

Disability Rights in Ireland: Chronicle of a Missed Opportunity*

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Abstract: This article critically examines the Disability Act 2005 which regulates access to public services for disabled people in Ireland. We examine the competing conceptions of disability rights advanced by the government and the disability sector during the debate on the legislation and offer an interpretation of disability rights as the justiciable right to challenge. The Disability Act 2005 is then evaluated in light of the proposed framework. We outline a number of ways in which the absence of a justiciable right to challenge fails to safeguard the dignity, empowerment and participation of disabled people. We contend that, despite protestations to the contrary, the Act fails to meet the requirements of a rights-based approach, thus amounting to a missed opportunity for genuinely advancing the cause of disabled citizens in the Republic of Ireland.

Introduction

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In July 2005 the Irish Parliament passed the Disability Act 2005, which forms the legislative centrepiece of a wider strategy regulating access to public services for disabled people in Ireland.¹ The Act is the result of a protracted legislative and consultative process, following the popular defeat of proposed disability legislation in 2001. It is hailed by its supporters as one of the most progressive pieces of legislation in Europe (*Irish Times*, 22 September 2004). At first blush, the Government's disability strategy seems to confirm Ireland's reputation as a frontrunner in the international battle for the inclusion and recognition of disabled people, witnessed most recently in its proactive role in promoting the United Nations Convention on the Rights of Persons with Disabilities and its Optional Protocol, adopted on 13 December 2006 in New York (Doyle, 2003; Quinn and Bruce, 2003; Toolan, 2003a; Quinn, 2007). Yet the Disability Act 2005 remains highly contested by many disability groups in Ireland, who lament its content and feel sidelined despite the extensive process of consultation that preceded its enactment.

The purpose of this paper is to offer a critical evaluation of the Disability Act 2005, and in particular to assess what remains the largest bone of contention: its rights-based grounding. Ireland is an interesting case in that both the government and the disability sector continue to affirm the importance of rights-based disability policy. But they adopt opposing positions on whether the current legislation is genuinely rights-based. An important source of disagreement appears to be the involvement of the legal system in securing disability rights, with the government claiming strict justiciability amounts to *rights essentialism*, the view that involvement of courts is the only way to secure rights, whereas the disability sector insists that legal

1 <http://www.irishstatutebook.ie/2005/en/act/pub/0014/index.html>.

remedies are crucial for ensuring disabled people's rights are properly safeguarded. For critics, the absence of a substantive role for the legal system demonstrates that the Act is not rights-based.

While this disagreement about the role of courts and legal remedies is no doubt partly the result of the prevailing policy context and partly driven by purely political considerations, a third reason for persistent political disagreement might be related to genuine uncertainty about the nature of disability rights. A common conception of disability rights does not emerge from the wealth of political statements, policy briefings and expert submissions that have informed the Irish disability debate. In short, despite ample discussion of the needs of disabled people and of the inequalities they face, which rightly engender demands for redress and rectification, significant disagreement remains about the precise form and nature of disability rights. There appear no agreed foundational benchmarks that specify what rights must be protected at what level, and how this protection must be enshrined in policy and law for disability legislation to count as genuinely rights-based. In our view serious conceptual and normative ground still needs to be covered before we can ascertain whether the Disability Act 2005 satisfies the criteria of rights-based disability legislation.

This article extends the debate on disability rights in two ways. First, in contrast to the approach of the Irish government, we do not privilege a single focal point at which rights to disability services ought to be institutionalised and where political commitment to protecting such rights is subsequently evaluated. Specifically, whereas the government's perspective privileges needs assessment, we maintain that a robust model of disability rights ought to provide for substantial evaluation of the political commitment to both needs assessment *and* service delivery. Second, to accommodate

these dual focal points within a single model of disability rights, we propose to shift from a substantive model to one that safeguards fair procedures in decisions pertaining to both needs assessment and service delivery. In this respect our position diverges from that of the disability sector. However, we also argue that the specific model we propose – based on a disabled person's *right to challenge* key decisions regarding needs assessment and service delivery – does not merely represent a version of empty formalism but produces substantial outcomes in terms of services delivered as well as the manner in which key decisions are made.

This paper proceeds as follows. The next two sections sketch the development of disability legislation in Ireland to provide some background to the subsequent discussion and review the prevailing conceptions of disability rights in the current Irish debate. We then propose our alternative model by rethinking the core of the rights-based approach to disability services in terms of a justiciable right to challenge. Having established a firm conceptual and normative grounding for understanding disability rights we then turn our attention to the Disability Act 2005 and assess its alleged rights-based status. We identify features of the current legislation that fail to ensure disability rights as conceived in this article and conclude that recent developments represent a missed opportunity for safeguarding the rights of disabled citizens in the Republic.

Disability Rights in Ireland: A Brief Overview

Ireland's engagement with the disability sector is complex and ambiguous, while forged by a history of disability charity driven by Catholic institutions, contemporary policy is framed by a neo-liberal economic agenda but also by a public commitment to mainstreaming equality of opportunity, social inclusion and human rights norms (Allen,

2003; Doyle, 2003; Toolan, 2003a; Quinn, 2000; Quinn and Bruce, 2003). To understand the legal status of disability rights in the Republic of Ireland we need to appreciate that attempts to compel government action through litigation have been largely unsuccessful. Claims to various forms of services for disabled people have been hampered by the absence of a substantive equality guarantee and a conservative Supreme Court stance on socio-economic rights (De Blacam, 2002; O'Mahony, 2002, 2006; Whyte, 2002, 2006; Quinn, 2000; Walsh, 2006). In the absence of entrenched constitutional rights to disability services, the impetus very much lies with elected representatives and government initiatives in the field.

December 2001 witnessed the publication of a bill, which according to the government would deliver on key recommendations of the Commission on the Status of People with Disabilities (1996).² However, the Disability Bill 2001 was withdrawn in February 2002 following opposition from disability groups and disability rights campaigners. It could be argued that the series of public protests and meetings which greeted the draft law heralded the arrival of a disabled people's civil rights movement in Ireland. The Supreme Court judgement in *Sinnott*³, which had been issued the previous summer, cemented political mobilisation and attracted media attention and public support, rivalled only by the notorious High Court decision on reproductive rights in *X*.⁴ These events perhaps demonstrate how adverse litigation outcomes may in fact propel a social movement forward (Hunt, 1990).

The key stumbling block was Section 47, which in effect provided that no element of the legislation could be enforced before a court. 'The Disability Bill appeared to be

2 The Commission was established by the government in 1993, its 1996 report contained 402 recommendations aimed at addressing the inequalities faced by disabled people.

3 *Sinnott v Minister for Education* [2001] 2 IR 545.

4 *Attorney General v X* [1992] 1 IR 1.

an attempt to restrict the use of the courts system to vindicate rights where agreed actions were not forthcoming' (Toolan, 2003a: 180). Following a protest meeting held outside Dublin's Mansion House the Cabinet first announced its intention to revise the draft legislation, then decided to jettison it entirely.⁵ Human Rights Commissioner Gerard Quinn (2003: 3) rightly commented that '[t]he question of legal remedies has become a test of whether proposed legislation is rights-based or not.'

