

The Future of Social Justice in Britain: A New Mission for the Community Legal Service

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Editorial Note and Acknowledgements

The author has been an Atlantic Fellow in Public Policy at CASE on a year's leave as General Counsel at Community Legal Services in Philadelphia, Pennsylvania, a legal services program that has won national recognition in the United States for providing both individual and law reform or impact legal services to its clients. He has practised as an attorney at CLS since 1968, served as CLS' Executive Director from 1983-86, and received the Reginald Heber Smith Award of the National Legal Aid and Defender Association for life-time achievements and success in the largest Social Security class action in the U.S. Supreme Court, *Sullivan v. Zebley*.

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Abstract

This paper explores the disjuncture in the New Labour Government between the largest reform in fifty years of the nation's Legal Aid system and the concurrent pursuit of progressive anti-poverty, social inclusion, community regeneration, and human rights social policies. The failure of the newly created Community Legal Service (CLS) to incorporate these policies reveals the contradictions in the Third Way's effort to reconcile private market, managerial efficiencies with the goals of advancing social justice. This failure to adopt a social justice mission for the reformed legal aid and advice system, it is argued, shows the limited vision of these reforms and defines an unfinished agenda for a second term Labour Government. The paper suggests what would constitute a social justice mission for the CLS.

Legal advocacy and advice for the poor and excluded is an effective engine of social inclusion and fighting poverty through insuring and expanding rights to critical benefits and services, and giving a voice to grievances and empowering people and communities. Yet the major restructuring of the former Legal Aid system lacks a social justice mission, as has existed in government funded Legal Services in the United States; such a mission could ally legal aid reforms with the social policy and human rights goals of the Government of ending child poverty and remedying social exclusion, as well as "join" with various community renewal efforts.

The reforms have continued a primary reliance on a flawed, historically privatized delivery model, termed a "judicare" system by observers in the United States, rather than expanding the neighbourhood law centre and not for profit independent advice centre sectors of full-time, dedicated professionals. They have continued the sole provision of one-to-one, often "band aid" individual case services, instead of also pursuing legal and policy advocacy on behalf of client community organizations that would have larger impacts on systemic problems of the poor and excluded and on Human Rights Act implementation. The new CLS has also continued funding allocations that have under served social welfare law areas and community legal needs, and given uncapped, demand-driven spending to the criminal justice system, while reducing civil legal aid spending for social legal needs.

1. Introduction – A Community Legal Service Bereft of a Social Justice Mission

Britain's signal commitment to the principles of equal justice for all is its publicly funded legal aid, an offspring of the nation's Welfare State.¹ In Richard Titmuss' apt description, since adoption of the Legal Aid and Advice Act 1949, it has been a service to enable the poor "to protect their badge of citizenship."² Another theorist of the Welfare State, T.H. Marshall viewed it at its inception in 1950 as a new attempt "to remove the barriers between civil rights and their remedies."³ Viewed broadly as well, legal aid and advice play a critical constitutional role in democracies like Britain and the United States by establishing for the poor and excluded a fundamental right to be heard and to obtain redress for grievances of the state and market place.⁴

Now, fifty years after its founding, the virtually unchanged civil and criminal legal aid service has been radically reorganized through the Access to Justice Act of 1999. A Legal Services Commission (LSC) has replaced the Legal Aid Board, and funds a new Community Legal Service (CLS) for all civil legal advice and representation services with a new Criminal Defence Service (CDS) beginning in the spring of 2001. Yet with this major revamping, emphasizing cost capping and private

¹ One observer who questioned if legal aid is even part of the welfare state, later acknowledges that it did, in 1950, "emerge as a small and unobtrusive part of the welfare state,...cover[ing] almost 80 per cent of the population." Nick Timmins, *The Five Giants: A Biography of the Welfare State*, pp. 7, 172 (1995). Several decades later the legal aid program had been scaled back becoming a "safety net for the least well-off." *Ibid.* p.504.

² Cited by Frank Field in *Establishing a free legal service for poor people*, Memorandum to Lord Chancellor's Advisory Committee on Legal Aid and Advice, reproduced in *Poverty*, p. 24 (Child Poverty Action Group (CPAG) Autumn/Winter 1972).

³ T.H. Marshall and Tom Bottomore, *Citizenship and Social Class*, p. 29 (London Pluto Press 1992).

⁴ One can trace the antecedents of this right to access to justice in Britain, and indeed for the many countries, like the United States, influenced over time by Britain, to the Magna Carta's principle that "to no one will we sell, to no one will we refuse or delay, right or justice." Magna Carta, cap. 40 (1215). The Statute of Henry VII, in 1495, provided for appointment of an attorney for the poor in civil cases in common law courts. 11 Hen. 7, c.7, 2 Statutes of the Realm 578 (transcribed in 2 Statutes at Large) (repealed 1883, 46 & 47 Vict. c. 49).

market management reforms, the CLS has uncritically inherited funding priorities and a privatised delivery system of individual case service that conflicts with the broader social policy agendas of the Government. These reforms, “the biggest shake-up in legal services in fifty years,”⁵ will thus test the more sceptical view of New Labour reforms that the “third way is still far more preoccupied with efficiency than with justice.”⁶

A few years earlier in the Report of the Borrie Commission on Social Justice, a body instigated by the then Labour Party leader, the late John Smith, a social justice mission blueprint had been offered for a New Labour Government.⁷ But there was no mention of a social justice goal in the provision of the 1997 Manifesto of the Labour Party, *Because Britain deserves better*, that to the surprise of many proposed a new Community Legal Service to “achieve value for money for the taxpayer and the consumer.”⁸ Read with the White Paper, *Modernizing Justice*,⁹ and building on the prior Government’s legal aid change agenda, the New Labour reforms are focussed on rationalizing and restructuring the delivery of civil and criminal legal aid. Central was the setting of a cash-limited ceiling on expenditures for the first time, ending an entitlement to legal aid.

The prime “reform” mechanisms have been franchising and the contracting for blocks of legal services from providers screened for the first time and given a Quality Mark approval based on crude transactional criteria. With these came the establishment of new bureaucratic structures, Regional Legal Services Committees and local Partnerships of private and not for profit providers, and the voluntary and local government sectors, intended to address local needs and priorities. The local authority “partners” have no statutory duty to contribute to CLS providers, and some local authorities have, with the arrival of the CLS, cut back their funding. As local authorities will often be adversary parties to poor people in their areas, these Partnerships

⁵ Lord Goodhart, HL Deb vol. 595, col 1119, 14 Dec. 1998.

⁶ Hugo Young, columnist, *The Guardian*, p.24, 11 Jan. 2001. An adviser to Prime Minister Blair has reportedly described New Labour as a “hyper-rationalist generation of labour politicians.” Quoted in Andy Beckett, “Dulling Down,” *The Guardian*, G2, p. 2, 5 March 2001.

⁷ See *Social Justice—Strategies for National Renewal* (Commission on Social Justice/Institute for Public Policy Research, 1994).

⁸ *Because Britain deserves better*, p. 35 Labour Party, 1997.

⁹ Cm 4155, 1998.

have the seeds of conflicts of interest, especially in setting advocacy priorities.

The restructuring, embracing funding for both criminal and civil legal aid totalling £1,625 million in 2001/02,¹⁰ embodied a bias in favour of the constitutionally mandated criminal defence to the detriment of the civil legal aid, and consequently, to the social justice goals that civil legal aid can address. The absolute right to criminal defence counsel and political “law and order” imperatives in the criminal justice system have kept the criminal defence budget essentially demand driven, and the civil legal services budget tied to this defence budget *and* explicitly subservient to it.¹¹

The intent of the reforms are best found in the blunter words of Steve Orchard, the tough, first chief executive of the new Community Legal Service, who stepped into this position after making his reputation at the Lord Chancellor Department as a proponent of franchising legal aid providers under the previous Government. Mr. Orchard described the prior system as marked by private lawyers “ripping off” a system which simply paid bills for services; thus a primary goal was to restore accountability and legitimacy to a 50 year old program that was, correctly or not, viewed as having run adrift.¹² Mr. Orchard reflects the view of the current Lord Chancellor, Lord Irvine of Lairg, who expressed the hope that a new and successful Community Legal Services, will be able to make a “more attractive plea to Government for new resources than traditional legal aid has made” as it will alter the

¹⁰ LSC Corporate Plan 2001-2004, pp. 14,25. In 2001/02, £893 million or about 55% of legal aid expenditures were forecast for criminal legal aid, and £732 million for civil assistance. *Id.*

¹¹ In defending the budget linkages and the rising costs of criminal legal aid, termed “a greedy Leviathan,” the Lord Chancellor readily acknowledged that “the only money that is left for civil legal aid is what is left over out of that budget after the requirements of criminal legal aid have been met....” HL Deb vol 596 col 918, 26 January 1999. It is Lord Irvine’s intent to inject fixed price contracting into the provision of criminal legal aid, to “bring the criminal legal aid budget down for the benefit of the Community Legal Service.” HC, Home Affairs Committee, Minutes of Evidence, *Report-Work of the Lord Chancellor Department* (2 Nov. 1999) para 13.

¹² Interview with Steve Orchard, 12 Jan. 2001. Although the demand led system contained some abuse, the broader public view of lawyers “ripping off” the system was primarily fuelled by statements of the current and prior Lord Chancellor and embraced by the press, and did not present an accurate view of the Legal Aid system. Interview with Michael Zander, law professor emeritus, LSE, 22 Feb. 2001.

“perception that traditional legal aid feeds lawyers’ bank balances.”¹³ The primacy of the cost-cutting intent of the reforms, though, goes far to explain the absence of a social justice mission.

Concurrent, but decidedly divorced from these legal services reforms in Britain, have been a burst of New Labour progressive policies that should be having galvanizing impacts within the new CLS. These policies are led by the Government’s re-discovery of poverty, after nearly two decades of avowed denials from the past Government, and the remarkable commitment to end child poverty in 20 years.¹⁴ This anti-poverty effort is centred around broad New Deal welfare to work schemes and a host of in-work and out-of-work benefit, service and tax system changes. Legal advocacy and advice, the claimants’ justice and law enforcement arm of the Welfare State, can play a critical role in safeguarding and expanding claimants’ entitlements to benefits and services, and illuminate inequities and gaps in the safety net.

In addition, the Government has imported from the Continent the malleable concept of “social exclusion,” to provide a more comprehensive framework and presumably remedies for the complex of socially structured disadvantages that deny the rights of citizenship and opportunities for a fuller life.¹⁵ Informed, holistic and proactive legal services advocacy and advice should be viewed as a prime instrument of the Government in remedying social exclusion, as the interplay of law, policy and administration often form the web of the structures that keep especially low income people from participating in the norms of

¹³ HC, Home Affairs Committee Minutes of Evidence, *Report-Work of the Lord Chancellor Department* (2 Nov. 1999) para 11. Lord Irvine noted that “conventional legal aid was not the most popular of public social services. The [CLS] will increase the popularity of legal aid considerably.... Average payments in civil legal aid rose from £1,875 in 1993-94 to £3,239 in 1998-99, an increase of 73 per cent and the number of people helped fell by 21 per cent; so much more money to help fewer people. A similar pattern shows in crime.” *Id.*

¹⁴ The commitment to end child poverty was made in Prime Minister Tony Blair’s Beveridge Speech of March, 1999, two years *after* the election. Following a belated and, to many, a disappointing start, by the end of this Parliament and including implementation of the 2000 Budget, a combination of benefit and tax system changes should result in a substantial diminution of child poverty. J. Bradshaw, “Child poverty under Labour,” pp.8-27 in G. Fimister, ed. *Tackling child poverty in the UK: An end in sight?* (Child Poverty Action Group 2001).

