

POWERS OF ENTRY - AN INTERIM REPORT

The Hon. Minister of Justice

Dear Mr McLay,

Statutory powers of entry and search are numerous. Their sheer number, coupled with the breadth of some particular powers, has caused some public concern, notably that expressed some time ago by the Chief Ombudsman. As part of the Public and Administrative Law Reform Committee's mandate from you to study statutory discretions, we have begun an investigation of these powers.

As we stated in our 15th Report, we began by commissioning a report identifying and classifying these powers. This proved to be a very large research project. It was found that there were more than 150 separate powers of entry and search scattered throughout the statute book. We listed together the various powers exercisable by the officials of each separate government department, and invited departmental comments. We have carefully analysed those comments. We have now almost completed the process of examining each separate power in the light of departmental comment as to its importance and justification.

During this analysis the Committee has formulated a number of principles that it considers should be applied to every power. This interim report sets out these principles and very briefly explains the rationale behind each one. It then goes on to discuss other pertinent issues, some of which have not been finally resolved by the Committee.

The next step in the process will be to apply these principles to all the powers identified, and then to seek the reaction of affected departments. A final report containing recommendations to improve the present position will then be prepared. Since we recognise that these last stages will take some time, an interim report setting out our thinking to date seems desirable.

THE PRINCIPLES

We have adopted the following principles of approach. They are principles, not rules. We intend to apply them consistently unless exceptional reasons justify a departure from principle in the case of a particular power. The onus of justifying such a departure will be placed upon the relevant administering

Department. If in the Committee's opinion that onus has not been discharged in borderline cases the principle will be adhered to.

1. The Essential Power Principle

The grant of a power enabling officials to enter property must be essential to achieve a purpose of the Act.

We see this principle as raising the most basic question of all. It must always be asked whether the power is really necessary. Just because a power is rarely used, however, does not mean that it is unnecessary. In practice statutory powers of entry are invoked in two ways. First, they are invoked in order to enable officials (in which category we include inspectors) to enter and search the land or premises of a person who, in the absence of the statutory power, would refuse to consent to the entry. Secondly, the existence of the power is often pointed to by an official in order to induce a person to consent to an immediate entry, that person knowing that if he refuses his consent the official will go away and obtain a warrant and later come back and enter pursuant to it. In this latter case it would be misleading to speak of entry "pursuant to the power", or of the official "using" the power. It does not follow from the fact that a statutory power is seldom invoked in the first of these two ways that it should be regarded as a candidate for repeal. For it may be that the possibility of invoking the power in the second way is of more significance in actual practice. In any event a seldom used power may be judged to be essential if a statutory purpose is to be achieved: it all depends on the particular purpose, the importance of the power in terms of its social purposes, and the likelihood of obstructiveness by individuals.

We hold the view that a power to enter cannot be regarded as justified if the administering department is not able to demonstrate that that power is presently needed. Putting the same point in another way, a power of entry is unjustified if it may perhaps be needed in future hypothetical situations but has not been found to be needed in recent practical experience.

2. The Express Power Principle

A power to enter should be conferred expressly and not by implication. Further, it should always be conferred by the empowering Act, and not by regulations made under it, unless special considerations justify the location of the power to enter in the regulations themselves, for example if it would

e misleading for readers of the regulations not to find the power there or, for example, if the conferment of power in the statute itself would necessarily mean (because of the variety of situations to which powers of varying scope would be appropriate) that it could only be expressed in the statute in undesirably over-wide terms. Further, powers of entry should never be conferred by mere by-laws when this course is avoidable. For by-laws are commonly not as accessible to the public as statutory regulations are. We take this view as to powers conferred by by-laws even although by-laws are subject to advertising requirements and, unlike regulations, may be attacked in the courts on the ground of unreasonableness. When an Act confers a power to make by-laws, by-laws conferring a power of entry should be specifically excluded.

It is a matter for some concern that a significant proportion of entry rights are implied. In some instances a power of search has been conferred but nothing is expressly stated about the power to enter. The Committee can see no justification whatsoever for such a drafting practice.

In most situations it is preferable to put the power of entry in the parent Act. Its existence and terms will then be capable of being debated while the Act is passing through the various Parliamentary stages. On the other hand there is no objection to the practice sometimes adopted of repeating in statutory regulations the power of entry conferred by the relevant Act which also confers a power to make statutory regulations.

