

14 feature powers of entry

More than most professionals, entering people's homes is a big part of a social worker's job. But what happens when an individual who appears to be seriously neglecting themselves refuses entry to their property, preventing professionals from being able to make a proper assessment of their mental capacity? Or what happens where there is suspicion that a person is being abused by a member of their family, or carer?

Are such people afforded enough protection by existing legislation or does it allow, through a fear and distaste of infringing civil liberties, for neglect and abuse to continue unchallenged? It's a question that is being asked by the Westminster Department of Health as part of a consultation process on proposals in the draft Care and Support Bill, first published in the Queen's Speech in May. Proposals to tighten up legislation around safeguarding are a response to concern that there is currently a gap in provision that is failing to protect the most vulnerable adults, such as the elderly or disabled. In Scotland, it is a gap that has already been closed, with new powers increasing the right of entry in certain circumstances introduced in 2009.

Whether England and Wales will follow suit remains to be seen but the reason why the proposals are causing such intense consideration is easier to assess. Any proposal to increase the power of authorities to gain entry into a home raises highly emotive and ethical questions of personal liberty and of how far the state, even when armed with the best intentions, can stray into the lives of individuals.

Infringements

Some view such legislative change as risking infringements of civil liberty, leading, potentially, to unacceptable abuses of power. Others argue that with the right safeguards in place, new legislation can protect adults from unnecessary harm. A further issue, raised by members of BASW's Mental Health Reference Group, is that the measures could be a charter for a new industry in lawyers fighting dispute claims.

The proposals for the new powers of entry in England and Wales stem from a notion that current legislation can make it difficult for professionals to act on concerns they may have about vulnerable adults. Whereas Scottish law now allows for circumstances in which the wishes of an adult who has not been assessed as lacking mental capacity can be over-ruled if a criteria of risk has been identified as being met, this is not the case in England and Wales.

According to national charity Action on Elder Abuse (AEA), however, it is not yet clear whether new laws are needed to justify power



More power to you?

How far should the authorities go in a bid to protect vulnerable adults who are considered to be capable of making their own decisions? **PSW** looks at the implications of proposals to increase powers of entry in the Westminster government's draft Care and Support Bill.

of entry that are not currently covered by existing mental health and capacity legislation. The organisation admits, though, that this does leave room for certain legislative blind-spots, such as where "self-neglect is a consequence of a failure to deliver community care support, and where it has not been possible to undertake an appropriate assessment".

Current legislative provision allows powers

of entry in the following circumstances:

- in respect of life and limb danger
- assessments under the mental health act
- child safeguarding and mental incapacity
- provisions relating to the investigation of a crime.

Presently, in any circumstances other than immediate life and limb danger – a "can you smell gas?" scenario – a warrant needs to be obtained through the courts.

Ian Priddey, a member of the BASW Mental Health Reference Group, believes that legislation currently available to authorities should be sufficient, but needs to be amended. "My initial thought is rather than create new power of entry, this would be a good time to re-look at the rather old-fashioned wording of Section 135(1) of the Mental Health Act and revise the grounds for obtaining a warrant to include what is required in relation to people who may lack capacity and may be in need of protection.

"This is a well known if not widely-used part of the Act. Approved Mental Health Professionals (AMHPs) and magistrates are aware of balancing the needs of vulnerable people and not barging into people's homes indiscriminately without good cause."

Fellow group member Craig Wilson is also sceptical about the need for new laws and warns no decision should be made about closing the gap in legislative provision until we are clear about the social and moral implications. "Some professionals are concerned that adult safeguarding is already out of control and becoming an industry," he said. "A new power of entry could have a negative impact as another element of a defensive and paternalistic safeguarding culture. We have to guard against further infringement of adult liberties."

Lazy approach

A key worry of those urging caution before introducing new legislation on power of entry is that it could result in a "lazy" approach to complex situations by some professionals. "One of the most important concerns is that good professional practice, using good social work techniques to encourage people to co-operate, could be lost sight of," says BASW professional officer Joe Godden. "If the legislation is there, people may just reach for it."

