

POWER OF ENTRY GATEWAY GUIDANCE 2011

Purpose

This document sets out guidance for Government Departments to follow when considering the creation, amendment or re-enactment of powers of entry. It is written in the context of the Government's policy objective of reducing or applying tighter safeguards to the exercise of the 1200 or more powers of entry that currently exist.

Introduction

Implementing Government policy on powers of entry has two strands:

1. To reduce or add tighter safeguards to existing powers of entry (using statutory powers in the Protection of Freedoms Bill currently before Parliament); and
2. To limit the creation of new powers of entry in future.

This guidance relates to the second strand above. In order to limit the creation of any new powers the Government has committed to establishing a new Home Office-led Gateway process through which any new proposals from all Government Departments must pass.

Devolution

Where the subject matter is devolved, this guidance covers the position in relation to England only. In relation to EU obligations where parallel legislation is being passed in devolved administrations you should be aware of proposals for enforcement powers in those territories and similarly devolved policy officials may be interested in non-devolved matters.

The Gateway Process

The Home Office have established a small team to manage the process for Government Departments seeking approval for new powers of entry. Before approaching the Home Office team, officials in other Government Departments should first consult their internal Departmental leads about whether, in their view, it is necessary to pursue the creation of a new power. Requests received by the Home Office will be examined by a review panel of officials seeking input from legal advisers where necessary before the requested power is submitted for ministerial consideration.

The Home Office team can be contacted at PofEGateway@homeoffice.gsi.gov.uk or on 0207 035 0920

Considerations

The granting of any power which allows access to a person's property or records represents an interference with the rights of the individual which requires justification. Exercising these powers can also result in an administrative burden on the owner or occupier of premises and place a constraint on businesses. It is therefore essential that the need for any proposed new power to enter premises and any associated power consequent to entry should be given significant consideration.

The purpose of this guidance is to establish the consideration applied by Home Office Ministers in scrutinising requests made by other Government Departments and agencies and to introduce a standard approach in the making of such requests.

This should enable Departments to apply the key principles effectively during internal consideration of their proposals and to submit their request for scrutiny to the Home Office in such a way as to enable more constructive and quicker responses. This guidance is therefore in two main parts: matters for consideration by the sponsoring Department and submission of requests for scrutiny.

CONSIDERATION BY THE SPONSORING DEPARTMENT

The Government is committed to limiting the creation of new powers of entry and to reducing the 1200 or so powers that currently exist. Powers of entry and associated powers are numerous and varied in both design and application. Many are linked to criminal offences but a number are not, and instead often relate to other forms of inspection or the need for emergency access. You are encouraged to consider carefully whether a new power is really necessary, other similar powers might be applied, or whether alternative enforcement options or sanctions could be used instead. An application to create a new power should only be made where there is sufficient reason to believe that written or oral interventions alone would not achieve the desired outcome and alternative enforcement methods would not work.

When seeking to create a new power or amend a power you should also consider whether there is scope to consolidate any similar powers, bringing together those that perform similar functions under a single piece of legislation. This will not only improve the transparency of such powers but will also help reduce their overall number where it is possible and right to do so in line with Government policy. You should also carefully examine the safeguards that apply to the power and or associated powers, ensuring that they are suitable and provide the appropriate level of protection for individuals (business owners, homeowners or others affected by the exercise of the power).

Where powers are consolidated under a single piece of legislation the safeguards that apply when taken together must provide a heightened level of protection for anyone affected by the exercise of the power than was previously the case.

However in all cases the need to minimise intrusion must be balanced against the need to allow proper enforcement action that is not unduly impeded. Striking the right balance between the rights of the individual and enforcement that serves the wider 'public interest' is therefore crucial.

In some cases it may be necessary to revoke an existing power and replace it with a new one, for instance where legislation requires updating. The case for re-enacting a power should be set out carefully and wherever possible should be presented with added or greater safeguards than was the case before. Examples of specific types of safeguard are discussed later in this guidance.

General principles

Home Office Ministers will ensure that the need for any power of entry requested is justified and proportionate before granting approval. They will bear in mind that almost all powers of entry are intended to protect the public interest, and in some cases are essential to protect individuals for example from child abuse or threats to the environment which could be injurious to health.

