

# **Human rights, professional practice and social care: the findings of a small scale research study**

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The 1998 Human Rights Act (HRA), which aims to incorporate rights and freedoms guaranteed by the European Convention on Human Rights into UK law, was implemented in October 2000. Broadly welcomed by the disability movement, it nevertheless appears that, as yet, the legislation has had only a minimal impact on the conduct of public authorities, including social care agencies (Watson 2002). This paper sets out to assess in greater detail the implications of the introduction of the HRA on older and disabled people's rights to adult social care.

As part of this examination, the paper draws on the findings of interviews with front-line social workers about their understandings of human rights. These form part of a larger investigation which set out to assess the potential relevance of the incorporation of the ECHR into UK law for popular and welfare provider attitudes towards rights to social welfare. The investigation was funded by the Economic and Social Research Council under Award Reference Number R000239425, and conducted between 1 September 2001 and 28 February 2003. The findings are fully reported in an edited volume entitled *The Ethics of Welfare: Human rights, dependency and responsibility* (Dean 2004).

## **Human rights and social care: policy and practice**

### *Civil rights, human rights and social rights*

Insofar as they inhere in people simply by virtue of being human, human rights are fundamentally 'natural' rather than ascribed. The legal framework of rules required to interpret and enforce human rights transforms them into civil rights, or rights that are granted by the state to individual citizens and protected by law. Legislative power is seen as essential with the disability movement as a means of protecting disabled people against discrimination perpetuated by social structures and institutions (Scott-Hill 2002: 398), with the result that claims for greater empowerment are made almost entirely on the basis of civil rights (Handley 2000: 313). Several years of campaigning eventually led the passage of the 1995 Disability Discrimination Act (DDA) which affords protection to disabled people against discrimination in certain prescribed areas, principally employment, education and the provision of goods and services.

The introduction of the HRA can be linked to a broader movement for global justice pursued through human rights. Whereas the social rights of welfare citizenship dominated debates about human welfare in earlier post-Second World War periods, Turner (2001a; 2001b) suggests that post-national human rights are slowly replacing, or perhaps augmenting, existing social rights. Insofar as human rights encompass notions of entitlement that transcend considerations of nationality (Dean 2002: 56-7), they serve to protect humans from involuntary risks beyond the control of individual nation states, particularly the negative consequences of economic growth and technology on health and safety (Turner 2001a; 2001b).

Human rights discourses hold an appeal not just for governments but also for marginalised groups, including disabled people. Morris, for example, maintains that the universal and inalienable nature of human rights means that they have the potential not just to protect disabled people against

discrimination but to support arguments for social inclusion (2001: 171). Inasmuch as a key deficiency of the DDA is that it reproduces a medical model by reinforcing the causal association between impairment and disability, thereby creating rights that are neither absolute nor universal (Priestley 1999: 207), it is unsurprising that within months of the Disability Rights Commission beginning work in 2000, its chairperson Bert Massie was arguing that the HRA provided a more inclusive framework than the DDA against which to argue that any given legislation discriminated against disabled people (Revans 2000).

In substituting negative for positive rights, human rights would appear at first sight to be a poor exchange for social rights to welfare provision. Human rights are based on a classic liberal model of justice according to which the primary concern is to protect the freedom and wellbeing of the individual from possible infringements by the state (Michailakis 1997: 26). Thus the ECHR endows citizens with a predominantly negative (and relatively costless) set of civil rights, such as freedom from torture and the right to 'dignity' of treatment, which are to be judicially protected against interference by the state; or with positive rights that cannot be in short supply, such as equal treatment under the law (Campbell 1999; Clements 2002; Hunt 1999).

As Sterba (1981) points out, the negative cast of human rights represents an inversion of the conventional conception of social rights as positive. Whereas welfare rights imply a societal duty to secure the rights of the less well-off to obtain the goods and resources necessary to satisfy basic needs, he argues that the negative right of (individual) non-interference may be construed as an obligation on the better off not to interfere with a person's attempt to meet their basic needs (in Smith 1998: 25). As such, the shift from social rights to human rights is consistent with the neo-liberal ideology underpinning welfare retrenchment across advanced industrialised countries.

Yet the ECHR was never intended as an exhaustive human rights code rather as part of a broader framework of international provisions dealing also with economic, social and cultural rights (Knafler 1998). Thus the European Social Charter, for example, has afforded some protection to economic and social rights although, in the case of the UK HRA, 'express reference to economic, social and cultural rights is virtually non-existent' (Knafler 1998: 9). Arguing that the boundaries between socio-economic rights on the one hand and civil and political rights on the other are artificial, and therefore subject to change, Clements and Read (2003) offer as evidence interpretations of Convention rights by the European Court of Justice which extend their scope into the sphere of economic and social rights. In this way, as Hazell and Sinclair (1999) argue, the HRA could lead to the courts exercising significant new powers over the executive; and the implications of incorporating the HRA into UK law for public authorities generally and local authority social services departments in particular may have greater significance for disabled people's social rights than first envisaged. The relevance of these arguments for disabled people is examined in greater detail in a later section.

