

# Does a Needs-Led Delivery of Services Undermine Disability Discrimination Principles?

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*Abstract: In this article we contrast the use of a needs-led approach to the provision of care services with one based on a right not to suffer discrimination. We demonstrate how a needs-led approach must inevitably be constrained by budgetary considerations and can therefore never be absolute. This in turn will lead to situations in which people are left out of provision, which raises the question: Have they suffered discrimination? But non-discrimination approaches to service delivery also create difficulties as they require an individual to identify the nature of their 'difference' from others, in order to establish discrimination based upon that 'difference'. This dilemma of difference can undercut the very notions of equality and equal treatment that underpin the core philosophy of the anti-discrimination approach.*

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Michael Barry lived in Gloucestershire, in a rural corner of England. When he was 79 he spent a short spell in Gloucestershire Royal Hospital suffering from dizzy spells and nausea. He was told that he had suffered a slight stroke. He had also had several heart attacks, in the past, and was partially sighted. After discharge from hospital, he returned home, where he lived alone. He got about using a zimmer frame, as a result of having fractured his hip several years previously. He had no contact with any of his family, although two friends called from time to time to do things for him.

It rapidly became clear to Mr Barry that he could not cope at home alone, without wider community support. Like many millions of people across Europe, and beyond, he believed he had the good fortune to be living in an advanced, and civilised, caring society with humane values, and good support systems for people in his position. He believed that he could rely upon the society in which he lived, to prevent his newly acquired impairments – all fairly normal and typical consequences of advancing age and illness – from becoming disabilities that would otherwise substantially diminish the quality of the last few years of his life.

There are two reasons why people in Mr Barry's position should have good cause to be optimistic in this regard. The first reason is that they live in a country with advanced, legislatively based, welfare rights. These include laws containing an unequivocal statement<sup>1</sup> that people with disabilities have a right to an assessment of their needs by their local authority; and that following the assessment, the local authority has a duty to make arrangements, to ensure that any care needs uncovered by such an assessment are met.<sup>2</sup> Medical opinion in Mr Barry's case was clear that he was suffering from impairments resulting from a combination of heart attacks and strokes, plus failing eyesight, from which he would never recover. These impairments created care needs for Mr Barry. If he could get some help around the house, help to do his shopping and cleaning, and prepared meals from time to time, he would be able to continue to lead more or less the same life as before, enjoying the same routines, with little reduction in the quality of his life. Without such services, he would be in trouble. He would not be able to cope at home and would be prevented from enjoying the sort of life he had previously taken for granted. Luckily, these were the sorts of services his local authority was able to provide.

There is a second reason that should provide people in Mr Barry's situation with cause for optimism, in the face of such new adversity. The United

Kingdom introduced in 1995, Europe's first comprehensive piece of 'rights-based' legislation designed to protect people with disabilities, the *Disability Discrimination Act 1995*. This Act makes it unlawful for any person to be given *less favourable treatment* in the provision of services by a public body, for a reason related to their disability. This surely should ensure that the rights of people like Mr Barry to receive the services such impairments required would be fully safeguarded, and without discrimination.<sup>3</sup>

So Mr Barry approached the Social Services Department of Gloucestershire County Council (the relevant 'local authority'), which duly set about:

- Assessing his needs for care services, and
- having completed the assessment and determining that he could not provide these services for himself, making arrangements to meet these needs.

Within a few weeks, the local authority was providing him with home care, twice a week, including assistance with shopping, pension, laundry, and cleaning, and 'meals-on-wheels'<sup>4</sup> delivered to his door, four days a week. These were the services which it deemed required to meet his care needs.

The system appeared to have worked very effectively. Mr Barry's public law rights to welfare services designed to

limit the impact of his impairments were not only entrenched in law, they were satisfied in practice. And if they had not been met by the local authority, then the *Disability Discrimination Act*, DDA, a powerful and comprehensive piece of legislation with its own enforcement and compensation structure, was waiting in the wings, ready to engage as a further guarantee of Mr Barry's rights.

For the next two years, although Mr Barry's lifestyle became slower and more confined in the range and scope of the activities he could undertake, his age and illness related impairments did not interfere in any significant way with his day-to-day life. This was largely thanks to the services that the local authority was providing. Without these services, his disabilities would have worsened considerably.