The collapse of the 2001 Bill put disability rights firmly on the political agenda: the Disability Legislation Consultation Group (DLCG), a body established from representatives of eight umbrella disability organisations working in close association with the National Disability Authority (NDA), undertook a nation-wide consultation process. In February 2003 the Group's recommendations were published in the form of a report entitled *Equal Citizens: Proposals for Core Elements of Disability Legislation*. This report explicitly adopts a rights-based approach: 'The DLCG consider that the right to independent needs assessment should result in services that are made available as a *right* for people with disabilities. These services should be identified to meet the needs set out in the Statement of Need. In the event of services not being available a programme of measures should be put in place in order to realise these services within an established timeframe' (DLCG, 2003: 18, emphasis added).

September 2004 witnessed the launch of the government's National Disability Strategy with a revived draft Disability Bill at its core.⁶ While most disability groups

⁵ <http://www.rte.ie/news/2002/0219/disability.html>

⁶ As discussed further below, other measures in the package are an advocacy system, which initially was to be implemented via the Comhairle Amendment Bill 2004. The legislation was withdrawn and surfaced again in the form of the Citizens Information Act 2007, section 5 of which provides for the establishment of a 'personal advocacy service'; six 'Sectoral Plans' that commit several government departments to setting out steps that will realise enhanced access to various public services; and a multi-annual Investment Programme.

acknowledged improvements on its predecessor, the 2004 Bill was generally not well received. Within weeks of its publication the DLCCG produced a document outlining fundamental flaws in the proposed legislation, reflecting the disillusionment felt throughout the Irish disability sector.⁷ On 8th February 2005 an alliance of twelve disability groups held a public meeting attended by over 700 people and chaired by the President of the Irish Human Rights Commission (IHRC), which sought ten key changes to the draft legislation (*Irish Times*, 9 February 2005).

The fact that the proposed legislation did not really secure access to legal remedies was again a chief cause of concern. During the Dáil debates the government's response to this criticism was to the effect that legal rights would divert resources allocated for service provision into the pockets of lawyers. Taoiseach, Bertie Ahern, famously quipped that the Disability Bill was meant to be 'rights-based but not lawyer-led'.⁸ Arguing that litigation is an inevitable feature of any rights-based model, the contention was that disability rights are better served by introducing robust policy measures but without providing for review by courts.⁹ This view underlies the government's disability strategy as expounded in the Disability Act 2005, which was signed into law on 8th July 2005 and is being progressively implemented.¹⁰ In essence, the Act confers a right on disabled Irish citizens to have their needs assessed, but no enforceable right to any of the services

(<http://www.justice.ie/en/JELR/Pages/WP07000539>).

7 www.namhi.ie/legislation/documents/TenFundamentalFlaws-DisabilityBill-DLCCG.doc.

8 *Dáil Debates*, Vol. 597 No.3, 9 February 2005.

9 Government opposition to justiciable socio-economic rights is not unique to the area of disability. General objections were voiced by the then Minister for Justice, Equality and Law Reform, Michael McDowell (McDowell, 2002).

10 In April-May of 2007 every household in the Republic received a booklet which outlines the National Disability Strategy and the timetable for its implementation. The word 'rights' features once in the 16-page document and only then in the context of the Citizens' Information Service. According to the section on 'Individual Assessment' children aged under five will be entitled to have their needs assessed from June 2007 and assessments will be in place for everyone else by 2011.

that may flow from such an assessment. Further, although provision is made for several internal appeal mechanisms, there is no recourse to legal remedies in case of substantial disagreement between clients and providers about the interpretation of needs or service provision.

If it is the case, as we suggested in the introduction, that political disagreement about the role of courts in part masks a deeper uncertainty about the nature and form of disability rights, a better understanding of the latter might offer a first step towards resolving or at least clarifying the conflict between the different parties. This means we now must turn our attention to a conceptual and normative discussion of disability rights.

Disability Rights: Needs Assessment and Service Delivery

As part of a broader strategy of combating oppression and improving social and political participation, disability theorists and advocates in recent years have increasingly invoked the notion of *disability rights* (Barnes and Oliver, 1995; Charlton, 2000; Clements and Read, 2003). A rights-based approach contrasts with the prevailing social welfare model, in which goods and services are granted to disabled people by public authorities (Waddington and Diller, 2002).¹¹ The disability rights perspective is meant to enshrine disabled people's entitlements in law, allowing individuals to actively claim their rights through a set of legal remedies. Advocates of the rights-based approach maintain that the social welfare model fails to safeguard and promote the moral standing of disabled individuals in society in large part because the voice of disabled individuals has too little weight in the decision-making

11 Barnes and Mercer (2003: 116-117) suggest this divide mirrors the division between the strategy of employing civil rights in the US and that of enhancing the welfare state across Europe, while Morris (1997) pitches the distinction in terms of care versus empowerment.

process. As Jenny Morris (1997: 54) points out, '[e]mpowerment means choice and control.' Failure to employ a rights-based approach not only jeopardizes the adequate delivery of much-needed goods and services but in essence affirms the second-tier citizenship status of disabled people in modern society. It is no surprise, then, that disability movements are often referred to as the 'last civil rights movement' (Driedger, 1989).

Justiciable disability rights have not only permeated the discourse of theorists and advocates; in recent years they have become the mainstay of political and legislative initiatives pertaining to various aspects of disability policy. The least contested legally enforceable right, that of protection from discriminatory treatment, is now standard across the European Union Member States, and in comparable polities including Australia, Canada, New Zealand and the USA (Jolls, 2001; Breslin and Yee, 2002; EU Network of Independent Experts on Disability Discrimination, 2004; Lawson and Gooding, 2005). And developments within nation states are mirrored by increased recognition of disabled people's rights at supranational level (Degener and Quinn, 2002) culminating in the recent adoption of the United Nations Convention on the Rights of Persons with Disabilities.

The Irish government's commitment to the idea of disability rights appears to align with the developing situation in theoretical discourse and international practice, but there remains confusion what the idea itself refers to. In its appraisal of the draft law, the IHRC (2004) applied international human rights benchmarks to highlight procedural and substantive areas of concern, but the complex question of how various universal norms are given effect in specific contexts allow divergent understandings of compliance with disability rights to co-exist (Gavigan and Sandler 2004). Two very different interpretations or models of disability rights have come to dominate the Irish debate.

We outline each in turn and then suggest how their perceived deficits offer useful insight into a third model.

In the Disability Act 2005, disability rights boil down to a statutory entitlement to an assessment of health and education needs.¹² The ensuing Assessment Report includes a statement about the nature and extent of a person's disability (if any), the health and education needs arising from such a disability, and the services deemed appropriate to meet those needs as well as an indication of the time scale for delivery. The Assessment Report is then translated into a Service Statement which includes information regarding the practicability of providing the required services and the financial resources available. The view of the government, both implied in the Act and made explicit when commenting on the disability strategy, is that the new legislation is rights-based precisely because it *guarantees*, by means of a statutory entitlement, that each and every disabled individual in Ireland is entitled to a process of having his or her needs assessed.¹³

Several assumptions underpin this perspective. On the one hand, there is an assumption that without a systematic process of needs assessment, it is impossible for a disability policy to deliver adequate services. A system of 'categorical' service delivery – that is, service delivery based on the *type* of disability, without taking into account personal circumstances – produces both false positives and false negatives; some disabled individuals will receive services they neither need nor want, while others fail to get hold of the services they require (Toolan, 2003b). An individualized needs assessment procedure would ensure that needs are evaluated on a personal basis, targeting service delivery to those who effectively require it.