¹⁵ See R. Levitas, *The Inclusive Society? Social Exclusion and New Labour* (London: Macmillan, 1998); P. Stepney, R. Lynch, B Jordan, “Poverty, Exclusion & New Labour,” 58 *Critical Society* 109 (1999).

economic, social and civic life. Peter Townsend has referred to the “‘participative’ character of need” that allows people to fulfil societal “expect[at]ions of them at the workplace, in the home, the family and the community, and as local as well as national citizens.”¹⁶ In most of these areas, advocacy that gives practical voice to the aspirations and “participative” needs of dispossessed people, can be a most effective engine of social inclusion and should stand as a critical component of a national strategy on poverty and social exclusion.¹⁷

In recognizing the need for new approaches to long-term systemic poverty and social exclusion, New Labour has reaffirmed the need for so-called “joined-up government” to ensure that “all our different departments and programmes are working together to combat the multiple problems faced by individuals and communities.”¹⁸ In particular, New Labour has initiated what has been described as an “explosion of...area-based policy initiatives, all seeking to challenge different aspects of local poverty and deprivation”; these constitute over 890 local schemes in particular neighbourhoods or across council lines, and receiving a total of £5.6 billion over seven years.¹⁹ Here, too, a past successful legacy of community anti-poverty advocacy initiatives in Britain (and the United States) involving welfare and consumer rights

¹⁶ P. Townsend, Foreword, in P. Golding (ed), *Excluding the Poor*, pp. v-vi (Child Poverty Action Group 1986). Social exclusion may be measured by the degree of participation in the spheres of consumption, savings, production, political and social, as has been suggested by those at CASE attempting to give a working definition to this amorphous concept. See T. Burchardt, J. Le Grand and D. Piachaud, “Social Exclusion in Britain 1991-1995,” 33(3) *Social Policy & Administration* 227 (1999).

¹⁷ See, e.g., Law Centres Federation, *Social Justice and Social Exclusion, response on National Strategy for Neighbourhood Renewal, Minority Ethnic Issues in Social Exclusion and Neighbourhood Renewal* (2000) (www.lawcentres.org.uk); M. Holdsworth, *Social Exclusion: Is Advice a Solution,?* London Advice Services Alliance (LASA) (1999); Holdsworth, *Advice: Responses to Social Exclusion in London*, LASA (2000).

¹⁸ DSS, Opportunity for all—tackling poverty and social exclusion, p.5 (Cm 4445 1999).

¹⁹ P. Alcock, “Neighbourhood renewal,” in G. Fimister (ed), *Tackling Child Poverty in the UK: An end in sight?*. pp. 86-87 (CPAG 2001). These initiatives include New Deal for communities; the Single Regeneration Budget; Sure Start pre-school programs; Employment Zones; Health Action Zones; Education Zones; a Phoenix Fund to promote small businesses; and community safety, crime prevention projects. Id. pp. 84-87.

advocacy, tenants' groups, and community centres have demonstrated substantial beneficial impacts on the poor.²⁰

Finally the CLS reforms in Britain come at the seminal time of the adoption of the Human Rights Act 1998 (HRA), effective in Britain in October 2000. This constitutes the nation's first written Bill of Rights and could, with a more activist judiciary, be a source of pre-eminent protections for the poor and excluded. The HRA gives "further effect" to rights in the European Convention for the Protection of Human Rights and Fundamental Freedoms, by incorporating convention rights into domestic law and requiring that all courts and tribunals in Britain "must take into account" rulings and case law under the Convention.²¹ This constitutional rights-based system requires that all legislation, primary and subordinate, must, if possible, be interpreted in a way to be compatible with the Convention.²²

The HRA has great potential for rights development and progressive social change especially in regard to fair treatment and access to redress of grievances among governmental institutions.²³ The

²⁰ Id. p. 85. Alcock, while acknowledging New Labour's commitment to "recaptur[ing] a concern with neighbourhood deprivation," admonishes that instead of "re-connect[ing] with the local authority and EU experiences of sustaining local anti-poverty action," there has been "little evidence that the incoming administration did make the reappraisal of recent experiences of local anti-poverty work a central feature of its policy planning framework." Id.

²¹ HRA 1998 s2.

²² *Ibid.*, s3(1). This obliges British courts "to find the construction consistent with the intentions of Parliament and the wording of the legislation which is nearest to the convention rights." Lord Chancellor, Lord Irvine, HL Deb col 535, 18 November 1997. If such an interpretation is not possible for primary legislation, courts will now have the power to make a "declaration of incompatibility" prompting parliamentary correction; if subordinate legislation cannot be interpreted to be compatible with the convention, courts are empowered to disapply it; and all public authorities, broadly defined to cover all courts, tribunals, agencies of central and local government, and entities performing public functions, must act in ways compatible with convention rights. HRA ss 4(2), 4(4), and 6(1). It is significant that the Government has said that a declaration of incompatibility will "almost certainly" lead to the law being changed. White Paper, *Rights Brought Home*, para 2.9 (Cmnd 7382 1997).

²³ For expositions of potential HRA applications to social policy issues see Human Rights Act, Special Issue, *Legal Action Group Journal*, Sept. 2000; Human Rights Supplement to *Law Society Gazette*, 28 Sept. 2000; CPAG Conference, 21st Century Rights—Challenging benefit decisions in light of the Human Rights Act, 19 Sept. 2000. The Government's more tempered view is

enthusiasm greeting the adoption of the HRA in Britain requires some tempering as the recent constitutionalizing of human rights in Canada, New Zealand and Israel, other neo-liberal western democracies with British legal traditions, have shown courts more inclined to embrace the Lockean “negative” rights of protecting the private spheres of human and economic behaviour from state intervention, in contrast to “positive” or social rights to services meeting basic human needs which implicate fiscal demands on the state.²⁴

A recent decision of the Court of Appeal in Britain, that could have created a “positive” right to mental health care as a corollary to enforcing a “negative” right to liberty is illustrative. The decision denied a conditional discharge to a psychiatric patient where the health authority failed to provide a consultant psychiatrist needed as a condition of the discharge under supervision, and reveals how the Human Rights Convention, article 5 “right to liberty” may be circumscribed when its implementation turns on the duty of the state to provide a needed social service.²⁵ Yet another recent Court of Appeal

illustrated in “Human Rights Act”, a quarter page newspaper Government advert in various newspapers (1 Oct. 2000) (providing the reassuring note that, “You’ll Probably Never Need It. But It’s Nice To Know It’s There.”) This writer is unaware whether the newly independent government of the United States in the 1790s similarly bought advertising space in its post-colonial newspapers to announce the newly adopted Bill of Rights to the U.S. Constitution, and whether the Founding Fathers, bereft of press secretaries, similarly counselled that their hard-earned bulwark against a powerful state was but a warm comfort and not likely needed.

²⁴ R. Hirschl, “ ‘Negative’ Rights vs. ‘Positive’ Entitlements: A Comparative Study of Judicial Interpretation of Rights in an Emerging Neo-Liberal Economic Order,” 22 *Human Rights Q.* 1060 (Nov. 2000). The HRA incorporates the European Convention on Human Rights, which is not a constitutional adoption of social rights as they are found in many national constitutions and international treaties and covenants like the International Covenant on Social, Economic and Cultural Rights, the European Social Charter of the Council of Europe, and the European Community Charter of Fundamental Social Rights. See *id.*, p. 1072 and n.28. Despite the constraints of a neo-liberal conception of rights manifested in the new constitutionalization of rights and judicial applications, Professor Hirschl points to initial evidence of “generous judicial interpretation of many “negative” rights such as those protecting privacy and personal freedom, equality, movement and property, having “the potential to plant the seeds of social change.” *Id.*, p. 1098.

²⁵ *Regina (on application of K) v Camden and Islington Health Authority*, Court of Appeal (21 Feb. 2001), Wednesday Law Report, *The Independent* (28 Feb. 2001) (Lord Phillips MR stating that the health authority’s inability to procure the level of care and treatment the mental health tribunal considered necessary

decision resting in part on Article 8's "right to respect for...[one's] home," and enforcing what the Court deemed was a "legitimate expectation" of a substantive benefit--a residential "home for life" for some elderly residents--suggests the potential of the HRA in extending social rights of the poor.²⁶ HRA effectuation for the poor and excluded will directly turn on whether a reformed legal aid system can proactively encourage and nurture human rights advocacy for these groups under the Act. There is little evidence that it has done so to date.

Notwithstanding these social and legal catalytic forces unleashed by New Labour in the late 1990s, the Community Legal Service appears relatively oblivious to these factors. The LSC's Corporate Plan 2000/01–2003/04 made no reference to the Government's goal of ending child poverty and almost no reference to social exclusion elimination.²⁷ According to David Lock, MP, then LCD Parliamentary Secretary under the Lord Chancellor most responsible for the new Community Legal Service, "There are no specific CLS initiatives or targets in relation

for discharge of a patient from hospital did not violate the right to liberty of article 5 of the Human Rights Convention).

²⁶ *R v North & East Devon Health Authority ex p Coughlan* (2000) 3 All ER 850 (CA). This might also be shown in a pending case before the Supreme Court of Canada, which will determine whether under the Canadian Charter of Rights and Freedoms and the Government of Quebec's Charter, there is a right to an adequate level of social assistance for those in need. The case of *Gosselin v. Quebec*, to be argued in the fall of 2001, involves a single employable woman under 30, not in a workfare program, who was cut from an entitlement of \$434 monthly to \$158 monthly and who went homeless as a result in Montreal. Section 45 of the Quebec Charter of Human Rights and Freedoms provides for a "right...to measures of financial assistance and to social measures provided for by law, susceptible of ensuring such person an acceptable standard of living." (For details access www.equalityrights.org/ccpi)

²⁷ Plan, p.7. The Corporate Plan for 2000/01 to 2003/04 does adopt a rather nondescript and minimal caseload yardstick to "[secure] greater social justice and [reduce] social exclusion" through increasing by 5% in four years "the number of people who receive suitable assistance in priority areas of law involving issues of fundamental rights or social exclusion." *Ibid.*, p. 11. The new edition of the LSC Corporate Plan 2001/02-2003/04 has a new preface page and added "vision" for services in 2004 to bring about, "Justice for people whose legal needs concern their fundamental rights or place them at risk of falling into, or provide an opportunity to rise out of, social exclusion." *Id.* p.4. But the contents of the Plan remains fundamentally the same as the prior edition.

to...child poverty...[except] under the overall heading of tackling social exclusion.”²⁸

Conversely, legal advocacy and advice assistance was revealingly absent in the Government’s comprehensive, first annual report, *Opportunity for all*, detailing all the new Government’s policy priorities and “key initiatives” for “tackling poverty and social exclusion.”²⁹ The Prime Minister’s Social Exclusion Unit’s major reports, *National Strategy for Neighbourhood Renewal: Policy Action Team Audit*³⁰ and *A New Commitment to Neighbourhood Renewal*³¹ entirely ignore the role of legal aid advocacy and independent advice agencies, as well as the Community Legal Service, in its comprehensive review of social exclusion problems and remedies for community regeneration and empowerment. The absence is especially pronounced in the *Policy Action Team Audit* which assembled eighteen teams scrutinizing the host of social problem areas, including employment, housing, community self-help, education and “better information,” yet makes no mention of advocacy or advice in its multifold findings and recommendations. Similarly, the close to 900 neighbourhood and community regeneration schemes generally share the common failure of incorporating or “joining” advocacy and advice services whose empowering thrust could complement and better realize the objectives of these local program efforts.

The void of advocacy and advice services in the national anti-poverty and social inclusion plans has received little public attention as yet. One of the few critical observers, the London Advice Services Alliance (LASA), after detailing an impressive track record that independent advice agencies have generated, has observed that although “the advice sector has always considered tackling social exclusion as central to its work...the role of advice work in addressing social exclusion is conspicuous by its absence on the national agenda.”³²

²⁸ Written Answer of 10 April 2001 to a Parliamentary Question of Paul Stinchcombe, MP.

²⁹ DSS, *Opportunity for all: tackling poverty and social exclusion* (Cm 4445, 1999). The second annual report offers only a brief description of the new CLS in its 240 page report of anti-poverty and social inclusion measures. DSS, *Opportunity for all, One year on: making a difference* (Cm 4865, 2000), p. 158.

³⁰ Cabinet Office (Jan. 2001) (www.cabinet-office.gov.uk/seu).

³¹ Cabinet Office (Jan. 2001) (www.cabinet-office.gov.uk/seu).

