



27 June 2011

Letter to Secretary of State and ministers
BIS

**Re: BIS response to pedlars pre-legislative scrutiny of the Executive
Summary on *Street Trading and Pedlary Laws* - URN11/542**

In responding to Pedlars enquiries to BIS for further clarification¹ Roger Dennison, Senior Policy Advisor at BIS avoids giving any substantive response but prefers replying to serious inquiries by confirming his support for what has to be a pre-determined policy agenda that has not yet been able to persuade agreement with those stakeholders most harshly, directly and disproportionately affected by its potential outcome.

Pedlars are likely to be sledgehammered by bullish policy announcements and this is a letter of complaint to you as heads of the department that Mr Dennison claims have set more important ministerial priorities than assisting stakeholders.

In his latest communication he takes offence about a pedlar's perception that BIS policy is similar to that of Central Europe circa 1933 when people were beginning to be thought about in terms of symbols, although while Germany was a democracy under a coalition government. What Mr Dennison and his department fail to acknowledge are the lessons of history, particularly the most recent examples of how the constitution of a society can be eroded by persistent attacks of denigration, a similar stratagem to that used by those policies of the 1933 regime.

The department's tactic of manipulating data in order to justify conclusions as facts should be a cause for concern to the silent majority of the eligible British population allowed for by the Pedlars Act – a population which is more than the paltry and inaccurate figure of perhaps 4000 claimed by Durham University in their research "consultation" - the only channel made available to them. Pedlars, identified as particular stakeholders and made to represent an insignificant proportion of the population², consider the entire approach of BIS to be a failure of duty and process by HMG.

This failure is epitomized by how the *Services Directive* (SD) has been incorporated into UK law as *the Provision of Services Regulation Act 2009*,

¹ <http://www.pedlars.info/bis-consultation/94-concerns-about-executive-summary.html>

² an assumed 4000 represents less than one hundredth of one percent, and some 50 interviewed represent one ten thousandth of one percent of persons that are eligible to act as pedlars

(PSRA). This directive, arising out of European thought, puts forward compelling reasons for the necessary removal of all access barriers or restrictive *Authorisation Schemes* from National Legislations³ - this to free up the Internal Market and allow easy cross-border trade.

The aim is to ensure non-discrimination and provide wider consumer choice with better pricing, competitiveness and economic progress whilst protecting in particular social and cultural values for all. It lists sensible criteria to retain some authorisation schemes but BIS has picked only the scheme of *Licensed Street Trading* to defend and justify without any similar consideration for retaining the scheme for *Certified Pedlary*.

For instance, BIS and Mr Dennison use the justification of *Overriding Reasons Relating to the Public Interest* (ORRPI) such as *public safety* concerns about static obstacles that create liability in the street with another justification: the desire to maintain the “*cultural identity of an area or a street*” - this for licensed street traders but not for certified pedlars.

Pedlars had reasonable expectation that BIS would consider the case for retaining the authorisation scheme for pedlary but the BIS report has usurped the meaning of *Recital 40* of the *Services Directive* that provides criteria that justifies a scheme for pedlary with the following: “*cultural policy objectives, including ... in particular social, cultural, religious and philosophical values of society... the preservation of national historical and artistic heritage*”. *Recital 40* applies to the social and cultural identity of “people” and not as BIS usurp the meaning to apply to the cultural identity “*of an area or a street*”, which is a corrupt interpretation of *Recital 40*.

Recital 54 of the *Services Directive* [footnote 3] provides a convincing argument on the basis of consumer redress to justify an authorisation scheme for pedlary and concludes with the following statement “*The results of the process of mutual evaluation will make it possible to determine, at Community level, the types of activity for which authorisation schemes should be eliminated*”. BIS has not bothered to reveal anything about “*mutual evaluation*” to stakeholders but reverses its own consumer redress argument in support of an authorisation scheme for pedlars. Kevin Davis of BIS writes on 4 November 2009 - “***We think that the requirement to have a pedlar certificate is a proportionate measure justified by the need to ensure that those with a criminal record are not allowed to sell services on the street and that consumers are able to know who it is that is selling the service so they can seek redress if something goes wrong***”.

