:

- i. In accordance with the law (ie contained in sufficiently clear, transparent, and foreseeable legislation or rules);
- ii. Rationally connected with pursuit of a legitimate aim (one of the list specified in Article 8(2) which includes "*public safety*" and protecting "*the rights and freedoms of others*") and;
- iii. "*Necessary in a democratic society*" which has been interpreted as whether there is a proportionate means of achieving that legitimate aim.

91. The test for whether or not a measure is justified was described by Lord Reed in *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39, [2014] AC 700 at §74:

*(1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the*

*importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter.*

92. The legal framework is sufficiently broad that where the Gypsy or Traveller's occupation of land is unlawful as a matter of national law, the Court is likely to find that the eviction is in accordance with the law and the measure has a legitimate aim in upholding that law. The battleground for Gypsies and Travellers resisting eviction is therefore likely to be whether or not the eviction is justified, in the sense articulated by Lord Reed above.
93. The onerous nature of this test has been made clear in a line of ECtHR cases concerned with Gypsies, Roma, and Travellers:
  - i. In *Buckley v United Kingdom* (1997) 23 EHRR 101, the ECtHR held that the availability or otherwise of "*practical alternatives open to the applicant if she leaves her land*" was relevant: §76. That was due to "*the special feature*" presented by the case, which was "*that, being a gypsy, the applicant leads a traditional lifestyle which restricts the options open to her*": §76. Furthermore, "[s]pecial considerations arise in the planning sphere regarding the needs of gypsies": §84.
  - ii. In *Chapman*, the ECtHR held that "*there may be said to be an emerging international consensus amongst the Contracting States of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle, not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity of value to the whole community*": §93. The fact of being a "*member of a minority with a traditional lifestyle different from that of the majority of a society*" did not "*confer immunity from general laws intended to safeguard assets common to the whole society*", but "*it may have an incidence on the manner in which such laws are to be implemented*": §96. As had been intimated in *Buckley*, "*some special consideration should be given to their needs and their different lifestyle both in the relevant regulatory planning framework and in arriving at the decisions in particular cases*": §96. To that 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.

- iii. In *Connors v United Kingdom* (2005) 40 EHRR 9, the ECtHR reiterated that 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 framework and in reaching decisions in particular cases” and that there was therefore a “positive obligation” on the UK “by virtue of Art.8 to facilitate the gypsy way of life”: §84.
  - iv. In *Yordanova and Tohsev v Bulgaria* (App. no. 25446/06), the ECtHR listed a series of resolutions of the Council of Europe which called upon Member States to adopt a proportionate response to unlawful Roma and Traveller settlements: §§76-79. The applicants (who were Roma) formed part of “an outcast community and one of the socially disadvantaged groups” which “may need assistance in order to be able effectively to enjoy the same rights as the majority population”: §129. That disadvantaged position “could and should have been taken into consideration”: §133.
  - v. In *Buckland v United Kingdom* (2012) 56 EHRR 16, the ECtHR noted that “the loss of one’s home is the most extreme form of interference with the right to respect for the home”.
  - vi. In *Winterstein v France* (App. no. 27013/07), the ECtHR reiterated “that the occupation of a caravan is an integral part of the identity of travellers, even where they no longer live a wholly nomadic existence, and that measures affecting the stationing of caravans affect their ability to maintain their identity and to lead a private and family life in accordance with that tradition”: §142. It emphasised that “numerous international instruments, some of which have been adopted within the Council of Europe, emphasise the necessity, in the event of the forced eviction of Roma and travellers, of providing them with alternative housing, except in cases of force majeure”: §159.
94. Article 8 may therefore be relevant to (and, depending on the facts, may defeat) an attempt by a public authority to evict a Gypsy or Traveller from an unlawfully occupied site, whether that is by way of: a claim for an injunction under s187B TCPA 1990 (*South Buckinghamshire District Council v Porter* [2003] UKHL 26); a claim for an injunction to restrain trespass (*Bromley London Borough Council v Persons Unknown*); a claim for

possession (*Connors v United Kingdom* (2005) 40 EHRR 9); or any other action. This is because public authorities have a statutory duty under s6 HRA 1998 to comply with Convention rights.