³² Holdsworth, *Social Exclusion: Is Advice a Solution?*, *op. cit.*, p.6. The Law Centres Federation similarly reported that, “The Government’s response to the argument that social justice and legal and advice services have a key role

Yet a resourceful legal services and advice service is fundamental to a civil and just Britain. As Professor Hazel Genn has written, “the inability to secure redress for what are seen as morally justifiable claims and a sense of exclusion from the apparatus provided by the state for dispute resolution lead[s] to frustration, apathy and lack of confidence in institutions.”³³

The disjunctures described above may reflect an historical divide in Britain between the legal system of law, courts and lawyers and social policy planning and programs. More recent developments of public interest law and policy advocacy, as documented in the seminal work of Professors Harlow and Rawlings, *Pressure Through Law*, have shown, though, how the law and legal aid have been utilized for broader, social collective objectives.³⁴ Perhaps, too, the void derives from the historical legacy of the administration of legal aid left until 1989 to a private interest group, the Law Society, and its place within the Lord Chancellor Department, until very recently a backwater niche in Government divorced from the social policies of Government affecting the poor and the excluded.³⁵ The LCD, too, too, has had a limited vision of its potential in furthering social justice among agencies of Government and in the private market.³⁶

By contrast in the United States, Legal Services for the poor had its origins in the mid-1960s arising as a national War on Poverty initiative, one of the few that has continued and maintained an anti-poverty ethos

to play in combating social exclusion has been disappointing.” B. Nightingale, *Human Rights, Human Dignity*, annual report of the Law Centres Federation (Nov. 2000).

³³ H. Genn, *Paths to Justice: What People Think and Do About Going to Law* 254-5 (Hart, Oxford 1999).

³⁴ C. Harlow & R. Rawlings, *Pressure Through Law* (Routledge 1992).

³⁵ Thus one observer notes that “at central government level, the [LCD] does not have a tradition of working with other departments on social exclusion issues...,” and the LCD was not one of the ten major departments working to develop a national social exclusion strategy on neighbourhood renewal. Holdsworth, *Social Exclusion: Is Advice a Solution?*, *op. cit.*, pp.5,8.

³⁶ Perhaps the nation’s leading strategic thinker on access to justices issues, Roger Smith, has urged a broader policy role for the LCD to fulfil what he properly maintains is the constitutional role which access to justice serves in Britain. He has proposed that the LCD assume an institutional lead across all agencies of Government by undertaking a “justice audit” as well as assuming responsibility for the adequate dissemination of information about the law to the public (what is called in Canada “public legal education”). R. Smith, *Justice—Redressing the Balance*, pp. 85-95 (Legal Action Group 1997).

(albeit later clothed in the rhetoric of access to justice) despite a hostile Reagan Administration in the 1980s and mid-1990s Republican Congress efforts to end or alter its course.³⁷

The catalytic social and legal forces described above should be leading to a major refashioning of the primary government funded service for legal advocacy and advice whose clients and client communities are precisely the low income and excluded people of Britain. This will necessitate defining a new social justice and human rights mission for the Community Legal Service. An outline for such a mission follows beginning with an analysis of how despite the expenditure of hundreds of millions in civil legal aid yearly, the systemic problems and injustices faced by legal aid clients are unaddressed by the reformed legal aid scheme. Thereafter the author addresses the inability of the inherited and privatized, “judicare” model to deliver social justice to consumers of civil legal aid. The writer then explains why the future of a social justice mission may ultimately rest on whether courts in Britain establish a broad constitutional right to civil legal aid under the new Human Rights Act. A summary of recommendations for a revitalized social justice mission is included in the conclusion.

2. A Strategy to Produce Larger Civil Justice Impacts with Limited Resources

The lack of a strategic social justice mission and results orientation within the new Community Legal Service (CLS) has meant that it has missed the forest of broad impacts on the lives of the poor and excluded for the trees of transactional cost efficiencies in individual legal aid cases. The permanent state of limited resources to meet legitimate unmet needs for civil legal services, especially in a CLS where the civil side is subservient to a demand driven criminal legal aid budget, strongly suggests new policies to produce larger social and justice impacts that materially help as many clients and client communities as possible.

³⁷

In 1965 the Johnson Administration had included a Legal Services division in its anti-poverty office, the Office of Economic Opportunity (OEO). This later became in 1974 the Legal Services Corporation, a quasi-independent congressionally funded entity created under the Nixon Administration. For a history of these early years see E. Johnson, *Justice and Reform—The Formative Years of the OEO Legal Services Program* (Russell Sage Foundation 1974).

Limits of individual casework

A reinvigorated social justice mission can seize the opportunities for rights enforcement and development under the Human Rights Act, and “join” with the anti-poverty, social inclusion and community regeneration initiatives of the Government to produce more results from the expenditure of civil legal services funds. This mission would view CLS’ clients as including those large numbers of the poor and excluded who will never be walking into the offices of providers. The current sole reliance on individual case services ignores underlying problems of systemic inequalities and unfairness in the marketplace and government programs that the smart use of publicly funded legal services could address.³⁸

Among scores of examples one might employ, local council Housing Benefit (HB) maladministration, a scandal that has gone unremedied for years, causes people to lose homes, become mired in debt, creates work disincentives in transitions from “welfare to work”, and even drives some victims to attempt suicide.³⁹ The Legal Services Commission (LSC) continues to fund possession and rent arrears housing cases where HB maladministration is the root cause; it would be more cost effective, as well as fulfilling a larger social justice mission, to insure that CLS advocates are in place with a mandate and funding to pursue legal actions that will reform some of the worst local councils whose actions are harming thousands by undermining the HB statutory entitlement. Because the maladministration of Housing Benefit, accurately described by Paul Convery as “the single weakest link in the Government’s ‘making work pay’ strategy”, discourages or penalizes those now on Income Support or Job Seekers Allowance to make the

³⁸ The LSC has inherited and reinforced through its management imperatives and funding incentives this individual case model, enshrining it and the personal injury case as the paradigm in the Commission’s lengthy Legal Practice Manual for providers. Interview with Russell Campbell, chief solicitor, Shelter, 22 Jan. 2001. This critique of the individual case model in no way denigrates the value of individual client service, nor the potential for change that can emanate out of aggressive representation of individual clients.

³⁹ See Commission for Local Government in England, *Local Government Ombudsman Annual Report 1999-2000*, pp. 10-11 (noting an 83% increase in HB complaints with 60% of nation’s HB complaints originating in four London boroughs of Lambeth, Hackney, Islington and Southwark). Local authorities and registered social landlords continue to seek evictions where council HB problems are the cause of arrears. See J. Luba and B. Harris, “Housing benefit law update,” *Legal Action Group Journal* (Dec. 2000), p. 29.

transition from “welfare to work,” such advocacy would also further the anti-poverty and welfare- to- work policies of Government.⁴⁰

In the United States, Legal Services advocates have long embraced a larger role for civil legal aid through advocacy that has included a strategic view of litigation, involving class actions and test cases, legislative and social policy advocacy, representation of and support to organizations of low income clients, consulting to government agencies, and community legal education. Well-prepared test case and affirmative litigation, founded upon compelling equities and articulated hardships experienced by the poor, have given even a conservative judiciary opportunities to develop poverty law by protecting existing or extending new rights through an evolving common law, or statutory or constitutional law interpretation. Advocates apprised of the central roles that statutory and regulatory law have in determining the lives and opportunities for the poor and excluded, have worked to create or change primary and secondary legislation, or sometimes to forestall repressive laws from getting adopted. And advocates have fulfilled a much broader role as a voice for clients or helping clients and organizations find their own voice in ways that empower both individuals and communities.⁴¹ Millions of low income people in the United States have benefited through such cost-efficient, impact legal services, supplementing not replacing a traditional and still vital one-to-one service.

An enlarged legal impacts mission for the Community Legal Service is appropriate in Britain despite differences in US and UK legal systems and cultures that might appear to make this role more feasible in the United States such as the presence of class actions; the absence of the British cost indemnity rule, making the loser liable for the victor’s costs (but waived in legal aid cases); a greater willingness to hear the

⁴⁰ P. Convery, “An agency for the Working Age,” 117 *Commentary* (Sept. 2000) (describing HB as “the single weakest link in the Government’s entire ‘making work pay’ strategy) (www.uuy.org.uk). The work disincentive was made graphic by an Employment Service, Lone Parent Advisor who had been working both in the London Boroughs of Camden and Islington. He told this writer last Fall that lone parents in Islington, where HB administration is quite poor, will not, knowing this fact, make a work transition in contrast to lone parents in Camden, where administration is relatively good and where lone parents will go forward knowing that changes in HB will be efficiently and timely rendered.

⁴¹ See Brennan Center for Justice, New York University School of Law, *Legal Services Lawyers Work Closely with Communities to Help Those in Need*, p. 18 (2000) (www.brennancenter.org).

“social facts” in the case and receive *amicus curiae* briefs from interested groups. Perhaps, most importantly, unlike the British system which, in Francis Bacon’s words, described the courts here as “lions beneath the throne,” now the sovereign Parliament, the U.S. has had a more active judiciary that is constitutionally a co-equal branch of government and one that can now even have the final say in Presidential elections.⁴²

Yet change can even come to such change-resistant institutions as the judiciary and legal profession. In Professors Harlow and Rawlings’ influential undertaking, *Pressure Through Law*, the authors traced the evolution in Britain of using law and legal avenues for broader collective objectives, including “litigation as a method of campaigning,” vindicating not just individual rights but collective rights as well.⁴³ Public interest lawyers in Britain have begun to use the law to bring about political and social change for the excluded and poor; community lawyers use the law to obtain community goals in areas like housing; and the law centre movement itself has altered lawyer’s own perceptions about the role of legal services serving communities. “[P]ressure through law has always been part of the British tradition,” these authors conclude.⁴⁴ The adoption of the Human Rights Act may now give judges here the courage and the instrumentality through a statute of overriding constitutional rights to address heretofore ignored state injustices toward the poor and excluded.

Impacting on poverty and exclusion

A mission to adopt a broader results orientation impacting on poverty and social exclusion, firstly requires the CLS to make explicit a role in ending poverty and social exclusion by insuring full access to statutory

⁴² Comparative differences are set out in T. Prosser, *Test Cases for the Poor—Legal techniques in the politics of social welfare*, pp. 8-13 (CPAG 1983); R. Smith, ed., *Achieving Social Justice*, pp. 34, 51-8 (LAG 1996).

⁴³ Harlow and Rawlings, *op. cit.*, pp. 1, 7. As well, a recent pattern of court decisions in Britain evidences significant shifts in judicial thinking and a willingness to pursue a higher level of judicial intervention. See, e.g., the 1996 Court of Appeal decision in *R v Secretary of State for Social Security, ex parte Joint Council for the Welfare of Immigrants* [1996] 4 All ER 385, [1997] 1 WLR 275, holding ultra vires regulations that removed an entitlement to urgent cases payments from those seeking asylum. The quick parliamentary overruling of the latter decision through passage of primary legislation also shows the limits of judicial intervention.

⁴⁴ *Id.*, pp. 5-6. The authors critique a more traditional view of a “political constitution” of rights “claimed” via the political process. See J. Griffith, “The Political Constitution,” 42 *Modern Law Review* 1 (1979).

in-work and out-of-work income benefits and services, and enforcement of employment rights, lynch-pins of an anti-poverty and social inclusion national strategy. “It is not enough for people to have rights; they must be confident they can enforce those rights if need be,” the Lord Chancellor has affirmed.⁴⁵

A strategy for enforcement and take-up of entitlements would necessitate addressing historic and continuing underspending in social welfare areas of civil legal aid wherein now over two-thirds of spending goes to criminal and matrimonial cases, not surprisingly the bread and butter work of solicitors.⁴⁶ Illustrating disparities in service expenditures, at the inception of the CLS, in the category of Legal Advice and Assistance (now termed Legal Help), of £171.5 million spent in civil and criminal areas, expenditures for employment related problems was but £1.9 million; welfare benefits, £14.9 million; landlord & tenant, housing, £13 million; consumer, hire purchase and debt, £8.9 million.⁴⁷

Many believe the Government failed to keep a commitment to redirect savings from the reforms’ elimination of personal injury and other cases from the ambit of legal aid to social welfare law areas which the LCD White Paper, *Modernizing Justice*, identified as one of the greatest priorities to “assist people to avoid or climb out of social exclusion.”⁴⁸ Savings have not gone into expanding services for various social welfare legal needs, with even evidence of a diminution of spending in this area.⁴⁹ And very recent research has revealed perhaps unanticipated adverse impacts of some of the reforms’ “excluded” cases, such as the business case exclusion which has apparently hurt self-employed small businesspeople faced with business failures.⁵⁰

⁴⁵ Forward to *Modernizing Justice*, *op. cit.*

⁴⁶ Family law cases provides the “foundation for the Community Legal Services—the vast majority of work is carried out by suppliers who provide family services as their core category of law.” Email from Allison McGarrity, CLS Policy Advisor, Policy and Legal Dept., 1 Feb. 2001.