3. The Precise Purposes Principle

The purpose that justifies an entry should be expressed in terms which are as precise as the subject matter permits. By way of example, a power of entry exercisable "for the purposes of this Act" is objectionable because it creates some uncertainty, and entitles a court to construe the Act in question as having some general purposes which transcend the purpose underlying a particular section or sections. Individuals should be able to find out for what purposes an official may effect an entry. An over-wide statement of purpose will tend to give rise to doubt.

4. The Objective Belief Principle

The lawfulness of an entry should not be conditional on the official's or his employer's "opinion" ("where...is of the opinion that..."). Any condition precedent should be stated objectively (typically - "where he has reason to believe...").

This principle is closely connected to the purpose of entry. It deals with the state of mind of the person deciding whether or not to enter. Objectively framed tests are preferable because when so framed they operate as a check upon official eccentricity or arbitrariness.

5. The Notice Principle

Sometimes the giving of reasonable advance notice of entry would defeat the purpose of the power. When that is not the case, notice should be required. The notice should contain a reference to the particular statutory source of the power, to its purpose and to the time when entry will occur.

Such a notice will enable a person upon whom it is served to consult his lawyer and to check that the power exists, and that the purpose and time proposed for the entry fall within the bounds of the statutory specification.

Sometimes it will be sufficient if notice is given over the telephone, providing that the recipient is orally given what the present principle regards as essential, namely, the particular statutory source of the power, the purpose of the proposed entry, and the time of entry. In many instances communication by telephone will be inappropriate.

The Committee considers that there is a need to distinguish situations where the occupier of premises is licensed, or otherwise regulated, or contractually related to the person entering, with the situation where entry is into private property and the occupier has no special pre-existing relationship with the person entering. Should licensees, who presumably have been carefully scrutinised before being given the necessary license, be given more or less notice than ordinary citizens? It can be argued that they should expect to be under close scrutiny to ensure that they comply with the terms of their licence. It might be possible in some cases to set out the rights of entry in the particular licence or contract. No final decision has been reached.

6. The Evidence/Warrant Principle

Where the power is required for the purpose of ascertaining whether an offence has been committed, the official should obtain a warrant from a person acting judicially, following an application in writing on oath.

A power to enter without warrant (or notice) should be conferred only when an overriding public interest demands such a power, and it should be accompanied

oth by the requirement of authorisation from a senior officer in the relevant department and by an obligation to report on the exercise of the power.

In other words if for any reason an official does not want to give notice, he must obtain a judicial warrant.

The term 'judicial officer' is purposely used instead of "District Court Judge" so as to include court registrars and Justices of the Peace. In practice registrars and their deputies issue most police warrants as officers of the Court. The continuation of this practice seems satisfactory providing that the application for a warrant is in writing and on oath, as we believe that it should be.

The need to act at once will sometimes override the need to obtain a warrant or give notice. In such situations as many safeguards as possible should surround the exercise of the power. This is the rationale behind the requirement that a senior officer must authorise the entry and that a report should be lodged after the event. Such a power should be conferred only in very exceptional categories of situation.

7. The Reasonable Time Principle

Where the power is silent as to the time of day when it may be exercised, or specifies "at any time", it should be confined to "at reasonable times". There may occasionally be sound reasons for conferring a power to enter "at any time", but such a power will need to be convincingly justified by a department before this Committee will support a power which could be exercised at any time of the day or night. This is very much a minimum standard. In many cases more restrictive times for entry are specified in the empowering Act, and such a practice is to be encouraged wherever possible.

8. The Forcible Entry Principle

A power to enter should not be accompanied by a power to use force or to "break into any building" unless the absence of such an ancillary power would frustrate the purpose of entry.

A power of entry which is silent about the use of force does not authorise force. It merely means that no action for trespass to land can be brought.

The Identification Principle

An inspector should carry a warrant of authority to identify himself, the position he holds, and the source and nature of his authority. Further, he should be obliged to produce this, whether asked to do so or not.

The warrant of authority would amount to more than the identification presently required in many statutes. The warrant of authority that we envisage will set out the source of the authority, and exactly what powers it confers on the holder.

A rule requiring an official always to show his warrant of authority is no hardship on him, and may reassure many too timid to request it. Certainly no entry should ever be effected without the official carrying his warrant of authority.