12 Health in this case also covers other forms of personal social assistance, which are all administered by the Health Service Executive (HSE).

13 A recent report suggests that 14,380 people (56.0% of the disabled population) require assessment for therapeutic intervention and rehabilitation services (O'Donovan and Doyle, 2007).

However, the latter point is critically dependent on the further assumption that, once the right to needs assessment is properly institutionalized, adequate service delivery will follow. This assumption has been challenged by the disability sector as being both simplistic and lacking in credibility (Forum of People with Disabilities, 2004; National Parents' and Siblings' Alliance, 2004). There is considerable concern amongst disability advocates that there are too many bottlenecks obstructing a fluid transmission of needs assessment into service delivery. Having a right to needs assessment is still a long way from having a guaranteed right to the services this assessment calls for.

There are at least two obvious ways in which needs assessment may fail to generate adequate service delivery. First, the needs assessment itself may not be accurate or at least contested by the disabled person being assessed. Second, even if an assessment appropriately indicates a particular service is needed, local contingencies – notably, resource limitations – may intervene such that the disabled person fails to receive a service despite having his statutory right to a needs assessment fully respected. In particular, as Mike Oliver (1996: 71) observes, a 'fundamental problem with needs-assessment is that it is going to take place in the context of fixed budgets.' To foreshadow the analysis below, the fact that the Disability Act 2005 makes a formal distinction between Assessment Reports and Service Statements, which contain qualifications as to practicability and resource availability, clearly demonstrates the contingent nature of the assessment impacting on actual service delivery. For the disability sector, needs assessment is simply too weak a focal point to enshrine a robust set of disability rights; consequently, the government's interpretation of a rights-based policy as framed through needs assessment remains contested.

In their critique of the Irish government's stance, the disability sector typically advances a more expansive version of disability rights. The acid test of rights-based legislation is whether a disabled person has a (statutory) right to have her needs met, effectively shifting the rights focus from needs assessment directly onto service delivery. For proponents of this expansive interpretation a disability policy is rights-based if (and only if) it safeguards that disabled people's needs are *effectively met*, not merely assessed. This interpretation has been criticised by the Irish government as well as by a number of researchers who believe it to be both confused in principle and counter-productive in practice.

The main problem is that a right to effective service delivery is potentially open-ended, which in turn gives rise to two concerns. First, such rights are *economically infeasible* because they could conceivably entail ever-expanding demands on limited resources. The problem many opponents of open-ended rights see is the following: rights depend on resources but both the number of rights and the amount of available resources are variable; as proliferation sets in more rights require protection, which in turn demands more resources being diverted to rights protection. Stephen Holmes and Cass Sunstein (1999: 94) emphasize that '[t]aking rights seriously means taking scarcity seriously.' Consequently, either we make do with the available resources by economising on the rights we effectively ensure, or the levels at which we protect a set of rights; alternatively, we divert resources spent elsewhere to securing disability rights. The former is not an option under the expansive rights view, while the latter is possible but runs into the further objection that 'overstatement [of the absoluteness of rights] can create problems too, and an insistence that rights are absolute may lead to the over-protection of some rights to the detriment of others that have an even greater claim' (Holmes and Sunstein, 1999:

103). This raises questions of justice or fairness regarding competing claims on rights-protection.

Second, guaranteed service delivery might be considered *undemocratic* if the goal of ensuring disability rights conflicts with other values that a democratic community holds dear, including the power of legislators to set social and economic policy. The democratic objection is especially forceful when introducing *legally enforceable* rights to a range of disability services, which it is argued implies a shift of political control from the legislator to the courts because such disability services can no longer be revoked or revised by the democratic majority (Nolan, 2003; O'Donnell, 2003; more generally Waldron, 1999).¹⁴

The previous discussion suggests that even where both parties genuinely agree that disabled Irish citizens are entitled to have access to services as a matter of right, the precise nature and content of disability rights remain disputed. The Irish government adopts a perspective that proceeds by instituting a statutory right to needs assessment, but at the same time allowing service delivery to depend on the availability of resources and organisational capacity (both of which are assumed to be fixed and determined prior to needs assessment). The disability sector asserts that an assessment of needs must also imply the right to have those needs met. This in turn implies that a government that formally endorses disability rights ought to commit to providing a level of resources sufficient to delivering needed services.¹⁵ Each model

14 Elsewhere we have argued in more detail that the democratic objection can be addressed in favour of justiciable disability rights (De Wispelaere and Walsh, 2005). Recent work in constitutional theory such as that concerning 'democratic experimentalism' (Dorf and Sabel, 1998; Dorf, 2003) 'constitutional dialogue' (Hutchinson, 2004; Roach, 2004; Dixon, 2007), as well as the South African experience (Davis et al, 2002; Kende, 2003; Pieterse, 2004), demonstrates that courts are capable of dealing with the complex policy considerations generated by disability services, in a manner that addresses democratic and competence-based objections to their involvement.

15 Disability advocates typically take a more relaxed approach, insisting that what they require is only that the most *urgent* needs will be met as a matter of right, with higher levels of provision being secured over time (e.g. DLCC, 2003). But this strategy either implies too little or too much. One the

privileges a single focal point – needs assessment and service delivery, respectively - and suggests that the ultimate judgement as to whether disability policy is genuinely rights-based depends on how well it enshrines and protects rights at the respective point. Given the normative and practical concerns raised with respect to each model, it is hard to see how we can objectively opt between one or other. One solution would be to give up on disability rights altogether and return to the much-maligned social welfare model. Instead, we propose a model of disability rights as the right to challenge decisions in relation to needs assessment and service delivery (the 'right to challenge' for short). In the next section we outline its main advantages compared to the previous models. The following section then evaluates the Disability Act 2005 from the perspective of the right to challenge.

Disability Rights as the Right to Challenge

To accommodate the problems identified with the two models of disability rights that feature in the Irish debate we propose an alternative model organised around a robust and justiciable *right to challenge*, which we argue is capable of meeting the main concerns of both the government and the disability sector. In this section we outline our model by discussing in turn what the right to challenge implies, the main properties that have to be met when institutionalising the right to challenge, and above all why we believe the right to challenge is preferable to the other models.

one hand it may not tell us enough about what minimal standards to adhere to in order to safeguard the legitimate claims of disabled people in the face of competing claims. On the other hand, disabled people may insist on claims that may no longer be justified, in light of legitimate competing social priorities, as part of their claims to having their needs met. In either case, the absence of a clear indication of what is to determine the content of minimal or urgent disability rights is problematic.

What Does the Right to Challenge Imply?

The first question to address is what aspect of disability policy the right to challenge is meant to contest. Although there are many points at which decisions are made that affect a disabled person's access to public services, the right to challenge primarily addresses the two focal points identified in the previous section, namely the assessment of needs and the delivery of services.

To elaborate, in the first place a disabled person (or her advocate) should be able to challenge the process of needs assessment. Needs assessment is a crucial gateway for access to services, as explained above, and forms a natural point for challenging key decisions regarding services. Having the ability and power to directly contest the administrative evaluation of the extent of disablement, the needs incurred by the disability and the services required to remedy those needs, in effect puts the perspectives of the disabled service user and the person conducting the assessment on a more equal footing. Moreover, the right to challenge thus affirms the view that the assessment of an individual's needs is not an objective enterprise, but instead unavoidably reflects a measure of subjectivity grounded in a person's particular context, history and overall lived experience (but see Doyal and Gough, 1991 for reservations about needs subjectivity).

