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1

Towards practising social work law

Social workers in training and experienced practitioners alike often appear apprehensive and lacking in confidence about working in the legal arena (Braye and Preston-Shoot et al., 2005). They perceive social work practice, experience, training and evidence to have limited credibility compared with that of other professional groups (Preston-Shoot et al., 1998b), whilst they are also concerned about the complex jargon and high volume of factual detail to be grasped. Others may struggle owing to limited opportunities to develop and update their knowledge and skills for interacting in the legal arena. Indeed, ignorance of, or uncertainty about, the legal rules features in inquiries into mental health tragedies (Sheppard, 1996) and in research on direct payments (Glasby and Littlechild, 2002) and on child protection (Hunt and Macleod, 1998). Alternatively, social workers may be disappointed when the clear boundaries they expect from the legal rules are not apparent. Some may question the very idea of law being part of social work.

Research has also found that teams are sometimes not up to date with changes to the legal rules. Performance targets may matter more to managers than legal challenges to unlawful practice, with practice being driven and distorted by an organizational focus on agency procedures, such that the law becomes less visible (Braye et al., 2007). The role of the organization is influential in determining the extent to which law is seen as a significant feature of practice. Competence depends not just on practitioners taking responsibility for their continuing professional development but also on organizational competence (Preston-Shoot, 2000a) in providing regular legal updates and clear information that is not mediated through agency interpretation (Braye and Preston-Shoot, 2006a). This should be coupled with supervision and debriefing to help practitioners manage the anxiety, ambiguity and pressure which accompany the legal mandate, and to learn from experience.

By contrast, experts by experience expect social workers to have up-to-date legal knowledge and to be technically competent in its use (Barnes,

2002; Braye and Preston-Shoot et al., 2005). However, they also expect practitioners to be *critically* competent. Critical thinking here refers to being able to articulate legal knowledge, debate the relationship between law and professional practice, share ethical dilemmas and options for their resolution, and explain their decision-making. It includes a commitment to tackling discrimination and oppression alongside individual need, responding to the impact of the law on people's lives, and taking action when the law disadvantages particular social groups.

How well do social workers in training and experienced practitioners measure up against these expressed standards? The picture is variable. Practice teachers appear daunted by their responsibility for teaching and assessing social work law and express reservations about their own legal competence (Preston-Shoot et al., 1997; Braye and Preston-Shoot et al., 2005; Braye et al., 2007). Marsh and Triseliotis (1996) reported a lack of confidence among newly qualified practitioners. Barnes (2002) found that most students were competent when answering questions about the law but that carers considered social workers to be ill-equipped with legal skills. Another survey (Willis, 2002) found respondents critical of management support and of their lack of training, for example on court skills and legal proceedings, which created difficulties when working with lawyers. Half of the students in another project recognized that complying with legal rules was a key task but believed that they did not have sufficient knowledge of relevant legislation (Mathias-Williams and Thomas, 2002). More positively, social workers in training are increasingly ranking their law teaching as good and relevant (Ball et al., 1995; Marsh and Triseliotis, 1996; Lyons and Manion, 2004).

Crucially, then, what is written and taught about social work must leave practitioners certain in relation to 'knowing what' and 'knowing how'. It must also enable them to question the roles prescribed for them in law and to debate how legislation defines problems and solutions. Finally, it must provide understanding of the relationship between law and practice, and facilitate confidence in responding as that interface changes and develops.

The contested relationship between law and social work

There is long-standing concern about apparent deficiencies in social workers' knowledge and use of legislation, and their unease when acting as statutory agents (Ball et al., 1988). During the 1980s reports into child abuse tragedies criticized the failure of practitioners to identify and observe their legal duties, and to use positively their available legal powers (DHSS, 1982; Blom-Cooper, 1985; London Borough of

Greenwich, 1987). They suggested that social workers disliked an authoritarian role and the use of legal intervention. By contrast, other reports criticized social workers for being over-zealous and ill-advised in their use of the law, and found that using statutory controls can be counter-productive to risk management and decision-making in child care (DHSS, 1985; Butler-Sloss, 1988). The paradox was stark: social workers appear damned if they act and damned if they do not act.

This paradox has continued, with social workers criticized (DH, 1995) for focusing more on child abuse and child protection than on the support needs of children and families, without examining the context which had created this situation. This research advocated an increased emphasis on preventive services without indicating how an apparent preoccupation with abuse was to be modified, thereby failing to address the roots of the paradox in the legal mandate and its relationship with social work. Similarly, Hunt and Macleod (1998) found evidence of social workers refocusing risk assessment and supporting families through partnership but concluded that some cases enter the court system too early and others too late. The paradox or dilemma is further reinforced by the Laming Report (2003) appearing to require social workers to adopt a more suspicious approach towards families, which could risk alienating them and jeopardize preventive and collaborative work (Sinclair and Corden, 2005).

Policy pronouncements envisage more support to enable older people to live independently, with high quality, flexible services designed to promote personal dignity, respond to individual need, and afford people greater control over their lives (DH, 2006a). Similarly, excellence is defined as better access to services, improved well-being and enhanced quality (DH/DfES, 2006). Whilst this is acknowledged as requiring a fundamental change in service provision, changes in the legal mandate have yet to follow to ensure more user-focused services.

The paradox is reflected in ambivalence about social workers' authority within the legal rules. Only qualified social workers can become independent reviewing officers, monitoring how local authorities implement plans for looked after children (Adoption and Children Act 2002), and they have a lead role in core assessments to safeguard and protect young people (DfES, 2006a). However, social work has lost its pre-eminence in decision-making on admissions to psychiatric hospital or guardianship (Mental Health Act 2007), with the newer role of approved mental health professional also pivotal to best interests assessments (Mental Capacity Act 2005).