95. However, Courts are generally – and in our view increasingly – likely to afford some deference to the decisions of elected decision-makers, particularly when interpreting legislation. This concept of the “*margin of discretion*” applies to all questions of proportionality in relation to qualified Convention rights. It was recently revisited by the Supreme Court in *R (SC) v Secretary of State for Work & Pensions* [2021] UKSC 26, [2021] 3 WLR 428, wherein Lord Reed described the question of what margin of discretion to afford the defendant as one of degree. It had been described in similar terms in *R (Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department* [2020] EWCA Civ 542, where at §140 Hickinbottom LJ held:

*The greater the element of economic and/or social policy involved, the greater the margin of judgment and the greater the deference that should be afforded. That is, for obvious reasons, particularly so when that body is Parliament. However, if the measure involves adverse discriminatory effects, that will reduce the margin of judgment and thus the degree of deference. That will be particularly so where the ground of discrimination concerns a core attribute such as sex or race.*

96. Similarly, in *Stec v United Kingdom* (2006) 43 EHRR 47, the ECtHR held as follows at §52:

*The scope of this margin will vary according to the circumstances, the subject-matter and the background. As a general rule, very weighty reasons would have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of sex as compatible with the Convention. On the other hand, a wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature's policy choice unless it is “manifestly without reasonable foundation”.*

97. Accordingly, tighter protection may be given where actions by a public authority which impinge upon a Gypsy or Traveller’s traditional way of life also have a particular adverse

effect on members of those communities as such, in a way which amounts to unjustified discrimination under Article 14. As noted above, this involves understanding the need to respect different needs and lifestyles and to therefore treat different cases differently (the *Thlimennos* formulation of indirect discrimination) rather than simply asking if a Gypsy or Traveller has been treated in the same way as a member of a settled community.

98. In *Clarke v Secretary of State for the Environment, Transport and the Regions* [2002] JPL 552, for example, an Inspector appointed by the Secretary of State to determine a planning appeal dismissed a Romani Gypsy's appeal, finding that his contention that his family would have to resort to a roadside existence if they were refused planning permission was undermined by the fact that conventional housing had been offered to the family. However, the High Court quashed that decision, holding at §30 that:

*...in certain appropriate circumstances it can amount to a breach of articles 8 and 14 to weigh in the balance and hold against a Gypsy applying for planning permission, or indeed resisting eviction from Council or private land, that he or she has refused conventional housing accommodation as being contrary to his or her culture.*

99. It is clear from the case-law that the courts will often be willing to accept – or the defendants to admit – that a measure is *prima facie* discriminatory in that it treats Gypsies and Travellers differently (or fails to treat them differently when they are in a different position). The battleground usually centres upon whether the measure is justified. In *R (Wilson) v First Secretary of State and Wychavon District Council* [2007] EWCA Civ 52, the Court of Appeal held that it was lawful for the statutory regime under TCPA 1990 to permit the service of stop notices to apply to individuals living in caravans but not dwelling houses. Although this was admitted to be discriminatory, there was a clear distinction between the unauthorised stationing of a caravan on land and the use of buildings as dwelling-houses and therefore the difference in treatment was justified. In *Smith v Secretary of State for Housing, Communities and Local Government* [2021] EWHC 1650 (Admin),<sup>6</sup> the Planning Court held that the Secretary of State's policy, which defined Gypsies and Travellers so as to exclude Gypsies and Travellers who were too old or disabled to travel, indirectly discriminated against elderly and disabled Gypsies and Travellers but was justified because

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<sup>6</sup> See also above at §37 of this Opinion.

the Secretary of State was entitled to distinguish between the land-use needs of nomadic Gypsies and Travellers and the settled community.

*Relevance of the ECHR and HRA 1998 in interpreting and applying the PCSCA 2022*

100. Part 4 of the PCSCA 2022, which is described above, generates a number of serious human rights concerns: first, that it is a disproportionate interference with the Article 8 rights of Gypsies and Travellers and places them at disproportionate risk of criminalisation; second, that the seizure provisions may constitute a disproportionate infringement of the right to respect for Gypsies and Travellers' property (and their homes); and thirdly, that the types of behaviour criminalised are too broad and insufficiently clearly defined to comply with the protection against doubtful penalisation in Article 7 ECHR.

101. These concerns were closely analysed by the cross-party JCHR in its pre-legislative scrutiny of Part 4 of the Bill<sup>7</sup>.