The right and ability to challenge the process of needs assessment also affirms the fact that neither party necessarily has a superior outlook on what constitutes an appropriate set of services for a particular person, and that the final assessment ideally represents the informed perspectives of both service user and assessment officer. This last claim may be controversial to radical disability advocates, who typically favour the user's perspective as the decisive voice in assessment of needs and required services, but also to the establishment of expert health

care practitioners, who regard needs assessment a matter of objective measurement. However, in our view needs assessment requires both the perspective of the lived experience and that of the disembodied expert who offers a more general outlook based on statistics and aggregate data across different persons and lives, and the right to challenge is designed to balance both perspectives.¹⁶

In addition, disabled people should be entitled to challenge the process of service delivery. Specifically, they should have the right to challenge the quality of service, the time frame for delivery in accordance with the needs assessment, the level of resources committed to a particular service scheme, and arguably even future commitments by service providers (including local and national government) pertaining to resource inputs and effective delivery capacity. At this level the disabled service user engages head-on with the supply side of service delivery by challenging any failure to provide services in accordance with the agreed needs assessment. Note that the right to challenge does not in itself ensure a right to service delivery, but instead offers the service user a mechanism to contest the grounds upon which service provision has been (partially) refused and in turn assert her own reasons for insisting upon them. This exchange of reasons is a crucial component of a contestatory mechanism like the right to challenge. We return to this point below.

By allowing service users to challenge both needs assessment and service delivery our proposed model avoids tying the notion of a disability right to either focal point. Instead, the model vindicates the importance of service user involvement at *any* juncture at which decisions are made that affect access to services. The model also

¹⁶ In practice it is expected the right to challenge will shift the balance of power considerably in favour of the service users who are typically insufficiently consulted in processes of needs assessment and service design.

explicitly endorses the view that a rights-based disability policy must reflect a form of public agreement – or at least an agreement that reflects conditions of public reason (see below) - across the whole process of decision-making, from assessing needs to delivering services. On this view, participation of service users in some robust form is a *conditio sine qua non* for a rights-based policy on disability services.

What Are the Central Properties of a Right to Challenge?

There are a number of ways in which a robust right to challenge could be institutionalised. This variation is a strength when we consider questions of political feasibility and implementation, so we are hesitant to offer a particularly restrictive institutional model. Nonetheless it is worth noting that the regular court system need not be the primary forum of redress: for instance, various forms of tribunals have been established to resolve disputes throughout common law jurisdictions (Richardson and Genn, 2007). In the Irish context the Ombudsman system¹⁷ and the various employment rights bodies, most notably the Equality Tribunal, offer interesting templates for relatively expedient and inexpensive resolution of grievances. Whatever form is employed, in our view there are a number of properties that must be present for the right to challenge to deliver on its intended goals. These are: individual mechanisms for contestation, justiciability, and fair proceduralism.

One key feature of the right to challenge is that it entails an *individual* right, allowing a disabled service user or her advocate to challenge decisions in a private capacity. In his work on contestatory democracy Philip Pettit (1997; 1999; 2000) has argued that in a democracy mechanisms of

¹⁷ <http://ombudsman.gov.ie/en/>

collective decision-making must always be complemented by some means by which individual citizens can contest policy. Acknowledging the importance of collective action for influencing political decision-making or the presence of major coordination benefits when addressing concerns about disabled people as a group does not invalidate the notion that these collective mechanisms cannot fully capture the features of an individualized right to challenge. In the first place, as is evident from observing diversity within the disability movement itself, representation only captures part of the specific reality faced by a disabled service user.¹⁸ Secondly, groups and organisations are subject to political dynamics that might effectively curtail an individual's capacity to contest a particular decision. In the Irish case consultation for policy-making is highly coordinated and regulated through the inclusion of select representative groups in social partnerships. As has been argued by several scholars, such a mechanism produces exclusion and silences perspectives through the very process that is aimed at embracing broader perspectives and diverse opinions (Baker et al, 2004: 91-95, 111-13; Murphy, 2006). An individual right to challenge is a necessary and useful democratic complement to any corporatist scheme, including social partnership mechanisms. Finally, an individual right to challenge produces symbolic value of a sort that can never be fully substituted by a collective mechanism: a disabled service user being able to express her particular viewpoint in a case of disagreement with a needs assessment or service delivery is a key feature of what it is to have a right. We return to this point briefly below.

18 Robert Drake (1999: 184) observes that 'advocacy and representation by non-disabled people may, on occasion, achieve improvements in the circumstances of disabled people', but insists 'there are, of course, no guarantees that they will, and the views and desires of disabled people can be filtered, distorted or vitiated.' Our point is that the same problems may arise even when disabled service users are represented by other disabled people, and that only an individualized right to challenge safeguards a person's access to services.

Second, we argue that the right to challenge requires robust *access to the legal system*. The main reason for making the right to challenge justiciable is to ensure that grievances can be heard in a properly independent forum. As we show in the next section, the Disability Act 2005 fails in this respect. But justiciability as conceived under the right to challenge is of a different character to the justiciability of substantive disability rights, and objections to the latter, if sustainable, do not apply in the same way to the former.¹⁹ A justiciable right to challenge is not undemocratic since it does not impose substantive policies that might run counter to the policy agreed by the democratic majority. Instead, the right to challenge asserts a legally protected power for disabled service users to enquire into the reasons for not delivering on the services sought; the validity of these reasons in turn are assessed against the views of the democratic community as expressed in constitutional or legislative documents, policy statements and political debates. Recent work on deliberative democracy emphasises the importance of reasons, in particular public reasons, as a core component of a democratic process of decision-making (Gutmann and Thompson, 1996), and the right to challenge should be regarded as a mechanism that extends deliberation into policy-making with respect to disability services.

Nor is the right to challenge subject to the charge of inefficiency because it does not automatically endorse or promote rights expansion. While it is true that the right to challenge may end up contesting current resource priorities – both within the field of disability services and as between larger social projects – this does not imply an inefficient arrangement. The right to challenge might even allow for a more efficient prioritization within a particular budget constraint, simply because it offers a mechanism for

¹⁹ See Nolan (2003) and O'Donnell (2003) for concerns about justiciable rights.

service users and service delivery agencies to coordinate priorities across services. Why not treat challenges to needs assessment or service delivery as a source of relevant policy information, allowing the various stakeholders to adapt to each other's positions, thus coordinating the development of resource priorities and organisational capacities across time to accommodate the rapidly changing situation on the ground? Looked at this way, the right to challenge is an important instrument for enhancing efficiency in disability policy.

Of course one key objection to justiciable rights is that it eats into the available resources by diverting them from actual policy delivery to defraying legal expenses. As the Irish government was eager to point out, it is important that resources are spent on providing disabled citizens with services, not on subsidizing the legal establishment. There are several replies to this objection. In the first place, it remains to be seen whether a justiciable right to challenge will indeed lead to a litigation culture; it is equally plausible to assume that the right to challenge will produce a select number of high-profile cases with subsequent impact on the way administrators assess needs or organise service delivery as well as on the expectations of disabled people. If anything, current practice in Ireland supports our supposition rather than the nightmare scenario advanced by the government. The vast proportion of discrimination complaints referred to the Equality Tribunal, for instance, are resolved at that level with few filtering into the regular court system.²⁰ If the right to challenge operates largely because of the possibility of using the legal system, the legal costs incurred are neither prohibitive nor unjustified. Further, it is not unreasonable to think that disabled people themselves might prefer to divert a part of the resources to embedding the right to challenge in disability policy if this

²⁰ See the Annual Reports of the Equality Tribunal: <http://www.equalitytribunal.ie>.

provides them with a robust means to participate into the relevant decision-making processes (see also the point about dignity below).