Another discourse also identifies implementation failure in front-line practice but attributes it to lack of clarity about managerial responsibility

and accountability, procedural and practice failure, assessment of eligibility rather than need, harm and risk, and inadequate information exchange between agencies (Laming, 2003). Rather than the relationship between law and social work being seen as problematic, personal failures (unprofessional performance) and systemic problems (organizational malaise) are highlighted. Changes to the law (Children Act 2004) seek to create legal underpinning for a procedural system for sharing information and monitoring children, whilst leaving unaltered other aspects of the interface between law and social work. Sinclair and Corden (2005) argue, indeed, that the belief that children's safety will be enhanced through information collation and procedures is based on presupposition not fact.

The prescribed remedies for this 'malaise' differ fundamentally. The inquiry into the death of Jasmine Beckford (Blom-Cooper, 1985) argued that social work can only be defined in terms of the functions required of its practitioners by their employing agencies operating within a statutory framework. Here the law is seen as social work's core mandate, the pivot for practice, legal knowledge as offering direction in an uncertain and confusing world, as if it is somehow obvious when and how practitioners must act. What is required, therefore, is a higher degree of proven competence in relation to statutory duties, and an ability to interpret and exercise those duties in a technically correct way (Blom-Cooper, 1985). This legalistic model is reflected in *The Law Report* (Ball et al., 1988) which allocates legal knowledge the central position in social work. It is seen in the faith placed in the legal rules to shape aspects of practice such as interagency working (Laming, 2003; Children Act 2004; DfES, 2006a) without apparent questioning of their feasibility and impact on necessary relationships with families (Sinclair and Corden, 2005).

An alternative pivot for practice was offered by Stevenson (1988): an ethical duty of care. Here the law is but one framework, alongside key social work values and skills, including user self-determination, professional judgement, assessment and working for individual and social change. Law may be an obstacle to values-based and research-informed practice, work with asylum-seekers being one example (Humphries, 2004), even if there are other instances where principles codified in the legal rules correspond closely to social work values (Preston-Shoot et al., 2001). The belief that law alone is insufficient also has government endorsement: the assessment of young people and their families requires professional skill and judgement in addition to legal regulations and guidance (DH, 1989a, 2000b; GSCC, 2008). Rather than an ideology of legalism, emphasizing the pre-eminence of law in defining social work, a close fit between the law and appropriate courses of action is

not assumed. The law is seen only as one resource, ambiguous, open to interpretation, and not always effective.

These two positions, arguably, over-simplify everyday practice. Periodically, practitioners will encounter situations where law and values – two mandates for professional activity – collide. Routinely practitioners will encounter dilemmas and competing imperatives, such as care vs control, needs vs resources, welfare vs justice, individual vs society, or rights vs risks. There will be questions of how to respond when social policies neglect people's basic needs and social rights. There will be tensions to be negotiated between helping individuals and acting for society, between enforcing people's rights, affording them protection and securing social control. There will be cases where it is unclear what constitutes high or unacceptable risk, or which cluster of factors indicate action, or whether or not possible outcomes of intervention are to be preferred. Resolution requires professional analysis, judgement and problem solving (Braye and Preston-Shoot, 1990), assessment skills informed by values, knowledge, practice wisdom and the perspectives of experts by experience, and a delicate balance between law and ethics in a framework of professional accountability (Braye and Preston-Shoot, 2006b). When and how to intervene will not always be obvious. Equally appropriate but different orientations towards a situation will lead workers to prioritize agency procedures, people's needs, people's rights, or the avoidance of risk (Braye and Preston-Shoot, 2007). Neither the law nor social work values, alone, will enable practitioners to decide what they ought to do. Even where a mandate can be identified, and a situation falls on the 'right' side of it, permitted or mandated action may not be the 'right thing to do'.

Questioning law

Legal rules have been used to drive forward the modernization of social services (DH, 1998). The Public Interest Disclosure Act 1998 and the Care Standards Act 2000 address the objective of protecting service users from poor practice. Their provisions for whistleblowing and registration change the balance of power between social workers and their employers. The Community Care (Direct Payments) Act 1996, as extended by the Health and Social Care Act 2001, responds to the objective of prioritizing responsiveness, flexibility, choice and independence in meeting need. The Health Act 1999, the Health and Social Care Act 2001 and the Children Act 2004 tackle co-ordination between services and agencies, whilst the objective of securing greater consistency between services underpins *Fair Access to Care Services* guidance (DH, 2002b), the

framework for assessing children in need (DH, 2000b) and the national service frameworks (e.g. DH, 1999b, 2001b).

However, an exclusively legalistic model, where the law is elevated to become the main form of admissible knowledge, is inadequate for the complexities social workers face. It may be challenged for creating an impression that the law offers a clear map for welfare practice when, in fact, it provides a series of maps within statute, regulations, guidance and court decisions, regularly redrawn, sometimes inconsistent, and variable in detail and prescription (Braye and Preston-Shoot, 2006b). For example, youth justice legislation has created six youth justice systems rather than one coherent approach (Preston-Shoot and Vernon, 2002). Therefore, the law is neither simple nor unproblematic to apply. Nor can it be assumed that if the legal mandate is known and followed practitioners will provide appropriate types and levels of intervention. Social workers operate with legal clauses which are discretionary, open to interpretation, and within which what is included and excluded will be a matter of contested judgement. For instance, the House of Lords has returned split decisions in respect of the balance of probability to be shown in cases of likelihood of significant harm (*Re H and R (Child Sexual Abuse: Standard of Proof)* [1996]), and whether private residential care homes are providing a public function within the meaning of the Human Rights Act 1998 (*YL (by her Litigation Friend the Official Solicitor) v Birmingham City Council* [2007]). Moreover, both inquiries (Ritchie et al., 1994) and judges (*R v Gloucestershire County Council, ex parte RADAR* [1996]; *R (Coughlan) v North and East Devon Health Authority* [1999]; *R (Grogan) v Bexley NHS Care Trust and South East London Strategic Health Authority and Secretary of State for Health* [2006]) have criticized Department of Health guidance for being difficult to understand and couched in unhelpful jargon.