In their political campaigns, however, disabled people have tended to privilege human and civil rights over social rights. Firstly, as Drewitt argues, disabled people's rights to social and health services in Britain are much less well developed than anti-discrimination and broader civil rights measures (1999: 117). The realisation of social rights is dependent upon a determination

of need which is based, in turn, on pathologising notions of dependency. To the extent that the task of assessment has traditionally fallen to front-line welfare professionals, writers in the disability field argue that disabled people have been positioned not as bearers of rights within the welfare state, but as needy and dependent people whose access to special and segregated provision is governed by a panoply of professional experts. This leads us to the second point. It is not positive social rights but negative civil rights, including those conferred by human rights legislation, that serve to protect disabled people against breaches of privacy, dignity and confidentiality consequent upon such regulatory practices.

A further reason for caution about social rights on the part of disabled people relates to their conditionality within contemporary welfare regimes. Whilst Priestley argues that disability policy making is taking on the language of rights and participation developed by the disabled people's movement under New Labour (2000: 435), those rights are conditional upon the fulfilment of citizenship duties, particularly the obligation of employment. This is to disregard the fact that, firstly, two thirds of disabled people are over the compulsory retirement age (Priestley 2000: 434) and, secondly, that younger people may have high support needs which exclude them from the labour market (Morris 2001). Paradoxically, in perpetuating discriminatory notions of dependency, current policies to combat social exclusion serve as exclusionary devices because they 'are predicated on the assumption that 'independent people' are those in paid employment who can do things for themselves and 'dependent people' are those living on benefit who rely on other to do things for them' (Morris 2001: 171).

### *Social rights and social care*

The stated aim for adult social care of 'promoting independence' similarly reflects an antipathy on the part of New Labour for the very idea of dependency, coupled with a refusal to accept that some people need continuing support to cope with their lives (Hoggett 2001: 44). Sturdy individualism has eclipsed the socio-liberal values underpinning the post-war welfare state which, as Hill and Bramley point out, readily encompassed the care of groups made dependent by the specific contingencies of life (1986: 8). New Labour's White Paper *Modernising Social Services* contains the following stricture: 'Social services must aim wherever possible to help people get better, to improve their health and social functioning rather than just "keep them going"' (DoH 1998: para. 2.11). Through such measures as improved rehabilitation, systematic review, access to paid employment and an extension of the direct payments scheme, adult social care should be geared towards providing "the support needed by someone to make most use of their own capacity and potential" (DoH 1998: para. 2.5). Underlying this model of social policy, as Beresford explains, is the notion that it is welfare service users who should be reformed rather than the economic and social institutions that produce discrimination (2001: 499-500).

Eligibility criteria governing access to social care remain grounded in notions of dependency and risk which arguably runs counter to the essential purposes of human rights. Writing about older disabled people, Clark and Spafford argue that calculating eligibility in terms of functional (and financial)

dependency, reinforced by the tendency amongst professionals to pathologise their needs, is an approach which interferes with the individual's right to respect for his or her 'personhood' (2002: 254). As Vernon and Qureshi (2000) found, service users may value their ability to perform tasks independently where possible, but they tend to equate independence less with self-sufficiency than with autonomy, or a sense of control over choices and decisions affecting their lives. Whereas simply 'keeping people going' is now tantamount to policy failure, receiving help to meet legitimate needs arguably promotes rather than compromises people's sense of autonomy. The narrow formulations of risk upon which eligibility criteria and assessment schedules are based are similarly restrictive. Neglecting the extent to which risk and risk-taking are part of everyday living and, indeed, arguably essential to personal growth and self determination, limits people's autonomy, whilst the targeting of personal care on those most at risk of physical harm has been at the expense of low-level preventive services which are not only highly valued by many older people but based on a far broader definition of social inclusion (Clark *et al* 1998).

As Vernon and Qureshi (2000) point out, 'promoting independence' is less about securing human autonomy than ensuring self-reliance, particularly in terms of daily living tasks, but also in terms of managing without help wherever possible and paying for and making economical use of any services provided (Johnson 1999). The disability movement has championed direct payments as the preferred means for discharging the collective responsibility to ensure that disabled people can exercise choice and control (Morris 1997: 54). Indeed, Barnes describes the 1996 Community Care (Direct Payments) Act as possibly one of the most significant developments in British social policy since the establishment of the modern welfare state, basing this judgement on its potential to enable recipients to achieve a hitherto unprecedented degree of autonomy and realise civil and human rights (2002: 312). Despite this familiar emphasis on civil and human rights, however, the question of whether resources are to be allocated still rests on a decision about whether a social right to a cash payment exists.

### *Social rights, political rights and performance governance*

According to Pfeffer and Coote (1991), three models of quality assurance gained currency in debates around welfare restructuring in the latter part of the 1980s. Within the consumerist model, quality was defined primarily in terms of consumer rights and redress, whilst the managerial and expert model linked quality to efficiency and the professional-client relationship respectively. The top down imperative of providing services within fixed budgets, coupled with the low salience of consumer satisfaction in relation to the primary objective of cost efficiency, ensured the dominance of managerial over consumer models of quality (Pfeffer and Coote 1991: 25).