A third key feature of the right to challenge is its commitment to what we term *fair proceduralism*.²¹ Fair proceduralism sets itself apart from substantive fairness in that decisions are considered fair when arrived at through a procedure that itself is considered fair; that is to say, outcomes are fair because the procedure is fair, not because of some intrinsic properties of the outcome itself.²² However, the procedures at hand must satisfy a set of substantive conditions. Procedures that merely legitimize a particular outcome because there is a procedure in place constitute a fetishistic form of empty formalism. Although intuitively plausible and a mainstay of modern democratic thought, fair proceduralism nevertheless raises important questions when applied to the context of disability services.

To begin with, the right to challenge, as we envisage it, is procedurally fair insofar as it substitutes a right to a particular service with the right to hear and contest the reasons for a particular needs assessment or service delivery decision. But why should this be deemed an acceptable arrangement, since it might lead to a decision being challenged, resources being spent on advocacy, tribunal or even court proceedings, and in the end make no real difference in terms of a disabled citizen's access to services? There are several replies to this objection. One

21 Anita Silvers (1998) proposes a theory of 'formal justice' in relation to disability, based on the view that disabled people should receive those services that allow them to take up fair opportunities to contribute to society on the same basis as non-disabled people. Although we adopt a more pluralistic account in that we expand on the sort of reasons we might accept for requiring the state to provide access to services to its disabled citizens, we share with Silvers the perspective that such a formal/procedural approach is required to resolve competing views on what counts as appropriate needs. We also share with Silvers the expectation that this will result in fairly robust substantive entitlements.

22 See Rawls (1993: 421ff) for a statement and elucidation of the difference between justice in procedures and justice in outcomes, and Cohen (1994) and Alexander (1998) for discussion of the intricate connection between procedures and substantive justice.

could point out that even this process expresses an important value, namely that of recognition of disabled service users as key participants in the process of deciding on appropriate service delivery and the dignity associated with it.

However, thinking through the dynamics of the right to challenge offers a more powerful reply. While there are some concerns that the proposed system might fail to secure the fulfilment of even the most urgent needs, there are reasons to believe that the proposed right to challenge when robustly instituted will actually deliver a core content of disability rights as required under international human rights law (see further below). In the first place, the outcomes of individually exercised rights to challenge serve as important precedents informing both future legal and even bureaucratic decision-making. Given that such precedents act as a binding framework, individual claimants, respondents, and their advocates or legal representatives, will put a lot of stock in the body of legal decisions already in place. Bureaucratic decision-makers likewise will try to pre-empt challenges and adapt their decisions partly on the basis of the cases already under review. A process of continuing mutual engagement between the various stakeholders effectively establishes a cumulative perspective on what is to count as justified reasons or legitimate complaints, respectively, when deliberating on a failure in service provision.²³

Further, the right to challenge invites all parties to present the reasons for their particular views, but the assessment of those reasons will undoubtedly be heavily influenced by pre-existing legislation, policy and even political debates. Thus the right to challenge does not operate in a moral, legal or policy vacuum, but is informed

²³ We surmise this collective reasoning to be heavily weighted towards disabled people simply because of the urgency and comparatively strong appeal of their demands in terms of needs in a strict sense and broader forms of social and political disadvantage.

by the evolving standards promoted by domestic and supranational institutions such as the Council of Europe and the United Nations. Norms that enjoy a binding legal status will have a direct purchase within the review process. Finally, we must not underestimate the importance of ensuring that administrative agencies offer genuine reasons for making decisions in terms of promoting accountability and overall responsiveness of policy-makers to the democratic will as expressed in law and policy. Failure to offer reasons that are publicly deemed acceptable is likely to trigger popular indignation and anticipating this response offers an important administrative (and political) incentive to take the needs and views of disabled service users much more seriously. In short, the right to challenge may not offer a simple indication of what substantive rights will be secured, but in our view it nevertheless becomes an important mechanism for ensuring that governments take their responsibilities towards their disabled citizens seriously when considering access to public services.

Fair proceduralism requires that certain conditions are met to ensure procedures remain fair throughout.²⁴ Applied to the present context we believe there are two that must be firmly put in place. On the one hand, the right to challenge requires a system of disability advocates to ensure that all disabled citizens have not merely the formal right but also the effective opportunity to challenge decisions (Clements and Read, 2003: 41-46). On the other hand, the right to challenge requires *independent* redress processes if it is to become an effective and fair mechanism for balancing reasons. Independence here

24 Estlund (forthcoming) criticizes fair proceduralism on epistemic grounds, arguing it cannot generate sufficiently thick reasons to adopt a particular outcome, which are likely to generate only occasional value. However, we must keep in mind that the fair proceduralism Estlund challenges operates at the general level of collective democratic decision-making, whereas our proposal operates below that level challenging decisions made by specific agents (typically administrators and service users) reflecting on a narrow set of reasons or goals.

must be ensured by formally separating the process of challenge from the processes that determine needs assessment and service delivery. We will return to this point in the next section. Independence must also be substantially ensured in that the process of challenge must take a principled unbiased attitude to the different parties in the dispute, although not to the *reasons* brought forward as explained above in relation to the role of legal and policy precedents.

There is understandable scepticism about the capacity of legal action to bring about change (Engel and Munger, 2003; Roulstone, 2003; Runswick-Cole, 2007), but in our view this concern does not invalidate the right to challenge as such; rather it sets conditions for its effective implementation. If properly implemented along the lines suggested here, a right to challenge may become a powerful tool in the arsenal of those concerned with securing fair access to disability services.

Why Advocate a Right to Challenge Model?

Having outlined the key features of the right to challenge, we can now turn to its justification. One possible justification is pragmatic: the right to challenge takes an intermediary position between the oppositional models discussed in the previous section, with increased scope for political compromise for future disability policy reform. Because the right to challenge offers a substantial measure of empowerment to disabled service users and their advocates we might expect the disability movement to endorse this model; similarly because it falls foul of demanding substantive service provisions as a matter of right, we suggest many of the government's concerns about expansive disability rights do not apply and one might expect their resistance to be equally mollified.

Nevertheless the main reason for adopting this model is not to do with its prospects for political compromise but with a particular understanding of what fairness and social justice in relation to access to public services requires. The right to challenge does not offer disabled individuals the sort of expansive right to a particular service delivery sought by radical disability advocates. Instead, it acknowledges explicitly that there may be legitimate reasons to deny that a particular disability implies a need that generates a duty for the state to meet at all costs. Most importantly, it acknowledges that legitimate reasons may exist that override the entitlement to a particular service *even where a genuine need has been identified*. This follows from the fact that a right to challenge invites both parties to submit reasons for their respective position in the disagreement, which then requires adjudication in favour of one or the other. But it also insists that, as a matter of respect and recognition of moral and political status, the disabled person who is denied such a delivery is entitled to hear the reasons against meeting her needs. In this regard, the right to challenge again moves considerably beyond the right to needs assessment; it could even be argued that in terms of recognition, the right to challenge performs at least as well as an expansive right to service delivery without running into similar problems.

