



When acting unlawfully is the legal thing to do

In the second of his three articles examining social work, human rights and the law, social worker and solicitor Allan Norman, asks whether it is illegal to act unlawfully

How many times have we all been frustrated by someone behaving like a petty bureaucrat and telling us that they are “not allowed” to do something, when we can conceive of no logical reason why they shouldn’t? Surely as social workers, it should be ingrained in us never to behave in such a manner? It is beholden on us to, at the very least, question what we have been told we are “not allowed” to do.

We should know who exactly is not allowing us to do something, and what authority they have to forbid us. We may be surprised how often the only proper and professional course of action is to challenge that authority. Social workers are subject to many forms of authority and it is my aim to explore the dilemmas that arise when there is conflict between them, looking in particular at authority deriving from: the employment relationship; the civil law; the criminal law; and professional standards.

If we bother to use them at all, many of us will use the terms ‘unlawful’ and ‘illegal’ interchangeably. Lawyers, however, would tend to make a simple distinction: something is illegal if it is proscribed by the criminal law, an offence against the state for which you can be prosecuted and receive a criminal conviction. Most of the things that people go

to court about, however, are civil wrongs. In going to court we are asserting that the actions of another person have prejudiced our interests, and we ask for a restorative judgement that puts things right. Many civil wrongs are unlawful but not illegal, hence it is not always illegal to act unlawfully.

People can get away with acting unlawfully with impunity. In the employment relationship, the power of an employer over an employee who needs their job “to pay the mortgage” is hard to exaggerate. Many employers use that power so frequently that employees assume that they are acting lawfully, when the truth is that they are acting unlawfully with impunity.

Acting unlawfully

The principle can be turned to the advantage of service users. For example, a service user facing overwhelming debt will be acting unlawfully when they prioritise and reschedule those debts, in breach of their contractual obligations. But it is not improper to advise them to do this, in the knowledge that any adjudicating court would itself effectively re-write the terms of the contract to ensure a more just outcome.

But it can also be turned to service users’ disadvantage, with social workers themselves

often the guilty party. It is tragic that social workers, in their relationships with service users, sometimes act unlawfully and get away with it. Much like with employment, it happens so often and so unthinkingly that everyone thinks it must be lawful.

In my previous article [*PSW*, October 2006 – Rights that Wrong], I drew attention to some of the ethical dilemmas arising out of the application of Section 21 of the National Assistance Act and its application to people subject to immigration control. I continue here to use this by way of illustration. A reminder: a provision that was originally used to provide institutional accommodation to vulnerable groups has been held by the courts to be sufficiently broad to allow the provision of ordinary accommodation to people faced with destitution or the anticipated physical effects of destitution. To assess people on this basis and ensure the provision of suitable accommodation has become a significant part of the caseloads facing social services, and many authorities have specialist teams to undertake this work.

The framework in which decisions are taken on behalf of people claiming support under Section 21 is changing, however, with a series of court decisions and legislative amendments serving to limit or clarify the



THE LAW: as it should be applied by local authorities

THE LAW: A person who is not subject to immigration control can be assisted under Section 21 based solely on their needs arising from destitution or its anticipated physical effects.

THE LAW: A person who meets the threshold for Section 21 assistance is the responsibility of the local authority, not the National Asylum Support Service (NASS).

UNLAWFUL VARIANTS: how local authorities misapply the law

MISAPPLICATION: A requirement that anyone seeking Section 21 assistance shows that their need arising from destitution is made more acute by some other circumstance, the 'destitution plus' test. Some authorities routinely apply it to all destitute people.

MISAPPLICATION: A requirement that an application is made to NASS to 'exhaust' alternative sources of support. Wrong practices in this area include making Section 21 support conditional upon such an application or even its outcome.

powers of social workers to provide such accommodation to certain groups based on their immigration status.

This has thrown up a number of common misapplications of the law by social workers working in this field [see examples above]. For instance, the law states that a person who is not subject to immigration control can be assisted under Section 21, based solely on their needs arising from destitution or its anticipated physical effects, yet some councils insist on a requirement that the person subject to immigration control demonstrates that they have a need for care and attention of a kind for which local authorities normally provide a service, additionally to their being destitute – a distinction that can rule out certain claims where a person's need falls outside of the care services provided by the particular local authority in question.