⁴⁷ Legal Aid Board, *Annual Report 1999-00*, p. 116.

⁴⁸ *Modernizing Justice*, *op. cit.*, para 3.7.

⁴⁹ Thus Legal Help (i.e. advice) in the contract category of social welfare law will be reduced from £76.1 million in 2000/01 to £64.3 in 2001/02. LSC, Corporate Plan 2001/02-2003/04, p. 14.

⁵⁰ T. Goriely and P.D. Gupta, *Breaking the Code: The impact of legal aid reforms on general civil litigation* (Institute of Advanced Legal Studies, June 2001). Ms. Goriely has said of her findings, “Business failure is a fast track to social exclusion.” IALS Seminar, 3 July 2001.

The net legal aid costs and hence “savings” for personal injury cases in 1998-99, now pursued through private conditional fee arrangements with lawyers, was £68.5 million. When David Lock, MP, then LCD Parliamentary Secretary, was recently asked how these savings expanded legal advice and representation, he pointed only to a £28 million (12%) increase spending for overall civil advice and assistance (now termed Legal Help).⁵¹

Skewed priorities were at the heart of New Labour’s criticism of the prior Legal Aid system’s demand and lawyer-driven system. Mr. Lock had stated, for example:

...Too many types of disputes are covered and the legal help outside litigation, for debt and welfare, is far too limited. Legal Aid...has not kept pace with the determination of cases outside the court system – and tribunals. You can get legal aid for tripping over a pavement but not for a race or sex discrimination case. If we were starting to design a system from scratch this is not a judgment we would have made.⁵²

A telling irony of Mr. Lock’s statement is that although reforms quickly excluded Mr. Lock’s pavement tripping tort case, and all other personal injury cases, the system continues to exclude legal aid at social security tribunals, hearing appeals of denials to three dozen, safety-net benefits, and the employment tribunals, remedying unfair dismissals and employment discrimination appeals.

The efficacy of tribunal representation has long been known, as have been a half century’s urging of extension of legal aid to tribunals—the Welfare State’s primary bulwark against administrative injustice.⁵³

⁵¹ Written Answers of 3 May 2001 to Parliamentary Questions of Paul Stinchcombe, MP. Steve Orchard, CLS Chief Executive, has said that savings have gone primarily into two areas: an increase in matrimonial law solicitor fees, and an expansion in eligibility for Legal Help (not Representation) effective in the fall of 2001. Interview with Orchard, 12 Jan. 2001.

⁵² Speech of 26 Nov. 1999 to Legal Service Regional Conference, Newcastle upon Tyne, as quoted in C. Haley, “Public funding for representation at tribunals,” *Legal Action Group Journal* 17 (Aug. 2000).

⁵³ The Rushcliffe Committee Report of 1945 (Cm. 6641), one of the first reports leading to the establishment of legal aid in Britain envisioned legal aid for tribunals with repeated calls for its extension since. See *Administrative Justice—Some Necessary Reforms*, Report of the Committee of the Justice—All Souls Review of Administrative Law in the United Kingdom, p. 228 (Oxford 1988). Current social security tribunal reversal data shows that with a representative the average reversal rate is 62.4% versus 48.9% where there is an appellant present with no representation versus 16.9% where there is no appellant in

The availability of legal aid could also help correct institutional failings of the tribunal system such as long delays, during which appellants are denied of necessities of life; non-appearances of appellants at hearings because of English language inadequacy or lack of understanding; and institutional racism in the very procedure established for redress of grievances.⁵⁴ A Community Legal Service that fails to embrace representation before tribunals is bereft of an anti-poverty mission.

Inequities in DSS' system of adjudications and appeals are illustrative of diverse welfare state injustices where impact advocacy could embody an anti-poverty strategy. The Social Security Commissioners, with the status of High Court judges deciding questions of law at the second appeal tier, have themselves roundly condemned the bias and unfairness of the current appeals systems. Commissioner Jacobs, raising questions of compliance with Article 6(1) of the European Convention on Human Rights, has, for example, detailed examples of how the appeals "system is structured in favour of the Secretary of State."⁵⁵ Commissioner Hywels, similarly, has stated that:

...The implications for a tribunal process in which the secretary of state, who is a party to every appeal, also makes the rules, is the paymaster, controls the entire tribunal administration, and can even set aside the result (s.13(3))

attendance (and one assumes no representation). DSS, Quarterly Appeal Tribunal Statistics (June 2000). (Those data do not include an additional number of reversals at Commissioner and court levels.) In employment tribunals where 2/3 of employee appellants are not represented, only 5% of these win their cases. Law Centres Federation, *Social Justice and Social Exclusion*, *op. cit.*, p. 15. The unrepresented appellant worker is often highly prejudiced by the presence of the represented employer at these appeals. H. and Y. Genn, *The Effectiveness of Representation at Tribunals*, report to the Lord Chancellor (July 1989).

⁵⁴ See M. Farrelly, *The Reasons Why Appellants Fail to Attend Their Social Security Appeals Tribunals*, DPhil Thesis, Univ. of Birmingham, 1989, p. 459 (appellants' experiencing "intimidation, alienation and powerlessness"), as quoted in R. Lister, *The Exclusive Society—Citizenship and the Poor* 36 (1990). According to Farrelly, 98% of those who did not attend tribunals did not understand their appeal papers, a problem worst for those for whom English was not their first language. *Ibid.* See also House of Commons Select Committee on Social Security, Eighth Report 1998-99, *The Modernization of Social Security Appeals*, paras. 28-29 (evidence of racial bias among tribunal members and lack of equal opportunity training in Independent Tribunal Service).

⁵⁵ CDLA 4734/99 para 47.

Social Security Act 1998) are perhaps too obvious to need stating.⁵⁶

One signal failing, ignored as yet by advocates and judges in Britain, is the policy of the DDS and its Benefits Agency of terminating benefits when it thinks appropriate without providing a hearing opportunity *before* the termination to allow the claimant to contest the adverse action before an impartial decision maker. Since appeal tribunal statistics show the DDS/BA decisions to cut benefits get reversed in almost two-thirds of appeals where the appellant and a representative appear, the current policy is a source of great injustice and hardship to a large majority of innocent claimants subjected to terminations.⁵⁷ The time interval between an adverse decision, appeal and corrective payment averages well over seven months.⁵⁸ Dire hardship, as illustrated through terminated Income Support families interviewed by the author, often results from the loss of all subsistence income to a household, commonly a family with children.⁵⁹ In the United States for the past 30 year years

⁵⁶ Commissioner Hywels' note, "A real and troubling question", appears in his website at www.hywels.demon.co.uk.

⁵⁷ For example, claimants appealing adverse Disability Living Allowance decisions win at a 65.7% rate; for Income Support, 66.4%; and Incapacity Benefit, 66%. DSS, Quarterly Appeal Tribunal Statistics, p. 13 (Sept. 2000). DSS erroneous decisions and reversals are probably higher as these numbers do not include reversals at the second tier Commissioner and High Court levels, nor include reversals at the informal "review" stage before an appeal is lodged.

⁵⁸ DDS data only record the average time between lodgement of appeal and first hearing, i.e. 27.79 weeks, about seven months. DDS, Analytic Services Division, Quarter ending Dec. 2000. There is often a further delay between date of adverse action and appeal lodgement, due to lack of knowledge of appeal rights, and often additional months delay, in fully implementing a decision reversing the adverse action.

⁵⁹ One family interviewed by this writer included a lone parent, mother of three in Eccles, Manchester, who was erroneously cut from an Income Support grant of £120 weekly last July on allegations of cohabitation. Her children began school without proper clothing and uniforms; a girl was kept out of school on days she had no money for cooking classes and school trips; the phone was cut off and passported health benefits lapsed; the mother lost a stone of weight, developed great anxiety which prevented her from enrolling in a job training course; and Housing Benefit and Council Tax Benefit lapsed. The tribunal decided in her favour, but corrective payments could not cure all these harms.

Another interviewed by the author was a lone parent mother of six children, youngest child being 6 months old, from Hull had her £177.20

under a landmark U.S. Supreme Court decision litigated by legal services lawyers, *Goldberg v Kelly*, welfare claimants have been afforded a constitutional due process of law right to have an oral, impartial decision-maker hearing *before* the termination of benefits.⁶⁰ *Goldberg's* application of principles of fundamental fairness to the loss of means tested benefits could well inform British courts to interpret the right to a "fair hearing" of article 6 and the right against improper deprivation of property under article 1 of protocol 1 of the HRA to provide for a similar opportunity to be heard before loss of DSS benefits.⁶¹

This illustration highlights the importance of the Human Rights Act as a vehicle for broad impact advocacy on behalf of the poor and excluded. Its article 6 provision has been interpreted beyond the confines of the right to a "fair hearing" to insure a "right to fair administration of justice." Its article 8 right to respect for private and family life and the home, can protect the right to create relationships and to develop the personality in relations with others, as well as benefits and services intended to further family life and protect subsistence

weekly in Income Support also terminated on allegations of cohabitation with the following consequences: her oldest daughter moved out of the house so "there would not be another mouth to feed"; her youngest lacked adequate clothing and nappies; the mother took light bulbs out of her children's rooms to cut down on electricity bills; her council served her with a possession notice for rent non-payment; the family went without many fresh foods; and the mother "cried a lot", was under great stress, and was constantly angry at her children. The DSS/BA case of cohabitation was sufficiently indefensible that no one from the agency came to the tribunal hearing to defend the decision, and, according to the mother, the tribunal chairman described the case as "absolutely ridiculous" with "no real evidence" to support the decision.

The House of Commons Select Committee on Social Security has heard evidence on hardships arising from delays in the social security tribunal system, but Parliament has yet to remedy the problem to provide adequate protections for claimants. See *Eighth Report—The Modernization of Social Security Appeals* paras 6-7 (1998-99).

⁶⁰ *Goldberg v Kelly*, 397 U.S. 254 (1970). The Court held that in the presence of "brutal need", the interest of the claimant in the uninterrupted receipt of essential benefits, coupled with the state's interest that payments not be erroneously terminated, outweighs the state's concerns for any increase in fiscal and administrative burdens. (For decision see www.findlaw.com.)

⁶¹ See J. Stein, "The Right to a Hearing Before Termination of Benefits and the Human Rights Act", 8 *Journal of Social Security Law* 146 (2001).

needs.⁶² Article 14 contains a very broad prohibition against discrimination on stated grounds such as sex, race, colour, language and national and social origin “or other status”. Akin to the equal protection clause in the United States Constitution, this provision has great potential to address discriminatory effects of government practices and programs, perhaps even viewing poverty as a “status” within the ambit of the article. Yet such impact advocacy under the HRA will be very much circumscribed without a reorientation in CLS funding and policies.⁶³

Impacting on employment, ethnic minorities, and community renewal issues

An anti-poverty mission for the CLS in Britain should support the Government’s current anti-poverty strategy of fostering employment and transitions from “welfare to work.” The CLS minimizes employment law, much less establishing a priority effort to remedy structural barriers to sustained employment and employment opportunities.⁶⁴ Employment law and policy advocacy could protect entitlements to in-work benefits like the new Working Families Tax Credit (WFTC), Disabled Person’s Tax Credit, the Minimum Wage law and maternity and paternity statutory rights; address employment discrimination against ethnic minorities and the disabled; press for access to and expansion of child care services for lone parents, and to opening up access to further and higher education for them; and it can remedy work disincentives such as local authority maladministration of Housing Benefit, a key safety net benefit for the person transitioning to work. As an example, the WFTC, introduced in October 1999 by Prime Minister Tony Blair to “give the biggest boost ever to the working poor,”

⁶² The provision’s “right to respect for...his home” was recently applied by the Court of Appeal here on behalf of elderly nursing home residents to enforce a substantive benefit of a “home for life” promised them. *R v North & East Devon Health Authority ex p Coughlan* (2000) 3 All ER 850 (CA).