102. We agree with the analysis of the JCHR as to the ways in which the PCSCA 2022 infringes Convention rights. The JCHR summarised its report as follows:

*Part 4 of the Police, Crime, Sentencing and Courts Bill proposes to criminalise Gypsy, Roma and Traveller people who reside, or intend to reside, on an unauthorised encampment, even when they do not have anywhere else to go. The Bill would also create new powers to seize caravans, including family homes, and gives landowners a new role in criminalising people who trespass on their land.*

*Part 4 of the Bill gives rise to several human rights concerns. We recognise that the human rights of landowners can be impacted by unauthorised encampments. The Government's proposals are likely to violate Article 8 of the European Convention on Human Rights (ECHR), which requires that the State should not interfere unnecessarily with a person's family life, private life, way of life, or their home. Most Gypsy, Roma and Traveller people do not want to live on unauthorised encampments, but a chronic lack of authorised sites means that many feel they have no choice. To criminalise unauthorised encampments without providing sufficient authorised sites would be contrary to the*

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<sup>7</sup> <https://committees.parliament.uk/publications/6554/documents/70980/default/>



*Government's obligation under Article 8 ECHR to facilitate the gypsy way of life. We recognise that landowners also have legitimate concerns around access to their own land. However, the Government should not use the criminal law to address what is essentially a planning issue.*

*The proposals self-evidently discriminate against Gypsy, Roma and Traveller people, putting at risk their right to practise their culture without being unfairly criminalised in the absence of adequate sites. We therefore have concerns that there is a significant risk that the Bill could be found to be in contravention of the requirement that all human rights and freedoms be secured without discrimination under Article 14 ECHR, as read with Article 8 and other relevant human rights.*

*There are far too many risks inherent in a system that effectively criminalises a civil law matter. This, combined with a lack of clarity in the language of the Bill, could give rise to violations of the principle of no punishment without law (Article 7 ECHR), the right to private and family life (Article 8 ECHR) and freedom from discrimination in the enjoyment of human rights (Article 14 ECHR).*

*This new offence relates to what a person may "intend" to do, or damage they are "likely" to cause, "if" they reside on land. Such language uses multiple terms that are open to wide and often subjective interpretation, and as a consequence may allow for prejudice and discrimination to permeate this new offence. It is clear that any infringement of property rights can cause harm to the landowner. However, we must not criminalise people for doing no harm, particularly when those being targeted by a new offence are a historically persecuted minority group who continue to suffer discrimination and prejudice.*

*We therefore have significant concerns with the justification behind this new offence and consider that there are other ways of tackling unauthorised encampments—for example, a statutory duty on local authorities to provide adequate authorised encampments—which would achieve the same aim without interfering with human rights in such a significant manner. The provision of more authorised sites would also benefit landowners, who are quite rightly concerned about the present situation.*

103. In its conclusions, the JCHR observed:

*7. The wording of Part 4 of the Bill is too vague and offends the principle of legal certainty, which is vital when dealing with criminal law. No person should be punished through laws that lack sufficient legal certainty (Article 7 ECHR) and, moreover, no*

*person's human rights should be interfered with by laws that lack sufficient legal certainty.*

104. In our view this analysis is correct and may be used in defence of specific prosecutions under Part 4 PSCSA 2022. However, we also consider that there are reasonable grounds for seeking a declaration that this part of the PCSCA 2022 is inherently incompatible with Article 7 and Article 14 ECHR.

### ***Other relevant international human rights instruments***

105. The UK is a signatory to a number of other human rights instruments which are material to the issues in this Opinion. Because of our dualist system, these instruments are not directly justiciable in UK law. Nonetheless, they are potentially relevant to questions concerning the rights of Gypsies and Travellers for three reasons.

106. First, they are binding on the UK at international level, and so breaches of these instruments may be pursued in international fora, and to bring moral pressure to bear on the Government to amend offending legislation and policy.

107. Second, it is long established that non-incorporated instruments are relevant in interpreting the exercise of common-law discretions (such as prosecutorial decisions).

108. Third, the ECtHR requires judges to interpret the ECHR in the light of other specialist international human rights law, and its judgments should inform the judgments of domestic courts in interpreting Convention articles. That interpretation will be relevant to domestic courts determining issues concerning rights under the ECHR by virtue of s2 HRA 1998.