This critique extends to challenging how social issues are addressed within legal rules. Humphries (2004) argues that social workers are complicit in implementing degrading and inhumane social policies with respect to asylum and immigration. The evolution of youth justice systems and the frequency of legislative reform betrays the anxiety generated by questions of crime control and the limited reflection on the ethics, evidence for and efficacy of statutory change (Preston-Shoot and Vernon, 2002). Continued faith is invested in legal rules promoting contact between children and parents (Children and Adoption Act 2006) when creative work and resources are more likely than legal interventions to overcome difficulties in contact relationships (Trinder et al., 2002). Some enactments, such as the Children Act 2004, recognize the need to address the full range of variables impacting on raising children; others,

such as parenting orders (Crime and Disorder Act 1998), hold parents alone responsible for controlling children's behaviour (Henricson, 2003). Guidance has been lacking on the potential conflict of interest for a local authority holding parental responsibility (Children Act 1989) but whilst also applying for an anti-social behaviour order (Crime and Disorder Act 1998) (*R(M) v Sheffield Magistrates Court* [2004]), and how councils with social services responsibilities should meet their duties both in respect of child protection (Children Act 1989) and the widening responsibilities for prevention and well-being (Children Act 2004). Some legislation (Disabled Persons (Services, Consultation and Representation) Act 1986, Children Act 1989) incorporates themes of empowerment and partnership, and is enabling in the sense that individuals may participate in assessment and service design. Some statutes (Human Rights Act 1998, Mental Capacity Act 2005) promote such social work values as self-determination, respect for persons, and openness. Others, however, promote dominant societal values and discriminate against groups of people, effectively denying humanity and embodying value judgements about their behaviour, choices, needs and goals. This presents a challenge to social workers committed to anti-oppressive practice and to changing structures which oppress social groups.

Some commentators (for example, Millar and Corby, 2006; Platt, 2006) have argued that the law, reflected through court orders and assessment frameworks, can assist social work's purposes, for example by helping to improve interagency collaboration, record keeping and the quality of decision-making, and by facilitating therapeutic benefits for children and improved social work relationships with parents. Examples are highlighted where the law supports social work values and purposes (Preston-Shoot et al., 2001), the Race Relations (Amendment) Act 2000 and the Disability Discrimination Act 2005, for instance, offering opportunities to public authorities to address collective concerns. The Human Rights Act 1998 offers opportunities to hold local authorities accountable for their practice. Courts have provided redress for service users by using:

- the right to private and family life to criticize failures in service provision (*R (Bernard and Another) v Enfield LBC* [2002]) or closure of residential care homes (*R (Phillips) v Walsall MBC* [2002]);
- the right to liberty to ensure that people's detention in psychiatric hospital is no longer than necessary (*R (KB and Others) v MHRT and Another* [2002]);
- the right to a fair hearing to criticize local authority consultation procedures on closure of residential homes (*R (Madden) v Bury MBC*

[2002]) and administration of reviews for looked after children (*Barrett v Enfield LBC* [1999]);

- the concept of proportionality to limit the use of without notice emergency applications in care proceedings (*Haringey LBC v C (a child), E and Another (intervening)* [2004]) and to monitor the threshold between supervision and care orders (*Re O (A Child) (Supervision Order)* [2001]);
- the requirement on public authorities to promote European Convention on Human Rights (ECHR) rights to hold them accountable for negligence (*W and Others v Essex CC and Another* [2000]);
- the right to live free of inhuman and degrading treatment to challenge the denial of support to destitute asylum-seekers (*R (Limbuella and others) v Secretary of State for the Home Department* [2006]).

Others (see King and Trowell, 1992; Utting, 1996; Garrett, 2003; Humphries, 2004) have argued that reliance on the law fails to address the problems people face and may, indeed, exacerbate them. By naming, as individual and/or family problems, issues which originate in social problems such as poverty, exclusion and unemployment, and by enforcing policies which dehumanize people, social work risks colluding with oppression. From this viewpoint welfare interventions are a deception and diversion from moral and political questions, masking deprivation, disadvantage and the damage done by inequitable social structures and discriminatory social policies. Increasing reliance on prescription and regulation reduces the discretion necessary for effective social work.

This critical line of argument points to the weakness of the legal rules in preventing institutional abuses and unlawful agency practice (Preston-Shoot, 2000b, 2001a). Social workers' legal options to protect older, abused people remain restricted, notwithstanding the release of policy guidance which requires an interagency framework (DH, 2000a) and legal reform that extends protections available for vulnerable adults (Mental Capacity Act 2005). Victims of domestic violence do not find the law effective if their abusers fail to observe legal injunctions. Legislating to promote interagency co-operation has not of its own accord made it happen. It remains difficult for mental health services to align levels within the health-led *Care Programme Approach* (CPA) to those in *Fair Access to Care Services* (FACS) (DH, 2002b; Cestari et al., 2006). Government commitment to personalization of services is enabled in social care through direct payments, but not within health provision. Additionally, in England health care remains free at the delivery point but charges are levied for social care (Kestenbaum, 1999; Glasby, 2003). The courts have had to intervene to mediate between agencies, for

instance in relation to housing children in need and their families (*R v Northavon District Council, ex parte Smith* [1994]) and providing services to families who may just have moved (*R (Stewart) v Wandsworth LBC, Hammersmith and Fulham LBC and Lambeth LBC* [2001]; *R(M) v Barking and Dagenham LBC and Westminster CC (interested party)* [2003]). Despite legislative reform to improve interagency co-operation (Health Act 1999; Health and Social Care Act 2001; Children Act 2004), the barriers to collaboration remain. They include resource levels, differing status accorded to knowledge and expertise, lack of role clarity and the splitting of people's needs (Lymbery, 2006), stereotyping and competitiveness, attitudinal and value differences, for example around medical and social models of disability (Hudson and Henwood, 2002), and separate training. These have to be addressed by managers in the respective services. Collaboration will not be realized without discussion of values, power, objectives, expertise, knowledge, attitudes to information exchange, and structures.