But then disaster struck. Without warning, Mr Barry received a letter from his local authority stating that some of the services he was receiving would be withdrawn. The letter was brutally clear why this was happening: the money allocated to the local authority by central Government for providing care services in the community had been reduced by £2.5 million, and this was 'nowhere near enough to meet demand.' It was purely a question of resource rationing, and Mr Barry had to take his share of the cuts, along with others.

Mr Barry was in despair. He believed that he could not cope without the extra services he had been receiving, and he saw himself having to enter a residential care home and losing his precious independence. He took legal advice from a specialist law centre and, in the light of their advice, commenced proceedings in the High Court for judicial review, challenging the lawfulness of the local authority's decision. His case was simple. His needs had not changed, and even though the local authority had less money than before it was still under a legal duty to make the arrangements necessary to meet his needs. It was no answer in law, he would argue, that the local authority was short of money (as it undoubtedly was). For their part, the local authority responded that, in assessing Mr Barry's needs, it was entitled to have regard to its overall financial resources. Needs, it argued, were inextricably mixed up with resources.

Over the next 3 years, through a series of high profile judgements, some of the most experienced and best-qualified legal brains in the country grappled with the case. After winding its way through the courts, and being considered by no less than ten senior judges,<sup>5</sup> the case was finally resolved by the highest appeal court of the land, the House of Lords, by a slender majority of 3/2. The majority held that local authorities could take resources into account in defining needs, even

though the inevitable consequence would be that individuals like Mr Barry would find themselves losing, or never getting, services which they clearly needed, in order to live in dignity and independence. Since this was a decision of universal application, and reductions in budgets for social services are common, the decision in *ex parte Barry* is of very considerable consequence.

What went wrong? Why was Mr Barry's optimism betrayed? Did the local authority not have a legal duty to make arrangements to meet his needs? Did he not live in a country with comprehensive anti-discrimination legislation designed explicitly to protect persons with disabilities, just like himself, from less favourable treatment in the hands of public authorities?

To understand how the law failed Mr Barry, and thousands like him, we must look more closely at what the House of Lords actually said in reaching their decision. Sometimes in legal cases the reasoning can be so enmeshed in debates over language, or the intention of legislators, or the minutiae of previous decisions that even trained lawyers find it hard to find their way through the brambles. But this case was not like that. The issue was clear and practical, and the reasoning was not disguised by legal technicality. The problem, though, is that the majority position seems to make little sense.

Look how Lord Lloyd of Berwick, who wrote the minority opinion in favour of Mr Barry, set up the issue. The relevant Act,<sup>6</sup> under the section entitled *Provision of Welfare Services*, required the Gloucestershire Country Council to do three things:

1. To assess the needs of people with disabilities living in its area;
2. to determine whether it is necessary to make arrangements to meet any assessed needs; and if so,
3. to make arrangements to meet those needs.

In Mr Barry's case, steps (2) and (3) were not at issue: it was agreed that the local authority had an absolute duty to meet both of these obligations with regard to meeting 'assessed needs'. This case was about step (1), assessing the needs Mr Barry had developed by virtue of his medically determined impairments. Since nobody was accusing Mr Barry of faking his impairments, step (1) was simply about assessing his needs, and Lord Lloyd believed that Parliament intended this step to begin a process that should end with Mr Barry being provided services and resources appropriate to meet his needs. (This was why assessments such as these are called 'needs-led'.)

Who should carry out the assessment? Lord Lloyd did not see this as much of a problem. To need something is not the same as to want it. A need is the lack of something objectively

determined to be essential for 'the ordinary business of living':

The assessment of the needs of the disabled individual against contemporary standards is left to the professional judgment of the social worker concerned, just as the need for a by-pass operation is left to the professional judgment of the heart specialist.<sup>7</sup>

But who decides what are the 'contemporary standards' against which to assess individual needs? Again, for Lord Lloyd, no problem: this is the job of the social services committee of the local authority in question. This committee produces, and is encouraged to publish, 'eligibility criteria', which are precise statements of the level of services appropriate for different combinations of impairment and individual circumstances. So, for example, for a given degree of immobility brought about by stroke, the recommended home care might be 'meals-on-wheels' three times a week, and this may be modified depending on other aspects of the person's circumstances: how isolated they are, whether it is possible for a relative to visit from time to time, and so on. These criteria match need to required service in a manner commonly done by rehabilitative therapists.

But now, where does the cost of providing services come into the picture? For Lord Lloyd, cost and

budget should have nothing whatsoever to do with assessing people's need, or determining the services that would meet those needs.<sup>8</sup>

Every child needs a new pair of shoes from time to time. The need is not the less because his parents cannot afford them.