109. It is well-established that Convention rights should be construed in light of relevant international law: *Demir v Turkey* (2009) 48 EHRR 54 at §85, *Neulinger v Switzerland* (2012) 54 EHRR 31 at §131, and *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4 at §21. However, in *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26, the Supreme Court held at §§74-96 that a domestic court cannot determine for itself whether the UK is in breach of its obligations under an unincorporated international treaty (whilst still accepting - per Lord Reed PSC at §86 – that other relevant international human rights instruments would be relevant to determining the proportionality of decisions under Articles 8 and 14 ECHR). It remains to be seen precisely how a domestic

court can or will use unincorporated international instruments to interpret Convention rights without interpreting them for itself; but since they are material to this interpretative exercise, relevant international instruments are described below.

*The Framework Convention on Minority Rights*

110. The Framework Convention for the Protection of National Minorities (“Framework Convention”) obliges its signatories to:

- i. Guarantee to persons belonging to national minorities the right of equality before the law and of equal protection of the law - Article 4(1);
- ii. Adopt, where necessary, adequate measures in order to promote full and effective equality between persons belonging to a national minority and persons belonging to the majority in all areas of economic, social, political, and cultural life - Article 4(2);
- iii. 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 - Article 5(1);
- iv. Refrain from policies or practices aimed at assimilation of persons belonging to national minorities against their will and protect such persons from any action aimed at such assimilation - Article 5(2);
- v. Encourage a spirit of tolerance and intercultural dialogue and take effective measures to promote mutual respect, understanding, and cooperation among all persons living on its territory - Article 6(1); and
- vi. Take appropriate measures to protect persons who may be subject to threats or acts of discrimination as a result of their ethnic or cultural identity - Article 6(2).

*United Nations Convention on the Rights of the Child 1989*

111. Article 3(1) of the UNCRC states that:

*In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*

112. It was held by the Supreme Court in *ZH (Tanzania) v Secretary of State for the Home Department* [2011] 2 AC 166 at §23 that this Article:

*...is a binding obligation in international law, and the spirit, if not the precise language, has also been translated into our national law. Section 11 of the Children Act 2004 places a duty upon a wide range of public bodies to carry out their functions having regard to the need to safeguard and promote the welfare of children.*

113. It was explained at §26 that:

*This did not mean (as it would do in other contexts) that identifying their best interests would lead inexorably to a decision in conformity with those interests. Provided that the tribunal did not treat any other consideration as inherently more significant than the best interests of the children, it could conclude that the strength of the other considerations outweighed them. The important thing, therefore, is to consider those best interests first.*

114. S11 of the Children Act 2004 (“CA 2004”) applies to local authorities and district councils together with a large number of other public authorities: s11(1) CA 2004. S11(2) CA 2004 provides:

*(2) Each person and body to whom this section applies must make arrangements for ensuring that—*

*(a) their functions are discharged having regard to the need to safeguard and promote the welfare of children; and*

*(b) any services provided by another person pursuant to arrangements made by the person or body in the discharge of their functions are provided having regard to that need.*

115. In *Stevens v Secretary of State for Communities and Local Government* [2013] EWHC 792 (Admin), at §69 Hickinbottom J (as he then was) considered the application of the best interests duty in the context of an appeal to a Planning Inspector (emphasis added):

*69. ...in respect of the approach of a planning decision-maker, the following propositions can be derived.*

*i) Given the scope of planning decisions and the nature of the right to respect for family and private life, **planning decision-making will often engage article 8. In those circumstances, relevant article 8 rights will be a material consideration which the decisionmaker must take into account.***

*ii) **Where the article 8 rights are those of children, they must be seen in the context of article 3 of the UNCRC, which requires a child's best interests to be a primary consideration.***

*iii) **This requires the decision-maker, first, to identify what the child's best interests are. In a planning context, they are likely to be consistent with those of his parent or other carer who is involved in the planning decision-making process; and, unless circumstances indicate to the contrary, the decision-maker can assume that that carer will properly represent the child's best interests, and properly represent and evidence the potential adverse impact of any decision upon that child's best interests.***