Community care law does not guarantee even limited government objectives on need and choice. Despite the duty to offer direct payments (Health and Social Care Act 2001) service users are still reporting that they are not being told about them (Leece and Leece, 2006). The policy vision may be personalization but financial ceilings set on community care packages restrict choice (Kestenbaum, 1999) and may not be set aside by judicial review. In one case a decision to move an older person from residential to nursing care was quashed when the service user could have remained there, as she and her family wished, providing resources were made available (*R (Goldsmith) v Wandsworth LBC* [2004]). Here the authority had not considered available assessments, proportionality or the right to private and family life (article 8, ECHR). However, in *R v Lancashire CC, ex parte Ingham and Whalley* [1995], the authority was entitled to consider the cost of alternative forms of provision to meet assessed need. Assessment is not user-led and there is no right to self-assessment, to refuse residential care in favour of community care, or care packages that are portable across local authority borders. Needs assessment remains targeted at those with greatest need (Richards, 2000). Some judicial review decisions have upheld policy guidance regarding choice of residential care (*R v Avon CC, ex parte Hazell* [1995]) and scope of needs assessment (*R v Avon CC, ex parte Hazell* [1995] and *R(T) v Richmond LBC* [2001]), and the requirement that services provided must have a reasonable chance of meeting the need identified rather than being solely resource-led (*R v Staffordshire CC, ex parte Farley* [1997]). However, others (for instance *R v Gloucestershire County Council, ex parte Mahfood and others* [1995]; *R v Wandsworth LBC.*,

ex parte Beckwith [1996]) have appeared to be limited in challenging a government policy which purports to endorse needs-led services but actually undermines people's rights to satisfaction of their needs through the emphasis on resources. Unsurprisingly, policy and practice have been challenged for a meanness of spirit, prejudice, indifference and poverty of provision (Utting, 1996).

In child care the legal system, instead of promoting children's welfare, can lose it amidst rules of evidence, court-room procedures, adversarial tactics and binary decision-making (King and Trowell, 1992). The Children Act 2004 fails to protect children completely from physical violence through corporal punishment, despite a ruling in the European Court of Human Rights (ECtHR) that this represented inhuman and degrading treatment (*A v UK* [1998]). The United Nations continues to allege that the best interests of children, as enshrined in its *Convention on the Rights of the Child* (UNCRC), are not reflected in United Kingdom law relating to the age of criminal responsibility and the detention of young people (Baglietto, 2005). Meanwhile courts have had to assert that every child really should matter by ruling that children in custody are children in need (*R (Howard League for Penal Reform) v Secretary of State for the Home Department and the Department of Health (interested party)* [2003]), and that young people must be tried in settings capable of determining their best interests and those of the community, and of facilitating their understanding of the proceedings (*T v UK* [1999]; *SC v UK* [2004]).

Questioning practice

The modernization agenda (DH, 1998) is built upon a critique of practice for being inflexible and of insufficient quality. Provision was to be transformed by breaking down organizational barriers and promoting people's welfare, for instance through delivering earlier or timely intervention to counteract the causes of social exclusion and promote well-being. However, local authority responses to guidelines on assessment and intervention regarding older-age abuse have been variable (Preston-Shoot and Wigley, 2002). Ellis (2004) and Postle (2007) found variable awareness of and attitudes towards human rights provisions. The take-up of direct payments has been patchy (Glendinning et al., 2004; Leece and Leece, 2006), partly because of social workers' attitudes and work pressures (Bainbridge and Ricketts, 2003; Clark et al., 2004), despite the evidence of considerable benefits for service users, including enhanced flexibility, choice, independence, personalization of care and continuity of support. FACS (DH, 2002b) has not widened the availability of support services for older people with low-intensity needs, because resource concerns

continue to dominate practice (Tanner, 2003), nor brought together the assessment of mental health and social care needs (Cestari et al., 2006). There is some evidence that implementation of this policy guidance has been haphazard, with variations in how practitioners actually determine eligibility for assessment (Davis et al., 1998; Cestari et al., 2006; Charles and Manthorpe, 2007).

Few disabled asylum-seekers are receiving any proper assessment of their needs (Roberts and Harris, 2002). Carers feel that they have to fight for assessment and service provision for those they are caring for, and for themselves (Robinson and Williams, 2002). Access to services for black and minority ethnic group older people and disabled people remains problematic because of language and trust issues, knowledge of what is available, and provider attitudes and practices (Vernon, 2002; Bainbridge and Ricketts, 2003; Butt and O'Neil, 2004). Strategic planning within councils and with NHS partners has improved, together with the involvement of experts by experience in service reviews. However, care plans for older people and learning disabled people remain service-led (Bainbridge and Ricketts, 2003; Fyson et al., 2004; Lloyd, 2006).

In child care, serious case reviews (Sinclair and Bullock, 2002) point to limited interagency co-operation between children's and adult services, poor communication and recording, insufficient attention to what children, friends and neighbours say, and inadequate attention to case chronology. Disabled children and young people from black and minority ethnic groups remain over-represented in the care population (DfES, 2007). Authorities vary in their use of preventive services and adoption placements due to the availability of staffing and resources, and their approach to risk (Dickens et al., 2007).