Consequently such powers should not be viewed purely from the perspective of the impact on the individual whose property is being entered into but more broadly, must balance the need to protect the rights of homeowners or business persons (as well as those of persons whose rights may be infringed by the actions of others) with appropriate and proportionate enforcement action by relevant state authorities.

The need for entry powers will be assessed on the principles of necessity, proportionality and whether sufficient safeguards are in place to minimise intrusion to businesses and occupiers of domestic premises.

Necessity

Before consideration is given to what form of power is considered appropriate and how it should be exercised, there are two basic questions which should be asked. The first is how serious it would be if a failure or omission occurred in the activity which is intended to be monitored by the power of entry. The second is, whether the power of entry is essential for effective enforcement or there are other existing powers that could be applied (in some cases with modifications) or better suited measures to achieve the same outcome.

These are matters entirely for the sponsoring Department who are best placed to justify the need for any new power. However it is not sufficient to simply indicate that new powers are necessary. The sponsoring Department must be able to show why the new power is required, that the power of entry is not disproportionate to the nature of the offence, and that it contains appropriate safeguards. Powers should not be sought to deal with minor regulatory requirements which could otherwise be dealt with more effectively. Departments should consider the likely effect if the power of entry was not available and the impact on the ability to enforce the relevant legislation. The benefits to the public at large should be weighed against possible inconvenience and disruption to individual owners and occupiers.

Proportionality

Having satisfied themselves that a power of entry is justified the sponsoring Department must decide what type of power is appropriate. It should be formulated in such a way as to impose as light a burden as possible upon individuals and businesses affected, and the use of the power must be proportionate in the circumstances while also sufficiently robust to deal with the most serious cases. The basic choice is between a power of entry which is dependent upon reasonable suspicion of a breach of regulations or a state of affairs and a power which allows entry even where there is no suspicion of contravention – a power of routine inspection.

a) Reasonable suspicion

i) The relevant official may enter premises only where there are reasonable grounds to suspect a *breach* of the law or reasonable grounds to suspect that a state of affairs exists which necessitate such entry. Generally speaking this type of power is preferable to b) below because it removes the danger of the occupiers of premises being subjected to routine day-to-day interference and regulation. Indeed, it is to be expected that the power will never be exercised in relation to the majority of persons who are potentially subject to it.

ii) Wherever possible, the reasonable suspicion test should be combined with a requirement for a warrant so that it is an independent third party – a Magistrate – who decides whether there are reasonable grounds to justify entry. This is a valuable safeguard against arbitrary use of a power of entry and its inclusion should always be carefully considered.

b) Routine inspection

Powers of entry are not simply linked to the investigation of criminal offences but more broadly may relate to serving wider public interests and protection from harm. Here the official need not have reasonable suspicion of an offence before entering the premises. This type of power is perhaps more suitable where it is necessary to check regularly the conduct of a specified trade or business. Where routine powers of inspection are needed, you should consult with relevant partners to ensure that for example, any pre-existing Inspection Plan arrangements (like Primary Authority Arrangements) or more generally,

established guidance relating to inspection visits that apply is taken into account.

c) “Hybrid” powers

While powers of entry frequently fall wholly into one or other of the categories outlined above, a power may be formulated in such a way as to combine features of both (a) and (b). In such cases some aspects of the powers may be exercised on a routine basis, others only on reasonable suspicion and a warrant. Examples are as follows:

i) Powers which distinguish between different types of premises

It is sometimes appropriate in the context of one power of entry to treat different categories of premises in different ways. For example, if there is a question of enforcing a licensing or registration scheme, it may be justifiable to have a power of routine inspection of premises licensed or registered under the scheme. However, it would not be justifiable to subject any other premises to such inspection, and if an official wished to enter non-licensed premises, he would have to seek a justice’s warrant (or, in Scotland, a warrant from a sheriff or a justice of the peace) on the basis of reasonable suspicion of breach of the law.

ii) Powers which distinguish between inspection and search

It does not follow that a routine power of entry and inspection should necessarily include a power of search and seizure. Such powers (assuming of course that they are necessary at all) should at least depend upon their being reasonable suspicion of a contravention and preferably upon a justice’s warrant as well. A power of search and seizure clearly bears more heavily on the occupier of premises than a simple power of entry and there should therefore be greater safeguards. Part II of PACE places tight restrictions and conditions on the police’s powers of search and seizure, and individuals and businesses should similarly be safeguarded as regards powers of search and seizure exercised by officials.