Increased costs and lowered budgets undoubtedly and obviously affect step (3) – providing the needed services. But how could costs or budgets affect what a person actually needs? So, can the assessment of what constitutes a person's needs be influenced by the amount of resources available to the local authority to meet those needs? Surely not. This is not rocket science; it is commonsense.

So what did the majority say to convince themselves otherwise? Consider the reasoning of Lord Nicholls of Birkenhead:<sup>9</sup>

A person's need for a particular type or level of service cannot be decided in a vacuum from which all considerations of cost have been expelled.

Lord Nicholls believed that to decide when impairments create needs, we need criteria, one of which he called 'an acceptable standard of living'. The social services committee of the local authority should decide that 'acceptable standard' within its published 'eligibility

criteria'.<sup>10</sup> In constructing these criteria, the committee must take into account the nature and extent of an individual's impairments, the extent to which their quality of life would be improved by the provision of a service, and the 'cost of providing the service.' But why this last one? Because:<sup>11</sup>

The relative cost will be balanced against the relative benefit and the relative need for the benefit.

Clearly, Lord Nicholls had pulled a rabbit out of a hat and was trying to rewrite the legislation. The Act requires the local authority to assess need, not 'relative need', (which is just another way of saying 'affordable need'). In an attempt to appeal to common sense, Lord Nicholls ended with his own homey example:

The importance of cost [must] vary according to the means of the person called upon to pay. An amount of money may be a large sum to one person, or to one person at a particular time, but of less consequence to another person, or to the same person at a different time. [Therefore] cost is a relevant factor in assessing a person's needs.<sup>12</sup>

Here he cleverly produced another rabbit, by conflating the person with the need with the person who has to pay for it. Obviously, cost is a relevant factor to the person who has to pay – the local authority – but cost does not determine

what the need is. This is just to beg the question.

For his part, Lord Clyde began by granting that once a local authority is satisfied that services are necessary to meet the needs of an individual, it has a legal duty to do so. He also conceded that, under the *Chronically Sick and Disabled Persons Act 1970*, once that duty arises, 'shortage of resources will not excuse a failure in the performance of the duty.' But this, he then suggested, did not mean that the Act prevented a local authority from considering resources when it assessed need. Far from it. The Act did not define the words 'necessary' and 'needs', implying that it should be left to the local authority to decide the definitions, on the basis of reasonable judgment grounded in sensible criteria. One criterion was obviously severity of impairment, but that alone would not assist the local authority in determining which services or resources were necessary. They also needed criteria that would determine 'the level at which there is to be satisfaction of the necessity to make arrangements.' For that determination, Lord Clyde believed that consideration of availability of resources was 'reasonable'.

But if this means that a local authority can determine what level of servicing it can afford when it specifies 'services that are necessary to meet needs', then there will inevitably be unmet need, which is just what the Act is supposed



to prohibit. Lord Clyde responded that, yes, there will be unmet need, but that was not a problem because:<sup>13</sup>

On a more exact analysis, whereby the necessity is measured by the appropriate criteria, what is necessary to be met will in fact be met and in the strict sense of the words no unmet need will exist.

Here is yet another rabbit. Instead of 'need', Lord Clyde slyly substitutes 'necessary need' – something the Act never speaks of – where 'necessary' is determined by budgetary considerations. The tips of the ears of this rabbit first appeared when he tried to restate his position in more ordinary language:

If my resources are limited I have to need the thing very much before I am satisfied that it is necessary to purchase it.

But, first of all, like Lord Nichols, by expressing this in the first person he was confusing the payer (the local authority) with the recipient (Mr Barry), which completely distorted the picture. Secondly, he was trying to conflate having a need, with having the resources to satisfy the need, which are obviously entirely different things.

Why did the majority resort to such odd arguments for its conclusion? The explanation is not hard to find: when their budgets are dramatically cut, local authorities find themselves between a

rock (their legal duty) and a hard place (no money). This court was sympathetic to this predicament, and unwilling to place impossible financial burdens on local authorities. So, the judges performed these logical contortions to get the local authorities off the hook. Lord Lloyd (for the minority) hit the nail on the head when he ended his judgment saying:<sup>14</sup>

The passing of the Chronically Sick and Disabled Persons Act 1970 was a noble aspiration. Having willed the end, Parliament must be asked to provide the means.

