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L I B E R T Y

RESPONSE TO THE HOME OFFICE CONSULTATION PAPER ON SQUATTING

March 1992

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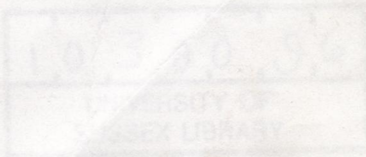


Liberty (the National Council for Civil Liberties) was formed in 1934 and is an independent and non-party-political organisation which seeks to defend and extend civil liberties. Ever since its formation nearly 60 years ago, it has taken a particular interest in the extension of the criminal law. Liberty was particularly involved in opposing the criminalisation of squatting that was suggested in the 1970s, and which lead to the Criminal Law Act 1977.

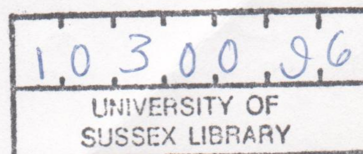
The political 'problem' of squatting

The Home Office Minister John Patten, in announcing to the House of Commons (Hansard, 25th July 1991, cols 1338-41) his department's intention to legislate on squatting, was at pains to show his awareness of the complex issues raised by so doing: in particular, he thought there should be compelling reasons if there was to be a further extension of the criminal law into an area of public interest traditionally the province of the civil law. Drawing on his department's year-long review of the law on squatting, he indicated that the government would take a careful and cautious approach, and would look for cross-party support.

For all the deliberation evident in the minister's approach, it is important to bear in mind the powerful emotional response which the issue of squatting evokes. This surfaces in the government's refusal, in the minister's speech and in the consultation paper, to consider arguments in defence of squatting (Hansard ibid,, para 1338; consultation paper, paras 5, 62). It also explains why legislative change is proposed to solve a 'problem' of the existence of which the Home Office is able to produce almost no evidence.

The practical 'problem' of squatting

Asked to identify possible legislative changes to implement the Government's declaration of principle, the consultation paper shows the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Home Office to be embarrassed on the one hand by the absence of evidence of any problem, and on the other by the existing legislative scheme, and the apparently limited scope it leaves for extending the criminal law against squatters.

The Home Office account of the 'problem' (paras 9 & 10) is derisory: there is no national information. The paper makes reference to 'media estimates' - but, since there are no national statistics, of what use are these? The only figures available are for London in 1986. These are so scanty that few conclusions can safely be derived from them, and it is extraordinary that the Home Office should see fit to propose legislation on the basis of so little hard information. This is emphasised by the pointers which the information does contain, which suggest that the 'problem' of squatting is quite different from that addressed by the Home Office proposals. The information indicates that:

(a) the great bulk of squatting (three quarters) affects local authority and housing association stock

(b) it is largely confined to London, and within London to three poor boroughs with large amounts of council housing, much of it poor quality.

It is arguable, on the present information about the nature and extent of squatting, that the problem does not merit legislative attention, that proper statistical information should be obtained before the problem can be accurately perceived (let alone remedies devised), and that if sqautting is to be reduced, attention should be concentrated upon the control of public housing stock, and upon the relationship between housing allocation and housing need.

Legislative remedies

Without evidence of a real problem to work with, the Home Office is left with answering the political need to 'do something' about squatting. In the popular imagination the most emotive injustice arising out of squatting is the archetypal nightmare of the home-owner or tenant coming

back from their holidays to find that squatters have taken over their home. It is a popular nightmare which exercises considerable sway, though few people will have had either direct or indirect experience of it. It is this nightmare that makes squatting a political issue, and which stimulates governments to want to act against it.

The problem for the Home Office is that this central mischief has already been addressed by legislation, as indeed John Patten has acknowledged. Section 7 of the Criminal Law Act 1977 added to the existing civil remedies available to property owners and tenants sanctions under the criminal law against squatters excluding from premises the 'displaced residential occupier' and the 'protected intending occupier'. Thus, in the key areas of popular concern - the owner or tenant returning from holiday to find squatters have moved in, and the person who buys a property to live in and finds squatters have moved in before them - criminal sanctions were introduced, intended to afford the excluded occupier the means to regain possession speedily with the assistance of the police.

The Home Office response is to propose extension - to a greater or lesser extent - to the availability of the remedies under s.7 CLA 1977. The main criticism of this approach is twofold. On one hand, such extensions inhibit civil liberties by widening the use of the criminal law to protect property. On the other hand, simply extending the existing legislative framework ignores that framework's shortcomings, both for those seeking to make use of s.7, and those on the receiving end.