Disabled parents report high levels of unmet need. This appears to be due to (Goodinge, 2000; Wates, 2002; Morris, 2003):

- a lack of co-ordination between child and adult services;
- confusion about the entitlement of disabled parents to parenting support services through community care legislation;
- shortcomings in assessment;
- stereotypical assumptions about disabled people as parents, leading to unnecessary removal of children from their care.

Some commentators point to the detrimental effect on social work of its close proximity to law and to government. Trust in its professional judgement and faith in its use of discretion have been curbed by regulations, national standards, inspection and dependence on judicial decision-making (Valentine, 1994; Lymbery, 1998; Jones, 2001), not all

of which facilitate sensitive, flexible and informed practice. The panoply of the legal rules is seen as contributing to routinized, proceduralized or mechanistic assessment and service provision (Richards, 2000; Jones, 2001) and to the commodification of care and to managerialist-technicist practice that undermines professional judgement and advocacy for service users (Harlow, 2003). Manktelow and Lewis (2005) argue that law compromises social work's professional autonomy. In community care, Rummery and Glendinning (1999) pinpoint how bureaucratic and procedural processes, supported by policy guidance on eligibility criteria (DH, 2002b), are influencing access to and levels of provision, and thereby compromising people's legal rights. Richards (2000) found that services for older people became less personalized, responding to perceived problems and with agency preferred solutions, leaving service users powerless to influence the decision-making process.

Moreover, it cannot be assumed that the powers and duties expressed through statute and policy guidance are accurately reflected or interpreted in agency procedures and performance. Local authorities have been criticized in judicial review for lacking compassion and humanity (*R (A & B by their litigation friends X & Y) v East Sussex CC and the Disability Rights Commission (interested party) (no 2)* [2003]), for a disgraceful departure from good practice which ignored people's feelings and rights (*Re F (A Child)* [2008]) and for illegality and irrationality when assessing need or reviewing care plans (*P v Newham LBC* [2004]; *R (LH and MH) v Lambeth LBC* [2006]) (Preston-Shoot, 2001a, 2008). There is evidence of local authorities attempting to sidestep their duties towards young people leaving care or detention (*R(S) v Sutton LBC* [2007]; *R (Behre and Others) v Hillingdon LBC* [2003]), and of implementing policies which were inflexible and contrary to the welfare of a child (*R (L and Others) v Manchester City Council* [2002]; *R (CD by her litigation friend VD) v Isle of Anglesey CC* [2004]). Ombudsman decisions (LGO, 2007) and judicial review cases demonstrate how agencies are failing to assess need in a structured way (*R v Birmingham CC, ex parte Killigrew* [2000]), to interpret law and guidance accurately (*R v Avon County Council, ex parte Hazell* [1995]; *R v Islington LBC, ex parte Rixon* [1996]), to provide sufficient assistance and help within a reasonable time period (*R (Bernard) v Enfield LBC* [2002]), to conduct regular reviews or to provide written plans, to report deficits in service provision, to consult with users and carers and to take their views fully into account, and to manage complaints procedures fairly. In *R (Goldsmith) v Wandsworth LBC* [2004], decision-making was seriously defective as the council had prejudged the situation, failed to reassess, ignored policy guidance and not listened to either the service user or the carer.

These cases provide graphic evidence of how professional practice can be compromised by organizational accountability (Wells, 1997), wherein procedures are elevated regardless of their appropriateness and ethical responsibility becomes undermined.

Practitioners report frustration with increasing bureaucracy, which devalues compassion and decreases the time spent with service users. They reveal stress from lack of control over their work, aggressive managerialism, pressures to conform, bullying and harassment (Syrett et al., 1997; Balloch et al., 1999; Jones, 2001). Students witness manipulation of workers, hopelessness, disillusionment and distortion of actual practice in official reports (Preston-Shoot, 2003a; Braye et al., 2007). Approved Social Workers have reported increased stress and determination to leave statutory social work as a result of their Mental Health Act 1983 duties (Evans et al., 2005), whilst child care practitioners found rigid assessment timeframes (as specified in guidance, DH, 2000b) stressful (Postle, 2007). The Audit Commission (2002) found staff to be exiting the public sector, overwhelmed by bureaucracy and government targets, feeling undervalued and demotivated by unmanageable workloads. Good practice relating to supervision, induction, and matching work allocation to levels of experience is ignored (Marsh and Triseliotis, 1996).

Experts by experience have voiced similar concerns about the lack of time spent with practitioners, inflexible and unreliable provision, poor practice standards, and quality dominated by bureaucratic and financial considerations (Preston-Shoot, 2003a; Braye and Preston-Shoot, 2007). They have identified serious shortcomings in the protection of vulnerable people against abuse and in the administration of complaints procedures (Flynn, 2004). They have strongly challenged artificial divisions between nursing care and social care (Goldsmith, 2005), and between children's services and adult social care for disabled parents (Wates, 2002), highlighting the increased distress, fear and vulnerability that results. They have also identified instances where the legal rules have been manipulated, abused or wrongly interpreted (Braye and Preston-Shoot, 2006a), namely:

- Social workers exploiting people's lack of knowledge to deny them access to assessment, services (such as direct payments) and complaints procedures;
- Managers providing misleading advice and direction about when and how an agency can balance resource considerations against need, or about what particular legislation mandates, requires or enables;
- An agency's refusal to listen to another's concerns about risk to a young person or adult;

- Agencies failing to connect child care with adult services legislation in respect of disabled parents;
- Agencies setting down blanket policies and practitioners uncertain whether and how these can be challenged;
- Uncertainty about what information can be shared and with whom, for instance about sex offenders or people who have been investigated but not prosecuted.

Questioning resources

Despite policy pronouncements about modernization, many people's long-term care needs are not being met, either because of non-provision or inappropriate provision. The imposition on local authorities of tight financial controls has become a dominant theme in health and welfare provision. Managers and practitioners are concerned about the impact of resource constraint on caseloads, time spent with service users, and their ability to meet the needs presented to them (Balloch et al., 1999).