Warrant

Wherever possible, legislation for powers of entry of any kind ought to include provision for a Magistrate’s warrant to act as a backstop power. A warrant would help achieve the balance between the rights of individuals and businesses (ensuring that the power to enter without warrant is not excessive) with the need for effective enforcement, applying for instance where entry to premises is refused, likely to be refused, where the owner or occupier of a property cannot be found or where force is required to gain entry. In particular, entry to private dwellings should only be by consent or following the issue of a warrant.

Private Dwellings

The Government is committed to ensuring that private and family life is respected at all times, including, in relation to the exercise of powers of entry, ensuring that premises consisting 'wholly' or 'mainly' of private dwellings (where for instance the dwelling contains dedicated office space) are protected from unnecessary intrusion. As such, private dwellings, under the definition set out here should be excluded from guidance or legislation authorising powers of entry. This however does not preclude entry to these types of dwelling where a warrant has been obtained and the court is satisfied that there is good reason to suspect that there may be evidence of wrongdoing on the premises that requires further investigation.

Article 8(2) ECHR permits interference to the right to respect private, family life and the home "if such interference is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." Caselaw in Funke v France [1994] establishes that in relation to private dwellings, save in urgent circumstances, prior judicial approval i.e a warrant is required.

The use of force

A right of entry does not necessarily imply that the official has the right to use force to effect entry: the incentive on the occupier to admit the official can normally be provided by making it an offence of obstruction to refuse entry. In the majority of cases, if it is necessary to use force, a justice's warrant must be obtained. While a person authorised to exercise the power cannot predict an obstruction, where they suspect reasonable force may be required to facilitate entry they ought to obtain a warrant before exercising the power. In rare cases where a general power prescribes the use of force, for instance to physically break open containers during an inspection, the grounds to use force must be explicitly set out to constrain and limit its use to a particular activity.

Associated powers

Powers of entry often also have associated powers attached to them to allow officials to conduct actions whilst on premises in relation to the premises or any persons found on the premises. Typically, associated powers include powers to inspect, search, seize, survey and retain. However there are numerous other variants in other powers of entry and associated powers.

It would not be reasonable to attempt to specify what associated powers should apply in particular circumstances here as these are numerous and varied but sponsoring Departments need to consider whether associated powers are necessary for effective enforcement while proportionate to the

power and then describe fully what those powers are and how they will be applied in relevant legislation. The new powers of entry Code of Practice when introduced will provide some guidelines for the use of associated powers.

Some inspection regimes for instance may require a power of inspection but not necessarily powers to search or seize. Limiting associated powers to only those needed to undertake proper enforcement is a good deal less intrusive and is more likely to elicit the co-operation of those affected.

Examples of associated powers could include powers

- to search and/or seize,
- to observe and view,
- to require explanations,
- to seek information,
- to take copies of documents,
- to direct others,
- to take law enforcement action,
- to take possession of anything found,
- to ascertain compliance with regulations,
- to take people and equipment with you when exercising the power of entry,
- to survey or test,
- to cut off the supply,
- to carry out works,
- to monitor and record,
- to examine and investigate,
- to direct premises to be undisturbed,
- to take measurements,
- to take photographs and make recordings,
- to take samples,
- to cause anything found to be dismantled or subjected to any process or test,
- to take possession of and detain substances or articles found,
- to require information and records,
- to install monitoring equipment

Legal privilege

The new Code of Practice for the exercise of Powers of Entry will cover legal privilege matters in more detail. However, for the purposes of adding 'associated powers' (such as obtaining or copying records or documents, seizing items etc) legal privilege is briefly explained below

In England and Wales legal privilege applies under the common law and is protected by the common law right to consult with a lawyer and by ECHR Article 8 (right to respect for private and family life). Legal privilege protects all

communications between a professional legal adviser and his or her clients from being disclosed without the permission of the client. When litigation is contemplated or pending, legal privilege can extend to communications between a lawyer and a third party which come into existence for the purpose of obtaining advice in regard to that litigation.

Legal privilege does not apply to communications or items held, or oral communications made, with the intention of furthering a criminal purpose.