The common characteristic of such misapplications of the law is that social workers place barriers or hurdles in the way of destitute people, obstacles that do not have legal authority and that result in destitute people being denied the most basic means of subsistence. When I wrote previously about human rights, I suggested that, as a profession, we were being restrictive and unimaginative in our approach. I am going much further here. I am saying the variants applied by local authorities are unlawful so the local authorities that practice them are acting unlawfully.

Having established that it may not be criminal to act unlawfully, what constraints are there to prevent a social worker acting unlawfully? The question has particular relevance when social workers are acting on instructions from their line manager and through their manager from their employer. After all, in the situations described, the resulting decisions are, legally, decisions of the authority, and for which the authority takes responsibility, rather than the individual

social worker. In my view, however, there are professional standards applicable to social workers that prohibit us from acting unlawfully. In general terms, the standards expected of a professional are higher than those of the criminal or even the civil law.

There is something about the label 'professional' that says that it is not enough that a person's conduct is legal, or even that it is lawful; it must be consistent with yet higher standards imposed by their professional code. For social workers, that code is now overseen by a relatively new regulator, the General Social Care Council (GSCC), and although conduct cases are only just beginning to be heard, I confidently expect a developing body of decisions from the Council that affirm the importance of making decisions in line with professional practice, and not just the letter of the law. Certainly, one can point to a number of decisions in relation to other professions, most pertinently by the General Medical Council, where this has happened.

Obligation

In specific terms, it is part of our professional role and obligation to help people secure their rights, and collaborating in the denial of those rights for unlawful reasons is the very antithesis of that obligation. In particular, social work's Code of Practice states that we should be [my emphasis] 'Meeting relevant standards of practice and *working in a lawful, safe and effective way*'; and 'Promoting the independence of service users and *assisting them to understand and exercise their rights*'.

Those of you tempted to say "my employer says otherwise", should consider BASW's Code of Ethics, which makes our professional priorities clear: social workers should 'strive to carry out the stated aims of their employing organisation, provided that they are consistent with this Code of Ethics' and 'uphold the ethical principles and responsibilities of this Code, even though

employers' policies or instructions may not be compatible with its provisions.'

There are a range of protections for us as professional social workers, in addition to our trade unions, if we have the courage to challenge unlawful practice. The protections can seem illusory or weak on occasions, but make no mistake, they are there.

Firstly, there are the professional and regulatory bodies to which I have already alluded. The GSCC has a role to uphold its Code of Practice, and has an Employers' Code that requires the promotion and support of an Employees' Code. BASW, meanwhile, provides an Advice and Representation Service, providing support to members facing such professional difficulties.

Secondly, there is the opportunity to refer service users to legal advice. Referral to appropriate legal advice is not only consistent with our professional obligations, but also with government policies aimed at promoting access to justice and creating a seamless referral network that includes local authorities. Sadly, almost all variants come about precisely because a service user successfully challenged the lawfulness of social work practice through the courts.

Finally, there is whistle-blowing legislation. The Public Interest Disclosure Act authorises the disclosure of unlawful practices in the public interest, through a hierarchy of disclosure that usually starts internally and proceeds through a regulator. For anyone who witnesses wrongdoing at work and is unsure of how to respond there is also a charity, Public Concern at Work (www.pcaw.co.uk), which can offer some useful advice.

It isn't always illegal to act unlawfully and social workers should know that the support is available for those times when they might be compelled to defend their profession and the interests of service users from the misapplication of the law.

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Allan Norman (right)



Allan Norman is a social worker, a solicitor, and a member of BASW's Standards and Ethics Board. He recently founded Celtic Knot (www.celticknot.org.uk) as a combined law firm and social work consultancy. He also works for the specialist community care charity B-Mag (www.b-mag.org.uk). In his final article in February 2007's PSW, Allan will address the ultimate dilemma: when social workers are required to act in a way that is lawful but ultimately unjust.