The Best Value inspectorate, set up under the auspices of the Audit Commission, is at the centre of what Humphrey describes as a massive expansion of the regulatory apparatus of performance governance under the current government (2003: 5). Best Value places a statutory duty on all public authorities to deliver services "to clear standards covering both cost and quality, by the most effective, economic and efficient means available" (DoH

1998: 1.5). This insistence that policy objectives must be underpinned by evidence of their effectiveness points not only to an *a priori* commitment to performance management on the part of the New Labour government (Blackman and Palmer 1999), but also to a new emphasis on measuring the end results for service users rather than the organisational means by which they are reached. Yet, as Schwehr (2000; 2001) observes, under the new performance regime it is appropriate to choose the cheapest means of meeting a need provided the local authority has taken into account the possibility that some other way might provide better (or “best”) value.

Quality standards in contemporary social care are connected to key government objectives, particularly the more efficient use of taxpayers’ money and greater responsiveness to individual citizens-as-consumers. The idea of ‘quality’ within a social model of disability, as Priestley points out, involves not only improved services, but enhanced civil rights and citizenship (1999: 11). Yet the rights to social care set out in the White Paper are procedural rather than substantive, limited to the right to co-ordinated and readily accessible services, including clear and comprehensive information, and to fair and consistent systems of charging and accessing support (DoH 1998). The managerialisation of needs assessment and care management means that, at the individual level, even the right to access an assessment is generally conditional upon a person satisfying eligibility criteria which determine whether or not s/he is likely to require a service (Davis *et al* 1997). Moreover, rights are ‘balanced’ by duties to manage without help wherever possible and to pay for and make economical use of any services provided (Johnson 1999).

In terms of political rights, for all New Labour’s rhetoric about decentralisation and consensual politics, performance management and budgetary controls ensure that power remains centralised. Although the current government represents the increased emphasis on assessing outcomes as a move towards greater democracy in the public sector (Blackman and Palmer 1999), top-down control through performance measurement and standardisation militates against local democracy and inclusive definitions of quality. Despite the promise that determinations of ‘best value’ will draw on a plurality of stakeholder approaches to and experiences of quality as a means of repositioning users and carers as local citizens rather than as atomised consumers (Jacobs and Manzi 2000; Rouse and Smith 1999), Best Value is ultimately an economic measure which links performance to value for money by targeting assistance only on those most at risk and minimising service use.

If, as Spandler argues, direct payments have the potential to redistribute power and resources away from local authorities and towards disabled people (2001: 192), then, they could represent a powerful counterweight to performance governance. The challenge is to ensure that all groups of disabled people, including older disabled people, are able to benefit in significant numbers which, in turn, probably depends upon expanding the grassroots organisational infrastructure required to recruit, employ and train staff and manage budgets.

*Social work, rights and ‘bureaucratic rationing’*

Performance governance has also arguably eroded expert definitions of quality which have been displaced by both consumerist and managerial models. On the one hand, consumer sovereignty has delegitimised traditional professionalism with its roots in beneficence, or actively taking responsibility for others (Smith 1998: 20). On the other hand, as Foster and Wilding point out, the direct relationship between professional and client has been largely eclipsed as the focus of policy and practice as a result of managers taking prime responsibility for the central task of managing and monitoring a range of abstract risk factors (2000: 152). Inasmuch as access to services is now linked to service criteria based on managerial definitions of risk, much front-line social work has arguably been transformed from a process of human interaction to a linear sequence of calculations about the negative consequences of not intervening to prevent harm (Davis *et al* 1997).

Despite attacks on the professional autonomy of welfare practitioners, however, Hunter maintains that they are still heavily involved in formulating policy at 'meso level' (2003: 333). The idea here is that, increasingly, policy is developed neither from top down nor bottom up, but from middle out (Davies 2000a in Hunter 2003: 333). As Chevannes points out, health and social care professionals *manage* people's needs in that they use criteria in their assessments which determine whether services are provided as well as prioritising outcomes according to resources available (2002: 175-6). In a study of access to needs assessments for community care services, Ellis *et al* (1999) similarly found that, despite the constraints of performance governance, social workers continued to use assessment criteria strategically as a resource to give access or deny entry to older and disabled people.

Rummery and Glendinning usefully distinguish three types of rationing underpinning front-line practice: 'managerial gatekeeping', of the type described above; 'professional gatekeeping', or the explicit role that welfare professionals play in rationing access to a finite level of services; and 'bureaucratic gatekeeping', or the informal and implicit rationing behaviour of 'street-level bureaucrats' (2000: 542). In terms of 'professional gatekeeping', it is relevant to consider the government's stated aim in passing the HRA which was not simply to require compliance with the ECHR but to build a new human rights culture amongst public authorities and the public more generally (Home Office 1999a; 1999b). Social workers were last urged to embrace cultural change during implementation of the 1990 National Health Service and Community Care Act, at that time as a means of negotiating the shift towards a new mixed economy of care based on 'markets and managers' (Taylor-Gooby and Lawson 1993). In principle, professional codes of conduct should be more readily accommodated within a human rights culture than market values; and it has been argued elsewhere that the moral philosophies associated with the two main social work traditions are each compatible with formulations of human rights insofar as both are based upon the classical justice principles of universalism and impartiality towards humans of equal worth (Ellis and Rogers 2004; Ellis forthcoming).