Yet the experience in Scotland suggests this may not be the case, Mr Godden continues. Before including the power of entry measures

CASE STUDY: WHERE POWERS OF ENTRY MIGHT BE USED

Neighbours have become concerned about an older man living next door. They haven't seen him for months and frequently hear raised voices through the walls. They suspect he may have been struck on at least two occasions. He had a minor heart attack several years ago and his daughter returned to live with him. The daughter is gruff and tends to keep herself aloof from the neighbourhood. The neighbours are slightly fearful of her temper and contacted the local authority who sent someone to carry out a safeguarding assessment.

However, the daughter refused them access, saying her father was fine and told them to mind their own business. She described the neighbours as "busybodies" and slammed the door. The older man was not seen. There is no evidence to suggest the father or daughter have either mental health or mental capacity issues and nor is there evidence to suggest an immediate risk to life or limb. There is no evidence to confirm that the daughter is, or is not, articulating the views of her father.

The local authority has no power to gain access to the older man to ascertain his situation or views.

in its Adult Support and Protection Act 2007, the Scottish Parliament faced opposition from disability groups concerned that the right of individuals to live in the manner of their choice could be infringed. The legislation paved the way for local authorities to apply to the local Sheriff Court for either an Assessment Order, a Removal Order or a Banning Order, enabling access in situations where, for example, a relative is resisting entry and an adult is believed to be at risk. It also means a person at risk can be removed, or a perpetrator of abuse forced to leave. The legislation enables, upon application to the court, for an individual's wishes to be overridden if it can be shown they have been unduly pressurised by someone into not giving consent to intervention.

During the first six months after the law was passed, there was a near 100% increase in referrals.

However, up to July 2011, only four Assessment Orders, five Removal Orders and 48 Banning Orders had been granted. The relatively small number of Orders issued suggests the new powers are being used only as a last resort in Scotland.

Reference Group member Ronnie Barnes,

who gave evidence to the Scottish Parliament before the Adult Support and Protection Act was passed, said the fact that the Act is "fully Human Rights compliant" should reassure other parts of the UK, thinking of introducing similar measures, that the powers are not draconian.

"The experience thus far is that the 2007 legislation has been a success, as there is a greater awareness of the need to protect vulnerable adults and, even with a relatively low level of formal interventions, a significant number of people have had appropriate actions taken which would not have been the case without the legislation."

So what's the view among social workers? A recent survey by The College of Social Work found 84% of adult social workers in favour of new powers of entry, but BASW continues to urge caution and a fuller exploration of the implications before introducing new legislation. Mr Godden said: "BASW really welcomes the fact that the draft Care and Support Bill is addressing the issues of safeguarding of adults and the specific issue of powers of entry. The debate that has occurred within BASW demonstrates the complexities of the situation; the ability of social workers to consider the unintended consequences of what can seem as worthwhile changes to legislation.

"It is essential that social workers engage with the Bill and use their voice to debate the details of the proposals."

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CURRENT LEGISLATION THAT CAN BE USED TO JUSTIFY ENTRY IN CASES OF MENTAL DISORDER:

- Part IX of the Mental Health Act (1983) outlines offences against persons with a mental disorder which can be investigated. These include ill treatment. Richard Jones suggests that the person does not need to be receiving treatment; they could be suffering or appearing to be suffering mental disorder and could be living in their own home or with friends or relatives. (See R Jones MH Act Manual 14th Edition).
- The Sexual Offences Act (2003) created offences against persons with a mental disorder impeding choice and made specific offences relating to care workers.
- Indictable offences qualify for application for a warrant to enter premises under PACE Police and Criminal Evidence Act (1984). These provisions focus upon the investigation of a crime and would be reliant upon witness testimony or victim evidence.

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To find out more about the draft Care and Support Bill, please visit careandsupportbill.dh.gov.uk