The DDA was not in force at the time the local authority reduced Mr Barry's services (in 1994). Nonetheless, we want to raise it here, if only hypothetically, to highlight another issue we believe is of major importance for all individuals with social care, health or disability related needs. If the decision in the Barry case establishes how we should expect courts – in situations of perceived financial constraint – to react to needs-led rights to services, can anti-discrimination law be of any help or, in the words of our title, does a needs-led delivery of services undermine disability discrimination principles?

It is impossible to predict how the Barry judgment at the House of Lords would have gone if the DDA had been argued. But Mr Barry would at least have had an arguable case. He could have argued that by withdrawing the

services in question, the public authority was discriminating against him as a disabled person,<sup>15</sup> by:

- refusing to provide, or deliberately not providing a service which they provide to other members of the public,<sup>16</sup> *or*
- providing a different of standard of service, or providing it in a different manner than they provide to other members of the public.<sup>17</sup>

To make the case for discrimination, Mr Barry would then have to show that the local authority:

- for a reason relating to his disability, treated him less favourably than they treat or would treat others without a disability; and
- the treatment in question was not justified.<sup>18</sup>

Although on the face of it, Mr Barry should have no problem making this case, unfortunately, this section of the DDA creates two problems for him. The first results from how anti-discrimination legislation like the DDA has been interpreted by courts in the United Kingdom, and elsewhere. To apply this section, the court will normally ask itself: 'less favorably than whom?' That is, with whom do we compare Mr Barry or, in the legal jargon, who is his 'comparator'? The answer that courts have given is that Mr Barry's comparator would be a real or notional person without Mr Barry's

particular impairments, but who is receiving the same treatment as him.<sup>19</sup>

To see how this works, consider a different situation. Suppose a restaurant puts up a 'No Dogs' sign on its front door. The sign will operate equally against a blind person with a guide dog and a sighted person with a pet dog. The comparator in this example would be a sighted person who could choose to enter the restaurant, without their dog, by leaving their dog outside. The blind person could claim less favorable treatment for a reason related to his or her disability, and the restaurant would face a plausible and strong accusation of discrimination.

Now apply this to Mr Barry's case. Here Mr. Comparator would be a person without his impairments, who had been in receipt of the same home care and meal services, for a similar period of time, and who also had his services cut back – i.e. the sighted dog owner was also prevented from entering the restaurant. But the Council would argue that such a person was a false comparator, one most unlikely to exist where service provision is prioritized according to need, and therefore not even 'notional'. Mr Comparator, lacking Mr Barry's impairments (and so, his needs), would never have qualified for services in the first place, so Mr Barry could not be said to have suffered unequal or unfavorable treatment, by comparison.



Even if Mr Barry could convince a court that he had been treated less favorably than some hypothetical Mr Comparator, his problems would not be over. The local authority would surely take up the opportunity the DDA offers them and argue that it was ‘justified’ in cutting back the services, on financial grounds.

Actually, the DDA seems to anticipate this kind of justification since it explicitly sets out, as an example of what constitutes ‘justification’, the cutting back of a service on the grounds that the service provider would otherwise be “unable to provide the service to members of the public”.<sup>20</sup> To make this argument the Council would first have to show that they could legally cut back Mr Barry’s services in the way they did (by redefining his ‘needs’ on cost grounds). Given what happened at the House of Lords, it is likely they would be able to get away with that. Then they would have to say that, unless they had cut back on Mr Barry’s services they could not have provided services to any one else. This might not be too difficult to argue as long as the local authority could show that they have eligibility criteria, carefully structured in terms of clear and reasonable priorities for meeting the need demands on a limited budget. Given good faith and a plausible allocation plan, the local authority could probably have made the case that it was justified.

Now in many countries with anti-discrimination law, it is relatively easy to argue that a change in a law or policy that disproportionately imposes a burden on, or withholds a benefit from people with disabilities – even when this result was unintended or unanticipated – is *prima facie* discriminatory. Yet, even in these ‘adverse effect’ cases, if the change in the policy can be argued to be a reasonable, tempered and unbiased response to budgetary reallocations, most courts would say that there was no discrimination at all, or if there were, it was justifiable under the circumstances.<sup>21</sup>

This sad prognosis for our theoretical attempts to use the DDA to win back Mr Barry’s much needed home care services is, unfortunately, not an isolated phenomenon. There appears to be a conflict, or tension, between a needs-based approach to social policy and service provision, exemplified by the *Chronically Sick and Disabled Persons Act 1970*, and a rights-based approach of the sort embodied in the DDA. As both kinds of legislation are found worldwide, if there is a dilemma here, it has wide consequences.