*iv) **Once identified, although a primary consideration, the best interests of the child are not determinative of the planning issue. Nor does respect for the best interests of a relevant child mean that the planning exercise necessarily involves merely assessing whether the public interest in ensuring planning controls is maintained outweighs the best interests of the child. Most planning cases will have too many competing rights and interests, and will be too factually complex, to allow such an exercise.***

*v) **However, no other consideration must be regarded as more important or given greater weight than the best interests of any child, merely by virtue of its inherent nature apart from the context of the individual case. Further, the best interests of any child must be kept at the forefront of the decision-maker's mind as he examines all material considerations and performs the exercise of planning judgment on the basis of them; and, when considering any decision he might make (and, of course, the eventual decision he does make), he needs to assess whether the adverse impact of such a decision on the interests of the child is proportionate.***

*vi) **Whether the decision-maker has properly performed this exercise is a question of substance, not form. However, if an inspector on an appeal sets out his reasoning with***

*regard to any child's interests in play, even briefly, that will be helpful not only to those involved in the application but also to the court in any later challenge, in understanding how the decision-maker reached the decision that the adverse impact to the interests of the child to which the decision gives rise is proportionate. It will be particularly helpful if the reasoning shows that the inspector has brought his mind to bear upon the adverse impact of the decision he has reached on the best interests of the child, and has concluded that that impact is in all the circumstances proportionate...*

116. Where a public authority is not one of those specified at s11(1) CA 2004, then it appears that the application of Article 3 UNCRC will be more limited, because of the judgment of the Supreme Court in *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26 at §§74-96 (described above) that a domestic court cannot determine whether the UK is in breach of its obligations under an unincorporated international treaty. Nonetheless, the best interests of the child will be a relevant consideration “*in assessing whether differential treatment is justifiable under article 14 of the Convention together with article 8, in a matter concerning a child*”, although domestic courts should not “*approach the question of justification by applying the provisions of the UNCRC, or by deciding whether, in adopting the measure in question, the national authorities complied with their obligations under the UNCRC*”: *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26, per Lord Reed PSC at §86.

*The UN Convention on the Rights of Persons with Disabilities 2006*

117. The UN Convention on the Rights of Persons with Disabilities (“**UNCRPD**”) was ratified by the UK in 2009. Article 4 obliges states parties to:

*...take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs, or practices that constitute discrimination against persons with disabilities.*

118. Article 5(3) provides that:

*...in order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.*

119. Article 19 requires that:

*States Parties recognise the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and proportionate measures to facilitate full engagement by persons with disabilities of this right and their full inclusion and participation in the community by ensuring that:*

*(a) Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement;*

*(b) Persons with disabilities have access to a range of in-home, residential and other community support services .... To prevent isolation or segregation from the community;*

*(c) Community Services and facilities are available on an equal basis to persons with disabilities and responsive to their needs.*

120. In an early case, *R (NM) v London Borough of Islington* [2012] EWHC 414 (Admin) at §§99-108, Sales J (as he then was) was inclined (obiter) to disregard the UNCRPD as an aid to ascertaining the scope of Article 14 ECHR. However, in *Burnip v Birmingham City Council* [2008] EWCA Civ [2012] EWCA Civ 629, the Court of Appeal preferred the reasoning of Carnwath LJ (as he then was) in *AH v West London MHT* [2011] UKUT 74 (AAC) at §16, in which he held, by reference to the UNCRPD, that:

*... By ratifying a Convention, a state undertakes that wherever possible, its laws will conform to the norms and values that the Convention enshrines.*

Maurice Kay LJ held at §22 of *Burnip* that if the meaning of Article 14 in that case had been elusive or uncertain, he would have resorted to the UNCRPD and would have resolved the uncertainty in favour of the appellants.

121. UNCRPD, particularly Article 19, may be of some persuasive effect in affecting the approach of courts to justification arguments concerning restrictions on the rights of disabled gypsies and travellers.

### ***Relevant provisions of the Equality Act 2010***

122. Together with the HRA 1998, the EqA 2010 is the domestic statute which has afforded most protection to the rights of Gypsies and Travellers. EqA 2010 prohibits discrimination on the basis of protected characteristics in a number of situations.