In community care, researchers still point to principles of quality, choice and needs-led assessments becoming secondary to concerns about resource constraints and controlling demand through rationing assessment and restricting services (Tanner, 1998; Richards, 2000; Lloyd, 2006). Wistow (2005) is blunt in his assessment that resources do not match the policy ambitions of early intervention, promoting social inclusion and well-being, and personalization. How care management is being interpreted and eligibility criteria implemented is threatening good practice (Syrett et al., 1997), including the effective use of resources by providing low-intensity support to prevent crises (Clark et al., 1998) and responding to the perspectives of experts by experience (Richards, 2000; Lloyd, 2006). Poor practice, including stereotypical assumptions about carers (Robinson and Williams, 2002) and older people (Davis et al., 1998), becomes more likely as the conduct and performance of staff is affected by the effects of chronic underfunding of community care (Brand, 1999).

Similarly, mental health assessments are being undermined by reductions in resources (Wells, 1997; Stanley, 1999). Thresholds for receiving mental health services have become so high that people are not securing access to much-needed services, with the impact of resource shortage seen in the mismatch between what is needed and what is provided, and in the appropriateness of the initial discharge, of the subsequent placement, and of follow-up support services (Sheppard, 1996; Pilgrim et al., 1997; Warner et al., 1997). People are being left to deteriorate in

situations that increase their vulnerability, their rights to equality and participation denied. Unsurprisingly, there is evidence of staff inflating levels of need to ensure that people receive services (Cestari et al., 2006; Charles and Manthorpe, 2007).

The Community Care (Delayed Discharges etc) Act 2003 has been criticized for putting financial priorities ahead of patients' needs and for prioritizing those in hospital ahead of those in the community. Kenny (2004) argues that the Act may reduce the time older people spend in hospital but increase the likelihood of some returning quickly, and some entering residential care inappropriately, underscoring the fragility and understaffing of intensive domiciliary care services (Glendinning et al., 2004). Lymbery (2006) argues that the Act fails to address the complexity of discharge planning, including the separation of health and social care funding streams, and the impact of factors beyond the control of social services.

Laming (2003) found services for children and families underfunded. He was strongly critical of managers and practitioners who limit access to services and adopt mechanisms to reduce demand, pointing out that the use of eligibility criteria to restrict access is not found in legislation or guidance. Only after assessment can criteria be justified to determine the suitability of the referral, the degree of risk, and the urgency of response. In line with other commentators (Blaug, 1995; Lymbery, 1998) who have demonstrated how encounters between social workers and service users have become distorted by eligibility criteria, the purchase/provider split, and the erosion of professional values and decision-making autonomy, Laming (2003) argues that the system has become distorted. Rather than a creative response to children's needs, evidence continues to indicate that:

- Delay has not been reduced in care proceedings (McKeigue and Beckett, 2004; Selwyn et al., 2006);
- Children in need are not being assessed within timescales laid down by government, partly due to staffing resources (Millar and Corby, 2006; Platt, 2006);
- Children are being inappropriately placed in residential care, with local authorities failing to take account of the suitability of a placement to the needs of the young person to be placed (Horwath, 2000), as required by guidance (DH, 1991a);
- The development of information-sharing and assessment systems to protect vulnerable children is delayed by insufficient resources and poor communication (Hunter, 2004), with practitioners also concerned about their mechanical and complex nature (Bell et al., 2007);

- Disabled children, privately fostered children, and unaccompanied asylum-seeking young people are not receiving the full protection of the Children Act 1989. Evidence points to delayed decision-making and reviews, children not being consulted about their wishes and feelings, failures to consider them as children in need, inadequate support for kinship carers, and parents not being assisted to attend reviews (Abbott et al., 2001; Morris, J., 2005);
- The quality of services for children in need is adversely affected by resource constraints (Colton et al., 1995; Reder and Duncan, 2004; Morris, K., 2005), with attention consequently focused on children at risk of abuse and neglect, at the expense of preventive work more generally, for instance with black and minority ethnic children (Ahmed, 2005), which might reduce the need for statutory intervention;
- Inexperienced practitioners are dealing with difficult situations alone, working with unreasonable workloads in unsupportive contexts, the consequences of which include the neglect of important issues in assessment and intervention, and a failure to engage significant people (DH, 1995; Laming, 2003; Reder and Duncan, 2004);
- The effectiveness of child protection services is adversely affected by resource constraints (Laming, 2003);
- Kinship carers feel isolated and want more financial and social work support (Broad et al., 2001);
- Pathway planning (Children (Leaving Care) Act 2000) for young people leaving care, including unaccompanied asylum-seekers, is very patchy, with evidence both of good outcomes in respect of education and of incomplete needs assessments, inappropriate patterns of support, premature discharge, failure to provide pathways plans and personal advisers as required by the Act, and young people experiencing loneliness and isolation (Coles et al., 2004; Broad, 2005; Harris and Broad, 2005; DfES, 2007).

This picture indicates the necessity of rethinking funding arrangements. Government has acknowledged that services have been underfunded (DH, 1998) and that effective safeguarding and quality social care will require that funding issues are addressed (DH/DfES, 2006). However, the legal framework has not been changed. Thus, judicial review decisions in community care have found that local authorities may consider their resource position when setting and reviewing eligibility criteria, and when deciding how to meet with services those needs which they are prepared to accept fall within their statutory duties (*R v Gloucestershire County Council, ex parte Mahfood and others* [1995]; *R v Lancashire County Council, ex parte RADAR and another* [1996]),

although any services provided must have a reasonable chance of meeting identified needs (*R v Staffordshire CC, ex parte Farley* [1997]). This undermines the emphasis elsewhere in guidance on needs-led services and choice and encourages slippage from needs-led into service-led provision. In children's services, the renewed emphasis on prevention (DH, 1995) and well-being (DfES, 2004a) has not been followed by either guidance or resources to assist practitioners and managers with how these imperatives are to be balanced against the child protection mandate.