The philosophical foundation behind this position is familiar in political theory. Most recently it has been developed in Philip Pettit's republican ideal of *contestatory democracy* (Pettit 1999; 2000). For Pettit democratic decision-making cannot merely rely on electoral systems but requires mechanisms by which citizens can contest decisions taken in between electoral rounds. Where electoral systems bind citizens to policies initiated by representative candidates, contestatory democracy offers a much more fine-grained system of (dis)approving particular decisions, options or actions. According to Pettit, broad

measures of effective contestation are a prerequisite for genuine political freedom and participation. This model of contestatory democracy fits well with one crucial concern throughout the literature on disability policy, namely that disabled people are often relegated to second-class citizenship and denied full social and political participation in society (Charlton, 1998). The right to challenge in part shifts the balance back to a state where disabled people are not mere recipients of policy, as in the social welfare model, but are regarded as political partners in policy design and delivery. Being able to challenge decisions is one of the apt ways of making oneself visible, democratically speaking, and therefore rightly counted as amongst the most important political rights.

The right to challenge receives further support from its positive impact on three values that take central place in disability policy: dignity, empowerment, and publicity. As we have argued elsewhere, these values are intricately linked with the justiciability of disability rights (De Wispelaere and Walsh, 2005). Because we believe an effective right to challenge will in fact require the provision of legal remedies, the right to challenge is closely tied in with these values.

For disability rights activists, the *level* of assistance or services accessed is not all that matters; depending on how they are organised, services express a symbolic value. The core value at issue is human *dignity*. Human dignity is both inward-looking and outward-looking when considered in relation to disability services. Looking inward, dignified service provision allows the disabled person to retain her self-respect and pursue her life goals in an autonomous fashion when the latter offers the opportunity to actively participate in a process that highly determines the options for leading her life in a decent and satisfying manner (Engel and Munger, 2003). Dignity is tied in with participation. Looking outward, dignified service provision

signals 'recognition respect' for the status of the disabled person as a moral person (Darwall, 1977).²⁵ By granting a disabled person a (justiciable) right to challenge, society promotes both inward looking and outward looking dignity since that person's moral status is safeguarded even in cases where service delivery itself is hampered simply because the option to *claim* one's entitlement to service delivery remains in place at all times. For legal philosopher Joel Feinberg (1980:155), '[t]he activity of claiming, finally, as much as any other thing, makes for self-respect and respect for others, gives a sense to the notion of personal dignity.'

Next, disability rights advocates often talk in terms of the need to *empower* disabled individuals in order to counteract the various forms of oppression they suffer — wittingly or unwittingly — at the hands of the non-disabled population (Campbell and Oliver, 1996; Morris, 1997; Charlton, 2000). In addition to global, systemic forms of empowerment, the capacity to empower individuals at the micro level in their day-to-day exchange with case workers and other expert professionals is of the utmost importance to disabled persons. Where case workers typically occupy a power position vis-à-vis the disabled person, making the latter dependent on the goodwill and discretion of the case worker (Kemp, 2002), a right to challenge may balance out this inequality in favour of the disabled person. Interestingly, in many cases it is often sufficient that the case worker is aware of the proverbial stick behind the door, provided by a right to challenge the case worker's assessment or other actions/decisions where deemed fit, for her attitude to adjust.²⁶ But where this is not sufficient,

25 This is precisely why the disability movement eschews certain self-referential labels and insists on employing the social model of disability which constructs the leading source of disablement as located in the external environment, as opposed to one's own body or mind.

26 Somewhat paradoxically, the presence of justiciable rights also provides a genuine opportunity for case worker, who is often under extreme external pressure to manage her case loads in an economically sound manner, to improve their work situation. The presence of a legal threat

an effective right to challenge has the power to countenance inequalities at the coalface of service delivery.

A final consideration brings us back to the politics of disability services. One of the crucial aspects of the right to challenge, especially when properly embedded in the legal system, is the fact that it 'tracks' reasons for making a decision regarding a needs assessment or service statement. The arguments informing a particular decision are in the public domain and can be traced throughout the various stages of decision-making. Such a perspective fits very well with recent work in political philosophy embracing that of Rawls and contemporary theories of deliberative democracy, which emphasizes the crucial importance of publicity and public reason in the justification of social practices (Gutmann and Thompson, 1996). Under these conditions reasons for decision-making are open to public scrutiny, which in turn will positively influence the use of reasons that are acceptable to a wider constituency, as opposed to the reasoning carried out internally by bureaucratic agencies (see Richardson, 2002 for a general discussion). Publicly available reasoning then serves to mediate amongst the different perspectives and interests surrounding service delivery decisions by insisting that arguments should be brought to the fore in an attempt to reach an acceptable compromise, or else a democratic way of agreeing-to-disagree.²⁷ The right to challenge offers interesting opportunities for all parties to engage in an open debate the services a disabled person is entitled to, given other legitimate claims on scarce resources. Furthermore,

introduces a balancing force that does not only affect the case worker but also the senior manager, who will have to take possible legal action into account and now has a genuine interest in making sure the office is not just run within budget but also in accordance with quality standards for dealing with requests for assistance. Streamlining bureaucratic incentives in accordance with disability rights is a major goal of the right to challenge.

²⁷ Rawls (1999: 575) specifies that public reason applies in particular to three public offices: decisions of judges; discourse of government officials; and candidates running for public office. However, we would argue that major policy-making decisions in close deliberation with all relevant stakeholders should operate on similar principles.

a decision-making process that can be publicly challenged leaves little room for political blame-shifting strategies, such as pledging symbolic allegiance to a particular cause while leaving it up to bureaucrats to figure out the details — the sort of details that make all the difference if you are on the receiving end of the policy at hand (Hood and Lodge, 2006),

Evaluating the 2005 Disability Act

In this section we examine the extent to which the Disability Act 2005 can be described as adopting a rights-based approach to the provision of services for disabled people, as interpreted through our proposed framework.

As outlined above, the Act offers one substantive right, namely the right of a disabled person to have her needs assessed. It should be noted at the outset that the definition of disability and the parameters of the needs assessment are both likely to generate problems for disabled people when the Act becomes operational. Section 7, for instance, anchors the needs assessment to health and education needs ‘occasioned by the disability and the health services or education services (if any) required to meet those needs.’ This leaves out crucial areas of public service provision, including notably housing provision. Other services pivotal to independent living, such as access to a personal assistant, may be included *provided they can be regarded as health-related*. Furthermore, Section 2 defines disability in a manner that excludes transient conditions and requires that a disabled person meet an impairment threshold substantially restricting their capacity to engage in occupational, social or cultural activities. These qualifications mean that, for example, a person that experiences a given mental health problem on a cyclical basis may have difficulty establishing eligibility. These problems are well-documented by the Irish

disability sector and were signalled to the government in the consultation phase (Forum of People with Disabilities, 2004; Namhi, 2004; Schizophrenia Ireland, 2004).