Matters subject to legal privilege are particularly sensitive and a power to acquire such information during the course of an inspection would normally breach ECHR Article 8 and has the potential to breach ECHR Article 6 (right to a fair trial). It is important to ensure that information or items subject to legal privilege are excluded from a power or associated power. It is envisaged that the circumstances in which items subject to LPP can be acquired under a power of this nature will arise rarely, if ever. If there are such circumstances the intention of the power to override LPP will need to be absolutely clear. The Home Office will need to be consulted before any such power can be created. Nevertheless, Departments who are designing a new power of seizure will need to consider whether in the particular circumstances of each power – including the wording of any comparable existing powers in the same field – it is appropriate to make an express carve-out for legal privilege, or whether it is sufficient to rely on the general law.

If any items or materials subject to legal privilege have been accidentally obtained during the course of inspection appropriate safeguards must be taken to prevent further disclosure or dissemination. Legal advisors within the relevant authority or body should be consulted immediately for further advice.

Safeguards

A power of entry and associated power should include as many relevant safeguards for the occupier of premises as are compatible with effective enforcement. That is to say, that Departments should seek to protect civil liberties wherever possible by providing an appropriate level of protection for the individual that recognises the right to private and family life as well as the rights of business owners. However, the application of safeguards must be properly balanced against any operational imperatives, including preserving the requirement for proper enforcement and protecting the wider public interest.

The power of entry and associated powers should set out the grounds for requiring the power in the first place and the extent to which the power applies clearly. For instance when creating powers that enable search and seizure it is important to restrict the power to 'relevant' items, samples, substances etc. This will help ensure that the power is properly targeted and will also constrain or narrow the power and make it less intrusive in all cases.

The following are common safeguards which sponsoring Departments are invited to consider. In particular attention is drawn to providing reasonable notice which must always be provided unless it can be shown that doing so would defeat the purpose of a visit / inspection and undermine enforcement:

Consent – obtaining the owner or occupier’s consent before exercising the power or associated powers

Judicial authorisation - whether a court warrant is required to gain entry before the power can be exercised. Departments need to provide a compelling argument why a power to enter does not require a warrant.

Internal authority – wherever possible legislation or guidance should set out levels of internal authorisation required within the enforcement body before a power of entry can be exercised. This need not set out job titles or roles which may change over time but could for example reflect the authorised person’s seniority or status.

Written authority - officials should be provided with documents confirming their authority (the threshold for those with the authority to exercise the power should be carefully examined or set) and should provide a copy of the document in plain English, setting out clearly for the occupier of the premises what the power allows.

Identification - officials may be required to show official documentation to identify themselves before entering.

Use of reasonable force – This is usually prescribed under a warrant. In the vast majority of cases we would not expect general powers to permit the use of force, but there may be occasions where some force is necessary in particular circumstances. In those cases, the grounds to use force should be explicitly set out.

Exercise of power - What associated powers the official may use once they have entered the premises. These should be qualified and set out explicitly

Reasonable time - In general there should be a requirement that entry may be sought only at a reasonable hour.

Advance notice – Advance reasonable notice must be provided to the owner or occupier of premises (other than in an emergency, where there is serious risk of harm to public or animal health or where providing notice obstructs the purpose of the inspection / visit). If following notice the owner or occupier of premises refuses to grant entry or it is suspected that consent will be refused then a warrant should be obtained to gain entry.

Type of official - this category should be defined as closely as possible – powers should not extend to more than one type of official under a particular

regime where this can be avoided. However in some cases a single power may apply to more than one similar regimes.

Type of premises - where possible, the power should be confined to a particular type of premises e.g. a specific form of business and where possible, the ***exclusion of domestic premises should be made explicit***. In some circumstances it should be possible to restrict the power of entry to land (outdoor area) only.

Seizure of property – the power should clearly set out what can be seized (by limiting the power for example to items that appear relevant to the exercise of the power) and for how long, and should include any redress for the owner and should require the owner to be provided with a receipt of what has been taken.

Non disclosure of information The power may need to restrict disclosure to third parties of information obtained in the course of inspections unless it is considered that data protection legislation already adequately covers this.

State of premises - requirement to leave premises and equipment as near as possible in the condition found especially if force is used to enter premises.

Compensation - provisions for compensation for damage caused by officials to premises or anything found on premises.

Complaints procedure - provide an avenue for redress against officers conducting the search if occupiers feel aggrieved with the conduct of the search.