Law-informed practice

How then should social workers practise within and interact with the law and legal system which can discriminate against or fail to protect people? How should they intervene in the context of an unequal society where the law is made by, and frequently benefits, those with social, economic and political power? How might social workers challenge narrow definitions of need and the influence of resource considerations in policy development, whereby practice becomes service-led and residual rather than oriented around considerations of quality of life? Once again social workers, now with a mandate and responsibility to highlight resource and operational difficulties that might affect the delivery of safe and effective care (GSCC, 2002), are faced with both implementing and challenging the law. Much of the remainder of this book is concerned with providing answers to these fundamental questions.

Why another book on the law and social work? Previous publications reflect the polarities discussed above. Some are oriented towards technical competence and therefore provide detailed descriptions of the legislation (see Brayne and Carr, 2008; Brammer, 2007) but downplay a critical framework within which to locate the law and the integration of case studies with the legal commentary. This is less likely to make legal knowledge appear relevant and endure (Braye and Preston-Shoot, 1990). Moreover it promotes the assumption that application of the law in social work practice is unproblematic when, in fact, practice often highlights the difficulty of knowing with any certainty when to intervene.

Other writers (see King and Trowell, 1992; Humphries, 1997; Garrett, 2003) provide a critical analysis of the values and ideologies underpinning legislation. This analysis pinpoints the inadequacies of the law as it affects and defines the needs of users of welfare services. Humphries (1997), for example, argues that law and social work represent a regulatory, normalizing discourse, which polices individuals at risk and engages in surveillance whilst minimizing people's abilities to secure

rights or counter discrimination. However these writers are less informative on where and how social workers should intervene, on the skills necessary for anti-discriminatory practice, for making empowerment work in a statutory context, and for challenging the social and economic consequences of attitudes, policies and structures. They downplay the potential for change offered by judicial review, anti-discriminatory and human rights legislation, and good practice standards codified in policy guidance to curb managerialism and policy-making when they risk compromising people's welfare (Dickens, 2008). Moreover the law tends to be presented in discrete areas when the reverse is the more usual practice reality: a breadth of knowledge, legal and otherwise, is required by social workers for effective practice.

Thus a broader focus is required, addressing contemporary social work issues, practice dilemmas and anxiety. It must promote confidence and competence in both knowledge of the law and skills in identifying its relevance to practice. It must therefore connect theory and practice by providing critical frameworks in which to experience, make sense of and resolve dilemmas of application, and by describing skills and principles for positive, effective intervention. It must encourage practitioners to move beyond narrowly defined agency functions of interpreting and implementing legislation based on dominant social values towards debating issues of crucial importance. These include all forms of discrimination and structural oppression, pervasive social constructions of older age, class, disability, sexuality, race and gender, and the principles and skills of anti-discriminatory practice and social action which follow.

This broader focus for social work law comprises eight components. Firstly, the law relating to specific user groups is essential knowledge for effective social work practice. It provides a degree of confidence by clarifying the rights, duties and powers of those involved and the circumstances in which these may be invoked. However, practice-relevant knowledge extends further than the ability to quote Acts of Parliament. Factual legal knowledge of primary and secondary legislation, policy and practice guidance, and case law, whilst important, is only part of the story. Surrounding its application the dynamics of the encounter between practitioner and user are such that legal knowledge alone will not guarantee that practitioners feel confident or intervene appropriately. Many situations are unpredictable and decisions will require skilled judgement (GSCC, 2008). A second requirement, therefore, is knowledge of, and skills in managing, the processes which occur. Social workers encounter frightening and horrifying behaviour, and frequently work where violence is explicitly or implicitly threatened, and for which they cannot

usually be granted anonymity when giving evidence (*Re W (Children: Care Proceedings: Witness Anonymity)* [2002]). They inherit an ambiguous mandate which requires certainty before action but the minimum of risk and time delay. Continuing emphasis on the importance of the family can promote over-optimism about the care available therein, which contrasts with the pessimism which follows from recognition of the frequent abuse of power in familial relationships. The dynamics of the helping encounter and the anxiety created by the work can lead social workers to downplay the legal authority vested in them or to simplistic directive authoritarianism to control the dynamics and minimize stress. The result can be inappropriate investigative measures or removal into care, or delayed rehabilitation – measures to minimize risk-taking, when risk may be justified but carries the possibility of an adverse outcome. If these ‘forces’ are not understood, and that understanding integrated into practice guidelines and supervision, work is more likely to become purposeless, stuck and ineffective.

This extension beyond legal knowledge also applies to the third requirement: knowledge which transcends specific groups. Clearly social workers must possess knowledge of the law which affects their work with users, such as knowledge when rights may be overruled, and procedures for obtaining evidence. However, the timing and mode of intervention demands a practice rationale as well as a legal rationale. Knowledge from social sciences and from social work theory and practice is required too. This knowledge may relate to specific user groups or transcend them. Knowledge of internalized oppression, triangular relationships and defence mechanisms will help to explain the position and needs of victims in abusive relationships. Indicators for managing the children in need/child protection threshold and for rehabilitation of abused children have been developed (DH, 2000b). These inform practice and give meaning to such legal concepts as ‘welfare of the child’ and ‘significant harm’. So too does knowledge of human growth and development and of indicators of risk of abuse or family breakdown.

The law deals mainly with individuals and with presenting problems or symptoms rather than with the structures, relationships and systems which impact on individuals. Systems theories alert us, however, to a circular view of causation which emphasizes the interaction between individual difficulties and internal processes, such as historical experiences, and/or social difficulties and issues, such as class, poverty and structural oppression. Whilst legal measures promote an individual focus, more effective or durable change follows from a person-in-situation focus where both the individual and social dimensions of problems are addressed, where the whole context, rather than just one, individual, part

of it is confronted. The limited effectiveness of race and sex discrimination legislation, and the failure of initiatives to curb child abuse or crime, and of measures to reduce poverty, are the result of just such a failure to look beyond the individual to the environment, and to the impact of each on the other.