1. the undesirable inhibition of civil liberties

As the consultation paper acknowledges (para 63(d)), the extension of criminal law in this area raises the prospect of fundamental shifts in the present balance of civil and criminal law in England and Wales. Extensions of the criminal law should not be countenanced without clear evidence of a public mischief with the civil law is inadequate to deal.

There is no such evidence - let alone clear evidence - in the case of squatting.

The existing criminal sanctions in respect of residential property were based on a clearly identified public wrong, that to the protected intending occupier and displaced residential occupier. The Criminal Law Act 1977 was an extension of the criminal law into an area traditionally the preserve of the civil law which required specific justification. That justification was seen to be the particular mischief of people being deprived of their homes without legal process: criminal sanctions were seen to be appropriate here, just as they are against landlords who illegally evict their tenants. But there is no justification for the extension of the criminal law to deal with the categories of case which the government has under consideration - the second home owner, the mortgagee in possession, the owner of vacant shop and commercial premises.

This is not to say that persons in those catgories should be denied a remedy against squatters. However, since the loss suffered by those persons as a result of squatting is principally a loss of value or commercial opportunity, it is loss that is appropriately remedied through the civil courts.

Even if it is accepted that it is appropriate that there be criminal sanctions to deal with squatting, the existing structure of such sanctions is so flawed that its extension should not be countenanced.

2. the shortcomings of s.7 CLA 1977 and the existing civil remedies

In principle, the civil remedies available to owners and tenants of properties against unauthorised occupants are quite adequate; the aggrieved owner/tenant satisfies a judge that s/he has a right to immediate possession, possession is so ordered, and is executable in as

short a time as a judge considers just and equitable. Justice requires simply that the occupants have sufficient notice of the hearing to be afforded an opportunity to attend to state their case. In principle, and if it were found to be in the interests of justice, an owner/tenant could regain possession in two or three days.

The problem with civil proceedings is almost entirely one of delay. The slow pace of civil procedure and the practical effects of a heavy caseload upon the courts have meant that ordinary possession proceedings cannot be carried through with such speed. Procedures have been amended to allow a 'fast route' available in squatting cases, under Order 24 of the County Court Rules 1981, and Order 113 of the Rules of the Supreme Court. Under these procedures, an order for possession may be made 5 days after service of the summons or application (2 days for non-residential property), or less in cases of emergency or with leave of the court.

In practice, civil proceedings take much longer. This is in part due to the inefficiency of litigants and their legal representatives, but is substantially due to the overburdening of the courts. This latter results in unacceptable delays before applications are listed for hearing. When cases are listed, there will be a tendency for the hearings to be adjourned if the respondents or their representatives appear at all. This is particularly true of proceedings brought by public landlords, when summonses are issued in bulk, and listed for hearing in bulk, no more than a few minutes being allowed for each. In the County Court, a respondent will find it relatively easy to obtain adjournment with directions, subject to a timetable which will take weeks or months to work through, with further delay waiting for a trial date. In the High Court, Masters are notoriously unwilling to deal with defended cases at all, requiring that they be transferred to county courts, with the consequent administrative delays which quite defeat the purpose of Order 113 in providing a 'fast route'. In 1989, the London Borough of Southwark found that it took from 4 to 5 months to obtain possession under these proceedings: by streamlining its own procedures, it predicted that this time could be reduced, at best, to 2 or 3 months.

John Patten informed parliament that he had discussed the need for the courts to expedite such cases with the Lord Chancellor, who had informed him that 'all that is possible to do under present procedures to expedite matters is being done': this is simply not true. With their present lack of resources, the courts simply do not deliver the expedited legal process provided in the court rules.

It is probably the case that, if litigants and the courts were able to make optimum use of the existing civil procedures, squatting cases would, in most cases, be dealt with so speedily and effectively that there would be 'no call' for criminal sanctions. As things stand, the archetypal displaced residential occupier and protected intending occupier will find the delays and formalities of civil proceedings unacceptable when they are being excluded from their home and have nowhere else to stay. The indications are that these form a small minority of cases, however. The great majority of cases in the civil courts are brought by public landlords who face additional problems.