Yet the potential for incorporating human rights into professional practice is weakened by two factors. Firstly, recent research by the District Audit reveals that the majority of local authorities have not reviewed their policies or working practices to bring about the promised culture change in public services, or indeed even to ensure compliance with the HRA (District Audit 2003). It is

perhaps unsurprising then that in a study undertaken by the British Institute of Human Rights, Watson (2002) points to a lack of understanding amongst front-line social care staff either about the rights the Act contains or their own responsibilities to uphold them.

Secondly, empirical studies of social work practice stretching back to the 1960s bear testimony to the weak influence of professional codes of conduct relative to the exigencies of resource management associated with street-level bureaucracy (Ellis *et al* 1999). Indeed, Rummery and Glendinning suggest that the increasing trend of devolving budgets to front-line practitioners may be associated with an expansion in bureaucratic as opposed to professional gatekeeping (2000: 542-3). As the authors point out, such practices could further undermine people's civil and social rights in that 'bureaucratic gatekeeping' denies many disabled people their civil right to access an assessment under Section 4 of the 1986 Disabled Person's (Services, Consultation and Representation) Act 1986 which, in turn, debars them from entry to the 'assessment arena' of front-line practice within which social rights to services are negotiated. (1999: 336).

### *Positive obligations and rights to social care*

Schwehr argues that the HRA can empower clients and professionals alike, providing a bulwark against the worst excesses of managerialism (Schwehr 2001: 80). She suggests that the HRA brings about three radical changes to the organisation and delivery of social care in England.

Firstly, Schwehr points out that the HRA establishes a new illegality ground for judicial review of the exercise of discretionary powers conferred by statute on public authorities, including social services departments, on the basis of an alleged breach of a human right. To this extent, the situation has changed since Rummery and Glendinning argued that professional gatekeeping judgements were not open to challenge through judicial processes as they had no basis in civil rights (1999: 336). Since implementation of the HRA, executive discretion must be exercised in ways that are compatible with Convention Articles in order to avoid challenges (with the possibility of financial compensation for victims of any breach of human rights) (Elliott 2001; Harpwood 2001; Leigh and Lustgarten 1999).

The second change highlighted by Schwehr (2001) is the introduction of 'proportionality' as a test for judicial intervention in the case of qualified rights. Unlike Articles 3, 12 and 14 (the prohibition of torture, inhuman or degrading treatment or punishment, the right to marry and found a family and the right not to be discriminated against respectively), which create absolute prohibitions, Articles 2, 5 and 8 (the right to life, the right to liberty and security and the right to respect for people's private and family lives respectively) generally require that the rights of the individual are balanced against the rights of others or the rights of society as a whole (Daw 2000; Harpwood 2001: 231; Schwehr 2000: 129; Schwehr 2001: 77). A qualified right can be breached if that restriction is legitimate, that is, if it is necessary in a democratic society; fulfils a "pressing social need"; and is proportionate to that need (the principle of 'proportionality') (Clements and Read 2003: 26; Elliott 2001: 307; Harpwood 2001: 231; Leigh and Lustgarten 1999: 522).



Legal commentators have suggested that the principle of proportionality restricts the margin of discretion previously afforded to the executive, marking a shift from procedural to substantive justice (Elliott 2001: 302-3; Gleeson 1997: 202; Harpwood 2001: 237; Leigh and Lustgarten 1999: 517). Not only is there a greater concern with the outcomes as opposed to the rationality of decision making but, in the third change outlined by Schwehr (2001), some Convention Articles place positive obligations on public authorities, including social services departments, to act where a failure to act could result in a breach of human rights (see also Williams 2001: 839-40).

Historically, courts in the UK have been reluctant to interfere with the resource allocation decisions of public authorities unless these were adjudged unreasonable or out of kilter with stated policy (Harpwood 2001: 237). In the case of social care, this is illustrated by the 1997 House of Lords judgement (*R v Gloucestershire County Council ex parte Barry*) which effectively confirmed the right of local authorities to tailor provision to resources available by ruling that a local authority could have regard to its own resources when deciding what a disabled person needed. Given the positive obligations implied by the ECHR, however, Clements and Read conclude that a resource argument will rarely, if ever, be a relevant factor in the case of absolute Convention Articles (2003: 78).

Consequently, the positive obligations imposed on local authorities by the HRA may widen the scope of people's rights to social care by challenging rationing regimes. In a recent review of the impact of the HRA on disabled people's rights, Clements and Read argue that UK courts have effectively recognised a core set of irreducible rights, most notably positive healthcare obligations, which appear to be immune to resource arguments (2003: 76). To the extent that a shifting health/social care boundary in recent years has made social care agencies responsible for people who depend on high levels of personal care for their very survival, then positive obligations, particularly those embedded in Article 2, could expand the scope of those rights to social care. Additionally, the courts have indicated not only that the minimum threshold of severity required under Article 3 may be significantly lower for older and disabled people, but also that arbitrary and gross acts of discrimination may exceptionally be considered, even in the absence of actual physical and mental harm (Daw 2000; Clements and Read 2003: 21).