It is obviously unnecessary for those wearing sufficiently distinctive uniforms to carry warrants of authority. In such cases the uniform itself serves as sufficient identification. A uniform is considered inadequate for present purposes unless it carries an identification number as do the uniforms of police constables.

10. The Precise-Power Principle

The acts that the official can perform, and the questions he may ask once he has gained admission, should be specified as precisely as possible, and should be related to the purpose of the particular entry.

This is another safeguard giving an individual recourse to the courts if an official oversteps the bounds of his legitimate authority. Many of the present provisions do no more than confer a power to enter, giving little or no idea of what an official may do once he has legitimately crossed the threshold.

11. The Questions Principle

The relationship between the privilege against self-incrimination and the asking of questions by the inspector should be clarified by either expressly affirming or negating the privilege, depending on what the circumstances require.

The privilege is expressly affirmed in comparatively few existing statutes. In most the relevant section is silent, and the position is unclear.

The Committee's view is that as a general rule the privilege against self-incrimination should be expressly preserved, and that where the privilege is negated

his should be clearly spelt out. A department should bear the onus of satisfying this Committee that the negation of the privilege is clearly justified in the particular area with which the statute in question is concerned.

12. The Challenge Requirement Principle

Where, consequent upon a power of entry, an individual is required to do a piece of work, or pay for its completion should he fail to complete it himself, he should be entitled to challenge the need for the work, and the cost of it, in the District Court.

Questions as to the cost of the work may at present arise by way of defence to proceedings for debt. This principle goes further and allows the need for the work itself to be questioned.

13. The Compensation Principle

When the power gives a right to compensation for damage occasioned by the entry, this should be assessed by an independent tribunal or Court.

The Committee considered whether the Land Valuation Tribunal was always the appropriate body. It was decided that the principle should not be so specific, and that in some situations the District Court may be more appropriate.

14. The Placement Principle

A power of entry should wherever possible be placed in juxtaposition to any section to which the power of entry is an ancillary enforcement power.

This is really just a question of convenience for a reader of the particular statute, and a suggestion for future drafting practice. In many instances it is already done.

Matters still to be settled

In the Committee's opinion it is appropriate to require a warrant before entry into a dwellinghouse in cases where this would not be necessary for other premises.

The first problem that arises in this context is just how to define a dwellinghouse. Statutory definitions vary with the purpose of the particular legislation and are of little assistance. Does a dwellinghouse include the garden, the garden shed, the patio, a motel unit etc? It comes down to

balancing the need to protect privacy with the public interest of detecting offences and checking up on particular activities. Does the right of privacy end at the front door or the front gate?

The Committee is clearly of the opinion that there must be consistency of definition among Acts which mention dwellinghouses only when conferring powers of entry, and in which the term "dwellinghouse" has no special meaning. That term should be given one consistent meaning so that any judicial elucidation of the term in one Act can be confidently applied to another. One existing definition is that contained in s.2 of the Housing Act 1955, where "Dwelling" is defined as meaning:

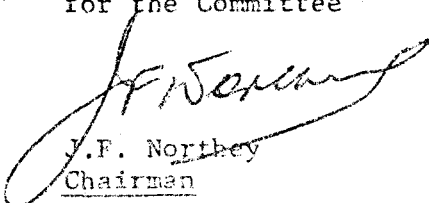
"any building or part of a building that is suitable for residential accommodation of any kind; and includes every garage, shed and other building used in connection therewith; but does not include the land appurtenant to a dwelling".

So far as the special position of dwellinghouses goes, the Committee's view is that it is appropriate to require a warrant before entry into a dwellinghouse in cases where this would not be necessary for other premises. This is not needed to enter the grounds and go straight to the front door. Anyone has an implied licence to do that so long as if asked to leave he does so. Should he fail to within a reasonable time he becomes a trespasser - Robson v. Hallett [1967] 2 All E.R. 407. Following the above definition, notice would be sufficient to avert a trespass action if entry is only to part of the garden. However the Committee considers that if the dwellinghouse is to be entered for any purpose, a judicial warrant should be obtained. There will always remain some exceptional circumstances, of course, such as civil emergency.

Another question to be decided is the length of time for which a warrant should remain valid after its issue. Clearly there must be a time at which it becomes stale and inoperative. This will vary with the circumstances. The Committee has yet to devise any principle to cover this point.

It is hoped that the final report will be available in about six months.

for the Committee


J.F. Northey
Chairman

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