One thing for sure, courts will be strongly tempted when there is such a conflict to the easy way and do what the House of Lords did in this case. Despite logic and commonsense, courts will be interpret a needs-based duty as conditional on resources, even if, as

here, the duty is not expressed conditionally. Neither the House of Lords nor any other court would be comfortable making demands on a local authority to spend money that they do not have, nor have any way of getting. Obviously, Mr Barry was challenging a political decision in a court of law, and courts are extremely squeamish about making decisions that are as overtly political as this. Courts will scrutinize policy-makers for bias, incompetence and unreasonable criteria; but they will be loath to act as overt legislators when it comes to budgetary matters.

This feature of the judicial temperament raises complex problems that go beyond the legal sphere. Intuitively, there is really no other rational option to welfare service provision than a needs-based approach. In the wider economy, if it is a market economy, we might be comfortable distributing services on a 'capacity to pay' basis; but user fees aside, that is hardly suitable in a welfare context. Moreover, a 'rights based' approach to service provision is unworkable without some determination of what kinds and levels of services a person has rights to, and the only plausible answer to that is also firmly grounded in needs. Needs-based distribution schemes are not without their problems, to be sure, but they are the only game in town.<sup>22</sup>

At the same time, we should not be naïve. Mr Barry's hope that the welfare state was there to meet his impairment

needs was dashed by this court (although under-resourced and over-stretched health authorities across the land probably breathed a heavy sigh of relief). Even though it is self-evident that needs are the only appropriate basis upon which to distribute resources – at least in a welfare context – we cannot ignore the judicial treatment of needs-led schemes when there is a financial crunch. What we see in *ex parte Barry* are judges going out of their way to qualify needs – Lord Nicholl's 'affordable need' or Lord Clyde's 'necessary needs' – in order to rescue local authorities from the budgetary decisions of political bodies over which they have no control.

Arguably, the culprit in the *Chronically Sick and Disabled Persons Act 1970* is not the needs-led approach, but the absolute legal duty to provide services. This kind of unqualified obligation on the part of a public authority is extremely rare, as all of the judges in the case remark.<sup>23</sup> And for good reason: it eliminates all room for maneuvering and compromise, either financial or political. When the body under the absolute duty does not itself have the power to raise resources through taxation or whatever, then the adamant duty simply cannot be fulfilled. The result is bad law of the sort we see in *ex parte Barry*. Lord Lloyd's trenchant remark at the end of his minority judgement bears repeating:

The passing of the Chronically Sick and Disabled Persons Act 1970 was a noble aspiration. Having willed the end, Parliament must be asked to provide the means.

There are many obstacles that stand in the way of equitable outcomes for persons with disabilities, even in the face of a sincere governmental and bureaucratic commitment to a rights-based policy. Some of these obstacles are well known. A rights-based approach to anything can only be assessed in the light of what it is that one has a right to. But what do people with disabilities have a right to? Since it is impossible for laws to grant each individual a specific right tailored exactly to their collection of needs and opportunities, legally-enforceable rights must be expressed in general terms that are then applied to specific circumstances. Thus disabled people are said to have rights to equality, to justice, to respect and independence, and so on. But how are we to transform these abstract notions into concrete terms which we can then apply? What, to take the obvious example, does having a right to equality actually guarantee to a person with disability, in real terms?

Scholars in various disciplines, supported by legal cases around the world, have argued that what equality entails is not the 'right to equal treatment', if that means ignoring differences in need, but rather treatment

as an equal.<sup>24</sup> But to operationalize this abstract goal, we need a more concrete policy objective through which to assess the effectiveness of our service and compensation programmes. There are roughly two options: equality entails the objective of ensuring that everyone has the *same opportunities* to participate in the full range of individual and social endeavours; or it means that *outcomes or results* in participation in basic social activities and roles should be equal for all people.

The first objective is that set out by the *UN Standard Rules* (United Nations, 1994). Despite their august authority, many scholars and disability activists insist that setting the standard at mere opportunity, rather than actual result, cannot have much effect on the lives of people with disabilities. To put the point bluntly: A country in which people with disabilities have equal opportunities to be employed need not be a country in which people with disabilities *are* employed.