One of the general principles of interpretation in relation to the ECHR is that it is intended to guarantee "not rights that are theoretical or illusory but rights that are practical and effective" (Daw 2000). Thus Article 5, which concerns the right to the liberty and security of the person, may also place positive obligations on local authorities. After all, Daw argues, the freedom for a disabled person to leave an institution may be illusory if a local authority fails to take the steps to provide the means for them to leave. By the same token, if a local authority fails to provide a service, or if the service is at a minimal level, a disabled person may be effectively imprisoned in his/her own home and deprived of his or her liberty. In similar vein, Clements and Read point out that Article 5 has led the courts increasingly to require the detention of mental health service users and people with learning difficulties to be accompanied by a suitably therapeutic environment (2003: 22).

In the case of Article 8, which confers the right to respect for an individual's private and family life, home and correspondence, Clements and Read argue

that the very phrase 'respect for' implies a positive obligation (2003: 23). Local authorities may be required to provide such assistance as is necessary to support people's rights to live independently in their own home rather than an institution, or to live with other family members in a way that does not adversely affect their quality of life, as well as to establish and develop personal relationships with others – in institutional care, for example; and to support the rights of disabled parents (Clements and Read 2003; Daw 2000). According to Clements and Read, Article 8 also has the potential to supplement duties imposed by the 1995 Disability Discrimination Act. For example, case law has established that a failure to remove unreasonable barriers (physical or otherwise) to enjoying a private life could be in breach of Article 8, yet unless such barriers relate to the provision of goods and services, they are likely to fall outside the 1995 Act (Clement and Read 2003: 63-4).

### **Human rights in front-line practice**

In assessing the impact of human rights on social care, particularly the scope for the development of positive obligations, it is important to explore the views of front line professionals; and this section presents interview findings from a small-scale study which throws some light on social workers' attitudes towards human and social rights. As Clements and Read point out, "For many disabled children and adults, their only opportunity to become aware of, and to extend, their human rights will be through contact with conscientious practitioners whose organisations are seriously attempting to work to the human rights agenda" (2003: 96).

The wider research study entailed two sets of in-depth interviews: the first with a 'core' sample of 49 working age adults with widely differing levels of income; the second with a sample of 9 social security benefits administrators and 14 social workers/social care staff. This section concentrates on the views of the latter group as they relate to the potential for promoting positive obligations in social care. (Given their numerical superiority - 13/14 - participants are hereafter referred to as 'the social workers'.) The participants worked in services for older and disabled people in three local authorities in the South East of England. Three were men and eleven were women. All were white. Three were aged under 40 and the others 40 or over. Five were graduates and the others were all qualified to Diploma level (one had a nursing qualification, the other thirteen a social work qualification). Given the small sample size, clearly caution should be observed in relation to the suggested interpretations that are offered in the following discussion.

#### *Promoting independence*

The principal investigation started from the premise that current understandings of the relationship between social rights and human rights are constrained by a tension between socially and politically constructed notions of dependency on the one hand and responsibility on the other. Consequently, participants' views about the nature of human dependency and responsibility were sought first before exploring their relationship to the question of human and social rights.

Social workers were unanimous in defining dependency as an unavoidable aspect of human existence, although it was narrowly associated by the majority with physical or cognitive incapacity and a consequential inability to function without assistance. Similarly, in response to questions about the nature of independence, participants' view was that no-one could be entirely independent; rather interdependence was the essential nature of human existence. When questioned about welfare dependency, half of the participants were consistently reluctant to problematise welfare dependency.

.... dependency is on many levels, isn't it? And that's why I don't like that word really, it has negative connotations, whereas we all have needs, and I think needs is probably a better word, we all have emotional needs, physical needs, and I think needs is a better word than dependency. It's a negative word, immediately, you label somebody.

The other half of the participants, however, were inclined to see the individual as blameworthy in some way unless that dependency was perceived to arise out of age, illness or impairment. Even then participants reasoned that greater self sufficiency could be achieved by exercising mental resolve.

It's almost a state of mind actually, because you can have people that, for example, erm are financially dependent on the state and yet you still define them as independent because they've still got sort of dynamism and urge about them, even though they may be, you know completely physically and financially dependent, they still may be independently minded.

Within the context of social care practice, moreover, at least half of the participants saw independence as a matter of personal aspiration on service users' part, with six voicing the view that people were prone to over dependency on staff or services when they ought to be demonstrating greater self-reliance. Provided there was no risk of harm to self or others, a majority of social workers (9/14) considered that users should take as much responsibility as possible for their own welfare.

I do have clients who are referred to us who are capable of getting by, but know the system and *could* be independent but, again, it is how they see themselves.

If you're looking at how people are responsible for themselves. Thinking about if I run out of money and my benefit didn't last until the end of the week then I'll ring up social services or whatever and I'll get something there. It's just complete... they know what they need to do but chose not to.

Social workers' beliefs about front-line practice are broadly in line with the policy and operational objectives for social care of 'promoting independence', as well as signalling an intertwining of managerial and professional gatekeeping. That is to say, their understanding of the nature of dependency not only closely mimicked eligibility criteria currently governing access to social care, but was also consistent with a professional commitment to self-determination.

