

# Rights that can wrong

In the first of a three part series on social work and its obligations to moral and legal human rights, **Allan Norman, qualified social worker and solicitor, uses Section 21 and contemporary immigration issues to describe the inconsistencies with which professionals are forced to grapple**

In the closing weeks of 1948, the memory of total war fresh in their minds, the nations of the world gathered to sign up to the Universal Declaration of Human Rights. It was an ambitious vision. It incorporated the liberal freedoms with which we are familiar, including the freedom of assembly and expression, the right to a fair trial and to a private and family life but also incorporated what have been termed positive rights – the right to housing, employment, subsistence, leisure and medicine, for example. The Declaration also implied collective rights to an international order in which a just society is realised.

Earlier that same year, as part of the UK's own post-war legacy, and to deal with 'want', one of Beveridge's 'five giants', the National Assistance Act was passed, bringing to an end the Victorian Poor Law.

My aim is to draw these two legacies of the 1940s together to examine the application of human rights by the social work profession today, using Section 21 of the National Assistance Act by way of illustration. My argument is that we have allowed others to control the human rights agenda which is our own natural territory, and we must assert our professional autonomy and reclaim human rights with, and for, our service users.

## Fundamental

Human rights are fundamental to social work. Did you get a warm glow at this statement, immediately recognising a statement that comes from the key purpose of social work expressed in our occupational standards? Or do you have a sneaking sympathy for the political and public antipathy to human rights?

Politicians and the tabloids are falling over each other in their efforts to denounce the Human Rights Act, with suggestions ranging from "let's go local and write some human rights just for the UK" to "let's pass laws to tell the judges that human rights mean just what we say they do".

The very idea of non-universal human rights may seem nonsensical but it has been a reality almost from the outset. For example – and this is the example that matters – the Council of Europe in 1950 approved the



The European Court of Human Rights in Strasbourg

European Convention on Human Rights, yet Europe did not incorporate the Universal Declaration. Generally, the liberal freedoms were in, but many of the collective and positive rights were out.

It is this subset of human rights, the European rights, rather than the Universal Declaration, that was incorporated into UK law by the Human Rights Act, and to which we as social workers have a legal obligation to give effect. And it is this subset that has prompted not only tabloid hostility but also serious calls for a more generous understanding of human rights.

In April of this year, the Social Care Institute for Excellence co-hosted a human rights conference. With a significant service-user presence, questions were repeatedly asked about why we are leaving it to the courts to determine our human rights. Days later, the Radio 4 programme *Unreliable Evidence* debated the proposition that judges were unwilling to step beyond 'the Strasbourg jurisprudence' – Strasbourg is the home of the European Court of Human Rights. The suggestion was that judges are too deferential to the European Court's restrictive understanding of human rights. In June this

was followed by a report from Age Concern which conducted research finding that public bodies viewed human rights as legal obligations to be complied with rather than positive duties to promote equality and dignity for older people.

## Professional obligation

As social workers, our legal obligation may be to adhere to the European subset of human rights, but our professional obligation is to the universal rights of the Universal Declaration. BASW is quite unequivocal in its Article 25: "Social workers have a duty to... respect basic human rights as expressed in The United Nations Universal Declaration of Human Rights..." (3.1.2(a)). Even if you are not a BASW member, the key purpose statement in social work's National Occupational Standards, setting out that human rights are fundamental to social work, derives directly from the International Federation of Social Workers' (IFSW) definition of social work – and when IFSW refers to human rights there is no reason to assume a European understanding.

Section 21 of the National Assistance Act and its application to people subject to immigration control provides an ideal

illustration of the dilemmas raised by this human rights debate; the tensions between positive and negative rights, universal and European rights, and those calling for an advance of, or a retreat from, the Human Rights Act.

Section 21 contains a power to accommodate and support people in need of care and attention. That power is vested in statutory social services. While there was a universal safety net of welfare benefits, Section 21 was generally confined to providing 'Part III' accommodation, such as residential care for elderly people. As successive governments have removed the universal safety net, in particular from people subject to immigration control, the courts have ruled that the provision can be used to provide conventional housing and subsistence to those who are destitute.