*Direct or indirect discrimination provisions of Equality Act 2010*

123. One of the protected characteristics is race: ss4 and 9 EqA 2010. Gypsies and Travellers, are entitled to protection from discrimination on grounds of race: see, for example, *Moore and Coates* at §58.
124. One of the contexts in which the EqA 2010 prohibits discrimination is in the provision of a public services (s29(1) and (2) EqA 2010) and in the exercise of a public function (s29(6) EqA 2010).
125. Discrimination may be direct or indirect. Direct discrimination occurs when “because of a protected characteristic, A treats B less favourably than A treats or would treat others”: s13(1) EqA 2010. Indirect discrimination is defined at s19 EqA 2010:
- (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
  - (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
    - (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
    - (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
    - (c) it puts, or would put, B at that disadvantage, and
    - (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

***Use of direct and indirect discrimination provisions to bring claims on behalf of Gypsies or Travellers and as a defence to civil and criminal enforcement action***

126. The direct discrimination provisions have been successfully used by Romani Gypsies and Irish Travellers on a number of occasions to challenge blatant discriminatory acts, such as the refusal to serve them in public houses and hotels.
127. However, the indirect discrimination framework can also be very useful in challenging decisions and policies which ostensibly apply to everyone equally but which have a particular adverse effect on Gypsies and Travellers because of their traditional way of life. Thus, s19 and s29 EqA 2010 have been successfully used to challenge public policies. For example, in *Moore & Coates* two Romani Gypsy women challenged the Secretary of State's



decision to adopt a policy of calling-in all planning and enforcement appeals relating to Gypsy and Traveller caravan sites in the Green Belt for his determination. The reason this policy amounted to unlawful indirect discrimination was because this led to greater delays in determining Gypsy and Traveller caravan site appeals in comparison with those relating to conventional houses which were not subject to the same policy and this had a proportionately greater adverse effect on ethnic Gypsies and Travellers than on non-Gypsy and Traveller applicants for planning permission. The High Court held that this was indirectly discriminatory and could not be justified: it was a disproportionate means of achieving the legitimate aim of properly applying planning policy.

128. Claims of discrimination have also often been used in challenges to local authority schemes for allocating social housing or pitches on local authority Gypsy and Traveller sites. In *R (Ward) v Hillingdon London Borough Council* [2019] EWCA Civ 962, the Court of Appeal held that the local housing authority's allocation scheme indirectly discriminated against Irish Travellers and would be unlawful unless it could be justified. The scheme gave lower priority to people who had not been resident in the local area for ten years. This put Irish Travellers at a disadvantage and the local authority had not yet shown that the measure was justified.
129. As the Court of Appeal recognised in the *Bromley* case, the making of a persons unknown injunction to prevent unlawful encampment will have a disparate adverse effect against Gypsies and Travellers, whom – because of the difficulties described in this Opinion – are more likely than others to need a stopping place where none is lawfully available. In addition to this, prosecutorial decisions under the PCSCA 2022 are very likely to have an indirectly discriminatory effect too and will thus be unlawfully discriminatory unless they can be proportionately justified. The factors identified by Coulson LJ in the *Bromley* case in respect of wide injunctions will therefore be very relevant in defending Gypsies and Travellers against such actions, which may otherwise be contrary to s19 EqA 2010.

#### *Use of the Public Sector Equality Duty*

130. S149(1) EqA 2010, so far as is material, requires a public authority, in the exercise of its functions, to have due regard to the need to:
- (a) *eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;*

- (b) *advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; and*
- (c) *foster good relations between persons who share a relevant protected characteristic and persons who do not share it.*

131. Pursuant to section 149(3):

*Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to-*

- (a) *remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;*
- (b) *take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;*
- (c) *encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.*

132. The combination of s149(1) and s149(3) EqA 2010 means that, in order to comply with the PSED, a public authority must identify and inform themselves as to the nature and extent of the disadvantages suffered by persons who share a particular characteristic that are connected to it, so that they can consider what steps could be taken to address them, and must give “*due regard*” to considering whether to take such steps, having regard to the equality objectives contained in s149(1) and s149(3) EqA 2010.