When defining their own dependency, however, the majority of social workers (12/14) distanced themselves from 'others' dependent on welfare

benefits and services. Their own dependency was described primarily in terms of an emotional reliance on support from family and personal networks and/or dependency on employers; and welfare dependency was regarded as qualitatively different to the normal (inter)dependencies of human relationships, the reciprocal nature of which left social workers' own autonomy intact.

I think there's a value that you can be dependent on an employer, which is seen as returning something, seen as earning that, whereas if you are dependent on the welfare state, it's seen as one directional with regards to the person who's receiving.

... you can *choose* to be dependent on a friend or a colleague, I can *choose* whether I want to ask for help. I can get by if I don't get it but if you're dependent on the state for benefits, you are completely dependent, and I think it's one of the worst things you can be.

Such views are arguably consistent with the 'stakeholder' approach to social justice of the current government which, according to Rodger, is based on 'amoralising familism', or the notion that earning a living and supporting a family represent the nature of people's stake in and responsibility towards society (2003: 411).

### *Balancing rights and responsibilities*

About half of the social workers expressed socially situated views about responsibility (although the majority of participants held simultaneously to individualistic and other regarding definitions).

... I mean classically I think a [responsible] person is able to conduct themselves in a way that takes due regard to other people's practical and emotional aspects. Just a basic, just a fundamental thing, I would guess that responsibility towards one another and responsible to anything around the environment or...

Generalised statements about the existence of responsibilities beyond self and others, however, did not necessarily translate into a notion of collective responsibility for others' welfare.

I think that every human being should ... have what we would call the basic needs adhered to. But I think that at the end of the day we can't always rely on other people to do those things for us. We can't sit back and wait. We have to get out and do something for ourselves.

In line with a stakeholder approach to social welfare, the qualifications expressed by social workers derived from a belief that rights depended upon the fulfilment of responsibilities. Just over half (8/14) raised concerns about welfare abuse, or the potential for welfare dependency to undermine a sense of personal responsibility; whilst, more pragmatically, unconditional rights were seen as untenable in an increasingly residualised welfare state.

The highly paternalistic discourse towards disabled people as rights-holders found amongst the core sample was absent amongst social workers. Although people should not be branded irresponsible for not working or

providing for their future if there were legitimate reasons, such as structural factors related to the employment market, or ill-health or impairment, if disabled people were sufficiently autonomous to exercise their rights then, by extension, they should be regarded as capable of behaving responsibly unless proven otherwise.

.... I think that people with disability if they can possibly work then it is the best thing in the world for them.

As a principle yes I believe in it [disability benefits]. Again I think, I think there has to be criteria though.

Once again, social workers' views are in line with the direction of New Labour policy towards disabled people of working age which is based on the assumption that younger disabled people will work, reinforced by a return to less eligible welfare in the form of a narrowing of access to Incapacity Benefit (Priestley 2000; Roulstone 2002).

In terms of professional practice, over half the social workers perceived the sense of responsibility which most felt they owed to dependent people in terms of promoting independence or empowering service users. As previously discussed, however, the desire to foster self-determination and to target resources appropriately appeared to be inextricably entwined.

... sometimes I have to say well, you don't meet the criteria anymore. I always like us to agree if we can, because I think that's much better, because then they've actually seen that they've grown and they can cope. Because you don't want them to be dependent on you, because that's the whole idea, the idea is that you go in there and you help them but sometimes you have to say, 'look, you *can* do this and you can do that and at the moment you're not meeting the criteria'.

Five of the participants, moreover, saw users' responsibility in terms of co-operating in social work interventions.

I think they need to take part of responsibility in a way because if you've got a client who doesn't engage properly, or doesn't engage with the service, there's only so much you can do. They need to take some responsibility in seeking out support, as much as you can give it, like people don't answer the door and you know, you're constantly going back, there's only so much you can do.

As Dwyer argues, where individual responsibility becomes the central focus of citizenship and the role of the state is reduced, welfare rights become increasingly conditional, and state funded provision is made dependent upon the individual conforming to particular obligations or patterns of behaviour (1998: 494).

### *Rights and front-line practice*

The majority of social workers accepted the proposition that people had human rights simply by virtue of being human, which half linked to notions of a fundamental human interdependency.

I think that we all have a responsibility to each other, before the Human Rights Act was even brought out. To have certain care towards each other and certain responsibility towards each other.

Yet acceptance of the inalienability of human rights did not translate into support for universal social rights. Rather the majority subscribed to a conditional definition of social rights.

... they do have basic rights, but then so do animals ... what concerns me is how far that is taken, because it's almost a sense that people have rights and that's taken to such a degree that it impacts on other people.

There was a marked resistance amongst social workers to the notion of *legally* enforceable rights in contradistinction to the 'natural' rights generated by kinship and human interdependency. Even those participants who most strongly supported the proposition that human rights should include social rights were uncertain about the term 'right' and/or located the roots of their support within the informal domain.