The Provision of Services Regulation Act 2009 (PSRA) implements the *Services Directive* but makes no provisions for complaints by a recipient of a service other than the *Section 7* “*duty to make [service provider] contact details available*”. There are no penalties if one fails in that duty or if one gives false information. Pedlars are concerned that under BIS policy there will be unregulated service providers who are neither answerable to *Recital 54* of the *SD*, nor *Section 7* of the *PSRA* regarding consumer protection. This is adequate justification for HMG

³ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32006L0123:EN:HTML>

to maintain an authorisation scheme for service providing pedlars.

No effort has been made to satisfy points that the BIS report finds “*untenable*” in regard to certification of pedlary. These are: police certification, residency, and a test for good character. Pedlars have serious concerns about why BIS neglects seeking justification for retaining a *Pedlars Certification Scheme*. They suspect that conformity to the principle of subsidiarity for the UK is being unfairly applied by BIS to diminish the professional identity of pedlars and so diminish the nation’s cultural diversity.

The principle of the *Pedlars Act* is to allow and enable a certified person to provide an economic service at any time and in any place throughout the UK without hinderance or causing a nuisance, in safety both to the pedlar and to the public.

The purpose of the *Pedlars Act* is to differentiate a "genuine" service provider from rogue traders and others.

Pedlary has been part of an oral, cultural, identity granted recognition in the UK since 1697, renewed in 1871 and in 1881, and is unique throughout Europe. The cultural tradition of self-regulating ambulatory trading was made a statute by the Pedlars Act to differentiate a certified person from any other person, including in *Section 13*⁴ - “*idle and disorderly persons, rogues and vagabonds* and *Section 23* - *commercial travellers, sellers of vegetables, fish, fruit, or victuals or sellers in public markets*”.

When *Street Trading* legislation was introduced into localities by the use of the adoptive *Local Government (Miscellaneous Provisions) Act 1982 Schedule IV*⁵ (LGMPA), it had nothing to do with pedlary and made no provisions for regulating pedlars. Pedlary was listed as an exempt activity⁶. The LGMPA *Street Trading Schedule* was intended primarily to regulate licensing of obstacles (street traders apparatus) in the street, the positioning of which requires approval by Highway authorities but has evolved to become a tool for abuse by enforcement officers to harass and intimidate pedlars who for three centuries have also traded on highways, streets or at houses but unlike static traders are ambulatory causing no obstacle liability to the flow of traffic or generic pedestrians.

The proposed new BIS policy has not indicated how or by what means of description it is “*intended*” to protect pedlars from being caught up in the resulting chaos of de-regulation. The BIS report hints at a “*new definition for the mode of operation of lawful trading that is outside the scope of street trading legislation*” but the report gives no textual substance for consideration and that is what current pedlar scrutiny finds so offensive. Pedlars find it impossible to endorse the notion of de-regulation of the very fundamental civil liberty that currently protects their daily profession. This mischief understandably places pedlars on the defensive.

Mr Dennison says all matters can be resolved by courts and whereas shifting the

⁴ <http://www.legislation.gov.uk/ukpga/Vict/34-35/96>

⁵ <http://www.legislation.gov.uk/ukpga/1982/30/schedule/4>

⁶ <http://www.pedlars.info/pedlar-research/93-private-act-interpretation.html>

issue of pedlars onto Local Authorities (LA's) may get HMG off a short term hook, for pedlars, and that includes every eligible person over 17 years... it's not good enough!

The 48 million silent majority can expect HMG to act to protect civil liberties for the best and for the good of the general interest in the long term.

They also expect government to not use EU directives against a national interest, here, as with this example of an attack on pedlary - by omitting a cultural identity and expunging it as an historic profession from the statutes.