133. The Courts have often held that in giving due regard to the statutory equality objectives identified in s149 EqA 2010, decision-makers must not take a perfunctory tick-box approach, but must perform the duty “*in substance, with rigour and an open mind*”. This formulation was approved by the Supreme Court in *Hotak & Kanu v London Borough of Southwark and Another* [2015] UKSC 30 at §75. In that case, which concerned homelessness provision, the Supreme Court held that the Parliamentary intention behind s149 was that there should “*be a culture of greater awareness of the existence and legal consequences of disability [and other characteristics protected by EqA 2010]*” (at §74). This duty is useful in cases concerning Gypsies and Travellers, though the Court also said at §75 that “*provided that there has been ‘a proper and conscientious focus on the statutory*

*criteria*”, the degree of weight to be given to the consideration was a matter for the decision maker.

134. The PSED contained in s149 EqA 2010 is of particular relevance in the context of seeking to defend the traditional Gypsy and Traveller way of life, because – as described above – Gypsies and Travellers are some of the most marginalised people in the UK. Consequently, the duty on public authorities in performance of their functions to “*give due regard*” to the “*need*” to avoid unlawful discrimination against Gypsies and Travellers; to advance their equality of opportunity; and to foster good relations between Gypsies and Travellers and others can be an important tool in ensuring that the particular needs and issues faced by Gypsies and Travellers are given sufficient focus and attention to ensure that they are taken into account. This is often not the case.
135. In some cases – such as the *Bromley* case - the courts have emphasised that the failure by a decision-maker to be able to demonstrate that they have properly given due regard to the issues facing a particular group adversely affected by a policy will make it less likely that the decision-maker can justify an exercise of discretion or a policy which adversely affects members of that group. Consequently, it can be helpful to draw a court’s attention to an inadequate analysis of the three statutory equality objectives (usually, but not always or necessarily, through conducting an equality impact assessment).
136. It is important too to appreciate that the PSED can be used to challenge ongoing discriminatory situations. This occurred in the case of *R(BAPIO) v Royal College of GPs and the General Medical Council* [2014] EWHC 1416, in which BAPIO challenged the ongoing use of a Clinical Skills Assessment which non-white medical students were significantly less likely to pass than white medical students. Mitting J held that there was not a breach of the PSED at the relevant time, but there ‘very soon’ might be if further consideration was not given to the reasons why this gap occurred and to identify steps which could be taken to reduce or eliminate it.
137. However, if a decision maker has taken the needs of Gypsies and Travellers into account, the PSED is unlikely to help in challenging the rationality of a decision. For example, in *R (McDonagh) v Newport City Council* [2019] EWHC 3886 (Admin), a local housing authority’s scheme for allocating pitches on a Gypsy and Traveller site did not breach the PSED. The scheme stipulated that applicants would only be eligible for a pitch if they had

a demonstrable aversion to bricks and mortar accommodation. The claimant argued that that failed to have “*due regard to the opportunity to live in accordance with one’s own cultural heritage*”: §62. The Judge rejected this, holding at §65 that:

*...the critical point is that the valuing of a traveller's culture is actually achieved by the policy itself. The 'demonstrable aversion' requirement is not directed to the question whether the culture is one that is valued or ought to be given respect: that question receives its answer from the policy itself. Rather, the requirement is directed to the scarcity of resources and the need to follow some course in order to allocate scarce resources to those in greatest need. Thus it is not a valid objection to the requirement to say that it fails to afford inherent value to the cultural practice.*

### **The key legal issues currently facing Gypsy and Traveller communities**

138. As noted above, Gypsy and Traveller communities experience “*the worst outcomes of any ethnic group across a huge range of areas, including education, health, employment, criminal justice and hate crime*”: House of Commons Women and Equalities Committee, *Tackling inequalities faced by Gypsy, Roma and Traveller communities*, March 2019, p3. The causes of these disadvantages are complex and multi-faceted, but a recurrent theme is the shortage of suitable and culturally-appropriate accommodation. The causal link between the failure to make adequate provision for Gypsies and Travellers’ housing needs and the disadvantages experienced by Gypsies and Travellers has been accepted by the High Court in *Moore & Coates* at §§60-61 (and indeed, as is clear from the same paragraphs, by the Secretary of State for Communities and Local Government):

60. *The ECHR submissions ... were that ...*

*“In terms of health and education, ethnic Gypsies and Travellers are one of the most deprived groups in Britain. Life expectancy for Gypsy and Traveller men and women is 10 years lower than the national average. Gypsy and Traveller mothers are 20 times more likely than the rest of the population to have experienced the death of a child. In 2003, less than a quarter of Gypsy and Traveller children obtained five GCSEs at A\*-C grades, compared to a national average of over half. **The Commission's research has shown that a lack of authorised sites for Gypsies and Travellers perpetuates many of these problems [footnote omitted]. Thus, there is a clear relationship between effective access to the planning system and the welfare of this disadvantaged racial group**”*