I think rights, the rights of the individual should be extended as far as, as far as possible to protect the individual, they should, you know, they should be allowed, I think as citizens, that should be, er, extended as far as possible. It doesn't follow that it has to be statute.

... I think it becomes more legal ... the more sophisticated we become the more unsophisticated we become ... in bringing sophistication and culture and philosophy it becomes more unsophisticated I would say, because we're having those basic human rights imposed on us. Whereas ... those basic things to me as a human being are enshrined in my kind of human sense.

Four participants in this study expressed overt hostility towards rights talk in terms of the tenets of professional practice. Rights were not only used to advance 'unrealistic' claims for state support whilst abdicating personal responsibility, but undermined the relationship at the centre of traditional social work practice with its associated skills of negotiating with clients to reach a compromise solution.

if you don't get it right, it looks from the outside that they've [disabled people] got all rights but no responsibilities.

It seems to me that we're getting into a situation where there is no compromise, there is no negotiation. It's either or, you know, you infringe my human rights, I'll take you to court. I mean, you know, it's something that gets quoted a lot at us. This Human Rights Act ... that's about getting into a situation where litigation is all people think about. Because people are thinking of rights as being purely legal instead of moral, I think.

In line with participants in the study reported here, a review of *Community Care* at time of implementation suggests a predominantly defensive response to the HRA. The Act is variously described as a 'weapon of litigation' that threatens to engender a 'compensation culture' and 'swamp' social services with dubious legal challenges. The 'compensation culture', moreover, appears

to be regarded as a further privileging of managerial over expert performance indicators. The combination of risk management procedures and greater formalisation of practice which, as Harpwood (2001) points out, will be required to avoid or defend challenges, has led to fears that professional flexibility and discretion will be curtailed still further (*Community Care* September 6<sup>th</sup> 2001; Whelan 2000: 14).

Notwithstanding the resistance towards legally constituted rights of some of the participants in this study, the majority (11/14) supported the proposition that people had rights to at least certain kinds of welfare. If individuals could not be held to account for their dependency then, by extension, their social rights should be upheld. Six social workers referred to their professional responsibility to advocate, or support users' rights of access to benefits and services. Two of these participants, who belonged to the same authority, made specific reference to their sense of responsibility for advocating on service users' behalf when employers' decisions threatened to contravene human rights legislation.

.... in terms of working with people ... I make them very aware of the rights that they have which is the clash that I have with my employers in that if they decide that they want social work practice to go one way, and we know that's not in the person's best interest, so, you know, it counteracts the Human Rights Act, I will jump up and down, and say, 'I'm sorry, you can't do that, this person has human rights'.

## Conclusion

This paper has examined the potential of the HRA for expanding disability rights by means of discussing the relationship in social care policy and practice between human and civil rights on the one hand and social rights on the other. Social rights have been largely discredited by British writers in the disability field. Oliver, for example, argues that welfare provisions and practices have not only failed to guarantee the citizenship rights of disabled people but have infringed and even taken away some of these rights (Oliver 1992: 30). Rather than lobbying parliament for an expansion in social rights, then, the emphasis within the disability movement has been on civil rights and legal protection as the route to social inclusion. The introduction of the HRA is regarded as the next logical step for expanding disabled people's protection against discrimination.

Some writers have maintained that this reliance on legal protection as the route to empowerment is illogical. Echoing criticisms of social rights, Scott-Hill (2002) argues that anti-discrimination legislation is based on the individual model of disability which serves to deny the existence of institutionalised disability, whilst Drewitt highlights the contradiction inherent in seeking to address disabled people's concerns through legal representation rather than parliament when the capacity of legislative reform to open up access to public goods to disabled people is the subject of such doubt (1999: 119). In terms of gaining redress, Barron has argued that although individual rights legislation can operate as a mechanism of inclusion for people in a position to take care of their own interests, it can operate as a mechanism of exclusion for others (2001: 446). In relation to human rights legislation, Clements and Read point out that disabled people's access to legal remedies is impeded by a judicial

system characterised by disabling structures and processes which are reinforced by such factors as poverty and the absence of financial and/or other types of assistance (2003: 41-3).

If Convention rights are to pose an actual as opposed to a theoretical challenge to the way in which social care is currently managed in the UK then both professional advocacy and grassroots pressure are required to promote change. The advocacy movement for the largest group of users, older disabled people, is less well-developed than is the case for younger disabled people and mental health service users. Front-line social workers will therefore need to champion the cause of the majority of older and disabled people whose rights are unprotected by user groups and movements. Yet although the ethical basis of social work is compatible with human rights, the interview findings have highlighted a number of constraints on securing professional advocacy for human rights.

In terms of conceptualising rights, the view of social workers in this study was that social rights are properly dependent upon citizens exercising personal responsibility for welfare sits comfortably with contemporary policy approaches. Home Office guidance (1999a) accompanying implementation of the HRA makes it clear that citizenship rights and responsibilities must be 'properly balanced'. The primary obligation is to eschew dependency on welfare by engaging in paid work and supporting a family. For social workers, too, autonomy and rights are linked to the responsibility to work. Consequently, if disabled people are sufficiently autonomous to exercise their rights then, by extension, they are capable of behaving responsibly which is linked in turn to paid work. As Dean argues, if social inclusion is to mean anything, it should mean being dependent upon those around us (2002: 207). Yet the view of rights and responsibilities embedded within policy and professional practice pathologises welfare dependency. Whilst most social workers did locate human rights within an ontological view of human interdependency, to the extent that this was narrowly conceived in terms of the reciprocal ties of family and employment, it was an interdependency that generated 'natural' rights rather than universal social rights. As such, it served to exclude what was perceived as a unilateral welfare dependency.