The policy of repeal of the *Pedlars Act* satisfies only the self-interested and more powerful lobby groups. BIS shows the true intent of its policy towards pedlary and "*de-regulating pedlars*" despite the fact that pedlars are currently free of any regulation other than the conditions of the *Pedlars Act* and of the general law. BIS prompts LA's to find "creative criteria" such as "*pedlars may cause congestion in busy streets*" in order to prohibit pedlars directly by using LA local legislation.

This begs the question about consumers also causing congestion in busy streets, and how to regulate this other form of allowable free ambulatory activity. The abuse of principle and of primary constitutional safeguards has been noted by pedlars as a mischief for more than a decade since the City of Westminster Act in 1999, "the trailblazer" for causing confusion by altering sub-clause texts⁷, and BIS, who make no comment on "private business", but nonetheless support and seem determined to perpetuate those sorts of thought processes that become set out in corrupted interpretation.

Ministers should be aware that BIS in 2009 commissioned Durham University for £85,000 to gather information about *Street Trading and Pedlar Laws* as research information for policy formulation. The one page summary on the *Services Directive* concluded that "*It may be possible to institute a national system of authorisation for service providers within the requirements of the Services Directive...*". However BIS has not provided any research information about the impact of the *Services Directive* on certified pedlars and licensed street traders other than outlining its own conclusions. This has not been a consultative process and repeats Roger Dennison's failure to disclose what order was made in 2009 to initiate research consultation giving precise information about the chosen methodology for the research or how that was determined and about the wider consequences of an Impact Assessment. The latest BIS policy report bears no connection to the Durham Report and instead concentrates exclusively on BIS re-interpretation of the meaning of the *Services Directive* and without any significant public consultation.

Pedlars.info has already informed BIS about the "*potential victim status*" of pedlars operating in private Act jurisdictions⁸ due to woeful interpretation by LA's of an amendment to a local Act such that all "*genuine pedlars*" are prosecuted for the alleged offence of unlicensed trading. It is well documented that LA's

⁷ Westminster, Newcastle, London, Medway, Leicester, Liverpool, Maidstone, Northern Ireland, Bournemouth & Manchester.

⁸ <http://www.pedlars.info/pedlar-research/87-history-of-pedlary.html>

want repeal of the *Pedlars Act* and total control of all trading activities. BIS is following that guidance - fact. Genuine pedlars are being prosecuted - fact. The BIS policy to de-regulate pedlary and repeal the *Pedlars Act* will make "potential victims" of all itinerant traders in every jurisdiction whether with private Acts or not unless BIS proposed legislation breaks the powers of prosecution by LA's for exempted trading activities "in the mode of a pedlar". The BIS policy supports existing and even more draconian measures in private Act jurisdictions including seizure, confiscation, forfeiture and fixed penalty notices. BIS say this policy will not harm pedlars but pedlars recall promoters' empty assurance in the City of Westminster Bill 1998 that "*genuine pedlars would not be affected by the bill*". Pedlars in fact, have been affected for the last decade and are currently affected. It is reprehensible of BIS to ignore pedlars repeated warnings.

Gareth Thomas, while *Parliamentary Under Secretary of State for Trade & Consumer Affairs* at BERR, now BIS, stated that "*the restriction on pedlars' activities*" is of concern⁹ when he reported on compatibility with the *European Charter of Human Rights* of the then current *City of Westminster bill*, the trailblazer to all these other privately adopted LA Acts. Pedlars believe that a "*potential victim status*" arises out of the private Acts reported to BIS and potentially also out of current BIS policy. It provides for a case to be brought before the European Court of Justice about HMG discrimination against a singular cultural profession, that of pedlary as recognised in EU nomenclature¹⁰. Pedlars.info seeks to avoid this outcome in the knowledge that ECJ does have powers of determination about mis-treatment by a national government of its more vulnerable people. Pedlars suspect that deregulation is a superficial PR spin that appears to remove restrictions on pedlars but will have exactly the opposite effect by a different route contrary to *Article 1 (5)* "*This Directive does not affect Member States' rules of criminal law. However, Member States may not restrict the freedom to provide services [such as an alleged offence of unlicensed street trading under local street trading legislation] by applying criminal law provisions which specifically regulate or affect access to or exercise of a service activity in circumvention of the rules laid down in this Directive*".