Even if we accept the objective of equality of opportunities (on the grounds, for example, that equality of results is unfeasible or socially and economically disruptive), we face another, and in some ways more difficult practical obstacle: How do we know when opportunities for persons with disabilities are equalized?

A solution is possible, although it involves a step governments may be

reluctant to take, namely to subject policy initiatives to scientific scrutiny by implementing evidence-based criteria for assessing effectiveness. One approach, now being considered in many countries, is by way of what might be called 'participation indicators'.<sup>25</sup> The technique is to first identify areas of participation in which we feel it is important to measure progress -- say employment. Then, we statistically measure the participation 'gap' in employment as the difference between the employment rate of persons without disabilities and those with disabilities. With these data in hand, we would then assess the effectiveness of our policies in 'equalizing opportunities' by monitoring this gap.

Whether this particular approach is feasible or not, there is little doubt that without some measure of success or failure, we cannot tell if our policies further the objective of equality of opportunity. Instituting a 'rights-based disability policy' may be a successful political gesture, but without outcome measures and programme assessment it is a futile one. The reluctance that responsible sectors of governments have to move towards evidence-based performance assessments of their policy is one of the major reasons why rights-based policies for services and compensation fail.

Yet, there may be a yet more fundamental obstacle to extricate Mr

Barry and other disabled persons around the world from the frustration of failing to achieve equity of outcome in services despite a social and political commitment to rights-based approach to disability policy.

Some years ago the American social psychologist Irving Goffman isolated a dilemma facing marginalized populations, a dilemma further developed by the American legal scholar Martha Minow in her important book *Making All the Difference* (Goffman, 1963 and Minow, 1990). This is the so-called *dilemma of difference*: When people marginalized by a characteristic (be it ethnicity, religion, gender or disability) seek to redress this mistreatment through political action and the law, they face a choice of either ignoring or emphasizing their difference.<sup>26</sup> Seeking equality with others, disabled people rightly insist that they are, and should be treated, like everyone else. Their differences, their disabilities, should make no difference to their treatment as citizens who deserve respect, equality, and rights. Disability does not make people inferior, less deserving, or less human. Disability is merely a difference, a variable in the universal human condition that should not be viewed as having any social significance. However, in order to mobilize as a political force to achieve legal and social changes, disabled people need to constitute an oppressed minority group. In the famous phrasing of the *Americans with Disabilities Act*

1990 -- one of the world's first disability-focused anti-discrimination law – people with disabilities are:

A discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.<sup>27</sup>

Hence the dilemma. The aim of disability advocacy is to achieve a state of social equality in which disability does not matter; yet the means for achieving equality requires disability to matter very much as the basis for political solidarity. This is more than a transitory dilemma of advocacy, it also effects how we approach concrete problems such as those Mr Barry faces. For anti-discrimination purposes, disability needs to be understood as a marker of a socially disadvantaged group, disability becomes a categorical distinction, a matter of 'yes' or 'no' rather than 'more or less'. But a categorical approach to services is incompatible with a needs-led approach, which characterizes needs in terms of impairments that are not categorical but continuous – matters of 'more or less,' depending on severity, duration, and other variables.

Ultimately therefore, there is a basic conflict between individualized needs assessment -- where needs arise from impairments – and categorical determinations for rights protection. Worse still, given the administrative pressure to use a more convenient, categorical determination of eligibility, service programs of the sort that Mr Barry tried to rely on, gravitate to 'all or nothing' eligibility criteria – thresholds and cut-offs.<sup>28</sup> In this sense, the rights-based approach (which is inherently categorical) does a disservice to services that should be needs-based, and so non-categorical. In most parts of the world, disability-related service programmes are created and financed on the basis of artificially-established prevalence thresholds, since it is politically easier to sell a programme if it is addressed to the 'truly' or 'severely' disabled.

As any health or social service professional knows, the threshold between 'severe' and 'non-severe' is artificial and arbitrary. People have a variety of needs, and only an individualized assessment can determine what these are. Yet, policy makers tend to keep faith with artificial thresholds that describe some people as worthy of services and others not, even though these thresholds and eligibility criteria are, as Mr Barry found to his dismay, the product not of professional judgment, but of political and economic expediency.



So, we appear to be stuck with the conclusion that, in some instances, when the provision of impairment needs is curtailed because of availability of resources, it is unlikely under our present laws that this would constitute an act of discrimination against individuals who thereby would be deprived of services they need. But should we conclude that the culprit here is the 'needs-based' approach to service provision?