The exigencies of front-line practice place further constraints upon the expression of human rights. It is bureaucratic rather than professional methodologies that tend to influence resource allocation, particularly when time and other resources are scarce. Certainly, the intensification of bureaucratic gatekeeping in social care has served to deny disabled people their civil right to a needs assessment which, in turn, has had the effect of compromising their social rights to a service. Given the threat that legally enforceable rights represent to professional and bureaucratic discretion alike, the interview findings suggest that social workers have adopted a predominantly defensive stance on human rights. Nevertheless, it is important to recognise that some social workers were prepared to advocate on behalf of service users' rights. The drive on the part of the current government to involve service users in the design and delivery of the new three year social work degree offers the opportunity to input a disability centred approach to human rights into professional training.

Disability writers would argue that there is a fundamental distinction between the functional and financial self-reliance to which governments urge



citizens to aspire and the autonomy for which disabled people struggle in order to be able to make choices about their lives. Whilst the study demonstrates that social workers' view of dependency as mental or physical impairment reinforces managerial gatekeeping, or the need to target resources appropriately, nevertheless policy and professional discourses of autonomy appear to be increasingly disembodied. Policy requires those reliant on welfare provision to be active participants in overcoming or minimising their dependency, whilst in this study the social work ethic of self determination found expression in the view that service users should demonstrate the mental resolve to take charge of their lives.

Such approaches can be linked to constructs of ontological identity embedded in popular culture which, according to Watson, imply that it is only by being independent that we can truly forge our own identity, a sense of self that depends, in turn, on lifestyle choices (1998: 148). There is also arguably some convergence between the cognitive version of autonomy within policy and professional discourses and the emphasis of the disability movement on civil and human rights. After all, civil rights are based on the notion of the autonomous human being whose capability for rational thought means that the individual should be allowed to make decisions and choices for him or herself, provided they do not impinge on the rights of others to do likewise.

As such, civil and human rights confer predominantly negative freedoms. Whilst these may provide necessary protection for disabled people against restrictions placed on the exercise of their rights and freedom, they do not inevitably translate into claims for resources. Indeed the move away from social rights towards civil and human rights on the part of governments within advanced industrialised countries is consistent both with welfare retrenchment and with the greater conditionality of social rights. As Dean argues, individual freedom implies risk; and personal security is properly based on a recognition of human interdependence, underwritten by social rights and social provision (2002: 218).

Of course the disability movement has not entirely abandoned claims for social rights, such as the right to health care, income maintenance, social housing and so on. Even though direct payments are preferred over social care, both cash payments and services in kind rest on positive rights to collectively pooled resources. Claims on those resources, however, depend not only upon some form of distributive rather than procedural justice, but also upon relational rather than individualistic notions of autonomy. As Young states: "An adequate concept of autonomy should promote the capacity of persons to pursue their own ends in the context of relationships in which others may do the same (Young 2000: 23). Collective welfare rests on the proposition that I can only enjoy my rights to social provision if others also have the wherewithal to satisfy their needs.

What is required perhaps is a politics of rights that encompasses struggles for social rights to meet the needs of all disabled people. In the case of social care, disability writers maintain that 'independent living', supported by direct payments, is best equipped to deliver the autonomy required to exercise human and civil rights, including access the paid economy. Thus Morris argues that care and empowerment are mutually exclusive as the ideology of care means caring for, or taking control, rather than caring about (1997: 54). Yet for older disabled people the evidence is that care services are regarded

as a good in and of themselves rather than as a means to an end precisely because, at their centre, lies the experience of caring about, or a process of building relationships with front-line staff within which there is evidence of considerable mutuality (Ellis 2004). Of course there is no reason why such benefits could not be delivered through cash payments, which could also potentially enhance the flexibility of existing provision. At the same time, any expansion of direct payments schemes would need to take account of the central importance older people accord to security of provision, and the extent to which their confidence has been undermined by the contracting out of home care from social services departments to the independent sector.

Scott-Hill is critical of Oliver (1996: 34) for characterising 'policy', based on the individual model, as oppressive and as inevitably in opposition to 'politics', which has become the authorised voice of resistance because it derives from the social model of disability. Rather, she maintains, both policy and politics are collective voices that represent particular outcomes of the negotiation of difference (2002: 398). Both civil and social rights may arise out of political processes but, in the case of civil and human rights, once the state has provided the legal framework to protect these rights, it withdraws. Social rights, by contrast, remain within the political arena at local and central government level. This paper has sought to demonstrate that there is an opportunity to use those political processes to challenge constraints on provision by enforcing the positive obligations of social services departments to protect the human rights of people using their services.

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