#### 'Excluded classes'

As social workers, our powers and obligations will differ according to whether someone is in an 'excluded class'. A legal provision ominously entitled 'Withholding and Withdrawal of Support' means exactly what it says on the tin – social workers are required not to support people in an excluded class, unless the Human Rights Act requires it. We have a two-tier service. For those who are not in an excluded class, we are entitled – professionally obliged even – to interpret human rights generously. In the context of Section 21 assistance to those who are destitute, this is likely to mean we provide our clients with accommodation and the means of subsistence. For those who are in an excluded class, we are legally obliged to interpret human rights narrowly, and maybe contrary to our professional values, potentially turning away the destitute. What do we do?

Do we decide for ourselves, in conjunction with our service users and bearing in mind our professional values, what respect for human rights might mean for service users? Or do we bow to a legal model of human rights, just as we have been accused of bowing to a medical model of community care? It seems we are diffident about making decisions about human rights.

Most of the time, our obligation as social workers is to give effect to human rights. As Local Authority Circular (2000) 17 expresses it, 'Social Services Departments should actively develop existing good practice in a manner suited to the new human rights culture...'

Section 21 does, however, raise a legal and

## Social work's ultimate aims

### The definition and key purpose of social work:

'A profession which promotes social change, problem solving in human relationships and the empowerment and liberation of people to enhance well-being... Principles of human rights and social justice are fundamental to social work'

BASW's Code of Ethics

### Extract from Universal Declaration of Human Rights:

'Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services...'

Article 25



Allan Norman

professional dilemma for social workers, because of the 'Withholding and Withdrawal of Support' provision.

Where this provision applies, the usual social work practice is subverted. Instead of pursuing the wider universal rights agenda that is consistent with the narrower legal obligation, the social worker must not give effect to anything other than the narrow European human rights framework. In the context of Section 21 assistance, many statutory social workers are actually instructed to take legal advice, yet it is worth pausing to deconstruct the context in which that advice will be provided. For local authority solicitors, the authority itself is their client, not the service user, and such solicitors, quite rightly, are expected to protect the interests of the authority, including its financial interests. As such, we might want to know whether it would be lawful to help our service user and whether it would be lawful to refuse our service user.

We might want to, and might be entitled

to, give effect to a broader universal understanding of human rights but we are likely to be receiving advice based on the narrower European rights. For example, since the latter, unlike the former, is short on positive rights, the lawyer will not be asking whether it would breach a right to housing and subsistence, but whether it would be inhuman or degrading treatment were we to do nothing. Equally, we might want to accept our service user's account of why they fear removal from the UK but we are likely to receive advice that accepts at face value the conclusion of any decision maker or tribunal on this question.

#### Expertise

So are we entitled to make our own decisions? I believe we are not only entitled to make our own decisions, but also effectively obliged to do so. If our professional status as social workers means anything, it means we form our own judgements within our sphere of expertise, and are professionally accountable for those judgements. If 'human rights are fundamental to social work' then they are within our sphere of expertise. If we don't feel expert, we should be developing our expertise and should be looking within social work for support in doing so.

When we make our own decisions, based on our broad understanding of 'universal rights', when we consult with service users as to their understanding and when we defend the judgements we make, we are acting professionally, just as we are each time we advocate for the services we believe service users need, rather than what we believe they will get. When we see human rights only in narrow terms, the liberal rights but not the social rights, a burden rather than a positive duty, we are not being true to our professional values. Sometimes, but rarely, we are being true only to the letter of the law.

*In two further articles for PSW Allan Norman will continue to use Section 21 of the National Assistance Act to examine two further professional dilemmas for social workers: what to do if your employer instructs you to act in a way that is unlawful; and what to do if you are required to act in a way that is lawful but ultimately unjust.*

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