The assessment will be undertaken without regard to cost or capacity to deliver the identified services. However, the resultant Assessment Report is subsequently translated into a Service Statement, which will take into account the 'practicability' of providing the services and the financial resources available. Clauses such as 'not possible or practical to provide', 'appropriate allocations', 'availability of resources', 'budget priorities' are threaded through Part 2 of the Act. It is clear from the outset that funds are not ring-fenced so that other priorities may overtake the resources demands generated by disability services (Civil and Public Services Union, 2004; IHRC, 2004, 2005: 81-82). For disability rights advocates the lack of legally earmarked funding means the Act cannot be regarded as rights-based (Crowley, 2006).

Note that, since no minimum floor or essential guaranteed level of services is set, the Act departs from the stance adopted by the DLCG (2003) and the Irish Human Rights Commission (IHRC, 2004). Both positions had been informed by international human rights law, which obligates governments to furnish a minimum threshold or core content of socio-economic rights while also committing to progressively realising higher levels of provision (Eide et al, 2001; IHRC, 2005). Further, the conditions that will render the availability of appropriate services a reality are relegated to Sectoral Plans that six government departments are obliged to prepare demonstrating how key disability issues are to be addressed.²⁸ Although the Plans must be drafted following consultation with the disability

²⁸ The six departments are: 1) Communications Marine and Natural Resources; 2) Enterprise Trade and Employment; 3) Environment and Local Government; 4) Health and Children; 5) Social and Family Affairs; and 6) Transport. The inaugural plans were published in July 2006 and are available for consultation on the website of the National Disability Authority: <http://www.nda.ie/>

sector, their content and the scope of the commitments undertaken is ultimately determined by department officials.

It should be noted that Part 3 of the Act does provide for accessibility benchmarks or standards. Sections 32-40 of the Act, for instance, supply general guidelines as to the areas that should be addressed under each plan, specify that an internal complaints system should be established by all six departments, and provide an oversight role for the Ombudsman in relation to implementation of the sectoral plans and the related general accessibility measures contained in Part 3. In turn Sections 25-28 oblige public bodies to make public buildings, services and information accessible to disabled people within set time frames, but again obligations are qualified by considerations as to cost, practicability and appropriateness. These benchmarks are complemented by a Code of Practice, published by the National Disability Authority, but these too leave intact a wide margin of discretion (NDA, 2006).

By and large, these guidelines are typically too general and do not provide any real opportunities for input – let alone challenge – on the part of disabled people. Although the Ombudsman may ultimately hear complaints about failure to implement general standards, there is no scope for *individual* legal redress on the part of disabled persons in the design stage, which violates a core requirement of Pettit's model of contestation.²⁹ In all cases, duties are tempered by conditions of practicality or resource constraints without any requirement that efforts should be directed towards improving practicality or increasing funding. It is obvious from the previous discussion that the Act fails to secure, in any robust manner, the services

²⁹ For Pettit, proper contestation requires what he terms 'editorial control', which 'cannot be exercised collectively, in the manner of electoral ... control' but 'has got to be exercised by individuals or groups at a noncollective level' (Pettit, 2000: 117-118). In the context of disability rights, even single group contestation may become suspect and we recommend fully individualising the right to challenge.

sought by campaigners. In addition, it performs poorly when considering how it might meet our model of disability rights by putting in place an effective right to challenge.

Commenting on the draft legislation one of Ireland's principal disability rights groups argued that the envisaged redress process amounted to a *bureaucratic super-structure* that would waste resources and 'tie disabled people and their families into a bureaucratic battle with service providers, state agencies etc.' (Forum of People with Disabilities, 2004). There is ample reason to suggest these fears will be realized since the complexity of the administrative scheme at the heart of the Act is absolutely staggering, and any attempt at challenging a needs assessment or service delivery entails moving through several layers of *internal* review. The needs assessment is to be carried out by a Health Services Executive (HSE) official and the Service Statement drawn up by a HSE-appointed *liaison officer*.³⁰ Section 14 provides that a person can lodge a complaint about a determination that they do not have a disability, the standard of the assessment, the contents of the Service Statement, or a failure to provide the services outlined. But the complaint will be heard by a *complaints officer*, who is also a HSE employee, and who will either attempt to resolve the matter informally or else investigate further - although the ensuing recommendation is again contingent on the availability of resources. Adverse findings can then be further referred to an *appeals officer*. However, appeals officers are yet again civil servants, this time appointed by the Department of

30 A disabled child may either be assessed under the Disability Act or under the Education for Persons with Special Educational Needs Act 2004. If an educational need is identified following a Disability Act assessment, that aspect of the assessment must be referred to the National Council for Special Education or to the Principal of his or her school for the purposes of an assessment under the 2004 Act. Health needs identified in an assessment under the Educational Needs Act 2004 will be dealt with in a Service Statement under the Disability Act.

Health and Children. At this point the decision is final and can be appealed only on a point of law to the High Court.³¹

Several aspects of this complicated process interfere with the right to challenge. First, the *substance* of any civil servant's decision is not open to review by an independent court or tribunal. Internal grievance processes are commonplace in the field of social provision (Cousins, 2002; Cowan and Halliday, 2003; Kenna, 2006).³²

Requiring a complainant to pass through three such tiers before a complaint is externalised, however, is not. The central point here is that a disabled individual is *effectively prohibited from* accessing an independent arbiter, such as the Ombudsman or the regular court system until the internal review procedures have been exhausted, which serves as a genuinely 'dis-abling' procedure. For these reasons alone the Disability Act's enforcement scheme scores low on the dignity and empowerment factors we identified earlier as valuable properties of a rights-based approach.³³

A further problem arises when we consider the value of publicity. Each stage on the path to service provision is heard in private and there is no provision under the legislation for publicizing the reasons for the decisions made at various junctures. Provision is made for the publication of an annual report which addresses the 'aggregate needs identified in assessment reports prepared including an indication of the periods of time ideally required for the provision of the services, the sequence of such provision and an estimate of the cost of

31 On this point, Section 20 of the Disability Act 2005 is explicit: 'An appeal to a court shall not lie against a determination of the appeals officer other than an appeal on a point of law to the High Court.'

32 For example, a dedicated statutory appeals system is provided for under the Social Welfare Code.

33 With respect to empowerment, it should be acknowledged that at least disabled people may be entitled to the services of an advocate, drawn from either the community and voluntary sector or the service to be instituted by the Citizens Information Board, the national support agency responsible for the provision of information, advice and advocacy to members of the public on social services (Citizens Information Act 2007).

such provision' (Disability Act 2005, Section 13). A similar obligation is placed on each appeals officer, but no guidance is supplied as to the content of their report save that it should relate to the performance of her function under the Act (Disability Act 2005, Section 17). This level of publicity is inadequate because it only relates to 'aggregate needs', nor does it offer genuine reasons for decisions but merely statements of needs identified, services provided, and so on.

Avoidance of judicial oversight is a clear government imperative. As we have seen control of the assessment, complaints and appeals procedures rests exclusively with the service providers; that is, the HSE and the Department of Health. The Taoiseach and various government Ministers have continually asserted that precluding access to the courts is designed to ensure that the costs associated with litigation do not drain the funds available for service provision. Earlier we have outlined several counter arguments. The most obvious one is that recourse to the courts only becomes an issue when rights provided for by law are violated, which hardly makes for a good argument against the use of courts. In addition, we argue that access to courts is essential to incentivise bureaucratic agents to take disability rights seriously, not treat them as a mere afterthought in a resource-limited policy context.