⁶³ The potential for litigation under the HRA for low income and excluded groups of people across the range of poverty law areas was set forth by specialist advocates in a series of articles appearing in *Legal Action Group Journal* and *Law Society Gazette, Human Rights Supplement*, both of Sept. 2000. The Human Rights Act Research Unit at King’s College London plays an important monitoring role, but fails to focus upon the HRA and the poor (see www.kcl.ac.uk/hraru).

⁶⁴ For 1999-00, only about £2 million out of £171 million for Legal Help was spent for employment related cases. LAB, *Annual Report 1999-00*, p. 116. Of 5,156 contracts for legal aid work let in 1999, only about 7% were for employment law; about 90% were for family law.

has in its first year of operations revealed problems such as employer retaliation towards employees claiming WFTC, and policy deficiencies, that legal services advocacy could help expose and remedy.⁶⁵ Advocacy could also enhance another area of New Labour initiatives, maternity and paternity statutory rights. These are frequently violated with, for example, large numbers of pregnant women sacked illegally or threatened with dismissal; forced to resign or work fewer hours; denied time off for ante-natal appointments and to return to the same job after birth; and with fathers wrongfully told by employers that there is no paternity leave.⁶⁶

A CLS social exclusion and human rights impacts strategy should also target the legal problems of racial and ethnic minorities. CLS funded advocacy can fill the void appearing among the remedial actions for ethnic minority exclusions recommended by the Prime Minister's Social Exclusion Unit.⁶⁷ Legal advocacy and advice are precisely the instrumentalities for implementing the Unit's report which recommended tackling racial discrimination, improving information available to these communities, and insuring access to mainstream services.⁶⁸

A broader impacts strategy must also lead to a rethinking of the CLS provision of legal advice and representation solely to individuals which ignores the more strategic use of CLS funding for advocacy and advice efforts around community regeneration and social inclusion. Despite the across government chorus for "joined-up" government and "partnerships" with the voluntary sector that recognize the right of

⁶⁵ See J. Wheatley, *Work in progress: CAB clients' experiences of Working Families' Tax Credit* (NACAB, Feb. 2001) (www.nacab.org.uk).

⁶⁶ See J. Wheatley, *Birth Rights: a CAB evidence report on maternity and paternity rights at work* (NACAB, March 2001) (www.nacab.org.uk).

⁶⁷ SEU, *Minority Ethnic Issues in Social Exclusion and Neighbourhood Renewal: a guide to the work of the Social Exclusion Unit and the Policy Action Teams so far* (Cabinet Office 2000). The needs of ethnic minorities were recognized in a framework document published shortly before with a Foreword by the Prime Minister. SEU, *National Strategy for Neighbourhood Renewal: a framework for consultation* (Cabinet Office 2000).

⁶⁸ *Minority Ethnic Issues, op. cit.*, pp. 8-9. For a critique of New Labour's policies toward ethnic minorities, see G. Craig, "Race and New Labour." in G. Fimister, (ed.), *Tackling child poverty in the UK: An end in sight?*, pp. 92-100 (CPAG 2001). Symptomatic of policy failings, Professor Craig notes that the seemingly comprehensive *Report of the Commission on the Future of Multi-Ethnic Britain*, did not "adequately address the deficiencies of much of social and welfare policy towards Britain's minorities." *Id.* p. 99.

voluntary groups to pursue campaigning,⁶⁹ the government has failed to recognize the potential of the new CLS to promote “capacity building” and “community empowerment,” by integrating legal services and advice into the various Blair Government neighbourhood revitalization initiatives such as the Single Regeneration funding, and New Deal for Communities and Employment Zones. Recent local initiatives are instructive in demonstrating this potential such as the Sheffield Law Centre setting up an Ethnic Minorities Social Exclusion Action Project through the Single Regeneration program, and the Coalfields Regeneration Trust and National Association of CABx joining to address debt and Welfare rights issues in their region.

Reforming the legal aid legacy

An anti-poverty and human rights impact strategy will require a further refashioning of the Legal Aid legacy to include:

- Injecting flexibility into the Legal Services Commission (LSC) contracting and individual case schemes as these denigrate an integrated, holistic approach to legal assistance, and discourage advocates from looking at the larger picture of legal problems and taking steps, such as working with community organizations and pursuing community education, to remedy them.⁷⁰ For example, the North Kensington Law Centre, which will be losing its non-CLS funding for race harassment and domestic violence community forums it has been successfully running, sees no opening for CLS funding of these efforts as out of necessity it must pursue a CLS civil legal service contract.⁷¹
- To step beyond the individualist case model, and to maximize remedies for large groups of aggrieved clients, the CLS should fund what are called representative actions (akin to class actions in the United States). This would allow groups of people, whether they be all tenants of a borough’s council housing, child claimants for a Disability Living Allowance, or lone parents seeking access to child care, to be “represented” by campaigning organizations like the Child Poverty Action Group. Thanks to courts’ liberal interpretation of the “standing” test for judicial review in the public law field, groups like CPAG, as a “private attorney-general”

⁶⁹ Relationships with the private sector are set forth in the Home Office’s *Compact* (1988).

⁷⁰ See N. Ardill and M. Holdsworth, “The justice debate: Reclaiming the poverty agenda”, *Legal Action Group Journal* (June 2001).

⁷¹ Interview with Ann Lewis, director, North Kensington Law Centre, 2 May 2001.

- enforcing the law for the poor, have already obtained judicial approval for their “representative” status in litigation.⁷²
- The progressive CLS reform of the Lord Chancellor Department authorizing Legal Representation and Support Funding for cases manifesting a “significant wider public interest” to obtain “real benefits for individuals other than the client,”⁷³ essentially lowers the usual thresholds in the legal aid merits and cost-benefits tests. But to date this innovative Funding Code expansion has not as yet led to funding any significant “public interest” civil case for the poor or excluded or under the HRA. Although this may be due to an institutional lack of capacities and skill, motivation and awareness among the large majority of legal aid practitioners, part may also be the provision’s subjective and controversial restrictive funding criteria (such as a “competing interests” factor); reliance on a single individual pursuing the public interest action that can too easily be mooted by a settlement offer to the person; and the single gatekeeper structure of the Legal Services Commission and new Public Interest Advisory Committee passing on every such “public interest” funded case in the nation.⁷⁴
 - Today’s astute poverty law advocates must often be experts in all aspects of law, administration and social policy in various specialty poverty law areas. To fill this glaring gap within the CLS, there is a compelling need for national and regional centres that have the mandate to provide comprehensive expertise to first tier providers, but equally important, to help initiate advocacy in these

⁷² The LCD Consultation Paper, *Representative Claims: Proposed New Procedures* (Feb. 2001), intended to widen the scope of representative actions for organizations in private law actions, is ambiguous on whether representative actions will be funded by the CLS. The premise of the Paper recognizes though that “...in some situations individuals may not be in a position to pursue a matter themselves....The Government’s policy of ensuring access to justice will be better served if a wider range of bodies is empowered to protect the interests of those that they represent.” *Id.* p. 3. See K. Ashton, “The justice debate: Public interest litigation–realising the potential”, *Legal Action Group Journal* (July 2001).

⁷³ LSC, Funding Code Guidance, s 5.2.

⁷⁴ See K. Ashton, “The justice debate: Public interest litigation–realising the potential”, *Legal Action Group Journal* (July 2001); J. Gould, “Advising on public interest cases,” *LAG Journal* (Dec. 2000), pp. 17-18; Ashton, “New opportunities for public interest litigation,” *LAG Journal* (Dec. 2000), pp. 18-20. Public interest litigation needs more flexibility and multiplicity of approaches than this narrow, guarded scheme presently allows.

areas as well. In the States these national centres have proved invaluable in developing expert, specialized knowledge, and providing support and training to practitioners, as well as pursuing impact advocacy. The LSC's current Alternative Delivery pilots, by funding Shelter, Liberty and the Public Law Project, are beginning to recognize the value of second tier, not-for-profit providers but only to provide technical advice assistance to front line legal aid providers, thereby ignoring a larger social justice mission of initiating impact advocacy. Yet these pilots could be the precursors of centres of advocacy in critical areas of law like social security, housing, economic development, immigration, health, consumer, employment, disability, education and children's law, and community care.

- The LSC's prime response to addressing unmet needs of clients and communities has been to establish local Partnerships of CLS providers, local authorities (who have no duty to fund legal services),⁷⁵ not for profit agencies, and LSC representatives. The presence of a local authority, whose interests may often be in conflict with local residents harmed by local authority actions, creates a flawed system to set service priorities and for insuring that systemic problems of poverty and exclusion are addressed by the LSC and providers.⁷⁶
- Finally, much of the best impact advocacy in Britain on poverty, social exclusion and human rights issues is being done not by the large majority of CLS funded private solicitors or barristers but by

⁷⁵ A disturbing pattern has arisen with the birth of the CLS of local authorities withdrawing funding. Thus concurrent with the launch of the CLS and Partnerships, the Islington Law Centre in London for the year 2000 reported losing one-third of its Council funding, with other Islington advice agencies having suffered Council funding losses earlier. Islington Law Centre, *Annual Report 2000*, p. 2.

⁷⁶ One law centre participant in recent Partnership meetings found that local authority deficiencies toward housing for asylum seekers and in the area of special education for challenged children never received Partnership and LSC priority attention due to the censoring role of the local authority and LSC Regional Legal Services Committee representative. Even as senior a figure as David Lock, former LCD Parliamentary Secretary, has opined that a request for a CLS funded judicial review of a local authority's action to close social or health services, should first be reviewed and approved by the local Partnership (which includes that authority) and Regional Legal Service Committee of the LSC. Interview with David Lock MP, 27 March 2001. If this were indeed national policy, then community-oriented impact advocacy would be subjected to severe bureaucratic restraints.

extraordinarily capable non-profit groups like the CPAG, Disability Alliance, Maternity Alliance, MIND, Day Care Trust, Unemployment & Youthaid, National Council of Lone Parents, and Gingerbread, and within independent advice agencies, such as those in the London area under the London Advice Services Alliance umbrella. Most of these groups have under resourced legal offices or citizen or consumer rights offices or telephone advice lines, but most receive no CLS funding and are even deterred by the burdens and restrictions of funded contracting. To tap into their potential to achieve larger social justice impacts, the CLS should accommodate the needs of these groups by adjusting contracting requirements and inviting them into a funding stream.



Thus a new social justice impact and results orientation can both accommodate the zeal of LSC's current administrators for efficient and "best value" advocacy and the Government's national commitments on poverty, social inclusion and HRA implementation.

3. Delivering a Social Justice Mission Through Not-for-Profit Providers – Neighbourhood Law Centres and Independent Advice Agencies

The Community Legal Service, embracing an asserted hard-nosed reassessment of the Legal Aid legacy, has remarkably avoided addressing the best means of delivering a social justice mission that would beneficially impact on poverty, social exclusion and Human Rights Act implementation for client communities. But for a small, yet important increase in LSC support for not-for-profit providers, the reforms have uncritically continued the half century's virtual monopoly of a privatized delivery system for civil legal services.⁷⁷ This dominance is in conflict with a larger social justice mission that embraces, the anti-poverty, social inclusion and community regeneration goals of the Government.

⁷⁷

The £36 million in contracts to not-for-profits between January 2000 and March 2001, doubling the previous year's amount, still represents but 5% of the total CLS' civil expenditures of £784 million for 2000/01. LSC, *Corporate Plan 2001-2004*, p.11; HC Written Answer of David Lock, MP of 10 April 2001 to Paul Stinchcombe, MP. Criminal legal aid, involved forecast expenditures of £838 million in 2000/01 for the Criminal Defence Service. *Plan*, p.27.

For historical and political reasons marked by the influence of the Law Society and its administration of legal aid until 1989, Britain has been committed to the so-called *judicare* delivery model of providing a largely traditional, individual legal service primarily through private practitioners. This has given a large proportion of lawyers legal aid responsibilities *and* a reliable source of income, but has also resulted in their dictating priorities and goals for a publicly funded service. As a result, social welfare and community legal needs have gone ignored, and still do under the reformed CLS.