Fourthly, social workers must understand legal processes and procedures. This includes familiarity with court structures, rules of evidence and limits to confidentiality, and an understanding from administrative law of the standards required when exercising authority. However, it also requires a critical appreciation of the dilemmas inherent in legal processes, such as the rights of victims in giving evidence versus the rights of the accused. Practitioners should challenge assumptions about the neutrality and impartiality of the law, and work to improve the current position of social work *vis-à-vis* other professions within the legal system. Medical and psychiatric evidence has higher status (*Re R (a minor) (disclosure of privileged material)* [1993]; *B v B (Procedure: Alleged Sexual Abuse)* [1994]), yet this evidence is also open to contradictory opinion. Nor is there any evidence to indicate that doctors or lawyers are any more likely to avoid errors of judgement, or to collect evidence more effectively, or to interpret the ‘truth’ of a situation more accurately. Rather, different professions are judged by different assumptions and standards.

This relates to the fifth component, understanding of the relationship between the law and social work. This understanding operates at two levels. The macro level involves not only identifying the practice relevance of the law but also the ways in which the law contributes to or exacerbates social work’s practice dilemmas, role conflict, uncertainty and ambiguity. This requires analysis of the law as a social construct, reflecting dominant (sometimes discriminatory) assumptions about, for instance, the role of women, appropriate needs, ageing, rights and responsibilities of parents, and disability. This understanding must incorporate the concept of conflicting imperatives which are the outcome of compromise and conflicts between value systems and which result in contradictory expectations of welfare services. From understanding of the relationship between law, social work and society practitioners must develop strategies for change at individual and social levels which give life to principles of empowerment, advocacy and anti-discriminatory practice.

The micro level relates to the ethical questions and value and practice dilemmas which the law poses for each practitioner. Each must determine where they stand on the law and anti-discriminatory values, on rights versus risks, on welfare versus justice, and on political action concerning

resources and working within agency constraints. These issues must be faced if practitioners are to manage the personal experience of work and be effective rather than inconsistent, defensive and/or dangerous.

The sixth component is the development of a decision-making framework. This must integrate legal and other forms of knowledge to formulate what may or must be done in any given situation, why, when and how. Such a framework provides a considered rationale to guide action and to minimize error, and to meet the standards for using authority laid down by administrative law (Braye and Preston-Shoot, 1999).

A decision-making framework is only as good, however, as the competence of practitioners in relevant skills and social work roles – the seventh and eighth essential components of a model for effective practice in social work law. The relevant skills include legal skills – collecting and giving evidence; applying the law where those to whom it is applied may wish to reject it – and practice skills in removing a child on an emergency protection order, in applying for compulsory admission to psychiatric hospital, or in encouraging but not coercing an older person to accept domiciliary services or residential care. They also include generic social work skills (GSCC, 2002; QAA, 2008): information gathering, formulating assessments, intervening on the basis of assessment and evaluating that intervention, recording and report writing, working in partnership with professionals and service users, transferring learning from one context to another, and advising people how to make complaints.

The importance of social work roles extends beyond legal roles, such as using powers and duties to protect people from abuse, to promote their rights or to assist decision-making when they are unable to exercise capacity or provide informed consent (GSCC, 2002, 2008). Broader roles express the profession's commitment to anti-discriminatory practice by means of social action, advocacy and empowerment, including supporting choice and promoting equality of opportunity, and building relationships through which to seek resolution of complex family and social situations (QAA, 2008). These roles focus on individual and community realization, political awareness and action, and on social change, and may involve challenging agency policies and procedures. Continued credibility will require that social workers, individually and collectively, implement strategies which make empowerment and anti-discriminatory practice a reality in the statutory context. This includes a political awareness which connects the individual and the social, and raises consciousness about the law, about unmet needs, about inadequate resources and structural inequalities and promotes that understanding of social work's mandate.

Conclusion

This book aims to develop the subject of social work law and to empower social workers in their practice. Specifically it aims to provide a critical understanding and appraisal of social work law, including its provisions, efficacy and the values it upholds. This will provide practitioners with one foundation stone: knowing ‘what’. It also aims to provide a practical text which will illuminate the relevance and application of the law to social work situations. This is the second foundation stone: knowing ‘why’. Finally it aims to connect the law with social work practice principles and skills in order that practice is informed and rigorous, credible and coherent. It is inspired by the anxieties and difficulties faced by practitioners and addresses these by providing conceptual frameworks with which to make sense of and work through them. This is the third foundation stone: knowing ‘how’ and ‘when’.

putting it into practice

Reflect on these questions and discuss your ideas with others if you have the opportunity:

- What is the law for?
- How does law affect the lives of the people with whom social workers work?
- What are your fears and hopes about working with the law?
- What experiences have you had of the law in action and what did you learn?

Further reading

Braye S. and Preston-Shoot, M. (2006) ‘The role of law in welfare reform: critical perspectives on the relationship between law and social work practice’, *International Journal of Social Welfare*, 15, 19–26. This paper considers the complex relationships between law, welfare policy and social work practice, exploring the role legal frameworks might play in achieving welfare policy and professional practice goals.

Kennedy, R. with Richards, J. (2007) *Integrating Human Service Law and Practice*, 2nd edn. Melbourne: Oxford University Press. This book provides an Australian perspective on the relationship between law and social work.

Madden, R. (2003) *Essential Law for Social Workers*. New York: Columbia University Press. This book provides a perspective from the United States of America on legal knowledge and legal processes relating to social work.

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