The police

Sometimes a power of entry is not only given to public officials but to the police as well. However, this is not usual, and where the chief responsibility for enforcement rests with officials it should not be necessary to give the police duplicate powers. The police are often not equipped to judge matters of a regulatory or technical nature, and they should not be involved unless there is an essential positive contribution which they can make. If a police presence might be necessary on occasions to deal with possible violence against an official, the existing common law power (preserved in PACE) for a constable to enter premises to deal with or prevent a breach of the peace should suffice. If police involvement is proposed, the Home Office will have to obtain a view from the police, who are very conscious of the many demands on their resources.

SUBMISSION OF REQUESTS FOR SCRUTINY

What is the Home Office's role in relation to powers of entry?

The Coalition Government has expressed its commitment to reviewing powers of entry and reducing or limiting their number under its new Freedom Agenda, particularly those that enable entry into private dwellings.

The Home Office has overall responsibility for the creation of powers of entry and sponsoring Departments are required to submit any applications for new or amended powers using the Gateway process.

Scope of the Gateway

You should seek Gateway clearance if you are proposing to do any of the following in legislation:

- create an entirely new power
- repeal and re-enact an existing power
- make any substantive amendments to a power (including consolidating powers)

The Gateway Team is happy to provide advice about the scope of the Gateway.

How will your proposals be assessed?

A review team led by senior officials within the Department taking advice from legal advisers as necessary will scrutinise applications from sponsors seeking evidence of the necessity and appropriateness of intended powers. When satisfied that the power is necessary and contains sufficient safeguards the matter will be placed before Home Office Ministers with a recommendation as to whether to accept the power or refuse it, outlining the reasons for doing so.

Ministers will approve proposals to create, retain or amend powers of entry only where they are satisfied that the proposed powers are necessary and sufficiently uphold the rights and protection of citizens while preserving the need for effective enforcement.

When considering your proposals Ministers will assess the evidence provided within the Gateway template form alongside other representations through officials. In particular consideration will be given to:

- whether powers of entry are needed at all;
- what effective alternatives to powers of entry are available

- what power or powers will be ‘surrendered’ upon the creation of the new power
- where you are creating powers of entry as a result of requirements under domestic or EU law, whether an alternative approach has been considered where there is scope to do so. This might for example take the form of bringing similar powers together using statutory instruments. Attention will also focus on whether alternative enforcement measures other than powers of entry which would constitute an effective and proportionate response to tackling any infringements or problems in the circumstances concerned were considered and, if not, why not
- where you propose to repeal and re-enact powers of entry whether they continue to be justified and proportionate – this is an opportunity to consider the matter afresh
- whether the powers of entry you propose will be a last resort
- whether you are targeting a time-limited issue (which has been the case with some specific powers of entry in the past)

The Home Office will also consider the number of powers you propose to create in line with the Government’s commitment to limit powers of entry or where possible reduce their number.

What happens if a request is rejected?

If a requested power of entry is rejected officials will seek to address concerns raised by Home Office Ministers. If a compromise can not be found then this will be escalated for Ministers to consider.

At what stage should Gateway clearance be sought?

Sponsoring Departments should consider using the Gateway process at the earliest opportunity in the development of policy or legislative proposals relating to powers of entry to ensure that sufficient time is allowed for Home Office officials and Ministers to conduct proper scrutiny and where appropriate to challenge proposals. However where clearance is required from others, for example, the Ministry of Justice in relation to the creation of new Criminal Offences the time required to resolve those or other related matters must also be taken into account. Officials should ensure wherever possible that clearance has been granted or at the very least, that those discussions are advanced to prevent delay. Where EU obligations must be met sponsoring Departments should allow further time for consideration.

You do not need Gateway clearance before publishing a consultation paper. However, you ought to take account of the Gateway principles when consulting on options for powers of entry.

What happens next?

Gateway clearance will usually be communicated at official level within 3 weeks of receipt of your application unless the issue is such that it requires Ministerial correspondence.

Contacting the Gateway Team

If you have any questions or wish to make further enquiries about the process outlined here or Powers of Entry please contact the Gateway Team at:

PofEGateway@homeoffice.gsi.gov.uk

New Criminal Offences

The Ministry of Justice operates a Criminal Offences Gateway. If your legislation creates or amends criminal offences, clearance should be sought from the Ministry of Justice: offencesgateway@justice.gsi.gov.uk