The broad political support for legal aid that arguably is gained by a *judicare* system embracing the majority of practitioners, may now be an empty rationale, battered away by over a decade of Lord Chancellor and media assaults.⁷⁸ The intrinsic failings of the *judicare* system, have been established in more objective criticism, such as last year's Consumers' Association survey of particularly vulnerable consumers of legal aid. In depth interviews were conducted with four groups of 80 vulnerable consumers, twenty from each group representing people with poor knowledge of English; with disadvantages including physical and sensory disabilities, and mental health problems; older people with other disadvantages; and young people.⁷⁹

This devastatingly critical report documented second-rate legal aid service from solicitors (and CABx), standing in sharp contrast to CA findings of outstanding service from law centre and independent advice and charity-linked services.⁸⁰

⁷⁸ Thus the current Lord Chancellor, Lord Irvine of Lairg, has referred to the "perception that traditional legal aid feeds lawyers' bank balances," in the context of expressing the hope that a new and successful CLS would make a "more attractive plea to Government for new resources than traditional legal aid has made." HC, Home Affairs Committee Minutes of Evidence, *Report-Work of the Lord Chancellor Department* (2 Nov. 1999) para 11.

⁷⁹ Consumers' Association, *The Community Legal Service: Access for All?* (May 2000) ("CA"). The report's author, Mick McAteer, Senior Policy Advisor at the Association (mick.mcateer@which.co.uk), worked in conjunction with support from the School of Law at the University of Westminster, Research Works, Inc., and the Market Research Department at the Association.

⁸⁰ CABx received a "very low level of satisfaction" as "transit points between advice centres" and "not as organizations where you could get actual help with a problem." *Id.*, pp. 53-4. The critique of CABx here, as well as in two internal NACAB studies on quality of CAB housing and employment advice offered by legally unsupervised, CAB lay advisors, see R. Smith, *Justice-Redressing the Balance* p. 28 (LAG 1997), does raise further questions about the CLS' commitment to CABx as appealing, high volume advice providers, and the CLS' current 208 General Civil Contracts held with CABx.

The Consumers' Association study found two broad polarized groups: one, seeking help from local advice/law centres and charity-linked services, who were viewed "extremely positively by the majority of respondents" in terms of advice received and outcomes; these were characterized by "very personal service in appropriate languages where required...good communication, both written and verbal, easy accessibility, and a focus on achieving a settlement." "Action-oriented and street-wise" representation was marked by dedication to and empathy with clients, and a respectful, client centred approach. Centres and agencies had "a clear knowledge and understanding of the respondents' communities and specific needs and this [provided] a highly individual and relevant service."⁸¹

The dissatisfied group were those using traditional solicitors, where clients often received "very junior representation...some...actually switched from the experienced solicitor to a junior when their funds ran out and Legal Aid was sought." Solicitor cases were "characterized by poor communication...solicitors were distant and officious[,]...with many cases proceeded to court with respondents failing to understand these procedures...[and] those with junior representation had invariably lost their cases and were very unhappy...." Solicitors were "seen as typically white and middle class...having little in common with the most disadvantaged clients they represent," and showing little interest in cases, just "going through the motions."⁸²

Respondents' "major problem with Legal Aid was that respondents saw it as offering second-rate legal services....that Legal Aid strongly equates with junior representation, a poor chance for success in court and a probability that your legal advisors will settle for...'whatever they can get.'" In sum, "There was an overwhelming sense that solicitors were not interested in Legal Aid cases."⁸³

⁸¹ CA, *op. cit.*, p. 54. The reported strengths of local centres in Britain interestingly parallel those in the States, with their professional commitment and "localness" providing convenient and reassuring access and giving those with no understanding of legal processes a sense that the centre was dedicated to working on their behalf.

⁸² CA, *op. cit.*, pp. 50, 56. Although the study does an excellent analysis of attempting to measure the quality of key components of legal advice, a fairly unusual research inquiry, it does not address other critical criteria of evaluation, e.g. evaluating the impacts of advocacy in addressing the systemic and structural problems giving rise to the requests for legal advice.

⁸³ *Ibid.*, pp. 50,52.

These findings have been paralleled in a more recent and the first major study of quality, post-franchising, by the Institute of Advanced Legal Studies which assessed 143 contractors, 100 solicitors' firms (two of which were law centres) and 43 agencies on not-for-profit (NFP) contracts. Peer review was used in 718 contracted cases, covering 52 contractees. The IALS report shows differences in approach such as NFP's more commonly involved in on-going management of client problems (taking more time and at a greater cost), with solicitors viewing their role more limitedly as providing one-off advice. In a direct comparison of solicitors and NFP's the study established that the proportion of NFP providers performing at higher quality levels was "significantly higher than for solicitors" and concluded that,

...somewhere between one in five and one in ten clients got a higher level of service in the NFP sector than they would have done from Private practice solicitors.⁸⁴

The Government, through its then LCD minister, David Lock, "accept[ed] the thrust of the [CA] report" as revealing past deficiencies, but then pressed on to assert that the report "explains why the CLS is needed" and "justifies our decision to press ahead with radical reform..."⁸⁵ This view misses the point that there is little in the franchising reforms and Quality Mark approvals that would change the habits, attitudes and training of the solicitor providers under the evaluative criteria used by the CA or in the more recent Institute study. Such attributes as a respectful, dedicated client centred approach are critical qualities to service and outcomes alien to contractual provisions that only professional training and a public service ethos can instil.⁸⁶

The new Quality Mark franchising and management reforms, exclusively relied upon by the LCD and LSC to tweak the judicare system, may well be helping to re-establish some much needed accountability and legitimacy to the legal aid system, but its main visible outcome has been to whittle down the number of legal aid providers from about 12,000 to about 5,000. The Legal Aid Franchise Quality

⁸⁴ R. Moorhead *et al.*, "Quality, cost, competition and contracting", *Legal Action Group Journal* p. 8 (July 2001). See R. Moorhead *et al.*, *Quality and Cost: Final Report on the Contracting of Civil, Non-Family Advice and Assistance Pilot* (TSO 2001).

⁸⁵ Quoted in S. Allen, "Legal Aid Clients Hit Out at Solicitors," *Law Society Gazette*, p.1, 18 May 2000.

⁸⁶ See H. Wainwright, "A piece of paper and a team of lawyers isn't enough," *The Guardian*, p. 24 (31 May 2001) (hilary1@manc.org).

Assurance Standards embrace but crude “transaction criteria” and exclude more determinative measures of quality legal service such as the values held by practitioners (e.g., dedication to and respect for clients) as well as other evaluative criteria and models like options, consequences, client satisfaction and peer review. The recent IALS research has now confirmed this assessment by concluding that “quality assurance is not sufficiently robust for contracting to ensure the quality of suppliers”.⁸⁷

With a focus on high output of cases, franchising has denigrated thorough diagnostic work, preventive advice, community education and policy advocacy – aspects of quality service that constitute a more integrated, holistic approach to remedying individual and systemic legal problems in the public and marketplace.⁸⁸ As noted earlier, under CLS contracting, North Kensington Law Centre’s race harassment and domestic violence community forums are in jeopardy, and the Islington Law Centre similarly reports, “Much of what we do now and what we need to do in the future can’t be funded from legal aid contracts...”⁸⁹

Moreover, the Institute of Advanced Legal Studies study of CLS contracting and quality of legal services, found that taking current contracting the next logical step to competitive tendering would “introduce further pressure on fixed prices and/or volume, [and] further downward pressure on quality would be likely”. The piloted group of solicitors paid a fixed sum per annum for a specified number of case starts, the “building block” for a system of competitive tendering, “tended to perform the most poorly” in the IALS study.⁹⁰

Having full-time, salaried, dedicated legal professionals, both lawyers and paralegals, working out of non-profit, and often neighbourhood law and independent advice centres, is the very successful model that has marked the civil provision of legal aid in the United States since the mid-60s as well in other Commonwealth areas

⁸⁷ R. Moorhead *et al.*, *LAG Journal*, *op. cit.*, p.8.

⁸⁸ For criticism of franchising and its quality standards, and alternative models, see M. Holdsworth, *Social Exclusion: Is Advice A Solution?*, p.8 (London Advice Services Alliance 1999); Consumers’ Association, *op. cit.*; R. Smith, *op. cit.*, p.28.

⁸⁹ Islington Law Centre, *Annual Report 2000*, p. 3.

⁹⁰ R. Moorhead *et al.*, *LAG Journal*, *op. cit.* p.8. The quality auditing of the Legal Services Commission was also called into question as the peer review employed in the pilot revealed that one in five contractees were found to be performing “at a standard significantly below threshold competence”. *Id.*

such as Australia and Ontario.⁹¹ The model embodies, most importantly, a conscientious and client-sensitive cadre of professionals and paraprofessionals whose ethical mandates value both quality service and respect for the decision making of clients, despite the gulf of class and cultural differences between helping professional and client. Unhindered by the conflicting loyalties of private practitioners to paying clients, the system encourages high professional standards, specialization, cost-effectiveness, especially with the employment of skilled paralegal advocates, diversity of staff, and responsiveness to the legal needs of local communities of the poor and excluded. The little written on legal services delivery models centres around cost efficiencies and independence of advocates, ignoring which system maximizes social justice impacts.⁹²

Unlike the British post-war experience in generating a publicly funded service of legal aid founded solely on the services of private practitioners, American legal service policies emerged out of the cauldron of the anti-poverty and community regeneration and empowerment initiatives of the War on Poverty of the mid-1960's—a time of innovation and hope not too unlike its second generation New Labour offspring.

Central to the model in the States was the establishment of neighbourhood or community lawyers developing unique skills and experience and a commitment to a larger client community to redress long-standing, systemic failings in enforcement of legal rights of the poor. They would employ a comprehensive range of services from affirmative litigation to legislative advocacy to community problem solving. These developments in the States soon found a small, but enthusiastic audience in Britain, especially after reports in the *New Law Journal* and by then LSE law lecturer, Michael Zander in the *Society of*

⁹¹ See F. Zemans and A. Thomas, “Can Community Clinics Survive? A Comparative Study of Law Centres in Australia, Ontario and England,” in F. Regan et al. (eds), *The Transformation of Legal Aid*, p. 67 (Oxford: Oxford U. Press 1999).

⁹² For a comparative study of salaried and judicare systems, see, T. Goriely, *Legal Aid Delivery Systems: Which Offer Best Value for Money in Mass Casework?* (LCD, Research Series No. 10/97, 1997). For the view that salaried systems are the more efficient and responsive provider of services to the poor, see the Canadian report of the National Council of Welfare, *Legal Aid and the Poor* (Access to Justice Network 1996) (www.acjnet.org).

Labour Lawyers' pamphlet, *Justice for All*.⁹³ Emerging from an earlier generation's rediscovery of poverty and awareness of the efficacy of legal advocacy and community empowerment, came the first law centre in 1970 in North Kensington, peaking to 62 centres in the mid-1980s, and falling to the present number of about 50.

The retarded development of law centres is explained not by a Law Society which, by the end of the 1970s had made its peace with them, but by decisions of the Conservative government elected in 1979 that they were to be largely funded by local authorities, a rather precarious source of support. The new CLS, while following a prior trend of the Legal Aid Board to expand funding for the broader not-for-profit sector, has no national strategy for expansion of law centres, keeping law centre funding fairly constant at about £4 million with about £36 million now going to the entire non-profit sector, including law centres, out of a total £784 million for civil legal aid in 2000/01.⁹⁴ These figures show how still woefully small are the roles of law centres and independent advice agencies in the new CLS.

Neighbourhood law centres, local independent advice agencies, and broader not-for-profit advocacy groups like the Child Poverty Action Group, Disability Alliance, MIND, and National Council of Single Parent Families, have yet to appear as providers on the national legal services agenda despite considerable accomplishments and singular characteristics that parallel the American experience.⁹⁵ Among law centres' and independent advice centres' many strengths have been their ability to draw down other governmental and charities funding, and, through board management committees, to maintain an accountability to local communities absent in the judicare system. This has contributed, for example, to their unique contribution in outreach especially to ethnic minorities, who can constitute a substantial

⁹³ J. Weiss & L. Albert, "Neighbourhood Lawyer: An American Experiment," *New Law Journal* (July 11, 1968), p.667; Society of Labour Lawyers, *Justice for All* (Fabian Research Pamphlet No. 273, 1968).

⁹⁴ Written Answer of 10 April 2001 from David Lock, MP to Parliamentary Question of Paul Stinchcombe, MP.