The criminal sanction introduced by section 7 of the Criminal Law Act 1977 is open to serious criticism in principle, and in practice opens up opportunities for abuse by those who in fact make most frequent use of it, public landlords. As is acknowledged in the consultation paper (para 15), there are relatively few prosecutions: in 1989, only one person was prosecuted and convicted. If the section were not being used at all, then this might not give cause for concern. But in fact occupiers are being threatened with prosecution under section 7 CLA 1977 in significant numbers, and significant numbers are also being arrested for allegedly committing the offence. If there are arrests, why are there no prosecutions? The reason is that the person applying s.7 achieves their object without the necessity to prove the offence. What that person wants is to regain possession: if this can be done by asking an occupier to leave, and then having the occupier arrested by the police if they refuse to do so (by the police forcing entry if necessary), then this object is achieved without the necessity of then prosecuting the occupier.

This is an intrinsically pernicious state of affairs. The fact that persons are arrested but not prosecuted means that the defences built into section 7 are meaningless: an occupier may find him- or herself arrested and therefore evicted notwithstanding that s/he did not enter the premises as a trespasser, that the owner/tenant has failed to produce the required written statement or local authority certificate, that the premises were not used mainly for residential purposes, or that the occupier believed that the person requesting her/him to leave was not a DRO or PIO or agent of one of these. The fact that the occupier is not prosecuted means s/he never gets the chance to establish these defences. Even if prosecutions were carried through, the essential mischief would still remain: a person acquitted of the offence would still find themselves evicted simply thorugh having been arrested, with no prospect of resuming occupation.

The nature of section 7 is thus to place the police in the situation of arbiters of rights of occupation: it is for a police officer to decide who has the right to occupy premises at the point where a purported owner/tenant asks an occupier to leave, and the latter refuses to do so: depending on whether they decide to arrest the occupier or not the question of who has the right to occupy is determined. It is no part of the role of the police to make such decisions.

It can be rightly argued that section 7 raises questions of rights to possession which it is not the proper function of courts of summary jurisdiction to determine: magistrates and their clerks are neither trained nor experienced to decide, for example, whether an occupier entered premises as a trespasser or is alternatively a licensee or tenant: such questions are matters for civil judges. But in practice, the point is irrelevant: such cases do not come before magistrates' courts: they are determined by the police.

While it is unlikely that the s.7 procedure is abused by individual protected intending occupiers or displaced residential occupiers acting for themselves, it is certainly open to abuse by local authorities purporting to act on behalf of such persons - and it is such local

authority action that constitutes the great majority of cases of use of the procedure. As has been said, the procedure in the normal case is attenuated: the local authority achieves its object by making the squatter leave: it is not required to prove its entitlement to use the procedure by the proving of the offence in court. This opens up the possibility for the unscrupulous local authority to regain possession by serving bogus notices and certificates in cases where there is no protected intending occupier who is being excluded by the squatter's occupation, or where the property is not in a state of repair adequate to enable it to be let. Liberty has experience of a local authority gaining possession under s.7 CLA 1977, only for the property to remain empty for a period of months. Similarly, the same local authority has served papers upon squatters in a particular property whereby the authority purports to be acting on behalf of a particular individual to whom the property has been pre-allocated, only for the authority a few weeks later to repeat the exercise in respect of another property while purporting to be acting on behalf of the same protected intending occupier. It is in the nature of the s.7 procedure that such abuse goes unchecked.

If relatively accountable and responsible bodies like local authorities resort to abuse of the procedure afforded by s.7 of the Criminal Law Act 1977, how much more abuse is there likely to be if the same remedies are extended to individuals in respect of properties which are not their homes, and which represent to them sources of financial gain? Legal occupiers stand to find themselves arrested and ejected simply because someone has satisfied a police officer that they are not legal occupiers. Such questions of rights of occupation are not for the police to determine.

Conclusions

There would appear to be no case made out for further legislation in this field. The existing criminal law provisions relating to squatting are so drawn as to be arbitrary and unjust in their application: consideration should be given to their repeal rather than their extension to cases of unauthorised occupation currently excluded.

Remedies for disputes over the occupation of land should remain civil remedies: the under-resourcing of the civil courts is the real problem that needs to be addressed. Such disputes should not be handed over to the police to deal with: the actions of the police in such cases are unregulated by any need to justify themselves before the courts, and are uninformed by any understanding of the legal issues involved.