The dilemma of difference may well be the primary obstacle to achieving equitable outcomes from our needs-based service programmes. Unfortunately, this obstacle is untouched by the aspirations and guidance of a 'rights-based approach' to disability policy. The rights-based approach does not guarantee equitable outcomes. Even when, as with the *Chronically Sick and Disabled Persons Act 1970*, there is recognition of the need for an individualized, non-categorical assessment of impairment need, political and economic pressures will tend to re-create categorical thresholds to divide needs up into two mutually exclusive sub-sets, those that are 'affordable' or 'necessary', and those that are neither.

**Notes:**

<sup>1</sup> *National Health Service and Community Care Act 1990* and *Chronically Sick and Disabled Persons Act 1970*.

<sup>2</sup> These arrangements are widely defined and include a range of services, from the provision of meals and home care to assistance in obtaining recreational facilities,

and are available for disabled people, for frail, elderly people, for chronically ill people, and after care services for mentally ill people.

<sup>3</sup> Mr Barry himself was not able to seek the protection of the DDA, as the circumstances that led to his legal action occurred in 1994, a year before the DDA came into effect, and the legislation was not retrospective. This article assumes that the facts of the case occurred later, in order to examine the hypothetical effect of the DDA on Mr Barry's situation.

<sup>4</sup> Meals-on-wheels is a social service that delivers cooked meals to the home of a housebound client

<sup>5</sup> Two judges in the Divisional Court, three in the Appeal Court, and five in the House of Lords. For the full text of the final decision of the House of Lords, see: *R. v. Gloucestershire County Council and the Secretary of State for Health, ex. parte Barry* 1997, 1 CCLR, 40.

<sup>6</sup> *Chronically Sick and Disabled Persons Act 1970*.

<sup>7</sup> Ibid p.44.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid p 49.

<sup>10</sup> The Government has recently introduced a legally binding policy guidance document, *Fair Access to Care Services*, LAC (2002) 13, 28/05/02, which sets out in some detail the procedures that should be followed by councils in drawing up, and enacting these *eligibility criteria*.

<sup>11</sup> Ibid p. 50.

<sup>12</sup> Ibid p.50.

<sup>13</sup> Ibid p. 55.

<sup>14</sup> Ibid p. 49.

<sup>15</sup> Defined by *Disability Discrimination Act 1995*, s. 1 (1) as a person who "...has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities."

<sup>16</sup> *Disability Discrimination Act 1995*, s. 19 (1) (a).

<sup>17</sup> *Disability Discrimination Act 1995*, s. 19 (1) (c).



- <sup>18</sup> *Disability Discrimination Act 1995*, s. 20 (1).
- <sup>19</sup> *Clark v. Novacold Ltd* [1998] IRLR 420 and [1999] IRLR 318 CA
- <sup>20</sup> *Disability Discrimination Act 1995*, s. 20 (4) (c) and (d). The Act does mention cost as a justification in s. 20 (1) (e), but only in the special instance where there are extra costs specifically associated with providing the service to disabled person, costs which are not incurred when that service is provided to someone without a disability. This was irrelevant to Barry's situation.
- <sup>21</sup> See the Canadian Supreme Court case *Law v. Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497.
- <sup>22</sup> Still the best study of the problems, and solutions, to needs-based distribution is Braybrooke, 1987.
- <sup>23</sup> It is interesting to note that in the subsequent case of *R v. East Sussex CC ex. p Tandy*, 1997 3 WLR 884, a differently constituted House of Lords ruled in an education case, that a local authority could not take financial constraints into consideration when assessing what was appropriate education in a special needs case. It was deemed wrong to turn a statutory duty into a discretion.
- <sup>24</sup> This distinction was first discussed in Dworkin, 1977. For applications here, see Quinn and Degener, 2002.
- <sup>25</sup> In the United Kingdom, such an approach has been adopted in public authorities, in response to the widespread prevalence of evidence of 'institutional racism', see *Race Relations (Amendment) Act 2000*.
- <sup>26</sup> This is sometimes described as the 'asymmetric v the symmetric' approach to discrimination.
- <sup>27</sup> *Americans with Disabilities Act 1990* P.L. 101-336, Preface.
- <sup>28</sup> *Fair Access to Care Services*, *supra*, n. 9, explicitly encourages just such a course of action.

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