⁹⁵ See, e.g., Harlow & Rawlings, *op. cit.*, pp. 148-51, 170-72; Law Centres Federation, *Social Justice and Social Exclusion, op. cit.*; <http://www.lawcentres.org.uk> M. Holdsworth, *Advice: Responses to Social Exclusion in London, op. cit.*

percentage of their caseload, and thus be critical in the Government's efforts to enhance social inclusion.⁹⁶

Law centres and independent advice agencies have also uniquely emphasized community legal education.⁹⁷ Over the last 20 years there have been repeated calls for "legal literacy" programmes to create better understanding and empower people as consumers and as citizens in an increasingly complex and alienating legal world. The CLS has yet to assume this responsibility and tap into the potential of these agencies to establish legal education programmes.⁹⁸

Local law and advice centres' strong ethos as voices for their communities has fuelled a resourcefulness and imagination in advocacy that has been sorely lacking in legal aid in Britain, and that could now give impetus to national anti-poverty, social inclusion and community regeneration goals. The Humberside Centre pursued a test case challenge on behalf of seafarers made redundant in the 1980s, and the Hillingdon and Camden Centres have pursued neglected issues around sex discrimination.⁹⁹ Seizing the opportunity for social housing in what is now the Coin Street Development on the South Bank in London, an aggressive and creative North Lambeth Law Centre used planning law, a public inquiry, and the leverage of opposition to a large commercial development to insure that such housing was part of the final project

⁹⁶ The Lambeth Law Centre's Race Discrimination Unit recently won a test case under the Protection Against Harassment Act 1997 for racial harassment by the Sun newspaper of a young black woman who had come to the defence of an asylum seeker at a police station. *The Guardian*, G2 Section, pp. 10-11 (13 March 2001). The Sheffield Law Centre has set up an Ethnic Minorities Social Exclusion Action Project, and the Oldham Law Centre has an Asian Women's Rights Project. See Law Centres Federation, *Networking* 3-4 (Dec. 2000),

⁹⁷ See J. Richardson, "Law Centres experience of information work," in R. Smith (ed), *Shaping the Future: new directions in legal services*, pp. 118-21 (LAG, 1996).

⁹⁸ See Smith, *Justice--Redressing the Balance*, *op. cit.*, pp. 89-90; Smith, *A Strategy for Justice*, *op. cit.*, p. 152.

⁹⁹ Smith, *Justice--Redressing the Balance*, *op. cit.*, p. 26. The Camden Community Law Centre in the early 1990s successfully challenged the two year qualifying period in the law on unfair dismissal, arguing that the law was discriminatory against women because they were more likely to be in short-term employment. The case which went through the House of Lords and European Court of Justice led to the qualifying time being reduced to one year for everyone, including part-time employees.

constructed.¹⁰⁰ The Islington Law Centre has long been engaged in community housing advocacy which has included recent representation of tenants decanted from the Marquess Estate in a housing regeneration initiative that failed to provide “suitable” alternative accommodation for elderly tenants.¹⁰¹

The CLS could also utilize centres and independent advice agencies in a “joined” effort with the over 900 local area regeneration schemes the New Labour government has set in motion to explicitly “empower” and revitalize local communities.¹⁰² Advice and advocacy from law and advice centres could enhance these efforts by insuring a responsive consumer voice and direction in their operations.

Finally, expansion of centres can help address the worsening phenomenon of “advice deserts” around the country to allow the CLS to seed under serviced areas of the country, as current plans to set up a centre in Plymouth will do.¹⁰³

The only concerted CLS break with the private “judicare” model has been in criminal legal aid services where the LSC announced plans in September 2000 to establish salaried criminal defence offices or centres at six locations in England and Wales.¹⁰⁴ This new system, of

¹⁰⁰ Interview of 21 Oct. 2000 with Martin Evans, former Law Centre staff member and current Research Fellow, CASE, and interview of 1 Feb. 2001 with John Hobson, QC, who played a key role in achieving the housing goal.

¹⁰¹ The Islington Centre also is pursuing a test case on the issue of liability for nuisance caused by third parties such as unauthorized persons on the estate, and has successfully represented a large group of tenants at the Finsbury Estate to replace the entire hearing system that had failed tenants. When the House of Lords last year rejected civil liability by landlords for lack of sound insulation that made for miserable habitation in flats, the Centre brought one of the first successful actions in Magistrates Court that noise nuisance was a health hazard violative of criminal environmental laws. See Islington Law Centre, *Annual Report 2000*, pp. 8-9.

¹⁰² See, e.g., Tony Blair, “Opportunity for all, responsibility from all: a new commitment to neighbourhood renewal,” speech of 15 Jan. 2001 (www.pm.gov.uk/news).

¹⁰³ See Report on Development Work by the Law Centres Federation in Cornwall and Devon (10 July 2000). Most of Wales may be viewed as an “advice desert” and currently has but one centre, the Cardiff Law Centre.

¹⁰⁴ See *Modernizing Justice, op. cit.*, ch 6, setting out plans for creation of a Criminal Defence Service (CDS) to replace criminal legal aid under the Legal Aid Act of 1998, and the LCD Consultation Paper, *Establishing a Salaried Defence Service and Draft Code of Conduct for Salaried Defenders Employed by the Legal Services Commission* (June 2000).

what are called Public Defenders in the United States, appears to have been motivated primarily as a business-driven device to control costs and to provide a competitive “useful benchmark in terms of quality and cost.”¹⁰⁵ The full-time, salaried professional staff of current neighbourhood law centres already provide a parallel model to this developing Public Defender service but with the added and essential strength of independence from direct employment by government.

The law centre and independent advice sector track record of vigorous and productive individual and community advocacy, emanating from providers receiving but 0.5% of CLS civil funding, puts to question the “best value” of giving the judicare system a virtual monopoly lock on delivery of civil legal services. A balanced, mixed delivery system is a modest goal for a reformed legal aid system.

4. Establishing a Broad Right to Civil Legal Aid Under the Human Rights Act

We have seen that the much touted legal aid reforms have not resulted in any significant expansion of civil legal aid and has in certain areas, such as social welfare law advice, led to an actual diminution. The unmet needs for civil advice and representation in the various social welfare law areas, community revitalization, and community legal education, have been particularly ignored. A broader social justice mission for the Community Legal Service will not materialize without substantial increases of resources for such initiatives as: supporting current and developing new neighbourhood law centres and independent advice agencies; greatly increasing social welfare law services; establishing specialist second tier supports for strategic litigation and reform efforts; and achieving other needed reforms that are the subject of another paper, such as ameliorating the means test that disadvantages those transitioning from welfare to work and pensioners with some capital, and legal education reforms to train and recruit a new cadre of dedicated, career CLS lawyers and paralegals.

¹⁰⁵ Lord Chancellor, HL Deb vol 597, col 381, 11 February 1999. See also O’Brien and Epp, “Salaried Defenders and the Access to Justice Act 1999,” 63 *Modern Law Review* 394, 410-11 (2000) (urging a complementary not competitive model, mixed delivery system).

Aside from the pre-eminent factor of political resolve,¹⁰⁶ the main structural problem to a more adequately funded CLS is that the “capped” civil legal aid, where a social justice mission could be pursued, co-exists with a criminal defence budget. The latter is still largely demand driven and dominant: the new “[Criminal Defence Service] will not have a funding cap” to respond to “a persistent increase in demand owing to an increase in arrests and in the proportion of defendants granted legal aid.”¹⁰⁷ The Lord Chancellor, described “[c]riminal legal aid [as the] greedy Leviathan,” and readily acknowledged that “the criminal legal service fund budget must have a higher priority... because of the absolute nature of our international obligations...”¹⁰⁸ Put another way, Lord Irvine said, “The truth is that the only money that is left for civil legal aid is what is left over out of the budget after the requirements of criminal legal aid have been met.”¹⁰⁹

Critics in Parliament observed the anomaly of increased criminal defence costs, fuelled by increases in arrests being “paid for by depriving other people of access to justice.”¹¹⁰ The story is now told by the LSC Corporate Plan anticipating that criminal defence spending will *increase* from £863 million to £952 million from 2000/01 to 20003/04, and civil legal aid will be *decreased* from £810 million to £686 million in this same period.¹¹¹

¹⁰⁶ In arguing against an amendment to protect civil legal aid expenditures from getting reduced by the rising criminal defence side of the budget, the Lord Chancellor rather bluntly asserted that “the Prime Minister won the last election on an oft-repeated statement that schools and hospitals came first. He did not win the election on the proposition that legal aid came first.” HL Deb vol 597, col 380, 11 February 1999.

¹⁰⁷ LSC, *Corporate Plan 2000/01-2003/04*, pp. 24-5.

¹⁰⁸ HL Deb vol 597, cols 380-81, 11 February 1999. The Lord Chancellor stated that between 1991-92 and 1997-98 the cost of criminal legal aid in the higher courts rose by 87%, 70% above the rate of inflation with average payments increasing by 65%. In the Crown Court the most expensive 1% of cases consume more than 40% of the budget, he asserted, while the number of people served by legal aid fell by more than 9%. *Id.*

¹⁰⁹ HL Deb vol 596 col 918, 26 January 1999.

¹¹⁰ Lord Goodhart, HL Deb vol 597 col 376, 11 February 1999.

¹¹¹ *Corporate Plan 2000/01-2002/04*, p. 14. Mr. Lock explains this shortfall as a one-off accounting phenomenon, and strongly denies any reduction in the level of services. Interview with Mr. Lock, 27 March 2001; Lock, “The Community Legal Service one year on,” 151 *New Law Journal* 613 (27 April 2001). Yet the latest LSC Corporate Plan 2001/02-2003/04 shows a decided reduction in Legal Help for social welfare law, an area of promised expansion. *Id.* p.14. The

In light of the uncertain political will of the Government in using even a small fraction of its surplus budget to better fund civil legal services, a key to bringing in new resources and expanding legal aid to address unmet needs is for the courts to establish a broad right to civil legal aid under the new Human Rights Act and European community law. Short of the budgetary ring-fencing proposals for civil legal aid that did not get amended into the AJA,¹¹² such a right can give it equal status to criminal defence and what Lord Irvine referred to as the “absolute nature of our international obligations” for funding free criminal defence.

There now exists a human rights or constitutional “obligation” to civil legal aid in Britain, albeit a qualified one, under the *Airey* decision of the European Human Rights Court.¹¹³ The article 6(1) right to a “fair...hearing” is applicable to both criminal and civil proceedings and has been given broad interpretation so that explicit procedural guarantees, like legal aid, provided for criminal proceedings in article 6(3), have been implied in the civil area to provide a fair hearing. This fundamental right to a fair hearing consequently has been read as insuring rights to fair administration of justice and to access to the courts.

Thus in a long-standing, settled interpretation by the European Court of Human Rights in *Airey v Ireland*, the Court decided that the failure to provide civil legal aid in a matrimonial divorce contest could violate the right to a fair trial for a woman seeking to enforce her right to a divorce by precluding her effective access to the proceeding. Responding to the Irish government’s assertion that the woman could have represented herself, the European Court said:

The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and

issue is clouded by the change between the schemes and the lack of transparency in LSC public documents, raising legitimate scepticism about civil legal aid spending.

¹¹² See Amendment of Lord Clinton-Davis, HL Deb vol 597 cols 374-5, 11 February 1999.

¹¹³ *Airey v. Ireland*, 2 EHRR 305. For a good review of the jurisprudence and the implications under the new HRA, see H. Wadham, “Legal Aid and the Human Rights Act,” *Legal Action Group Journal*, 10-12 (Sept. 2000). For international perspectives on a right to counsel in civil cases see, Justice Earl Johnson, Jr., “Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrial Democracies,” 24 *Fordham Int’l Law Journal* 83 (2000); Johnson, Right to Counsel in Civil Cases: An International Perspective,” 19 *Loyola of Los Angeles Law Review* 341 (1985).

effective. This is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial. It must therefore be ascertained whether [the applicants'] appearance before the High Court without the assistance of a lawyer would be effective, in the sense of whether she would be able to present her case properly and satisfactorily.¹¹⁴

Short of an absolute right to civil legal aid, the Court established a qualified right to legal aid under article 6(1) where the lawyer was "indispensable for the effective access to court" based on a requirement that legal representation was compulsory or due to the "complexity of the procedure or of the case."¹¹⁵ Post-*Airey* developments have not as yet expanded on the right and may have added additional qualifications.