*61. That view is not disputed by the Defendant SSCLG...* (emphasis added)

139. The reasons for the lack of authorised sites are again varied. It is, however, clear that nomadism and caravan-dwelling have been placed under considerable pressure by both the historic legislative measures outlined at §27 of this Opinion and by the more recent legal and policy developments discussed in this Opinion, namely the passing of the PCSCA 2022, the increased number of injunctions granted by the courts to restrain unauthorised encampments, and the amended definition of Gypsies and Travellers for the purposes of the Government policy *Planning Policy For Traveller Sites*.

140. We note that:

- i. The combination of these measures together with the shortage of authorised sites is likely to make it very difficult, if not impossible, for many Gypsies and Travellers to pursue their traditional way of life without fear of criminalisation;
- ii. Gypsies and Travellers are a peculiarly vulnerable majority to whom the Government has significant responsibilities under both domestic and international law, as explained above at §§72-138;
- iii. Disabled and elderly Gypsies and Travellers are particularly disadvantaged by having been effectively written out of the PPTS if they have a cultural need to live in caravans but can no longer travel as a result of disability and/or old age.
- iv. Use of the new enforcement powers in the PCSCA 2022 is likely to result in increased homelessness amongst these communities, both in terms of eviction from unauthorised encampments and the seizure of their caravans, and is likely to encourage animosity and discrimination towards Gypsies and Travellers by members of the settled communities;
- v. It is hard to see any real need for the PCSCA 2022, for the reasons set out in the JCHR report of July 2021. Moreover, the police considered their pre-existing powers to be sufficient and that they would prefer for unauthorised encampment to be dealt with as a matter of planning enforcement not as a matter of criminal law and the response to the most recent consultation was overwhelmingly against the proposals.

## **Conclusion**

141. The various developments discussed above have created overwhelming difficulties for Gypsies and Travellers. Members of the Gypsy and Traveller communities who wish to pursue a nomadic lifestyle and/or to live in caravans in accordance with their traditional way of life face increased difficulties in obtaining planning permission for authorised sites; the risk of committal for contempt of court if they form unauthorised encampments on large swathes of public land; and the threat of criminalisation if they camp on both private and public land. Underlying all these issues is, of course, the long-standing shortage of authorised sites which forces Gypsies and Travellers onto unauthorised encampments and developments in the first place.
142. Our view is that the UK is failing to comply with the obligations it has chosen to undertake as a matter of international law: to facilitate the Gypsy and Traveller way of life (by virtue of the HRA 1998 and the Framework Convention); to have regard to the best interests of children in all decisions affecting them (by virtue of the UNCRC); and to ensure that disabled people have equal choices as to how, where and with whom they wish to live in comparison with people without disabilities (by virtue of the UNCRPD). These obligations include specific international obligations to respect, protect and preserve the rights identified in them, in a way which is practical and effective. However, the measures discussed above combine to make this traditional way of life all but impossible to pursue.
143. In terms of domestic law, we have highlighted a number of respects in which particular statutes or policies may be incompatible with the HRA 1998.
144. Any specific challenge to a specific piece of legislation, guidance or its application in a particular case would of course necessitate careful separate consideration. Nevertheless, we consider that there are serious grounds for saying that many of the measures outlined above, or application of them, do violate at least Article 8 and Article 14 of the ECHR, and in the case of the PCSCA 2022, additionally Article 7. This is particularly the case when these provisions are read in the light of other obligations undertaken by the UK which are binding in international law though not formally incorporated into national law, which interpretative

obligation still arises by virtue of s2 HRA 1998 (albeit somewhat attenuated in application by the approach of the Supreme Court in the *SC* case).

145. We also consider that much policy making and enforcement action takes place without any due regard to the statutory equality objectives as they apply to Gypsies and Travellers, as required by s149 EqA 2010. There is likely to be scope for challenges based on s149 EqA 2010 or s19 and s29 EqA 2010 in particular cases.

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**30 JUNE 2022**