

Is it 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 should not be allowed to do so? Surely as social workers, it should be ingrained in us not to behave like that? As social workers we should at the very least be questioning 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.

We are subject to many forms of authority. This article explores 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

Unlawful and illegal

If we bother to use the terms 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.

However, most of the things that people go to court about are civil wrongs. We are asserting that the actions of another person have prejudiced our interests, and we ask the court to give a restorative judgement that puts things right. Many civil wrongs are unlawful but not illegal, hence the answer to the question posed by the title is “no, not always.”

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 merely acting unlawfully with impunity.

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 exactly this, in the knowledge that any court adjudicating a dispute will itself effectively re-write the terms of the contract to do justice between the parties.

But it can also be turned to service users' disadvantage. And how! Tragically, all too often social workers in their relationships with service users act unlawfully and get away with it. And much like the employment relationship, it happens so often and so unthinkingly that everyone thinks it must be lawful.

The National Assistance Act

In my previous article, 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 to use that section for 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. It has become a significant part of the work of social services to assess for and make such provision, and many authorities have specialist teams to do so. Meanwhile, there has been a series of court decisions and legislative amendments, as the government and the courts seek respectively to limit or to clarify the powers of social workers to provide such accommodation to certain groups based on their immigration status.

In the table below, I set out the current state of the law, alongside some common misapplications of the law by social workers working in this field.

The law	Unlawful variants
A person who is <i>not subject to immigration control</i> can be assisted under section 21 based solely on their needs arising from destitution or its anticipated physical effects. ¹	A requirement that <i>anyone</i> seeking section 21 assistance shows that their need arising from destitution is made more acute by some other circumstance. This has been coined the “destitution plus” test, and some authorities routinely and wrongly apply it to all destitute people.

<p>A person subject to immigration control and seeking assistance under section 21 needs to show that their need for care and attention arising from their destitution is made more acute by some (any) other circumstance.²</p>	<p>A requirement that a person subject to immigration control demonstrates that they have a need for care and attention of a kind for which local authorities normally provide service, additionally to their being destitute. Some authorities assess against standard criteria e.g. Fair Access to Care Services eligibility bandings, or even the Care Programme Approach for people with mental health problems.</p>
<p>A person who meets the threshold for section 21 assistance is the responsibility of the local authority, not the National Asylum Support Service (NASS), hard case support etc.³</p>	<p>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.</p>
<p>An asylum seeker who claimed asylum at the time and port of entry and was granted “temporary admission” is not unlawfully present when their claim fails and therefore is not ineligible for section 21 support.⁴</p>	<p>A decision from local authorities that they are prohibited from helping such a failed asylum seeker, subject only to any human rights legislation. Some authorities do not even add the human rights caveat; the correct position is that there is no prohibition at all.</p>

The common characteristic of the misapplications of the law identified is that social workers place barriers or hurdles in the way of destitute people, that do not have legal authority, and that result in destitute people being denied the most basic means of subsistence.

Employee and professional obligations

When I wrote previously about human rights, I suggested as a profession we were being restrictive and unimaginative in our approach. I am going much further here. I am saying the practices in the second column are unlawful (as are practices in many other areas of social work practice), 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 that mean that a social worker should not act 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.

I suggest there are both general and specific professional standards that prohibit us from acting unlawfully.

In general terms, the standards expected of a professional are higher standards 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 our conduct is legal, or even that it is lawful, it must be consistent with yet higher standards imposed by our professional code. For social workers, that code, and the GSCC as our regulator are still relatively new, and conduct cases are only just beginning to be heard, but I confidently expect a developing body of decisions from the Council affirming this. Certainly, one can point to a number of decisions in relation to other professions that affirm exactly this point.⁵

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, our Codes of Practice say we should be [my emphasis]:

“6.1 Meeting relevant standards of practice and **working in a lawful, safe and effective way**; and

3.1 Promoting the independence of service users and **assisting them to understand and exercise their rights.**”

But my employer says otherwise!

BASW's Code of Ethics 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 unions, if we have the courage to seek to challenge unlawful practice. Make no mistake, the protections can seem illusory or weak on occasions, but they are there:

- Our professional and regulatory bodies. The GSCC has a role to uphold its Codes of Practice, and to help strengthen them has an Employers' Code that requires the promotion and support of the Employees' Code. In practice, issues raised of unlawful practices are likely to be referred to the Commission for Social Care Inspection. BASW meanwhile provides an Advice and Representation Service, which provides support to members facing such conflicts;
- Referral of service users to legal advice. Referral to appropriate legal advice is not only consistent with our professional obligations, but also with government policies to promote access to justice and create a seamless referral network that includes local authorities. And sadly, almost every case cited in this article came about precisely because a service user successfully challenged the lawfulness of social work practice through the courts.
- 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, proceeds through regulators and can end with the media. It provides remedies of employment law protection from the consequences of such disclosure including disciplinaries, dismissal and denial of promotion. The charity Public Concern at Work⁶ can provide advice to people who witness wrongdoing at work and are unsure whether or how to raise it.

In a final article, I address the ultimate dilemma, when social workers are required to act in a way that is lawful but ultimately unjust.

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Footnotes:

1. [A, R \(on the application of\) v Westminster City Council \[1997\] EWCA Civ 1032 \(17th February, 1997\).](#)
2. [O v London Borough Of Wandsworth \[2000\] EWCA Civ 201 \(22 June 2000\); Slough Borough Council v M, R. \(on the application of\) \[2006\] EWCA Civ 655 \(25 May 2006\).](#)
3. [Mani, R \(on the application of\) v Lambeth & Anor \[2003\] EWCA Civ 836 \(09 July 2003\); AW, R \(on the application of\) v London Borough of Croydon \[2005\] EWHC 2950 \(Admin\) \(16 December 2005\)](#)

4. [AW, R \(on the application of\) v London Borough of Croydon \[2005\] EWHC 2950 \(Admin\) \(16 December 2005\); Slough Borough Council v M, R. \(on the application of\) \[2006\] EWCA Civ 655 \(25 May 2006\)](#)
5. [Wilson, R \(on the application of\) v General Medical Council \[2005\] EWHC 1704 \(Admin\) \(27 May 2005\); Council for the Regulation of Health Care Professionals v The Nursing and Midwifery Council & Anor \[2005\] NIQB 69 \(25 October 2005\); Council for the Regulation of Health Care Professionals v General Medical Council & Anor \[2006\] EWHC 464 \(Admin\) \(26 January 2006\)](#);
6. You can obtain advice and support from the charity 'Public Concern at Work' on 0207 404 6609, at www.pcaw.co.uk or at Public Concern at Work, Suite 306, 16 Baldwins Gardens, London EC1N 7RJ.