A determinative factor, especially in litigation where the government is a party, or as at employment tribunals where the employer is usually represented, will be the need for a fair balance between the parties in presenting their cases. The European Court for Human Rights has created the corollary right of an "equality of arms" to insure this balance.¹¹⁶ Although the European Court has not found an inequality of arms due to lack of legal aid as such to be violative of a fair hearing, it has been suggested by John Wadham, director of Liberty, that courts in Britain, with the HRA baton now in their hands, may be prepared to go further.¹¹⁷

Other fundamental rights in the Convention and in the HRA might generate bases for a right to civil legal aid. As the court in *Airey* stated, "The Convention is intended to guarantee...rights that are practical and effective,"¹¹⁸ and if legal aid is necessary to effectuate Convention or HRA rights, then courts could direct that it be provided. These legal aid generating rights, fertile for judicial development in Britain, include article 13 of the Convention providing for the right to an effective remedy; article 2's protection of the right to life; and article 5(4), the right to have a court determine the legality of one's detention.

¹¹⁴ *Airey v Ireland* (1979) 2 EHRR 305, para 24.

¹¹⁵ *Ibid.* para 26.

¹¹⁶ *Dombo Beheer BV v the Netherlands* (1993) 18 EHRR 213, para 35. The applicant was denied a fair hearing because he was precluded from being a witness at trial in case where he was a party.

¹¹⁷ Wadham, *op. cit.*, p.11.

¹¹⁸ (1979) 2 EHRR 305 para 24.

In an unfolding development on the European human rights stage that is promising for the future, a drafted Charter of Fundamental Rights was “proclaimed” on 7 December 2000 by the Presidents of the European Parliament, European Commission and European Council of Ministers to provide a clear and comprehensive compilation of personal rights—civil, political, economic, social rights and rights of citizens of the European Union.¹¹⁹ This ambitious effort steps away from prior conventions that divided civil and political rights on one side, and social and economic rights on the other, enumerating instead all rights around a number of major principles: dignity, freedoms, equality, solidarity, citizenship, and justice. Although currently only a source of inspiration for the courts, as the Charter requires insertion and approval in treaties, its Article 47, on right to an effective remedy and to a fair trial, conflates civil and criminal into a broader right to legal aid, eliminating the civil/criminal distinction.

...Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice.

In Britain perhaps the most productive area for extending the right to civil legal aid will be in the administrative justice area where currently most tribunals have been excluded from legal aid.¹²⁰ The historical assumption has been, as restated by the current Lord Chancellor that, “most tribunal...procedures are intended to be simple enough to allow people to represent themselves.”¹²¹ This naive assumption on tribunal operations, perhaps masking the unstated

¹¹⁹ The Charter is published in the Official Journal of the Communities, OJC 364, 18 Dec. 2000, p. 1. For information on the charter see <http://db.consilium.eu.int/df> and <http://europa.eu.int/comm/justice-home/unit/charte/index-en.html>. See also, Communication from the Commission of the European Communities, *On the Legal Nature of the Charter of Fundamental Rights of the European Union*, COM(2000) 644 (Brussels 11 Oct, 2000); Alain Bruin, *Overview on the EU Charter of Fundamental Rights*, European Commission (Brussels 25 Jan. 2001).

¹²⁰ The AJA excludes most tribunals from legal aid representation with the exception of Employment Appeal Tribunals (the second tier appeal from Employment, formerly Industrial Tribunals) and Mental Health Review Tribunals. AJA 1999 c.22, schedule 2(2)(1).

¹²¹ LCD, Funding Code Guidance, Lord Chancellor’s Guidance para 3.4.

premise of limiting legal aid expenditures, is belied by the statistics of success and failure at social security and employment tribunals where appellants are and are not represented. The assumption is further undermined by the evidence of unreasonable actions and racist attitudes among many tribunals.¹²²

Former Minister Lock's rationale for reforming Legal Aid, to allow it to fund race and sex discrimination cases at tribunals in lieu of the "tripping over a pavement" case, was belied in the Lord Chancellor's announcement of the most comprehensive "review of the delivery of justice through tribunals" in 50 years, chaired by Sir Andrew Leggatt. The issue of CLS representation at tribunals bore the briefest note in the Consultation Paper, and was accompanied by an LCD editorial observation that lack of legal representation "may not be a bad thing," if the unsuspecting reader may have missed the point.¹²³ Few in Britain are sanguine that the Leggatt Committee report will have strong recommendations for extending legal aid into this area.

The ground is thus set for advocates to litigate a broader right to legal aid under *Airey* and article 6 of the HRA in the courts here. Efforts should prove promising, as the Scottish Executive, in anticipation of a successful HRA challenge in Scotland, where the law took effect one year earlier than in England and Wales, directed the Scottish Legal Aid Board to provide legal aid in all employment tribunals where the appellant is vulnerable due to lack of representation, or where the issues are complex.¹²⁴ As a result, too, of threatened litigation earlier from the Child Poverty Action Group and more recently from the Public Law Project, the Lord Chancellor has acknowledged his power under

¹²² See House of Commons Select Committee on Social Security, Eighth Report 1998-99, *The Modernization of Social Security Appeals*, paras. 28-29 (evidence of racial bias among tribunal members and lack of equal opportunity training in Independent Tribunal Service); report of Greater Manchester Welfare Rights Advisers Group that in one of five appeals, unfair or unreasonable actions were documented, as reported in Child Poverty Action Group, *Welfare Rights Bulletin* (August 1999). See also note 53, *supra*.

¹²³ LCD, Consultation Paper, *Review of Tribunals* (June 2000); LCD Press Notice, 158/00, 18 May 2000. The Paper invited comment on meeting the European Convention on Human Rights provision for independent and impartial tribunals, but not comment on applying the *Airey* right to civil legal aid principles to tribunals. *Ibid*. The Lord Chancellor has not as yet responded to the Leggatt Committee which submitted its report in April 2001. (www.tribunals-review.org.uk)

¹²⁴ See *Legal Action Group Journal*, p.4 (Dec. 2000). The Scottish directive is effective 15 January 2001.

s.6(8)(b) of the Access to Justice Act 1999 and through his Guidance within the Legal Service Commission Funding Code Guidance for “exceptional individual cases” to authorize funding for otherwise excluded cases such as those before a tribunal, inquest or public inquiry. But to date, only three Social Security Commissioner’s proceedings (and no tribunals) have been approved for legal services funding.¹²⁵

Three areas of administrative adjudication which appear especially ripe for HRA litigation to test and show the limits of the Lord Chancellor’s Guidance, and to establish a broad right to civil legal services include:

- Social Security Commissioner appeals which are granted primarily to decide errors of law, where legal complexity is inherent in virtually every appeal, and where the Commissioners themselves are the equivalent of High Court judges to whom the courts show deference in their decision-making.
- Employment Tribunals which, with the common presence of a represented employer, are already clearly adversary, and where resulting prejudice to the unrepresented appellant has already been documented; where professional factual investigation and presentation of facts and cross-examination of the adverse party’s version of the facts is also needed; and where the economic security and livelihood of the appellant is at issue.¹²⁶
- Children’s rights adjudications in various settings could establish a child’s right to legal assistance and representation such as in judicial child welfare and care proceedings, and in education settings with appeals of children denied special educational needs schooling and those contesting school exclusions before governing bodies or appeal committees (the latter of which may additionally be in noncompliance with the independent and impartial hearing requirements of Article 6). Many of these areas implicate Convention and HRA substantive rights such as the “right to education” of article 2, protocol 1 of the HRA and the “right to respect for [one’s] private and family life” of article 8, protocol 1.

¹²⁵ Interview with Conrad Haley, project solicitor, Public Law Project, 6 March 2001. The Public Law Project has the correspondence from the LCD approving funding and received after litigation was threatened in late 1999.

¹²⁶ The factual and legal complexity of employment issues coming before Employment Tribunals is outlined in O’Dempsey, “Employment law and the Human Rights Act,” *Legal Action Group Journal*, pp. 23-4 (Sept. 2000).

They thus provide an additional alternative ground independent of article 6's fair hearing basis for legal assistance.¹²⁷

The Lord Chancellor's Guidance has already been found wanting in light of Human Rights principles in a very recent decision of the High Court where Mr. Justice Burton found that the Lord Chancellor could not limit his "exceptional case" funding allowance criteria to showing a "significant wider public interest", but rather had to take into account *Airey v. Ireland* factors of whether a person with insufficient English communication abilities could effectively represent herself and whether the complexity of the law and procedures required assistance.¹²⁸

Utilizing the HRA to extend the right to civil legal services, especially in the critical areas of welfare state administrative adjudications, can have the very salutary effects of effectuating rights to benefits and services that also complement national anti-poverty and social inclusion goals. More importantly, it can set a more permanent foundation for a social justice mission for the Community Legal Service .

5. Summary Recommendations and Conclusion

This paper has attempted to suggest what would constitute a revitalised social justice mission for the Community Legal Service. Such an effort would build on current aspects of this, the first wave of reform, especially a healthy scepticism of the legal aid legacy and emphasis upon services that have value and relevance to the lives of legal aid clients—and their communities. But it would also embrace the thrust of various progressive policies of the Government that have been largely absent in the reformed legal aid such as abolition of child poverty, amelioration of social exclusion, human rights implementation, and community regeneration and empowerment. Specific recommendations would then include:

- Developing funding policies and advocacy services that have a results orientation impacting broadly upon issues of poverty, social exclusion and community renewal. Individual case service would no longer be the sole model for legal aid, and current franchising restraints would require modifications.

¹²⁷ For education issues establishing a claim for legal assistance see Parish, "Education law and the Human Rights Act," *Legal Action Group Journal*, p. 19 (Sept. 2000).

¹²⁸ *The Queen on the Application of Jarrett v The Legal Services Commission et al.*, [2001] EWHC Admin 389 (22 May 2001).

- Expanding services into neglected social welfare law areas of need, including benefits entitlements and take-up, welfare to work transitions, and access and retention to employment and employment supports. Extending legal aid to tribunals is a corollary of this recommendation.
- Insure the provision of legal services to racial and ethnic minority communities.
- “Join” advocacy and advice services with the variety of community empowerment and regeneration schemes underway and planned in other Government departments.
- Provide legal aid services for advising and representing community organizations to allow them to pursue systemic and holistic remedies for legal problems, as well as to provide preventive, community legal education. Insure that “representative actions” on behalf of groups of or representing the poor are funded by the CLS.
- Modify the Lord Chancellor’s “public interest case” funding criteria to allow for more flexibility and multiplicity of approaches for such litigation.
- Establish regional and national centres in various areas of poverty law and policy to insure expertise and strategic advocacy efforts that comport with an impact, results orientation to legal services.
- End the virtual monopoly of the “judicare”, private solicitor delivery model by at least having a much better mixed and balanced delivery system that would substantially increase the number and funding of community law centres and independent advice agencies, and not-for-profit providers. Nationally recognized advocacy and campaigning groups should be included among CLS providers.
- Reassess the current legal aid means test to insure that it has not become an instrument of social exclusion, and, by denying assistance to low wage workers, does not undermine the welfare to work policies of the Government.
- Establish a plan for educating, recruiting and retaining the future generation of legal aid lawyers and paralegals to insure the quality and professional ethos of future CLS providers.
- Through judicial interpretation of the Human Rights Act, establish a broad right to civil legal aid to create the long-term constitutional and financial foundation for a CLS social justice mission.

There are many sceptics in Britain today who have closely followed the implementation of the Access to Justice Act and the emergence of the Community Legal Service and have come to an answer

to the question posed earlier as to whether the legal aid reforms, as an archetypal Third Way initiative, have been more about promoting efficiency than enhancing social justice. With reforms less than two years old, this writer is willing to take a more sanguine view that the jury may still be out on this question, especially where few in Government have made a candid effort to assess the reforms and address the larger issue of a social justice mission for the Community Legal Service that this paper suggests.

Certainly the sceptics have persuasive arguments as they see spending for civil legal services being reduced; most policies and structures inherited from the past Legal Aid's judicare, private delivery and individual case models continuing under a new regime of block contracting and cost accounting; and a broader failure to incorporate the Government's anti-poverty, social inclusion and community regeneration agendas. On the other hand, many currents for social change have been generated since 1997, with expectations created and a renewed idealism ignited to address the past decades of ignored inequalities, social exclusion, and persisting poverty. These now have the potential to infuse a social justice mission and complete the unfinished reform agenda for the Community Legal Service.