Section 45 of the *Provision of Services Regulation Act 2009*¹¹, (*PSRA*) illustrates incompetence by BIS regarding pedlars when in 2009 upon the advice of BIS, the Grand Committee in the House of Lords erroneously expunged pedlars of "*handicraft*" and "*chair-menders*" from statutory protection. Pedlars forewarned of this as a grave error. BIS seems intent on handing control of pedlary to LA's whose lobbyists seek prohibition of pedlars by whatever means. Pedlars contend that this direction of policy towards prohibition will never change no matter how cleverly BIS intend to re-invent the wheel by re-writing a national

⁹ <http://services.parliament.uk/bills/2010-11/cityofwestminsterhl/documents.html>

¹⁰ DIRECTIVE 2005/36/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the recognition of professional qualifications Annex IV, List II, Directive 75/369/EEC (Article 6: where the activity is regarded as being of an industrial or small craft nature). ISIC nomenclature lists the following itinerant activities: (a) the buying and selling of goods: — by itinerant tradesmen, hawkers or pedlars (ex ISIC Group 612)

¹¹ <http://www.legislation.gov.uk/ukdsi/2009/9780111486276/regulation/45>

allowance for pedlars within local control.

Such an anomaly in law is not only absurd but is perverse when given with intent. It should be the intention of BIS to preserve the national *Social & Cultural* heritage as it already has *ORRPI* within the *Services Directive* as the means for justification.

Britain has a unique advantage compared to other nations in Europe, as the British constitution seeks to protect its people by statute such as with the Pedlars Act, but BIS and HMG appear to be prepared to abandon this quality either through ignorance and stupidity or by concupiscence.

Pedlars are prepared to enter willingly into constructive drafting of better and fairer legislation but reject humiliation by BIS using dismissive or blatant discrimination.

Pedlars have already produced helpful amendments to enable preservation of the Pedlars Act and to enable justification within terms of the *Services Directive*.

These include:

- retention of the cultural identity of the profession of pedlary;
- the protection of civil liberty in the *Pedlars Act*;
- the removal of the restrictive residency criteria and implementation of similar requirements to those of licensed street traders;
- alteration of the good character test to non-mandatory but discretionary tests similar to those applying for *Street Trader Licenses*;
- an imposition on pedlars to have public liability insurance for the protection of consumers
- in the absence of the practical possibility for local authorities to issue national certificates, the continuation of police certification through the Home Office;
- the removal of the anomalous restriction on the activity of pedlars whether at houses or between houses;
- amendment in local legislation defining "street trading" removing the anomaly hindering the right of pedlars to "*sell or expose for sale any goods*" and to make a clear distinction between *static trading* and "*mobile ambulatory trading*" as that which primarily distinguishes the two types of lawful street trading;

These are amongst other refinements that can only be discussed when BIS is instructed to engage directly with pedlars.

BIS took some thirteen months to digest stakeholders replies before producing URN11/542 and we at pedlars.info respectfully request further time to disseminate information and convey feedback.

As the Head of departments at BIS, pedlars through pedlars.info request an immediate halt to detailed proposals in draft regulations being developed as policy for government by BIS. Those most directly and negatively affected by determinations about pedlary are to be properly consulted. Frank and transparent consideration of policy is due in respect of the dignity needed to be given to the profession about which pedlars speak. This has, and should be, a common aim of producing a proportionate, balanced and sustainable outcome.

We the undersigned await your immediate reply.

Yours sincerely

Robert Campbell-Lloyd
Nicholas McGerr
Simon Casey
Andrew Carter
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