To revisit the question of institutionalisation briefly, the redress system for discrimination law claims operated by the Equality Tribunal serves as an interesting counterpoint. It entails the immediate externalisation of a grievance and as a quasi-judicial forum the Tribunal is completely independent of any employer, service provider or for that matter civil society interests. Although hearings are held in private, decisions are published, with provision for anonymity made in sensitive cases such as those on disability and sexual orientation grounds. Two recent cases concerning the reasonable accommodation duty imposed

on service providers under the Equal Status Acts 2000-2004, underscore how an independent forum can unearth and address flawed decision-making processes in the context of needs assessment and service delivery.³⁴ In both instances adherence to fair procedures and the elaboration of reasons for service refusal and inadequate service provision were central to the Tribunal's findings.

Paradoxically, the government's litigation-avoidance rationale as expounded through the Act is likely to have the opposite effect. Failure to guarantee a minimum level of services, and in particular to 'ECHR proof' the Act, will actually increase the likelihood of resort to judicial review. The ECHR Act 2003, in force since December 31st 2003, gives the European Convention on Human Rights an interpretive status within the Irish legal system and obliges public authorities to comply with the Convention in carrying out their functions. As jurisprudence develops both within the Strasbourg system and before the UK courts (Clements and Read, 2003; Gooding, 2003; Fredman, 2006; King, 2007), litigation seeking to test these precedents on the domestic front is inevitable.³⁵

Further, poor drafting means that the relationship between the various disability laws now in place will necessarily be ironed out in civil actions. For example, it is at least arguable that the Act as a whole will undercut or compromise the potential of the reasonable accommodation provisions set out under the Equal Status Acts 2000-2004 (IHRC, 2004). A Tribunal may be tempted to conclude that an accommodation sought by a given claimant has by implication been removed from the scope of the equality legislation since the Disability Act 2005 now

34 *Ms D (a tenant) v A Local Authority* (DEC-S2007-048); *A Complainant v A Local Authority* (DEC-S2007-049).

35 In May 2007 the High Court awarded damages to disabled siblings, whose living conditions at a halting site operated by a public authority amounted to a breach of their rights under Article 8 of the ECHR. Cf. *O'Donnell (a minor) and Ors. v. South Dublin County Council* [2007] IEHC 204.

specifies the conditions under which the service in question is to be provided.³⁶ As suggested by the IHRC (2004: 22), these tensions could have been managed by inclusion of a provision to the effect that the Statute did not diminish the existing legal obligations of the government.³⁷

The previous analysis clearly suggests that the Disability Act 2005 fails to meet the conditions for robust rights-based legislation in relation to disability services. The failure to provide secure access to public services is exacerbated by the fact that there is no genuine right to challenge assessment, service delivery or even the wider policy context, particularly resource commitments. This failure has important consequences in relation to the political status and participation of disabled individuals in modern Irish society. As suggested before, the right to challenge is the means par excellence for disabled people to contest popular perception, including *administrative* perception, about their needs in order to participate on equal terms in society. While the government may have raised legitimate concerns about expanding costs and competing claims for scarce resources, it has responded to this concern by drafting legislation which pushes legal proceduralism to its limits. Behind the complex layers of assessment, complaints and appeals procedures, an empty formalism looms large. This is in part because the processing of disabled people's claims throughout the Act remains a matter of administrative discretion, with no recourse to independent adjudication either as a substantive means of legal redress or even as a

36 The two main precedents to date from the Equality Tribunal are contradictory. In *Hemnessy v Dublin Bus* (DEC-S2003-046) the Equality Officer suggested that other legislative provisions dealing with the progressive implementation of access to public services could satisfy the duty to reasonably accommodate individual disabled people under the Equal Act Status Act. A more recent decision, which is under appeal to the Circuit Court, specifies that the reasonable accommodation requirement will not be displaced by other statutory provisions: *2 Named Complainants v Minister for Education and Science* (DEC-S2006-007).

37 Such provision is made in the Ontarians with Disabilities Act, R.S.O. 2001, c. 32. On which see Gordon et al (2002).

mechanism to incentivise the administrative decision-making process.³⁸ The structure of multiple layers of bureaucratic executives, often part of the same (or a similar) organisation, operating as internal checks upon each other's decisions clearly favours a lock-in of initial decisions.

Furthermore, at the end of the day, no firm commitments are made throughout the legislation in terms of addressing disabled people's needs in general. In terms of resource commitments, the Act has a strong conditionality built into its main provisions. The background conditions for enabling adequate service delivery are dependent, not on the Act itself, but on the Sectoral Plans, which are drawn up with a considerable amount of discretion and local autonomy, restricted only by general guidelines and at best weak oversight to ensure these match up with concerns of the disabled population in Ireland. One clear area of concern, from a right-based perspective, is the fact that there is no right to challenge the resource commitments themselves. These are assumed to be fixed or given, and serve as the benchmarks against which subsequent service delivery demands are being evaluated. In terms of a commitment to disability services, this is highly contingent at best, vindicating the charge of empty formalism.

In response to legitimate concerns about expanding costs and balancing disability rights with competing demands on scarce resources, the government could have taken an alternative route. Instead of empty formalism it should have adopted the perspective of fair proceduralism, as proposed by a number of disability theorists (e.g. Silvers, 1998) and developed in this paper in the form of a justiciable right to challenge. Accepting there may exist multiple legitimate perspectives on what counts as a just

38 See Richardson (2002) on the complicated connections between democratic authority and administrative discretion.

distribution of resources in view of varying social needs, fair proceduralism asserts that legislation provides for a process of adequately ascertaining the reasons for granting or denying certain services. Most importantly, fair proceduralism remains impartial between the perspectives of service users and providers; where the Disability Act 2005 effectively sets strict boundaries around service provision, with no right to challenge the reasons for deciding on budgets this way rather than that, fair proceduralism implies that these wider background context to be scrutinized as well. In practice, this means that a process must be available for disabled individuals seeking needs assessment and service provision to engage with those assessing their needs and deciding on service delivery. This process may result in a variety of outcomes, ranging (in theory) from all needs being met to only minimal service provision, but in all cases the reasons for the outcome are publicly stated after a fair hearing or, in ideal circumstances, a genuine mutual deliberation of both parties. A democratic state that values the participation of its disabled citizens should not settle for anything less.

Conclusion

The Disability Act 2005 will frame disability policy in relation to public services in the Republic of Ireland for decades to come. The legislation is hailed by the government as a major achievement in securing disability rights in Ireland, but the disability sector remains unconvinced. In this paper we evaluate the legislation and suggest that, while it undoubtedly will improve the status quo once fully implemented, the Act nevertheless represents a missed opportunity in terms of safeguarding disability rights in Ireland.

The current legislation centres around a conception of disability rights as the right to a needs assessment, which

is clearly too weak to adequately recognize the moral and political status of disabled people in Ireland. An alternative conception of disability rights grounded in a justiciable right to challenge needs assessments and subsequent decisions pertaining to service delivery in our view offers both a sound theoretical basis for understanding disability rights and a practical guideline in terms of which direction future disability policy should take. The right to challenge promotes the status of disabled persons as genuine citizens of the Republic of Ireland and would also positively affect the standards of disability service delivery. Most importantly, it would enshrine a robust rights-based approach to disability services that meets the requirements of the disability sector without causing the level of rights essentialism the government is concerned about.

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